

MULRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through April 30, 2009

MLRC		
	Legal Frontiers in Digital Media Conference May 14-15, 2009 Stanford	6
TRADEMARK		
2d Cir.	Second Circuit Rejects Non-Use Defense to Keyword Ad Cases <i>Plaintiff Must Still Prove Consumers Are Misled</i> Rescuecom Corp. v. Google, Inc.	3
LIBEL & PRIVACY		
Pa.	Pennsylvania Supreme Court Orders Review of \$3.5 Million Libel Judgment <i>Case May Have Been Fixed By Corrupt State Court Judges</i> Joseph v. Scranton Times	8
Pa. C.P.	Lawyer Wins \$210,000 Verdict in Libel Suit Against Spanish Language Newspaper <i>Plaintiff Deemed a Private Figure</i> Trujillo v. Guaracao	10
Wash. Super.	Community Leader Wins \$225,000 Verdict Against Vietnamese Language Newspaper <i>Plaintiff Was Accused of Being a Communist Sympathizer</i> Tan v. Le	11
N.D. Tex.	How We Obtained a \$12.5 Million Verdict in an Internet Defamation Case <i>Defendants' Website Contained False Stories About Plaintiff</i> ORIX Capital Markets, LLC v. Super Future Equities, et al.	12
N.D. W.Va.	Jury Awards \$7.2 Million Default Verdict to Former Miss West Virginia in Web Libel Case <i>Defendants Claimed Plaintiff Was Featured in Sex Tape</i> Williams v. Vidbidness, Inc. et al.	14
5th Cir.	Fifth Circuit Strikes Libel Case Against Louisiana Newspaper <i>Denial of Anti-SLAPP Motion to Strike Is Immediately Appealable</i> Henry v. Lake Charles American Press LLC	15
9th Cir.	Denial of Oregon Anti-SLAPP Motion Not Appealable <i>Denial of Anti-SLAPP Motion Not a Collateral Order</i> Englert v. MacDonell	16
9th Cir.	Ninth Circuit Affirms Dismissal of Libel Suit Against Radio Show Host <i>Statements About Consumer Complaint Were Opinion</i> Gardner v. Martino	17

NY	New York Court of Appeals Reverses Libel Judgment for Public Official <i>Independent Review of Record Showed Insufficient Evidence of Actual Malice</i> Shulman v. Hunderford	18
Cal. Sup. Ct.	Court Throws Out Libel-in-Fiction Case Against Sacha Baron Cohen’s “Da Ali G Show” <i>Comedic Statements Could Not Be Believed, and Plaintiff Was Libel-Proof Anyway</i> Doe v. HBO	19
Cal. App.	California Court of Appeals Says Myspace is Not “Private” <i>Rejects Private Facts Claim Based on Republication of Myspace Article</i> Moreno v. Hanford Sentinel Inc.	22
NY App.	Critical Statements About Tribe Are Not About The Chiefs <i>Newspaper Editorial Not “Of and Concerning” Tribal Leaders</i> Lazore v. NYP Holdings Inc.	23
Pa. C.P.	Court Tosses “Walking Crime Wave” Defamation Claim By School Security Guard <i>Statement Protected as Hyperbole or Truth</i> James A. Law Jr. v. CBS Broadcasting Inc.	25
INTERNET		
S.D.N.Y.	Court Applies Dendrite Standard to Quash Subpoena Seeking Information on Pseudonymous Posters <i>Plaintiff Failed to Satisfy Key Elements of Dendrite</i> Zherka v. Bogdanos	27
INTERNATIONAL		
Indonesia	Supreme Court of Indonesia Sets Aside \$92 Million Libel Judgment against TIME <i>Vacates Earlier Supreme Court Decision</i> Suharto v. Time Inc. Asia, et al.	28
UK & Europe	The Other Side of The Pond: Developments in UK and European Law <i>Updates on Damian Green Matter, CFAs, D-Notices, Recent ECHR Cases</i> Times Newspapers Limited v. UK, Sanoma v Netherlands, Tarsasag v Hungary	30
IACHR	Venezuela Breached Rights of Journalists <i>Government Threats and Mob Violence a Violation of American Convention</i> Rios et al. v. Venezuela, Perozo et al. v. Venezuela	36
NEWSGATHERING		
1st Cir.	First Circuit Rejects Webcasting of Hearing in High Profile File-Sharing Case <i>Local Rules and Judicial Conference Policy Bar Any Broadcasting</i> In re Sony BMG Music Entertainment et al.	38
COPYRIGHT		
	Comment: What’s “Fair” In Love And War? <i>Aggregation and Fair Use</i>	39

Second Circuit Rejects Non-Use Defense to Keyword Ad Cases

By Mark Sableman

The Second Circuit's decision earlier this month in [Rescuecom Corp. v. Google, Inc.](#), No. 06-4881, 2009 WL 875447 (April 3, 2009) has significantly changed the landscape for keyword-based advertising, by holding that trademark claims based on search engine results page advertisements can no longer be dismissed on the basis that they don't involve cognizable "use in commerce" of trademarks.

This one appellate decision essentially wipes clear all of the decisions that had relied on lack of "use in commerce" to dismiss keyword-based advertising trademark infringement claims – because all of those decisions had come from district courts within the Second Circuit. Now that the Second Circuit has ruled, consistently with decisions from courts in the rest of the country, keyword-based advertising claims should almost always get past the motion to dismiss stage. Put another way, the search-engine results page ads that reportedly make up 97% of Google's revenue are now fair game for trademark infringement claims.

Background

The case presented the basic facts of a keyword advertisement trademark infringement claim. The plaintiff, Rescuecom, objected to the sale of Google Adwords ads keyed to an Internet user's use of the RESCUECOM trademark in a search. Adwords is Google's program which places context-relevant ads on its search results pages (to be distinguished from Adsense, its program which places ads on third-party websites).

Google's first-line defense was a "no trademark use" defense that had been accepted by many district courts within the Second Circuit, based on the circuit's decision in *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 414 F.3d 400 (2d Cir. 1005), which involved pop-up contextual ads.

In *1-800 Contacts*, the defendant's software which had been placed on user computers generated context-relevant pop-up ads. When the user's web activity indicated an interest in eye care products, for example, the software would put a pop-up ad on the user's screen, advertising one of the eye care products providers in its database.

In *1-800 Contacts*, the Second Circuit addressed a claim by the owner of the mark 1-800 CONTACTS and the related website located at www.1800contacts.com, which claimed that the pop-up

software provider infringed its trademark, by displaying pop-ups advertising other eye care providers when the Internet user typed in the web address "1800contacts.com." The Second Circuit rejected the claim, holding, among other things, that there had been no actionable "use in commerce" of 1-800 Contact's trademark. (The phrase "use in commerce" is found in the Lanham Act sections that authorize trademark infringement claims.)

While the decision disclaimed any direct application to keyword-based ads, it clearly gave comfort to search engines by suggesting that "internal" use of a mark might not qualify as "use in commerce" and thus might not support infringement claims.

Based on *1-800 Contacts*, and two other decisions involving pop-up ads, all of the keyword ad cases decided by district courts within the Second Circuit have taken the position that keyword-based ads aren't actionable, because the "internal" connection between the keyword term and the resulting ad doesn't qualify as "use in commerce." Interestingly, almost all of the decisions outside the geographic bounds of the Second Circuit took the opposite view.

With this background, Rescuecom's appeal attracted great attention. Had the Second Circuit affirmed the district court's dismissal of Rescuecom's claims, it would have confirmed the deep split between courts on whether keyword claims could even meet the apparent threshold "use in commerce" requirement. A reversal, as occurred this month, essentially represented the end of that defense. Google fought hard for the "no use" theory, and a number of supporting organizations, including Electronic Frontier Foundation and Public Citizen, supported it through amicus briefs.

Second Circuit Decision

The Court's analysis was surprisingly simple. Initially, in a unanimous panel decision written by Judge Pierre Laval, the Court noted the deliberateness of Google's use of trademarks as keys for its Adwords ads. Google actively encourages its advertisers to use their competitors' trademarks as well as generic terms as keywords. The court pointed to Google's "Keyword Suggestion Tool," a program that recommends keywords, including competitors' trademarks, to potential advertisers.

Because the case arose on a motion to dismiss, the court deferred to plaintiff's allegations of consumer confusion, noting the reasons why Rescuecom felt that the Adwords ads keyed to its RESCUECOM trademark infringed this mark. Rescuecom

(Continued on page 4)

Second Circuit Rejects Non-Use Defense to Keyword Ad Cases

(Continued from page 3)

claimed that Adwords ads, particularly those placed above the organic search listings, could be interpreted by users as part of Google's normal organic search results. While the Adwords ads are labeled, usually with the phrase "Sponsored Listings," Rescucom alleged that consumers might not recognize or understand the label.

Thus, the case properly alleged a likelihood of confusion. The issue for decision was whether it alleged trademark "use in commerce" – that supposedly key element found lacking in *I-800 Contacts*. The Second Circuit had two paths for tackling "use" – the easy way (by distinguishing *I-800 Contacts*) and the hard way (by construing the meaning and intent of the "use in commerce" language of the Lanham Act). It chose to take the easy path in the

d e c i s i o n

proper, and to

address the

more difficult

path in an appendix.

The court found two distinctions between *I-800 Contacts* and *Rescucom*. First, the pop-ups in *I-800 Contacts* had been triggered by website addresses, not standalone trademarks, and that distinction supported the *I-800 Contacts* conclusion that trademarks per se had not been "used" by the pop-up provider. Apparently the court viewed the pop-up provider's technique as akin to using a consumer's street-address destination as a clue for the products or services he or she desires, and then displaying ads keyed to that interest. Trademarks are involved only in the coincidental case where the address reflects the trademark, so there is no real "use in commerce" of a trademark. By contrast, in *Rescucom*, "what Google is recommending and selling to its advertisers is Rescucom's trademark."

An alternative, and perhaps stronger, distinction related to how ads were placed in the pop-up situation. In *I-800 Contacts*, WhenU had not promised to place a specific ad in response to a specific use of a term (or website address) by the user. Rather, use of a website address would simply prompt a randomly generated ad from an advertiser within the particular category associated with that address. For example, when a user typed in "1800contacts.com," WhenU's software randomly generated a pop-up relating to one of its clients in the eye care category.

Thus, the Second Circuit noted in *Rescucom*, in the WhenU situation, "the trigger to display the ad was not based on the defendant's sale or recommendation of a particular trademark." WhenU

engaged in no "use or display" of anyone's trademarks to its advertisers. By contrast, in keyword advertising, "Google displays, offers, and sells Rescucom's mark to Google's advertising services when selling its advertising services." Indeed, in the court's view, Google's use of the Keyword Suggestion Tool emphasized its "use" of the trademark.

Google and its amici had strongly argued, based on *I-800 Contacts*, that mere internal use of a mark did not constitute trademark use. This argument had some real appeal, particularly when the transaction is viewed from the consumer's perspective, because the Internet user never sees the connection made between his search term and the Adwords ads that appear on Google's search results page. But the Second Circuit dismissed this argument as one that "overreads the *I-800* decision." The court focused more on

Google's interac-

tion with its ad-

vertiser than the

user's interaction

with the results page: Google clearly recommended to its Adwords customer that it use a trademark as a search term, and the court found that to constitute sufficient trademark use.

The court pointed to other problems with the theory that mere internal use of a mark could not support a trademark infringement claim. What if Google had sold the top place in its organic listings to an advertiser, and never labeled that placement as an ad? What if a search engine agreed to divert searches for a trademark directly to website of a competitor of the trademark owner? If, under Google's theory, all mere internal use of trademarks were exempt from infringement claims, then there would be no remedy for such abuses.

Finally, the court rejected the argument that because we permit product placements in the physical world (for example, store brand products displayed next to name brand products), keyword based ads should be permitted as well, as a kind of Internet analog of product placement. Physical world product placements get no "magic shield" from liability, the court held; they are permitted merely because they are viewed as "benign," not creating any likelihood of confusion, not because no trademark "use" is recognized.

The result of the Second Circuit's distinctions between *I-800 Contacts* and *Rescucom*, may surprise some Internet users. Pop-up ads like those of WhenU and Claria (formerly known as Gator) – which many consider deceptive, partly because consumers who downloaded the WhenU or Claria software as part of other transactions didn't realize what they were getting into – escape trademark

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Second Circuit Rejects Non-Use Defense to Keyword Ad Cases

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liability. By contrast, Adwords ads on Google search results pages – some of the best known and understood features of the Internet – face potential trademark liability.

The Second Circuit's appendix in *Rescuecom* on the issue of what Congress meant by the "use in commerce" requirement of trademark infringement actions deserves some comment. While the appendix was not necessary to the Court's decision, the court obviously recognized that district courts had misunderstood the phrase, and felt some responsibility to set them straight.

Many trademark scholars had criticized the "no use" decisions as misunderstanding the statute. But while the appendix sides with the scholars and backs off of "use" as a requirement for infringement claims, it also highlights the fundamental lack of clarity of the "use in commerce" statutory language, and suggests that Congress should clarify it. In the meantime, the Second Circuit's analysis in its appendix may discourage other applications of the "no-use" argument, including a recent extension of that defense to cases alleging infringement through website metatags.

After rejecting Google's no-trademark-use defense, the Second Circuit noted the obvious fact that its holding dealt only with the no-use defense, not the merits of the case. Rescuecom must still prove that consumers are misled when its competitors' Adwords ads appear on search results pages responsive to a search for "Rescuecom."

Rescuecom must still prove that consumers are misled when its competitors' Adwords ads appear on search results pages...

Developing such proof of consumer confusion, of course, may present an even more daunting task for plaintiffs than overcoming the non-use defense. Among other things, plaintiffs seeking to prove consumer confusion are likely to employ consumer surveys, and/or argue based on the controversial "initial interest confusion" doctrine. Barring an en banc reversal, *Rescuecom* means that the era of motions to dismiss in these cases is over. The era of battles over surveys and other evidence (or the lack thereof) of consumer confusion is about to begin.

Mark Sableman is a partner at Thompson Coburn LLP in St. Louis, MO. Google was represented by Michael H. Page, Kecker & Van Nest, LLP, San Francisco, CA. Rescue.com Corporation was represented by Edmund J. Gegan, Syracuse, NY.

UPCOMING EVENTS

Legal Frontiers in Digital Media
 @ Stanford University, Stanford, California
 May 14 & 15, 2009

MLRC London Conference
International Developments in Libel, Privacy
Newsgathering and New Media Law
 October 1-2, 2009

MLRC Annual Dinner
 November 11, 2009

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 MLRC's upcoming events @ MediaLaw@MediaLaw.org



Legal Frontiers in Digital Media

Stanford University

Stanford, California

May 14 & 15, 2009

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

This intensive two-day event is designed for lawyers and Web publishing professionals responsible for sorting out the emerging legal issues surrounding the distribution of content on digital platforms.

The conference explores...

- publishers' liability for user-generated content
- digital media policy changes coming from the new Administration
- legal issues surrounding online advertising and behavioral targeting
- the developing law affecting virtual worlds and online games
- emerging issues in mobile content distribution
- evolving fair use policies in a digital age

This conference includes seven 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.

Wireless Networks for Digital Media

A panel of distinguished mobile technology experts will provide a primer on how mobile networks work, and how they are evolving to provide greater bandwidth for content, as well as related functions such as location and search. Along the way, panelists will highlight the legal issues that arise in the world of wireless and mobile media.

Clicks and Customers: New Technologies and Online Advertising

Legal and business experts in online advertising will focus on how online advertising models are adapting to changes in technology and new legal and regulatory pressures. They will examine how new Web browser technologies impact the collection and use of visitor data for online advertising and how emerging laws and self-regulatory initiatives are changing behavioral advertising practices. Throughout this session, the panel will highlight the legal issues that arise in the current online advertising marketplace.

Is All Fair in Love and War? The Battle Over Fair Use

The Internet has fundamentally changed the rules regarding the use and distribution of content. In this panel, experts working at the intersection of law and technology will explore key questions, including these:

- The Digital Millennium Copyright Act (DMCA) has, in practice, given rise to an explosion of creativity on the Internet, even though these uses may not be legally protected by the Fair Use Doctrine. Should changing social expectations of what is "permissible" affect legal doctrines?
- What do the expansive technological possibilities -- archiving everything on the Internet, digitizing all books -- indicate for the Fair Use doctrine. Is it flexible enough to encompass such possibilities? Are further shifts necessary or desirable?
- Is the DMCA's "notice and take down" process showing signs of its age? What is a "reasonable" time to take something down? Is filtering the answer?
- How does the availability of Creative Commons licensing impact Fair Use doctrine? Does it create more opportunities for the free and widespread use of material?
- Can "Fair Use" be made more fair? More predictable? Is there a better paradigm?

User Conduct and User Safety

Industry insiders will explore what digital publishers are doing to deal with, and the legal regimes that apply to, cyber-bullying, mass-casualty and suicide threats, and other instances where user-generated content raises questions of public safety and publisher liability.

Will Change Come To Digital Media Policy? The New Administration and The New Congress

Industry and government experts will address new directions in digital media regulations, including those related to advertising, online privacy and content.

Technical and Infrastructure Issues

Will Congress or the FCC issue new rules or requirements for spectrum allocation, net neutrality, broadband or related issues? How should the transition to digital television be evaluated, and what does that portend for the future?

Is the Medium More Than the Messenger? New Developments in Liability for User Transgressions of Copyright and Trademark Laws

Copyrights and trademark owners are aggressively seeking to hold online intermediaries liable for infringement based on the conduct of their users. Content distributors are pushing the legal envelope with new technologies and business models. This panel will examine important recent court rulings in this area, and discuss emerging trends and problems. Topics will include:

- How reliable are the "safe harbors" under the now decade-old Digital Millennium Copyright Act?
- How far must an online platform go to police against its users' trafficking in counterfeit goods or services that infringe others' trademark rights?
- Are the traditional distinctions between different categories of infringement (direct, vicarious, and contributory) blurring in the Internet context?

The Developing Law of Virtual Realities and Online Games

Online games and virtual realities are not only among the hottest Internet businesses, they are also the focus of many new legal issues. This panel will discuss developing legal issues in virtual worlds, especially regulation of virtual economies and the buying and selling of virtual property. Other topics may include issues relating to ownership of identities, customer data, privacy and publicity rights for avatars and humans, safety issues, enforcement of terms of use, the growth of the MMO economy, gambling regulations, virtual currencies, export controls between the real and virtual worlds, and IP and DMCA enforcement issues arising from the peculiarities of virtual life and virtual commerce.

For more information including registration and a full curriculum please click [here](#).

Pennsylvania Supreme Court Orders Review of \$3.5 Million Libel Judgment

Case May Have Been Fixed By Corrupt State Court Judges

By Kevin C. Abbott

On April 7, 2009, the Pennsylvania Supreme Court granted the petition of the *Scranton Times* to assert the court's rarely used King's Bench powers and assume plenary jurisdiction over a defamation action in which the trial judge had entered a non-jury verdict of \$3.5 million. [*Joseph v. Scranton Times*](#), No. 19 MM 2009 (Pa. April 7, 2009).

The Supreme Court exercised its broad power to exercise plenary jurisdiction over any matter at any time because the *Scranton Times* "proffered evidence, not previously available, which raises a colorable claim that the irregular assignment and trial of this case were tainted by the involvement of former Judges Michael T. Conahan and [Mark] Ciavarella."

Background

The defamation action was brought by Thomas Joseph and several of his businesses against the *Scranton Times*, owner of the *Citizens' Voice* newspaper in Wilkes-Barre, Pennsylvania. The defamation claims arose out of a series of 10 articles published in 2001 which reported on searches of Joseph's home and his business, as well as the home of reputed Mafia boss Billy D'Elia.

The articles stated that Joseph was an associate of D'Elia's and that the federal government was investigating Joseph's alleged involvement in various crimes, including money laundering. D'Elia and one of the other persons whose home was searched at the same time as Joseph's home and business were prosecuted and convicted but Joseph was never charged. Although Joseph admitted that the searches occurred and that he had a past friendship with D'Elia, he denied that he had been the "target" of the investigation and also denied that the investigating grand jury had looked into whether one of his businesses had been used for the transportation of drugs and prostitutes.

Even though the articles all stated that Joseph was under investigation, Joseph argued that the average reader would conclude he had committed the crimes. The *Scranton*

Times contended that the articles accurately reported that Joseph was under investigation and that Joseph could not meet his burden under *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) of proving falsity because Joseph admitted he had no knowledge as to the scope of the investigation. The *Scranton Times* also contended that, as a result of the series of public searches by dozens of armed agents and the resulting publicity (including statements by Joseph's lawyer), he was a limited purpose public figure and had no proof of actual malice.

Bench Trial and Appeal

After a non-jury trial in front of former judge Ciavarella, judgment was entered against the *Scranton Times* for \$3.5 million. Relying largely on the findings of fact of the trial judge, the Pennsylvania Superior Court affirmed. *Joseph v. Scranton Times*, 959 A.2d 322 (Pa. Super. Ct. 2008). See also *MediaLawLetter* [Nov. 2006](#) at 13; [Sept. 2008](#) at 3 (login required).

The *Scranton Times* filed a petition to the Pennsylvania Supreme Court for allowance of appeal. While that petition for allowance of appeal was pending, the *Scranton Times* filed its petition asking the state's highest court to exercise its King's Bench powers, asserting that "[t]he unusual handling of judicial assignments in *Joseph v. Scranton Times*, the scope and subject of the newspaper articles in question, and a cascade of recent revelations regarding corruption in the Luzerne County Court of Common Pleas strongly suggest the \$3.5 million non-jury verdict was fixed."

As to the assignment of the case, the petition asserted that former president judge Conahan personally assigned pretrial matters to himself even though local rules provided for such matters to be assigned on a rotational basis. After Conahan was challenged for bias on a discovery motion brought by a bank on which he sat on the board of directors, that motion was reassigned to Ciavarella. The newspaper's summary judgment motion was also assigned to Ciavarella and he denied it without opinion.

(Continued on page 9)

Pennsylvania Supreme Court Orders Review of \$3.5 Million Libel Judgment

(Continued from page 8)

The Scranton Times requested that president judge Conahan assign the trial to an out-of-county judge but he refused to do so. The Court Administrator, Conahan and Ciavarella all assured the Scranton Times that the trial of the non-jury case would be assigned on a rotational basis but the Petition asserts that a computer record kept by the Court Administrator shows that the case was directly assigned to Ciavarella by Conahan and the Court Administrator.

In addition, the Petition included a declaration of Robert Kulick, an associate of D'Elia, alleging that he regularly had breakfast meetings with Conahan and D'Elia to discuss cases pending in the courts. Kulick said that "D'Elia told me that he had discussed the Joseph case with Judge Conahan, that Judge Conahan had told him that he had discussed the case with Judge Ciavarella, and that the outcome of that case was going to be positive for Joseph." Kulick said that these statements were made by D'Elia before Ciavarella issued his non-jury verdict.

Judges Pled Guilty to Corruption

In early 2009, both Conahan and Ciavarella pleaded guilty to federal charges arising out a scheme in which the two judges were paid \$2.6 million by the owner and builder of a juvenile detention facility for the judges taking discretionary acts relating to the construction, operation and expansion of two juvenile detention facilities and the placement of juveniles in those facilities. Both judges have been removed from office. The Court Administrator also pleaded guilty to federal charges for embezzlement of funds.

Evidentiary Hearing Ordered

After finding that the newspaper's petition raised a colorable claim of irregularity in the assignment of the case and the trial, the Supreme Court assigned the matter to the Honorable William Platt, President Judge of Lehigh County and instructed him to hold an evidentiary hearing and issue a report and recommendation as to whether any relief, including the award of a new trial, is warranted.

The Supreme Court also defined the standard for granting relief:

In making this assignment, we note that, where there is a proven, material conflict of interest, bias, or similar judicial irregularity, there is no need for a further showing of prejudice. Rather, in terms of the present case, an appearance of impropriety in either the assignment or trial of this case is sufficient to establish prejudice.

Judge Platt's report to the Supreme Court is due thirty days after the evidentiary hearing. No date has been set for the evidentiary hearing. The Scranton Times' separate petition for allowance of appeal has been held in abeyance by the Supreme Court until after it decides if the newspaper is entitled to a new trial or other relief as a result of the King's Bench proceedings.

The Scranton Times is represented by J. Timothy Hinton, Jr. of Haggerty, McDonnell, O'Brien & Hinton and W. Thomas McGough, Jr., Kevin C. Abbott, Kim M. Watterson and Mark L. Tamburri of Reed Smith LLP.

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Lawyer Wins \$210,000 Verdict in Libel Suit Against Spanish Language Newspaper

A former Philadelphia City Solicitor won \$210,000 in damages on April 2 in a libel suit against a Spanish-language newspaper for its coverage of the plaintiff's election as president of the Philadelphia Hispanic Chamber of Commerce, which the newspaper alleged was not in compliance with the Chamber's by-laws. *Trujillo v. Guaracao*, Civil Case No. 070101481 (Pa. C.P., Philadelphia jury verdict April 2, 2009).

Background

Kenneth I. Trujillo, who was Philadelphia's city solicitor from 2000 through 2002, became president of the Chamber of Commerce in February 2006, after the resignation of the Chamber's president and its executive director. *Al Día's* initial story on the change, published February 19, 2006 raised doubts over the legitimacy of Trujillo's selection by the Chamber's board of directors. And during the next three months, *Al Día* published stories in its print edition and on its website, in both Spanish and English, questioning the change in Chamber leadership, alleging that a "conspiracy" among chamber board members led to the forced resignation of the former president and the election of Trujillo.

In January 2007, Trujillo sued *Al Día* and publisher Hernan Guaracao in Pennsylvania Common Pleas Court over five of the articles – three in the printed paper, and two published only online, in English. The claims based on the Spanish articles were dismissed prior to trial, after the plaintiff failed to provide certified English translations. So, at trial, only the English articles were at issue.

Libel Trial

Common Pleas Judge Patricia A. McInerney held that despite his prominence in Philadelphia's Hispanic commu-

nity, Trujillo was a private figure for purposes of his libel suit. According to defense counsel, this was based on the rationale that few people knew, or cared, who the president of the Hispanic Chamber of Commerce was until the controversy over Trujillo's election arose. (Of the Hispanics in the *voir dire* pool, none knew who the plaintiff was.)

During the seven-day trial, the plaintiff said that he thought about the articles and the allegations they contained every day, and that his main concern was protecting his daughter. He expressed particular dismay over the cover of the March 12, 2006 issue of *Al Día*, which featured a picture of him in a broken-glass frame with the headline, in English, "Broken Trust." The defense argued that the articles were true, and that Trujillo had not shown any actual, pecuniary damage. The defense also argued that the "Broken Trust" picture was an expression of opinion.

The parties each had an expert on journalist standards. Plaintiff's expert was Joseph Goulden, author of several books on military history and on the culture of law and judges. The defendant presented Christopher Harper of Temple University, who formerly worked for ABC News and Newsweek.

The parties agreed to allow the alternate juror who made it through trial to join the eight jurors in deliberations; the jury deliberated for about two hours before finding for the plaintiff and awarding him \$150,000 in compensatory damages and \$60,000 in punitives.

No post-trial motions were filed, and no appeal is expected. The parties apparently reached a post-trial settlement.



The newspaper defendants were represented by Robert B. White, Jr. of Philadelphia. Plaintiff was represented by Clifford E. Haines of Philadelphia.

Community Leader Wins \$225,000 Verdict Against Vietnamese Language Newspaper

Plaintiff Was Accused of Being a Communist Sympathizer

A leader in the Vietnamese-American community of Olympia, Washington and the organization he heads won \$310,000 in libel damages over statements in a Vietnamese language newspaper and websites that said he and his organization were communist sympathizers. *Tan v. Le*, No. 04-2-00424-9 (Wash. Super. jury verdict April 16, 2009).

Background

Duc Tan, a lieutenant in the South Vietnamese army until he fled the communist takeover in 1978, now heads the organization Vietnamese Community of Thurston County (VCTC). In 2003, another Vietnamese community organization sent out an e-mail accusing Tan and his organization of communist sympathies, and announcing a press conference to elaborate on the allegations. The e-mail was also posted on a supermarket bulletin board with the label "public notice" and to an Internet site.

The press conference, held in Seattle on August 17, 2003, featured officials of the organization The Vietnamese Community of Washington State (VCWS), a coalition of Vietnamese business, social and community groups. There were follow-up press conferences in Olympia on August 23 and in Tumwater, Washington on September 20, 2003. The communist sympathizer allegation was repeated at each event, as well as in articles in 2002 and 2003 in two publications put out by VCWS: *New Horizon: The Voice of the Vietnamese Community of Washington State*, and *Community Newsletter*.

As evidence of Tan's communist sympathy, the defendants alleged that Tan and his organization had displayed the flag of modern Vietnam's communist regime, and refused to display the nationalist flag of the anti-communist Vietnamese diaspora. They also pointed to an apron that had been used at VCTC's booth at Olympia's annual LakeFair event, which featured a stylized picture of Santa Claus, with five-pointed stars on the top of his red cap, on his red mittens, and along the bottom of the apron; they claimed that the stars represented the star on the communist Vietnamese flag.

Trial

Prior to trial, the court ruled that Tan was a public figure who had to show actual malice in order to recover damages.

During the three-week trial the plaintiffs called Mariam Lam, Assistant Professor of Comparative Literature at the University of California – Riverside, as an expert on the damaging impact within the Vietnamese-American community of being labeled a communist sympathizer.

The defense called a U.S. Special Forces Vietnam veteran as its expert. Although he was prepared to testify that the communist regime's harsh treatment of the defendants led them to fear any communist sympathy within their community, the court excluded his testimony on this issue. The defense argued that the statements were opinion, and that they believed that the allegations they were making were true.

After deliberating for one full day, ten members of the 12-member, all white jury found for the plaintiffs, and awarded \$225,000 to Tan and \$85,000 to his organization. The defense has filed a motion for a new trial in light of some of the court's evidentiary rulings.

This is not the only recent case in which a charge that a member of the Vietnamese community was a communist led to a libel suit. In February, a California appeals court affirmed denial of an anti-SLAPP motion to strike libel and tortious interference claims brought by a Vietnamese-American public school administrator against a community activist who called her a communist, accepting plaintiff's evidence that calling someone a communist in the Vietnamese community was "extremely harmful to [her] reputation." *Nguyen-Lam v. Cao*, 90 Cal.Rptr.3d 205 (Cal.App., 4th Dist. Feb. 26, 2009); see also *MediaLawLetter*, March 2009, at 20.

And in 2007, the Minnesota Court of Appeals affirmed that it was defamatory to have called plaintiff a "Communist lackey controlled by the Vietnamese Communists." *Pham v. Le*, Nos. A06-1127 and A06-1189, 2007 WL 2363853 (Minn. App. Aug. 21, 2007) (unpublished), cert. denied sub. nom. *Van Tran v. Pham*, 128 S.Ct. 1891 (U.S. April 14, 2008).

The defendants were represented by Nigel S. Malden of Davies Pearson, P.C. in Tacoma. The plaintiffs were represented by Gregory M. Rhodes of Parr Younglove Lyman & Coker, P.L.L.C. in Olympia.

How We Obtained a \$12.5 Million Verdict in an Internet Defamation Case

By Michael P. Lynn and Richard Smith

In the Internet Age, virtually anyone can publish anything about anybody – and they frequently do. When someone crosses the line between fair comment and outright defamation, there may be depressingly little the victim can do about it. But a verdict from a recent jury trial in Dallas should send a message that there are, in fact, limits on what people can get away with on the Internet.

Our firm, represented the plaintiff in the case of *ORIX Capital Markets, LLC v. Super Future Equities, et al.* No. 3:06CV271-3, (N.D. Tex., Jury verdict Feb 6., 2009). The case was tried by Mike Lynn and Richard Smith. After a two-week trial in federal court, the jury returned a \$12.5 million rebuke to the defendants. It was an important vindication for our client, which had been subjected to several years worth of falsehoods on the defendants' website. We also believe it to be the largest verdict ever reached in an Internet defamation case. But ORIX had to overcome some serious obstacles that could have resulted in a defense verdict, including the problem of not being able to point to a single dollar of damages that it had suffered as a result of the defamatory statements.

The subject matter of the lawsuit was one that many businesses have had to deal with, namely a web site set up to attack the company and accuse it of misconduct. In our case, the website went by the name of www.predatorix.com, which contained dozens of false and defamatory statements about ORIX. Predatorix's stated purpose was to expose abuses in the field of mortgage-backed securities, but the content made it clear that it was mostly interested in attacking two particular institutions, Wells Fargo and ORIX. The website claimed it was "dedicated to all the victims of Wells Fargo and ORIX's predatory lending and discriminatory practices," including several people whose deaths it attributed to ORIX.

One of the most significant lessons we took from this case is that context matters with defamation. If the jury had concluded that ORIX was just seeking retribution against some random critic on the Internet, it is unlikely that they would have found the website to be defamatory or awarded much in the way of damages. But the family behind the

website actually had a long history of disputes and litigation with ORIX, and that history took center stage at trial as evidence of the defendants' malice and conspiracy against ORIX. It essentially became a character battle.

The dispute had arisen out of an apartment complex in Harvey, Louisiana, not far from New Orleans. The defendants were members of a family that had many millions of dollars invested in real estate across the country. The mortgage on the Louisiana apartment complex was held in a commercial-mortgage backed securities ("CMBS") trust, for which Wells Fargo was the trustee and ORIX was the servicer.

As the servicer, ORIX was tasked with ensuring that borrowers kept up their payments and properly maintained the property. It soon became apparent, however, that the defendants' apartments were in deplorable condition, which eventually led ORIX to foreclose on the property – but not before the family companies sued ORIX for various alleged abuses regarding its servicing on the loan. ORIX counter-claimed, and eventually ended up winning a judgment in Louisiana for more than \$10 million.

Our theme at trial was that the Predatorix website was just a vehicle for striking back at ORIX – a vehicle that ORIX could not defend against. Predatorix was apparently operated by the family's 17-year-old son, although discovery also linked the boy's father and cousins to the website. The boys were also in charge of another family company, Super Future Equities ("SFE"), which just so happened to have become an investor in the very same CMBS trust that had held the mortgage to the Louisiana apartment complex. And in yet another allegedly random coincidence, the Predatorix website went online the same day that SFE sued ORIX and Wells Fargo in an attempted class action securities lawsuit in the Northern District of Texas. SFE's suit was eventually dismissed on summary judgment, but ORIX's counterclaims for defamation and civil conspiracy went to trial in January 2009.

Predatorix had published many inflammatory accusations about ORIX, including claims of RICO violations, tax fraud, abusive collection tactics against borrowers, and manipulating the trust to benefit itself at the expense of both

(Continued on page 13)

How We Obtained a \$12.5 Million Verdict in an Internet Defamation Case

(Continued from page 12)

borrowers and investors. In the middle of the biggest financial meltdown since the Great Depression, it would be all too easy for many jurors to accept that such allegations against a financial services company were actually true, or to dismiss them because the company is still in business. To have any chance of winning the trial, we had to convince the jurors that the defendants were deliberately lying about ORIX, and at the same time show them that ORIX really was a good corporate citizen in both its industry and in its dealings with the defendants.

Our mock jury research before trial demonstrated that there can be a big “So what?” reaction to things that are said on the Internet, even when it comes to false accusations of criminal activity. To get past that, we needed the jury to understand not only what the website was publishing (much of which was quite technical) and how it was false, but also *why*

it was being published in the first place. Much like defamation in the newspaper, we learned that the intentions and motivations of the publisher were the key to adding gravity to our accusations. Thus, the lengthy and contentious history between ORIX and the defendants informed almost everything that happened at trial. The defamation becomes much more offensive to a jury if they can recognize that the people making the accusation do not have any good reason to be angry with the victim.

For our claims to truly matter, however, the jury also had to agree that ORIX’s reputation was actually worth defending. We therefore embraced that old adage that a company is no better than its people, and our trial strategy was to humanize ORIX for the jury. Fortunately, ORIX had plenty of fantastic people who could explain not only the company’s history, but also why ORIX’s reputation really mattered to the company, and to them personally. Several of ORIX’s personnel had also been the subject of personal attacks on Predatorix, which further personalized the case.

It’s one thing, after all, to have somebody say disparaging things about a company, but it is much more personal to accuse an employee of being a liar and a thief just for doing their job.

Still, being right does not necessarily get a defamation plaintiff to an award of damages, and ORIX’s own witnesses had testified in deposition that the company had sustained no quantifiable damages from the website. In fact, no one could point to any lost business due to the web site or its statements. As a private figure in a suit for defamation per se, ORIX was not required to prove actual damages in order to recover. It was, however, entitled to recover *something* for injury to its reputation.

Our witnesses therefore stressed the importance of ORIX’s reputation to its success in the business industry.

People want to do business with companies they trust to fulfill their obligations, and nobody wants to do business with a crook. Even more

importantly, we also turned the damages issue back on the defendants. ORIX might not have been able to put a precise dollar value on its reputation, but we argued that the defendants certainly must have believed the web site and defamatory statements were worth at least as much as the \$10 million Louisiana judgment that we asserted was their motive to attack ORIX.

After a few hours of deliberation, the jury sent a message to the defendants, awarding a total of \$2.5 million against three of the four defendants, plus another \$10 million in punitive damages. The verdict was read just minutes after the parties had reached a settlement, which resulted in a substantial payment to a charitable organization run by ORIX, a public apology from the defendants, and the turnover of the website to ORIX. You can read the apology and ORIX’s account of the dispute at www.predatorix.com.

Michael P. Lynn and Richard Smith of Lynn Tillotson Pinker & Cox, LLP in Dallas represented Orix. Defendants were represented by Tim Glavin and Chuck Blanchard of Carrington, Coleman, Sloman & Blumenthal, L.L.P., Dallas.

Our mock jury research before trial demonstrated that there can be a big “So what?” reaction to things that are said on the Internet, even when it comes to false accusations of criminal activity.

Jury Awards \$7.2 Million Default Verdict to Former Miss West Virginia in Web Libel Case

Defendants Claimed Plaintiff Was Featured in Sex Tape

A former Miss West Virginia won a \$7.2 million default verdict against nine defendants whose websites featured or sold a video that purportedly showed plaintiff performing various sex acts. *Williams v. Vidbidness, Inc. et al.*, No. 1:05CV51 (N.D. W.Va. April 8, 2009) (Keeley, J.).

Plaintiff is not the woman in the video. She sued numerous websites located in the U.S. and around the world for falsely identifying her as the woman in the sex tape.

Background

The plaintiff, Allison Williams, was crowned Miss West Virginia in 2003, and competed in the Miss America pageant that year. In 2004, while a law student, Williams discovered that a sex video was being advertised on various websites, with the advertisements identifying her by name, as Miss West Virginia, and as a television reporter. The video shows a woman, who is not Williams, and a man involved in sex acts in what appears to be the back of a mobile news van. Williams has not worked as a television reporter; the tape is apparently of another woman named Allison Williams, who was a reporter for a television station in Virginia.

In 2005, Williams sued 59 defendants – 29 American, and 30 foreign – whose websites featured either the video or links to buy it. Many of the sites advertised the video as “Allison Williams Miss West Virginia and TV reporter get banged in the camera truck!” and some used pictures of the plaintiff. A copy of the complaint is available [here](#).

Because of the difficulty in serving the foreign defendants, District Judge Irene M. Keely allowed the plaintiff to serve the non-U.S. defendants via e-mail, utilizing a website service called “Proof of Service – Electronic” (www.prooffservice.com) which offers encrypted online delivery of documents and returns a digitally signed proof of delivery once the document has been received by the target e-mail. *Williams v. Advertising Sex LLC*, 231 F.R.D. 483 (N.D. W.Va. Oct. 26, 2005); see also *MLRC MediaLawLetter*, Nov. 2005 at 8.

Jurisdictional Issues

In August 2007, Judge Keely dismissed one of the defendants, who had posted a link to the video on his blog, for lack of personal jurisdiction. *Williams v. Advertising Sex LLC*, 2007 WL 2570182, 35 Media L. Rep. 2614 (N.D. W.Va. Aug. 31, 2007). Citing the Fourth Circuit’s decision in, *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002), the court held that the mere availability of the blog, without directing any other activity to West Virginia, did not constitute purposeful availment. The court also noted that plaintiff had not shown that anyone in West Virginia actually accessed the blog.

Later, Judge Keely dismissed an additional 28 defendants on Oct. 31, 2008 for lack of jurisdiction, using the same reasoning as her earlier decision (again citing *ALS Scan, Inc. v. Digital Service Consultants, Inc.*) to dismiss the defendants. *Williams v. Advertising Sex LLC*, 2008 WL 4525015, 37 Media L. Rep. 1294 (N.D. W.Va. Oct. 3, 2008), *motion to amend denied*, 2009 WL 723168, 37 Media L. Rep. 1460 (N.D. W.Va. Mar. 17, 2009). “[U]nder Fourth Circuit precedent,” Judge Keely wrote, “such generally accessible websites do not ‘direct’ internet activity into a particular state in a manner that satisfies the requirements for personal jurisdiction.” 2008 WL 4525015, at *13.

Williams has appealed this ruling, No. 09-1412 (4th Cir. filed April 9, 2009), arguing that personal jurisdiction could be exercised under the “effects test” of *Calder v. Jones*, 465 U.S. 783 (2004).

As the case progressed, the number of defendants was reduced to nine – four American defendants and five Australian. The district court entered default judgments against these defendants for failing to comply with jurisdictional discovery. The default damages trial was held April 7 and 8. On April 8, the jury awarded Williams \$800,000 in compensatory damages from each defendant, for a total of \$7.2 million.

Plaintiff was represented by Jackson Kelly PLLC, West Virginia.

Fifth Circuit Strikes Libel Case Against Louisiana Newspaper

Denial of Motion to Strike Is Immediately Appealable

The Fifth Circuit this month granted an anti-SLAPP motion to strike a libel complaint against a Louisiana newspaper, holding that the plaintiff failed to provide evidence of fault to withstand a motion to strike. [*Henry v. Lake Charles American Press LLC*](#), No. 08-30201, 2009 WL 989190 (5th Cir. April 14, 2009) (Smith, Barksdale, Prado, JJ.).

The plaintiff claimed that the newspaper printed defamatory articles after receiving a complaint that they were false. In an interesting analysis, the Fifth Circuit held that plaintiff's affidavit that the newspaper was "on notice" of falsity was legally insufficient to raise an issue of fault because plaintiff did not allege any additional facts to show that publication was unreasonable.

The court also addressed the question of whether it had jurisdiction to hear an interlocutory appeal of a denial to strike a complaint under the Louisiana anti-SLAPP statute. In a lengthy analysis, making up the bulk of the decision, the court held it could hear the appeal under the collateral order doctrine. The court held that the Louisiana anti-SLAPP statute "creates a right not to stand trial" and denial of this right is immediately appealable.

Background

The plaintiff, Mark Henry, is the former owner of the Chenault Jet Center, a private airport facility that had a contract to refuel military aircraft. The *American Press* newspaper in Lake Charles, Louisiana published a series of articles stating that the government was investigating the airport after four military jets suffered engine "flame-outs" allegedly because of contaminated fuel from the airport. One article quoted an unnamed source who said, "They are just lucky that no one has ever gotten killed." Another article stated that "a plane is said to have nearly crashed before the pilot was able to get the plane's engines restarted."

Plaintiff sued the newspaper and reporter for libel. Defendants moved to strike the complaint under Louisiana's anti-SLAPP statute, [La. C.C.P. Article 971](#). The statute is modeled on California's statute and provides in part that:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or Louisiana Constitution in connection with a public issue shall be subject to a special motion to strike, unless the

court determines that the plaintiff has established a probability of success on the claim.

The district court denied the motion to strike, holding that while the articles involved a matter of public concern plaintiff had demonstrated probable success on his claims. *See Henry v. Lake Charles American Press*, No. 2:06 CV 15132008, WL 398506 (W.D.La. Feb. 12, 2008) (on reconsideration). The district court held that 1) plaintiff was a private figure "because he is not involved with the resolution of important public questions nor has he thrust himself into the public limelight by owning a local airport"; and, 2) a negligence standard applied.

The district court found sufficient evidence of negligence where the newspaper republished the allegation about contaminated jet fuel after plaintiff's lawyer contacted the reporter and stated that there were no flame-outs and that Air Force sources could confirm the story's falsity. The district court concluded that a jury could find that the reporter "purposefully avoided acquiring facts that could demonstrate the falsity of the story, which was subsequently reprinted."

Interlocutory Appeal

The court first considered the threshold issue of whether the district court's denial was immediately appealable. The court undertook a lengthy analysis of the collateral order doctrine first articulated by the U.S. Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 546 (1949). In *Cohen*, the U.S. Supreme Court held that certain interlocutory orders are immediately appealable since they can be considered "final in effect" even though they do not dispose of the litigation.

To fall within the collateral order doctrine, an order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Henry* at * 5 quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

The court went on to find that a denial of an anti-SLAPP motion to strike meets all the requirements of the collateral order doctrine. First, it is conclusive as to whether Article 971 requires dismissal of the law suit. Second, it meets the separability require-

(Continued on page 16)

Fifth Circuit Strikes Libel Case Against Louisiana Newspaper

(Continued from page 15)

ment because it resolves an issue of immunity not normally revisited after final judgment in the lawsuit. Three, the denial is effectively unreviewable since the defendant will have been forced to go through trial. As the court explained:

The purpose of Article 971 is to free defendants from the burden and expense of litigation that has the purpose or effect of chilling the exercise of First Amendment rights. Article 971 thus provides a right not to stand trial, as avoiding the costs of trial is the very purpose of the statute. In other words, Article 971 does not provide a defense to liability; defendants remain liable for actual acts of defamation and other torts. But it does provide defendants the right not to bear the costs of fighting a meritless defamation claim. If an Article 971 motion is erroneously denied and unappealable, then the case proceeds to trial and this right is effectively destroyed. *Henry* at *12.

Moreover, the court noted that “importance” – i.e. – the public interest at stake weighed “profoundly in favor of appealability.” *Henry* at *14 (“Article 971 embodies a legislative determination that parties should be immune from certain abusive tort claims that

have the purpose or effect of imperiling First Amendment rights...”)

Plaintiff Failed to Show Fault

Reviewing the issue of fault, the Fifth Circuit found that it did not need to review whether plaintiff was a private or public figure because plaintiff failed to allege fault. Plaintiff’s evidence of fault consisted of his attorney’s affidavit stating that “he contacted American Press, provided them with information that the stories were false, and also provided them with the contact information of Air Force personnel who could confirm the stories’ falsity.”

This allegation, however, “provides no indication that American Press did not follow up on the information Anderson provided. ... [the] affidavit does not show that American Press acted unreasonably in investigating and publishing the stories.

In conclusion, the court noted that the Louisiana anti-SLAPP statute “places a high burden on a plaintiff bringing a defamation claim” but “this difficult burden exists to prevent frivolous torts from chilling exercises of First Amendment rights.”

The newspaper defendants were represented by James B. Doyle, Law Offices of James B. Doyle, Lake Charles, LA. Plaintiff was represented by David Kent Anderson, Anderson & Cunningham, Houston, TX and Yul D. Lorio, Doucet Lorio, Lake Charles, LA.

Ninth Circuit: Denial of Oregon Anti-SLAPP Motion Not Appealable

In an interesting contrast of reasoning, the Ninth Circuit earlier this year held that a denial of a motion to strike under Oregon’s anti-SLAPP law is not appealable under the collateral order doctrine. [*Englert v. MacDonell*](#), No. 06-35465, 2009 WL 32559 (9th Cir. Jan. 7, 2009) (Tallman, Clifton, Korman, JJ.). The Court concluded that Oregon’s anti-SLAPP statute “was not intended to provide a right not to be tried.” *Id.* at *5. Instead the statute creates a right to have the legal sufficiency of the evidence underlying a complaint tested before trial – and such sufficiency can be reviewed on ordinary appeal. The Court found it significant that the Oregon anti-SLAPP statute, O.R.S. 31.50, does not provide for an immediate appeal of a denial to strike. While noting that state law does not control federal appellate jurisdiction, the Court found it highly relevant to show that Oregon lawmakers did not intend the statute “to protect speakers from trial itself.”

The plaintiff in this non-media case is a forensic scientist. He sued six other scientists for “falsely denigrating” his qualifications. The district court granted the anti-SLAPP motion to strike of two defendants. The others appealed from the denial, but after reviewing the collateral order issue the Ninth Circuit dismissed for lack of jurisdiction.

Ninth Circuit Affirms Dismissal of Libel Suit Against Radio Show Host

Affirms Dismissal Under Oregon's Anti-SLAPP Statute

The Ninth Circuit affirmed dismissal of libel, privacy and related claims against a radio talk show host and his distributor, finding that the host's on air comments about a jet ski retailer were protected opinion. *Gardner v. Martino*, Nos. 06-35437, 06-35931, 2009 WL 1098934 (April 24, 2009) (Pregerson, Reinhardt, Marshall, JJ.).

On appeal, the plaintiffs argued that the host relied on false statements made by a caller and therefore his statements were actionable. The Ninth Circuit disagreed, finding that even if the caller's statements were false, the host was not negligent or unreasonable in relying on her story "in the context of a radio show that takes live calls on the air."

Background

Defendant Tom Martino is a Denver-based host of a nationally syndicated radio talk show that deals with consumer complaints. Known as "The Troubleshooter," Martino bills himself as a consumer advocate who "blasts liars and cheaters, exposes rip-offs and investigates consumer complaints live on the air." See www.troubleshooter.com.

The plaintiffs are the owners of a Portland, Oregon retail store. The libel case was based on several statements Martino made during a lengthy on-air discussion with a caller about her troubles with a jet ski bought from plaintiffs' store, Mt. Hood Polaris. The consumer gave a detailed account of her troubles getting the jet ski repaired or returned. Among other things, Martino stated "they're just lying to you." He later asked rhetorically "will they admit to us, that they went back on their word?" And later commented, "Polaris sucks."

Plaintiffs sued Martino, syndicator Westwood One, and Portland radio station owner Clear Channel for libel, false light and interference with contract. The district court dismissed the suit under Oregon's anti-SLAPP statute, O.R.S. 31.50 et seq. The district court held that the average person would understand that a talk radio show would contain "hyperbolic, exaggerated, and self-serving," statements and Martino's statements were clearly opinions "given that the statements came after a long recitation of facts disclosed by" the caller. See *Gardner v. Martino*, 05-CV-769-HU (D. Or. Dec. 13, 2005) Brown, J.) (adopting magistrate's recommendation available at 33 Media

L. Rep. 2541 (D. Or. Sept. 19, 2005). After the decision Clear Channel was voluntarily dismissed from the case.

Ninth Circuit Decision

On appeal, plaintiffs argued that Martino's statements that they were "lying" were actionable because the on-air discussion was serious and not hyperbolic and the statements were based on false statements made by the caller. The Ninth Circuit panel disagreed. Looking at context, the Court cited the nature of the radio show, finding that its elements of "drama, hyperbolic language, an opinionated and arrogant host, and heated controversy" all signaled to listeners that the show featured expressions of opinion.

Martino's statements that plaintiffs were "lying" were made in reliance on the facts outlined by the caller in an on-air exchange, and "no reasonable listener could consider Martino's comments to imply an assertion of objective facts rather than an interpretation of the facts equally available to Martino and to the listener." Citing, e.g., *Partington v. Bugliosi*, 56 F.3d 1147, 1156 (9th Cir. 1994); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir.1993) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.").

Moreover, plaintiffs presented no evidence that Martino's reliance on the caller's statements was unreasonable or negligent. His statements were based on comments made by a frustrated consumer, who called in to narrate her story on the air. "It was clear to all that Martino had no independent knowledge of the complaint at this point." Thus, even if the caller's statements were false it was not unreasonable to rely on them "given the nature of talk shows." The Court added that it would be "unreasonable to require a speaker to determine the actual truth or falsity of every fact the speaker relies on before stating his or her opinion." *Gardner* at * 6.

Tom Martino and Westwood One were represented by Charles Hinkle and Brad Daniels of Stoel Rives in Portland, Oregon. Plaintiffs were represented by Linda Marshall, Lake Oswego, Oregon.

New York Court of Appeals Reverses Libel Judgment for Public Official

Independent Review of Record Showed Insufficient Evidence of Actual Malice

The New York Court of Appeals, the state's highest court, unanimously reversed and dismissed a \$100,000 libel judgment in favor of a former elected school board member who sued over statements in a campaign flyer opposing his reelection. [*Shulman v. Hunderford*](#), 2009 WL 774199, 2009 N.Y. Slip Op. 02263 (NY March 26, 2009).

In an interesting non-media decision, the court strongly upheld the role of independent appellate review in actual malice cases, finding that the intermediate appellate court's summary affirmance was improper.

Background

In 1998, the plaintiff, Larry Shulman, was an elected school board member on Long Island. The defendant, Frank Hunderfund, the local school superintendent, opposed plaintiff's reelection. The defendant helped prepare and circulate an anonymous flyer titled in bold capital letters "BROKE THE LAW," and stating in relevant part:

Shulman flagrantly broke the law when he awarded a lucrative food service contract to one of his business associates. Concerned Citizens has verified the fact that Shulman NEVER revealed his business relationship with the food service company PRIOR to the awarding of this contract. Shulman's disregard of ethical principles and conflict of interest laws has cost the District dearly.

Plaintiff lost his bid for reelection and sued for libel. The jury found in favor of plaintiff and awarded him \$100,000 in punitive

damages. The trial court granted defendant's motion for JNOV. The intermediate appellate court summarily reinstated the verdict, holding that actual malice was supported by "legally sufficient evidence in the record." See *Shulman v. Hunderford*, 48 AD3d 449, 450 (NY App. 2d Dept. 2008).

Court of Appeals Decision

The Court of Appeals reversed and dismissed the case, finding that the court below applied the wrong standard. "The usual deference paid by courts to jury verdicts," the Court stated, "is inapplicable in cases subject to the *New York Times v. Sullivan* rule." Instead, courts "must scrutinize the evidence of actual malice for 'convincing clarity' we find no such clarity here."

The Court then went on to examine in detail the allegations in the election flyer that plaintiff "broke the law" in connection with awarding a contract. Looking at relevant law and ethics codes, the Court noted that while plaintiff may have violated neither "the record does not clearly and convincingly show that Hunderfund knew Shulman to be innocent, or that he had no basis for thinking him guilty, of any legal transgression."

The Court noted that while plaintiff may not have liked the defendant's "provocatively phrased, and anonymous, charges," his only remedy is "to develop a thicker skin."

Plaintiff was represented by Diane K. Farrell, Devitt Spellman Barrett, LLP, Smithtown, NY. Defendant was represented by Mark S. Yagerman, Smith Mazure Director Wilkins Young & Yagerman, P.C., New York.



Employment Libel and Privacy Law 2009

REPORTS FROM ALL FIFTY STATES, THE DISTRICT OF COLUMBIA AND PUERTO RICO.

Edited by the Media Law Resource Center, Inc.

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Los Angeles Court Throws Out Libel-in-Fiction Case Against Sacha Baron Cohen's "Da Ali G Show"

Comedic Statements Could Not Be Believed, and Plaintiff Was Libel-Proof Anyway

By Michael Cleaver and Russell Smith

In a decision that could benefit comedy writers, performers, television broadcasters, and film studios across the United States, Channel Four Television Corporation ("Channel 4"), the UK's second largest television broadcaster and the originator of "Da Ali G Show," starring Sacha Baron Cohen ("Cohen"), has defeated a libel case filed in Los Angeles by a plaintiff who sought millions of dollars in damages, all allegedly due to the inclusion of her name in a comedy routine. *Doe v. HBO*, Case No. SC092739 (Los Angeles Sup. Ct. April 21, 2009).

The plaintiff, who sued as "Jane Doe," claimed that Cohen used her name in a comedy "interview" by "Ali G" with the historian and author, Gore Vidal, during the course of the television program "Da Ali G Show." In the interview, the fictional "Ali G" asked Mr. Vidal why there is any point in amending the U.S. Constitution, since he (Ali G) once had a girlfriend (the plaintiff) who was constantly "amending herself," but to no avail.

Da Ali G Show

"Da Ali G Show" is a satirical television comedy in which Cohen (a white male from the UK), under the guise of three separate, fictional alter-egos – "Ali G" (a "wannabe" black gangsta-rapper), "Borat" (a witless journalist from Kazakhstan), and "Bruno" (an Austrian gay fascist fashion reporter) – interviews real people, including countless celebrities and other public figures (such as Pat Buchanan, Boutros Boutros-Gali, Newt Gingrich, Dick Thornburgh and Donald Trump). The "interviews" involve a steady stream of ridiculous statements and questions posed by the respective alter-egos to the interviewees. Although the television audience is well aware that the interviewer is a fictional persona, the interviewees, at least at the time of the interview, are not. According to the consent agreements they signed in order to appear on television, they didn't care.

Throughout the program, Cohen never steps out of character, and never appears as himself. Using his idiotic and buffoonish *Ali G* persona in particular, Cohen satirizes sexism, racism, homophobia, and what passes for Western "youth culture." As *New York Times* columnist Maureen Dowd noted, "[w]ith his white-gangsta-rapper-wannabe persona, Sacha Baron Cohen, a brilliant graduate of Cambridge, sends up the vacuity of the culture."

Background of the Case

The Plaintiff originally sued Home Box Office, Inc. ("HBO"), Cohen, "Da Ali G Show," and 50 unnamed "Doe" defendants. In October of 2007, the Plaintiff was persuaded to voluntarily dismiss the entire complaint, with prejudice, as to all of the named defendants, in exchange for the substitution of Channel 4 as Doe Defendant No. 1. This was based on the theory that it was Channel 4, the foreign distributor of the show, not HBO, which licensed the specific broadcast of the show in Finland that ended up on YouTube, with the Plaintiff's name in it.

In her complaint, the Plaintiff alleged that the broadcast defamed her. In the episode in question, during a spoof interview with Gore Vidal, Cohen's *Ali G* character remarked as follows:

Ain't it better sometimes, to get rid of the whole thing rather than amend it, cos like me used to go out with this bitch called [Jane Doe] and she used to always be trying to amend herself. Y'know, get her hair done in highlights, get like tattoo done on her batty crease, y'know have the whole thing shaved – very nice, but it didn't make any more difference. She was still a minger and so, y'know me had enough, and once me got her pregnant me said alright, later, that is it. Ain't it the same with the Constitution?

(Continued on page 20)

Los Angeles Court Throws Out Libel-in-Fiction Case Against Sacha Baron Cohen's "Da Ali G Show"

(Continued from page 19)

Mr. Vidal laughed, and then responded: "Well, the Constitution has not yet become pregnant."

The Plaintiff apparently did not laugh. Instead, she responded with a libel suit alleging that the above statements falsely suggested that she had a sexual relationship with Cohen, and that, because she has no children, the statements also falsely suggested that she must have had an abortion.

The Plaintiff claimed she was damaged by (a) former defendant HBO distributing the allegedly offending episode of the Program at least 21 times across the United States in August of 2004, (b) Channel 4 distributing the episode to Finland in December of 2004, (c) HBO distributing the episode in the U.S. again in 2005, (d) a viewer of the Finnish broadcast posting the offending segment of the episode on YouTube in December of 2006, and (e) the Plaintiff's public filing of the lawsuit in 2007, which included her full name, and gave rise to a barrage of worldwide, negative publicity concerning the Plaintiff and her claims.

Summary Judgment

Granting Channel 4's motion for summary judgment, Los Angeles Superior Court Judge Terry Friedman, in a pro-media ruling that apparently is only the second libel-in-fiction decision in the television context (the first being *Frank v. National Broadcasting Company*, a New York decision dismissing a libel suit against *Saturday Night Live*), decisively threw out the lawsuit, holding as follows:

No reasonable person could consider the statements made by Ali G on the program to be factual. To the contrary, it is obvious that the Ali G character is absurd, and all his statements are gibberish and intended as comedy. The actor, Sacha Baron Cohen, never strays from the Ali G character, who is dressed in a ridiculous outfit and speaks in the exaggerated manner of a rap artist. Ali G's statements are similarly absurd. For example, prior to the reference to Plaintiff, while 'interviewing' the author Gore Vidal, Ali G refers to the Constitution of the United States as having been written on two tablets, clearly intended to confuse the Constitution

with the Ten Commandments. Altogether, the program is obviously a spoof of a serious interview program. No reasonable person could think otherwise.

In the same interview about which the Plaintiff complained, "Ali G" also states that Moses was involved in writing the Constitution, and that author Gore Vidal is a world-famous hair stylist (apparently mistaking Mr. Vidal for Vidal Sassoon). Elsewhere in the same episode, Ali G states that actor Denzel Washington lives in George Washington's former home at Mount Vernon, that John Paul Jones had no arms or legs, that the world is running out of gravity, that gravity was discovered by "Sir Isaac Newton-John" after shooting an apple from William Tell's head, and that euthanasia refers to the killing of elderly people by youth in Asia.

Based on the "content of the program" (i.e., the context in which the statements were made), the court held that the Plaintiff could not prove that the statements declared or implied a "provably false assertion of fact," and that the statements were not "susceptible to [a]... libelous meaning." Much less could the Plaintiff prove that the statement at the core of the lawsuit, namely, that the Plaintiff had sex with a fictional character, was factual. At oral argument, Judge Friedman compared this allegation to a claim that a real person could have sex with "Bugs Bunny."

Moreover, the Court found that the dissemination of the allegedly libelous statements by Channel 4 could not have caused the Plaintiff further damage, beyond that allegedly resulting from the original HBO broadcast. In finding the Plaintiff to be libel-proof with respect to the allegedly offending statements broadcast by Channel 4, the court noted that "[the] Plaintiff attests in discovery responses that the damages all flow from a rebroadcast of the Program [prior to the distribution of the episode in Finland].... Accordingly, no other damages flow from any subsequent rebroadcast in Finland or as a result of YouTube rebroadcasting ... the Program."

The winning brief in favor of summary judgment is available at:

www.sddglobal.com/Doe_v_HBO_SDDGS_Brief.pdf

(Continued on page 21)

Los Angeles Court Throws Out Libel-in-Fiction Case Against Sacha Baron Cohen's "Da Ali G Show"

(Continued from page 20)

India's Role in Libel Defense

Channel 4, which incidentally developed and produced countless innovative films such as *Slumdog Millionaire*, *The Crying Game*, *Trainspotting*, *The Last King of Scotland*, and *Four Weddings and a Funeral*, is happy not only with the result in the "Ali G" case, but also with the low legal fees that made the defense possible. As noted by the company in an unusual press release following the victory:

This action was fought with the litigation support services of SDD Global Solutions, the India arm of Channel 4's U.S. counsel, Smith-Dehn LLP, in a groundbreaking case where 'outsourcing' has proved to be a creative solution to running a robust defense.

U.S. law-trained Indian attorneys at SDD Global conducted the legal research and drafted all of the preliminary drafts of court papers in the litigation, including Channel 4's motion and brief for summary judgment, which allowed Channel 4 to fight and defeat the lawsuit, rather than settling in order to avoid burdensome legal fees.

As Channel 4's general counsel noted after the decision: "US court actions are extremely costly to run and even where a defendant wins, little if any of their costs are recov-

erable from the plaintiff. As so often happens in cases like this, the 'chilling effect' of the threat of substantial damages and significant legal costs, forces defendants to settle with plaintiffs who have no justifiable claim. However, combining the skills and expertise of US attorneys with US law-trained Indian attorneys has proved to be an innovative and cost-effective way for Channel 4 to fight and win the suit."

Sanjay Bhatia, SDD Global's Head of Operations, commented:

This is a case where outsourcing created more work in the U.S., rather than less. Because our team made the defense affordable, U.S. lawyers were able to do the things in the U.S. that they do best there, such as strategizing, supervising, editing, and appearing in court. The implications of this case are

huge. With legal outsourcing, baseless lawsuits can be defeated on their merits, instead of settled simply out of fear of legal fees.

Russell Smith and Michael Cleaver of SmithDehn LLP were lead U.S. counsel to Channel Four Television Corporation in this case. Providing crucial and cost-effective legal research and drafting were Padmavathi Shanthamurthy, Vidya Devaiah, Preethi Venkataramu, Ashish Kumar, and Sanjay Bhatia, U.S. law-trained Indian lawyers at SDD Global Solutions Pvt Ltd. in Mysore, India.



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California Court Of Appeal Says Myspace Is Not “Private”

Rejects Private Facts Claim Based On Republication Of MySpace Article

By Kelli L. Sager and Jeffrey Glasser

In a decision that reinforces the application of traditional free speech protections to claims arising from Internet publications, the Fifth District California Court of Appeal has held that a plaintiff may not maintain an action for invasion of privacy based on the republication of information she voluntarily posted to her MySpace.com page. [*Moreno v. Hanford Sentinel Inc.*](#), 172 Cal. App. 4th 1125 (Cal. Ct. App. Apr. 2, 2009).

Writing for a unanimous three-judge panel, Justice Bert Levy found that no reasonable person would have an expectation of privacy regarding information that they have freely disseminated on a public social networking web site. “A matter that is already public or that has previously become part of the public domain is not private,” according to the court.

Background

In plaintiff Cynthia Moreno posted an article on her MySpace page titled “An Ode to Coalinga,” which railed against the Central California town where she grew up. After the principal at Moreno’s former high school convinced a friend to publish the Ode in the local newspaper, the Coalinga Record, Moreno and her family claimed that they were so severely harassed by local residents that the family was forced to move out of town. Moreno and other family members sued the principal and the newspaper publishers for invasion of privacy by publication of private facts, and for intentional infliction of emotional distress. The publishers prevailed on an anti-SLAPP motion, which was not challenged on appeal.

Private Facts Not Actually Private

In the published portion of the decision, the Court of Appeal rejected Moreno’s privacy claim on the ground that the allegedly “private facts” were not actually private. As the court explained, whether or not Moreno intended her article to reach only a limited audience, “[b]y posting the article on myspace.com, Cynthia opened the article to the public at large. Her potential audience was vast.” The court also rejected Moreno’s claim that her name was private because the article only used her first name, noting that “her identity was readily ascertainable from her MySpace page.”

The court also rejected the privacy claim brought by Moreno’s family members for the same reason, as well as on the ground that privacy rights cannot be asserted by family members merely based

on their relationship to the individual identified in the publication. In an unpublished portion of the decision, however, the court held that an emotional distress claim alleged against the individual who supplied the article to the local newspaper could not be decided on demurrer, since “reasonable people could differ” about whether this action was “extreme and outrageous.”

This decision is consistent with a 2005 ruling from a federal district court in San Diego, which held that the Associated Press did not violate the privacy rights of Navy SEALs by republishing photographs found on the Internet that depicted the SEALs roughing up detainees in Iraq. In *Four Navy Seals v. Associated Press et al.*, 413 F. Supp. 2d 1136 (S.D. Cal. 2005), the district court held that because the plaintiffs had willingly taken these photographs and allowed them to be placed on the Internet, their privacy was not invaded when the same photographs were widely distributed by AP.

Both *Moreno* and *Four Navy Seals* applied protections against privacy claims that developed in response to claims against traditional media companies. For example, more than two decades ago, in *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040 (1984), the First District Court of Appeal held that plaintiff Oliver Sipple’s disclosure of his sexual orientation to hundreds of people in San Francisco barred his invasion of privacy claim against the *San Francisco Chronicle*, which had reported that Sipple was gay in a story on describing his heroic act in saving President Gerald Ford’s life from an attempted assassin.

Similarly, in *Brewer v. Hustler Magazine, Inc.*, 759 F.2d 527 (9th Cir. 1984), the Ninth Circuit found that plaintiff did not have any viable cause of action for violation of right to privacy when the magazine published plaintiff’s photograph after plaintiff already had distributed it to approximately 200 people in the advertising industry.

These recent decisions help to limit the threat of invasion of privacy claims arising from the republication of content that a prospective plaintiff has posted on the Internet for the world to see. Under these circumstances, a defendant who “merely [gives] further publicity” to information that already is “public,” by virtue of its dissemination on the Internet, can and should be protected.

Kelli L. Sager is a partner and Jeffrey Glasser is an associate in the Los Angeles office of Davis Wright Tremaine LLP. Plaintiff was represented by Paul Kleven, Law Office of Paul Kleven Berkeley, CA. The school defendants were represented by Paul Auchard, Auchard & Stewart.

Critical Statements About Tribe Are Not About The Chiefs

Newspaper Editorial Not “Of and Concerning” Tribal Leaders

By Rachel F. Strom

Last month, in a unanimous five-judge decision, the New York State Appellate Division, First Department reversed a trial court’s ruling and reaffirmed the constitutional principle that otherwise impersonal criticism of governmental conduct cannot serve as the basis for a libel claim for the officials responsible for those operations. In [*Lazore v. NYP Holdings Inc.*](#), 2009 WL 910863 (1st Dep’t Apr. 7, 2009), the Appellate Division dismissed a libel lawsuit brought by the three duly elected Chiefs of the federally-recognized St. Regis Mohawk Tribe (the “Tribe”) against NYP Holdings, Inc. (“NYP”), the publisher of the *New York Post* (the “*Post*”). The court held that the plaintiffs could not maintain a libel claim based on statements about the Tribe as a whole simply because they “govern” the Tribe.

Background

Plaintiffs Barbara A. Lazore, James W. Ransom and Lorraine M. White are the three members of the St. Regis Mohawk Tribal Council, which is the federally recognized governing body of the Tribe (the “Tribal Council”). The Tribe is based on the New York side of the border between the United States and Canada, and it has nearly 2,700 members on its New York reservation alone.

On February 21, 2007, the *Post* carried an editorial about the Tribe’s efforts to build a casino at the former Monticello Raceway site in Upstate New York, which was entitled, “The Gov’s Gambling Goof” (the “First Editorial”). The First Editorial criticized then-Governor Spitzer’s decision to endorse the Tribe’s plans to build the casino. Specifically, the First Editorial opened by stating that “Gov. Spitzer is getting into bed with the *St. Regis Mohawks*, giving the green light to a partnership between the upstate Indian tribe and a private firm to build a \$600 million casino at the former Monticello Raceway in the economically troubled Catskills.” (emphasis added). It went on to state “We’re no fans of legalized gambling; it’s socially corrosive on several levels,” but “doing a deal with *this particular tribe* – with its extended history of often-violent criminality – is a travesty.” (emphasis added). The First Editorial then stated that the federal government has “cited the *St. Regis Mohawks*” in connection with various criminal violations and that “*They’ve* also occasionally engaged in shoot-outs with the New York State Police, the Royal

Canadian Mounted Police and the Canadian army.” (emphasis added). It then concluded by stating that “Spitzer needs to read the relevant State Police files on the St. Regis Mohawk tribe. When he does, he’ll come to his senses quickly enough - and ice this project.”

On January 8, 2008, NYP published another editorial in the *Post* about the Tribe entitled “A Bad Bet On The Mohawks,” which concerned the decision by the Secretary of the United States Department of Interior to reject the Tribe’s plans to build a casino (the “Second Editorial”). The Second Editorial stated that “US Interior Secretary Dirk Kempthorne did New York (and the rest of America) a big favor last Friday by nixing a plan to let the *St. Regis Mohawk Indian tribe* build a casino in the Catskills. Given the *tribe’s* longstanding links to crime and violence, the idea of offering it legal entre into the gambling world, letting it run its own facility 350 miles from its home, is absurd” (emphasis added). The Second Editorial went on to state that “it makes no sense whatsoever to invite what amounts to a criminal enterprise to run the joint. And make no mistake: Much of the Mohawks’ recent record lands squarely on the foul side of the law. The *Mohawk reservation* seems to have served as an express lane for the smuggling of cigarettes, booze, drugs, weapons . . . even people.” (emphasis added). The Second Editorial then stated that “When Spitzer last year first struck a deal with the tribe to pursue the casino plan, we noted that the feds had linked the Mohawks to some \$687 million worth of smuggled goods - plus 3,600 illegal aliens from China who snuck in via Canada. *Tribal members* have also engaged in assorted attacks - including shootings - on New York State Police, US border agents, the Royal Canadian Mounted Police and the Canadian army. Not exactly the kind of folk you’d want running a potential shady operation like a gambling establishment.” (emphasis added). The Second Editorial then concluded that “Spitzer & Co. should now seek other ways to rebuild the upstate economy (tax cuts, anyone?) - and forget about taking a bad bet on the Mokawks.”

Significantly, neither Editorial refers to any of the plaintiffs by name nor do they even mention the Tribal Council.

Trial Court Decision

In February 2008, plaintiffs brought suit against NYP in New York State court, but they did not serve NYP until June 2008. On

(Continued on page 24)

Critical Statements About Tribe Are Not About The Chiefs

(Continued from page 23)

July 22, 2008, NYP moved to dismiss the complaint in its entirety because the Editorials were not “of and concerning” the plaintiffs. Specifically, NYP argued that, pursuant to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny, the references to the Tribe in the Editorials could not be considered “of and concerning” the plaintiffs merely because the plaintiffs “govern the Tribe.” In opposition, plaintiffs argued that the statements referring to the Tribe are “of and concerning” the plaintiffs individually because “the Tribe can only act through the Tribal Council,” of which the plaintiffs are the three duly elected members.

On October 15, 2008, the New York State Supreme Court for the County of New York (Edmead, J.) issued a Decision and Order denying the NYP’s motion to dismiss. Specifically, the lower court held that “accepting the allegations in the complaint as true ... it cannot be said, at this juncture, that a reasonable reader could not have understood the statements in the [First and Second] editorials to be ‘of and concerning’ the Plaintiffs.” The court went on to reason that “the three plaintiffs, as the three voting members of the Tribal Council, are the only members of the Tribe who had the authority to enter into partnerships on behalf of the Tribe. Further, Plaintiffs were responsible for the Tribe’s efforts to build a casino; thus, accepting plaintiffs’ allegations as true, each opening sentence [about the Tribe’s plans to build a casino] could *only* be interpreted as referencing the plaintiffs personally.” (emphasis in original). The court went on to hold that “Without more, it is possible that a person could reasonably read the aspersions cast thereafter as referencing any of the approximately 2,700 members [of the Tribe]; however, it is also not unreasonable to read such aspersions as continuing reference to the plaintiffs’ actions personally.” Therefore, the trial court concluded “plaintiffs should be permitted to explore extrinsic evidence during the course of discovery to establish whether the alleged libelous statements could reasonably be interpreted to refer to them individually.”

The Appeal

NYP appealed the Decision and Order arguing that the lower court improperly found that statements about the Tribe could be read as referring to the plaintiffs individually based solely upon

plaintiffs’ role in the Tribal Council. NYP argued that the trial court’s conclusion was contrary to the U.S. Supreme Court’s holding in *New York Times Co. v. Sullivan* in that the court allowed the plaintiffs to turn the editorial criticism in the *Post* of the Tribe into a personal attack simply because the plaintiffs are responsible for the operations of Tribe. NYP further argued that because the plaintiffs’ *sole* argument that the Editorials referred to them is constitutionally impermissible, the plaintiffs were not entitled to take any discovery.

In a Decision and Order dated April 7, 2009, the Appellate Division, First Department unanimously reversed the lower court’s Decision and Order and held that the Editorials are not “of and concerning” the plaintiffs as a matter of law. The court reasoned that

The editorials frequently referred to “the tribe” and “the Mohawks” but did not mention the Tribal Council or plaintiffs individually. Plaintiffs allege that it can be reasonably inferred that the editorials were “of and concerning” the governing body of the St. Regis Mohawk Tribe, i.e., the Tribal Council, i.e., the three plaintiffs. We dismiss the complaint because, even accepting such inference, the offending statements were directed against a governing body and how it governed, rather than against its individual members; there were no statements that the Tribal Council members were individually corrupt or individually promoting a criminal enterprise (see *New York Times Co. v. Sullivan*, 376 U.S. 254, 292 [1964]; *Rosenblatt v. Baer*, 383 U.S. 75, 82-83 [1966]).

Thus, the court re-affirmed the long-standing rule that members of a public governmental body may not maintain libel claims based on statements about that body, because to do so is “tantamount to a demand for recovery based on libel of government.” *Rosenblatt*, 383 U.S. At 83.

Slade R. Metcalf and Rachel F. Strom of Hogan & Hartson LLP, New York City represented defendant NYP Holdings, Inc. Plaintiffs Barbara A. Lazore, James W. Ransom and Lorraine M. White were represented by Daniel Seff and Russell Barr of Barr & Associates, New York City and Stowe, Vermont.

Pennsylvania Court Tosses “Walking Crime Wave” Defamation Claim By School Security Guard

Statement Protected as Hyperbole or Truth

By Tom Curley

Following a series of rulings narrowing the scope of the lawsuit, in March, a Pennsylvania trial court dismissed in its entirety a defamation claim brought by a school security guard against a Pittsburgh television station owned and operated by CBS. [*James A. Law Jr. v. CBS Broadcasting Inc., et al.*](#), No. 12107-2006 (Beaver County Court of Common Pleas).

Background

The lawsuit arose out of a news report by KDKA-TV in 2006 concerning the hiring of the plaintiff, James A. Law Jr., as a public school security guard by the Rochester Area School District. The broadcast raised questions about the propriety of plaintiff's hiring by this western Pennsylvania school district and his assignment to a school attended by students in kindergarten through 12th grade. As the broadcast reported, the plaintiff had a prior felony conviction for selling cocaine and had been arrested on assault charges on several occasions, resulting in guilty pleas, and had been named a respondent in petitions for protection from abuse.

The plaintiff and the school district's superintendent, both of whom were interviewed in the broadcast, defended the plaintiff's hiring. Also interviewed was a private investigator who had spent seventeen years with the Pennsylvania state police.

After reviewing on camera records relating to plaintiff's arrests and convictions, the investigator commented on them: “This isn't just a person who's committed a crime. This is a walking crime wave. This could keep a police department busy.”

The plaintiff filed suit in the Beaver County Court of Common Pleas asserting causes of action for defamation and for invasion of privacy by publication of private facts. With respect to his defamation claim, plaintiff initially contended that multiple statements in the broadcast pertaining to the particulars of his criminal history were false. The private facts claim rested upon plaintiff's contention that, as the records of his arrests and convictions were displayed in the broadcast, his social security number was visible to viewers on a portion of a court document.

The defendants, CBS-owned KDKA, its reporter Marty Griffin and the private investigator interviewed in the news report, filed preliminary objections (the Pennsylvania equivalent of a motion to dismiss) to the defamation claim on the basis that, *inter alia*, the challenged statements in the broadcast were substantially true, as evidenced by publicly accessible judicial records. In addition, defendants argued that the “walking crime wave” statement was a non-actionable expression of opinion based upon facts accurately reported in the broadcast and that the phrase was rhetorical hyperbole.

Emphasizing that it was bound by the “four corners” of plaintiff's complaint, the court in 2007 dismissed most of the allegedly defamatory statements in the case as not actionable. The court declined to dismiss the “walking crime wave” statement because, it held, the statement “[t]his is a walking crime wave” might have been understood to imply that plaintiff was engaged in criminal activity at the time of the broadcast.

Taken as a whole and its entirety, the broadcast itself made no such charge and in fact affirmatively stated that the criminal conduct in question had occurred in the past. Nevertheless, and despite defendants' arguments to the contrary, at the preliminary objection phase of the litigation, the court held it that could not evaluate plaintiff's criminal record.

Motion for Summary Judgment

Following limited discovery, defendants moved for summary judgment on plaintiff's defamation claim, again contending that – taken in the full context of the broadcast and in light of plaintiff's extensive criminal history – the “walking crime wave” statement was a non-actionable expression of opinion. And, to the extent it was not an expression of opinion, any reasonable construction of the statement could not be proven false.

This time, having reviewed the broadcast, the trial court agreed and held that the statement was a non-actionable expression of opinion. The court observed that:

“the statements were made immediately following [the] on-camera review of the records of Plaintiff's past arrests and punishments, which were laid out on

(Continued on page 26)

Pennsylvania Court Tosses “Walking Crime Wave” Defamation Claim By School Security Guard

(Continued from page 25)

[the interviewee’s] desk. The parties do not dispute that [the interviewee] was looking at and reading accurately from Plaintiff’s criminal records before he made the statements in question. There was no suggestion that [the interviewee] relied on hidden or false facts to form his opinion.”

The court also held that the phrase “walking crime wave” was a form of non-actionable rhetorical hyperbole, *i.e.*, “merely figurative language that has been used to describe someone who has been involved in multiple criminal cases.”

Finally, the court held that, even if the statement was not rhetorical hyperbole or non-actionable opinion, plaintiff could not demonstrate the falsity of any reasonable construction of the allegedly defamatory statement. “In truth, the Plaintiff has a lengthy criminal record,” the court wrote. “He has not and cannot set forth facts to show that the statements made about him were materially false.”

In a ruling prior to granting the defendants summary judgment on the plaintiff’s defamation claim, the court dismissed plaintiff’s private facts claim. Although plaintiff admitted that the record depicted in the broadcast that contained his social security number was otherwise publicly accessible, he contended that the identifier should have been obscured before the record was broadcast in connection with the news report, which was also published on KDKA’s website. The court expressed concern about the dissemination of social security numbers contained in court records. Nevertheless, the court declared that “information contained in a public record is completely public information, and the further disclosure of this information is not actionable.” Accordingly, the court dismissed the plaintiff’s publication of private facts claim.

The CBS defendants were represented by Hazel-Ann Mayers and Anthony M. Bongiorno of CBS and Gayle C. Sproul and Tom Curley of the Philadelphia and Washington offices of Levine Sullivan Koch & Schulz, L.L.P. Defendants Louis W. Gentile and Gentile-Meinert & Associates, Inc. were represented by Paul R. Robinson of Meyer, Darragh, Buckler, Bebenek & Eck, PLLC of Pittsburgh. Plaintiff James A. Law Jr. was represented by Gianni Floro of Moon Township, Pa.

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NY Federal Court Applies *Dendrite* Standard to Quash Subpoena Seeking Information on Pseudonymous Posters

By Mark Fowler

In a recent decision in the Southern District of New York, Judge Cathy Seibel applied the four-part test set forth in [Dendrite v. Doe](#) in quashing a subpoena seeking to compel disclosure of information that might lead to the identification of individuals who posted pseudonymous commentary on an online forum. [Zherka v. Bogdanos et al.](#), 08 Civ. 2062 (S.D.N.Y.),

The decision may be the first in the District to adopt *Dendrite*, which is emerging as the preferred standard for balancing the qualified First Amendment right to speak anonymously against the rights of litigants to make use of the subpoena power of the courts.

Background

The plaintiff Selim Zherka filed suit against the mayor of Yonkers, New York, an assistant U.S. attorney, and several John Does, alleging civil rights violations and defamation. Mr. Zherka contended that the defamation arose, in part, out of a series of postings on a forum in the LoHud.com website, maintained by *The Journal News*, a daily newspaper owned by Gannett.

According to the complaint, the comments were false and were intended to “impute to [Mr. Zherka] serious criminal wrongdoing, a criminal history, criminal activity as a member of an Albanian ‘mob,’ felonious possession and sale of illicit drugs, unfitness to engage in his professional activities as publisher/owner of the *Westchester Guardian*, and dishonest.”

Mr. Zherka’s attorney issued a series of subpoenas to *The Journal News* seeking email addresses and IP addresses relating to posters who went by three screen names. The newspaper moved to quash the subpoena, arguing that the information requested need not be disclosed unless Mr. Zherka could satisfy the four-part test set forth in [Dendrite v. Doe](#), 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), and [Ottinger v. The Journal News](#), 08-03892 (Sup. Ct. Westchester Co. N.Y. 2008), among other recent cases. Counsel for Mr. Zherka did not dispute that anonymous speech enjoys some degree of protection, but claimed that the standards for overcoming that protection had been satisfied. Judge Seibel disagreed.

Hybrid *Dendrite* and *Sony Music* Standards

Relying on *Dendrite* and *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp.2d 556 (S.D.N.Y. 2004) (a case in which plaintiff sought identifying information concerning anonymous music file sharers), Judge Seibel quashed the subpoenas. In an unreported decision dictated from the bench, Judge Seibel found that Mr. Zherka had not satisfied several key elements of the tests prescribed in those cases. First, Judge Seibel concluded that plaintiff had failed to make adequate efforts to notify the posters in order to give them an opportunity to come forward, anonymously or otherwise, to represent their own interests. Mr. Zherka had placed a notification concerning his subpoenas on a *Journal News* online forum, but the court deemed the notice inadequate because it appeared amidst commentary on an unrelated topic and was “not sufficiently calculated to reach those who made the complained of posts.”

Next, Judge Seibel noted that Mr. Zherka had failed to provide the court with “the full statements that are at issue” not just “edited snippets.” She expressed doubts that plaintiff could make a concrete showing of a prima facie case of defamation because many, if not all, of the statements appeared to qualify as protected opinion. But the court reserved decision on this point because it did not “have the full statements in context.”

Finally, Judge Seibel emphasized the importance of a requirement that was discussed in *Sony Music*, but which did not figure into the *Dendrite* decision. She indicated that plaintiff’s failure to exhaust potential alternative means of obtaining information concerning the identity of the posters was “a big factor in this case.” Because there was a meaningful likelihood that named defendants might know the identities of the anonymous posters, the court found that any effort to obtain such information from *The Journal News* should come only after other discovery had been taken in the case.

Mark Fowler and Glenn Edwards of Satterlee Stephens Burke & Burke LLP in New York City represented The Journal News. Jonathan Lovett of Lovett & Gould in White Plains, New York, represented Mr. Zherka.

Supreme Court of Indonesia Sets Aside \$92 Million Libel Judgment against TIME

By Robert Balin and Edward Davis

In a case that has generated worldwide attention and concern, on April 16 a three-judge panel of the Indonesian Supreme Court vacated an earlier Supreme Court decision that had awarded former Indonesian president Suharto a staggering one trillion rupiah (about \$92 million) in a libel suit against TIME magazine. *Suharto v. Time Inc. Asia, et al.*

A collective sigh of relief has been heard from local and international news organizations that report in Indonesia, and the victory for TIME is a hopeful sign of growing legal protection for press freedoms in Indonesia and the region.

The libel suit arose from a lengthy May 1999 cover story in TIME Asia, “The Family Firm,” which reported on the vast wealth amassed by General Suharto and his family members during his three decades in power—a period notorious for corruption, nepotism and cronyism. (A report issued by the World Bank and the United Nations estimated that General Suharto made off with between \$15 and 35 billion during his 31-year rule.)

Prior to publication, TIME conducted a four-month investigation that included hundreds of interviews with government officials, lawyers, accountants and business associates of the Suhartos, and the central allegations in the article were presented to General Suharto’s lawyers, whose responses and denials were included in the article.

Suharto sued in July 1999, naming TIME and six journalists as defendants and demanding \$27 billion in damages. He challenged only four items in the 14-page article: (1) a rhetorical reference to “Suharto Inc.” on the cover, which Suharto claimed was false because none of his companies was literally named Suharto Inc.; (2) an illustration showing Suharto against a background of giant banknotes, holding miniaturized photos of a mansion, a gilded plate and sacks of money, which he alleged was false because the mansion belonged to one of his children, not to him; (3) a quote to the effect that General Suharto’s companies probably paid only a small fraction of their actual tax obligations, which was attributed to a member of Indonesian Corruption Watch; and (4) an allegation regarding a transfer of “\$9 billion of Suharto money” from a Swiss bank to an Austrian bank, which was accompanied by denials issued by General Suharto and his lawyers.

Libel Trial

The trial began in March 2000, amid concerns about whether a foreign publication could receive a fair hearing in a suit by a former president who had appointed the judges hearing the case. Suharto put on no witnesses and submitted no evidence relating to the challenged statements or to any damages. TIME submitted extensive documentary evidence and put on several witnesses, including journalism and linguistics experts who testified that the magazine had followed responsible practices in reporting the story.

In June 2000, a three-judge trial panel in Jakarta ruled in TIME’s favor. The trial court found that the article was fair and balanced and that TIME had engaged in responsible journalism on a matter “in the public interest” – a defense recognized by the Indonesian Civil Code – because at least three other publications had already published reports on the alleged transfer of funds outside of Indonesia before TIME published its article, and they had not been sued; because TIME included specific denials from Suharto and his lawyers; and because TIME clearly identified the source of the allegation regarding underpayment of taxes. The court also concluded that the reference to “Suharto Inc.” and the mansion illustration were merely metaphors and not actionable. In March 2001, an intermediate appellate court affirmed the dismissal. The decisions by the trial court and appellate court were hailed as victories for the rights of a free press in Indonesia and as welcome indications that the nation’s courts would protect critical reporting on political leaders.

Suharto then appealed to the Supreme Court of Indonesia—where the case sat for six years. In the Supreme Court, all three judges on the panel reviewing the case had been appointed by General Suharto, and the presiding judge – a retired army general – had previously stated that he owed his career to Suharto. In August 2007, the Supreme Court panel reversed the lower courts and imposed a judgment of one trillion rupiah against TIME.

While the panel’s written decision was long, it provided little rationale for ruling against TIME or for the huge damage award. Neither TIME’s responsible reporting on matters of obvious public concern nor Suharto’s failure to submit any evi-

(Continued on page 29)

Supreme Court of Indonesia Sets Aside \$92 Million Libel Judgment against TIME

(Continued from page 28)

dence of falsity or fault seemed to trouble the Court. The panel instead seemed to focus on the dignity of a national leader, concluding that the TIME article “slander[s] the reputation and honor of the Plaintiff as the Great General of the Indonesian Army (Retired) and as former President of the Republic of Indonesia, thus the civil accountability...can be granted according to sentiments of appropriateness and fairness[.]” In addition to awarding a trillion rupiah for unspecified damage to General Suharto’s reputation, the Court ordered TIME to publish an apology to Suharto three consecutive times in its Asia, Europe and U.S. editions and in 10 other publications.

The reversal provoked intense criticism in Indonesia, where it was viewed as a serious blow to free speech and democratic reform. Outside Indonesia, many international media companies, non-governmental organizations and businesses with investments in Indonesia were also alarmed. The decision was widely perceived as a setback not only for the press but also, more generally, for the rule of law.

In February 2008, shortly after Suharto died at age 86, TIME filed a petition permitted under Indonesian law requesting that the Supreme Court review and reverse the libel judgment on grounds of manifest error. Among other things, TIME argued that the Supreme Court panel had erred by failing to find that TIME had acted without fault, by ignoring all the evidence that TIME had adhered to accepted standards of news coverage and journalistic ethics, by ignoring Suharto’s failure to offer any evidence to the contrary, by ignoring Indonesia’s Press Law and by ignoring the fact that Suharto’s reputation had already been lost.

TIME’s effort to overturn the Supreme Court decision was supported by a broad array of regional and international news organizations, journalism associations, bar associations and human rights organizations who joined together as *amici* to speak with one voice—including the Associated Press, CNN, Dow Jones, The Economist, the Financial Times, Newsweek, The New York Times, the Washington Post, Australia’s Special Broadcasting Service, Indonesia’s Tempo Magazine, the Jakarta Post, the Indonesian Press Council, the International Bar Association’s Human Rights Institute, the International Federation of Journalists, the Southeast Asian Press Alliance, the Committee to Protect Journalists, and the International Media Lawyers Association.

In their brief to the Supreme Court, *amici* noted that Indonesia has ratified the International Covenant on Civil and Political Rights and thereby agreed to construe its domestic law in conformity with the Covenant’s free speech provision, Article 19. *Amici* urged the Indonesian Supreme Court to consider examples set by courts in democratic nations throughout Asia, which, consistent with international free speech principles, have construed their own laws to preclude liability for publications on matters of public concern that are honestly believed to be true. *Amici* argued that liability was especially inappropriate in the Suharto case, since General Suharto had failed to provide any evidence that TIME published the article with knowledge of falsity and, indeed, failed to present evidence that anything in the article was even false. Last, *amici* bluntly informed the Court that the massive unwarranted award – in favor of a powerful political figure – had raised not only free speech concerns, but also widespread fears about the impartiality of the Indonesian justice system, which endangered foreign investment and economic progress.

On April 16, a different three-judge panel of the Supreme Court announced that it had granted TIME’s petition and nullified the libel judgment. The Court has not yet issued a written opinion, but, according to press reports, the presiding judge on the panel (Judge Hatta Ali) has stated that “We determined that the article wasn’t against the law. There was no violation of press ethics because the right of reply was given.” While analysis of the Court’s ruling – and its broader impact – will have to await its formal opinion, the change of course marks a landmark victory for TIME and presages a new judicial attitude toward affording meaningful protection to the press in Indonesia.

TIME magazine was represented by Robin Bierstedt and Andrew Lachow at Time Inc. in New York, Angus Emmerson at Time Inc. in Hong Kong and Todung Mulya Lubis of Lubis Santosa & Maulana in Jakarta. The amici were represented by Robert Balin and Edward Davis in the New York office of Davis Wright Tremaine LLP, Mark Stephens of Finers Stephens Innocent LLP in London and Darwin Aritonang in Jakarta, with assistance from Jens van den Brink of Kennedy Van der Laan in Amsterdam.

THE OTHER SIDE OF THE POND

Developments in UK and European Law

By David Hooper

Damian Green MP

I wrote in the [December 2008 MediaLawLetter](#) about the extraordinary attempts to arrest and threaten to prosecute the shadow immigration spokesman, Damian Green MP for making use of material which had been leaked to him by a disaffected civil servant who we now know is called Christopher Galley who is no longer employed in government service. Fortunately, the whole saga has been put to an end by Keir Starmer QC, the recently appointed Director of Public Prosecutions and a former member of Geoffrey Robertson QC's Doughty Street Chambers.

As one might expect, rather more sense came from Mr Starmer than from the members of the government showing signs of having been in power too long. What was particularly objectionable about the government's behaviour was that they were trying to circumvent the balance that had been struck between the need to protect areas of government which must remain secret and, on the other hand, the public's right to know about decisions taken on their behalf. Britain was long afflicted with a needlessly wide protection of government secrecy in the form of Section 2 Official Secrets Act 1911.

I chronicled how that Act had been abused by successive governments in my book [Official Secrets: The Use and Abuse of the Act](#). Roughly speaking, it took 25 years and a series of proposals before the Official Secrets Act was reformed in 1989. Government secrecy was, under the Official Secrets Act 1989, restricted to four principal categories which ranged from the areas of intelligence to international confidentiality obligations to law enforcement and military secrets.

What our tired government was trying to do was to use a common law offence of aiding and abetting, counselling, procuring and conspiring to commit misconduct in a public office. This drove a coach and horses through the balance struck in the Official Secrets Act 1989. It also removed the safeguard of the need to prove that those said to have committed an offence under the Official Secrets Act 1989, in the sense of being persons who were publishing the leaked information rather than actually leaking it themselves, should be shown to have caused damage by their publication of the protected information.

Mr Starmer indicated that the misconduct in public office offence required a serious departure from acceptable standards and an abuse of trust. He reminded us that we needed to have regard to the principle of freedom of speech and the right to publish information and ideas on matters of public interest. Most of the information which Mr Green had been publishing in his attempts to bring the government to account on some of the undoubted shortcomings at the Home Office, at most provided some evidence of damage to the functioning of the Home Office but it did not relate to military policing or intelligence matters. Nor were the matters particularly confidential with much of the information being known to others outside the Civil Service and having been reported in the press. Accordingly, Mr Starmer concluded that there was insufficient evidence to bring a prosecution not only against Mr Green but also against Mr Galley.

Conditional Fee Agreements

These continue to arouse controversy. Paul Dacre the Editor-in-Chief of the Daily Mail and Mail on Sunday used the opportunity of his evidence to the Culture, Media and Sports Committee of the House of Commons to attack greedy (Claimant) libel law firms, singling out for particular opprobrium Schillings and Carter-Ruck. They should, Mr Dacre suggested, clean up their act. They represented a lethal weapon in crushing press freedom and were rapacious, greedy and unscrupulous adding, for good measure, that he would be astonished if they were not also ambulance chasers. He also referred in a more general context to the disproportionate level of costs in libel litigation referring to a case where the damages had been £5,000 but the legal costs £520,000.

Lord Justice Jackson's Inquiry into Costs in Civil Litigation

This Court of Appeal judge is hoping to publish his report by December 2009. He too is focusing on the whole issue of no win no fee and the operation of CFAs. He will also be looking at the question of third party funding and he has put out a [consultation paper](#) where responses are required by 6 May 2009. The issues that he is particularly interested in are whether a

(Continued on page 31)

The Other Side of the Pond: Developments in UK and European Law

(Continued from page 30)

maximum recovery rate should be fixed and the operation of after the event insurance and the whole issue of cost-capping.

Cost-capping – A Setback

In the recent decision in [Peacock –v- MGN Limited](#) (2009) EWHC 769, Mr Justice Eady in fact refused to make a cost-capping order in circumstances where he considered that the law precluded him from doing so, although his inclination would have been to make such an order. It was what he described as a ding dong battle about domestic violence where he had “considerable sympathy” with the request for cost-capping.

The claimant’s costs including after the event insurance could amount to £800,000 with the total costs for both side being over £1 million. Mr Justice Eady certainly recognised that the costs implications of the CFA in this case could exert a considerable chilling effect. However, it does appear that the law has got into a certain state of disarray in that, with effect from 6 April 2009, the Costs Practice Direction, paragraph 23A has come into effect and overlooked the fact that CFAs were causing particular problems in the defamation field as noted by Lord Justice Brooke in the [Musa King](#) case which other judges have come to summarise as the blackmailing effect of CFAs.

However, the Rules Committee in their wisdom have indicated that the court should only make a cost-capping order in exceptional circumstances. Accordingly, Mr Justice Eady indicated that contrary to his inclinations in the matter, he felt inhibited by the exceptionality principle, he consoled himself – unrealistically in my view – with the fact that the costs judge could deal with any issue of disproportionality of costs.

That, with respect, simply does not provide a sufficient safeguard as challenging costs is again subject to the CFA and success fee so that the costs of challenging disproportionate costs can themselves be disproportionate. Perhaps not surprisingly, MGN have in other litigation complained to the European Court about the Operations of CFAs and various media groupings have submitted and amicus brief.

A More Cheering Case on CFAs

A rather different result was reached by a non-specialist libel judge on 25 March 2009 in the case of [Noorani –v- Calver](#) (2009) EWHC 592. This was a libel and slander action arising

out of feuds in a North of England Conservative Association. The claimant’s evidence went so badly that the case was withdrawn in circumstances which led the judge to award costs against the claimant on the higher indemnity scale. Mr Justice Coulson’s comments on the operation of CFAs however, were of considerable interest. He viewed it as a hopeless case which should never have been brought. He also commented that CFAs can inure claimants to the chilly winds of reality. As the claimant never had to reach for his chequebook he could become oblivious to the financial risks involved and in the view of the judge the conduct of libel proceedings on credit was a thoroughly bad idea.

Family Courts

On 27 April 2009 the [Family Proceedings \(Miscellaneous Amendments\) Regulations](#) came into effect. In principle these allow the reporting of family and related childcare and ancillary proceedings. The Ministry of Justice in the form of Jack Straw do not seem to have thought this through very carefully. Law firms are calling it a blackmailers charter on the basis that you call in the press to help you get more from your ex-partner before you share with the media his or her peccadilloes. The judges feel that the procedures may not be compliant with primary laws which severely restrict what can be published about what is essentially a very private area of people’s lives. One High Court family judge in the Family Division said the law could only describe the system and not the salacious detail. Guidance will now be given by the judges as to what can be reported. Another space to be watched.

Lord Hoffman

Lord Hoffman, who is one of the senior law lords and the keynote speaker at the upcoming MLRC meeting this autumn (this is, after all an English column!) made a very forthright speech to the Judicial Studies Board. Lord Hoffman has excellent liberal credentials and in the [Berezovsky](#) case had warned again the courts of this country becoming international libel policeman. He is a strong supporter of the Human Rights Act, but he had a number of telling points to make against the European Court of Human Rights which he felt was unable to resist the temptation to aggrandise its jurisdiction and to try and im-

(Continued on page 32)

The Other Side of the Pond: Developments in UK and European Law

(Continued from page 31)

pose uniform rules on member states and to set itself up as the equivalent of the Supreme Court in the United States. He felt that the European Court of Human Rights lacked constitutional legitimacy and was straying beyond its human rights remit when dealing with such matters as whether or not there were too many night flights at Heathrow.

Was Britain Involved in Torture of Guantanamo Bay Prisoners?

In my [February 2009](#) MediaLawLetter column I wrote about the case of [Binyam Mohamed](#) - this is a case which should be kept under continuing review. The government's case is in a state of considerable disarray. They have had to admit that they did not disclose all the relevant documents to the court and that they in effect permitted the court to be misled over the question of whether there was actual threat to the intelligence information-sharing arrangements between the UK and the USA.

The view of Lord Justice Thomas appears to be that it is inconceivable that the publication of the summary of the evidence without naming intelligence operatives would damage intelligence sharing relationships. The court has given the government one week to approach the United States government to see if they consent to the release of the summary of the evidence relating to torture, failing which the court will of its own motion issue an order. Every indication is that any such order from the English court will not make pleasant reading for the government and the court has specifically offered the Foreign Secretary the opportunity to disclose the evidence of his own motion in this intervening week.

D Notices and Anti-Terrorism

Set against a background of more ineptitude which led to the resignation of one of London's most senior policeman, Assistant Commissioner Bob Quick – coincidentally the man who appears to have thought it a good idea to arrest Damian Green MP – one saw how the UK D Notice procedure could work to protect the publishing of information which could be seriously damaging to the public interest – in a way that would be culturally alien to the USA.

The [DA notice system](#) – is a voluntary code whereby a committee of media and government representatives strikes a balance to prevent the publication of information relating to such matters as plans and capabilities for military operations to UK security and intelligence and special services. Mr Quick was in charge of an operation to arrest 12 suspected terrorist conspirators – they were in fact ultimately released without charge.

He had obviously been reading his papers in the car on his way to brief the Prime Minister. Despite the example of a number of people making the same mistake, Mr Quick managed to walk into 10 Downing Street with his papers showing the detail of the operation which was then duly photographed by the press photographers who are normally present outside 10 Downing Street.

Within a couple of hours a request had gone out to all editors not to replicate in a readable form Mr Quick's briefing note, albeit that the photo had been sold abroad where its publication could not be controlled. There was then a massive – and accelerated – police operation. The arrests were successfully carried out – albeit that the suspects are not charged although they are to be deported to Pakistan – and only a limited amount of information – and not the detailed briefing notes - was published until the arrests had been completed.

Booky-Wooky-Nooky

Readers of this column may recollect the matter of comedian Russell Brand and BBC presenter Jonathan Ross, a matter about which I wrote in the [November 2008](#) MediaLawLetter. The BBC has now been fined £150,000 by Ofcom in respect of their lewd phone calls to actor Andrew Sachs. Neither have themselves received any financial penalties as Ofcom has no power to impose them on individuals. Mr Ross is back in his job but the BBC received a roasting over the gratuitously offensive humiliating and demeaning content and the extraordinary nature and seriousness of its regulatory failures and the resulting breaches of its code. The material should never had been broadcast, it observed.

Regulatory Changes and Decisions

On 9 March 2009 a second edition of the [Editors Codebook](#) was published by the Press Complaints Commission. This has

(Continued on page 33)

The Other Side of the Pond: Developments in UK and European Law

(Continued from page 32)

certainly tightened up on the guidance given in relation to privacy in the sense that it underlines that it is unacceptable to photograph individuals in private places without their consent but there is, nevertheless, a fundamental difference between the approach of the courts on privacy issues and the interpretation of public interest by the PCC.

For example, if the complainant has not complained about previous reports (the complaint of David Maclean MP) or if people set themselves up as role models, the PCC is probably likely to find that there was sufficient public interest. Of particular interest in the Codebook is the guidance given on celebrity coverage and in particular whether one can publish pictures of where the stars live and also on police ride-alongs. Their consent should be in a form which is capable of proof and needs to be reassessed in terms of public interest so that it will generally not be permissible to publish intrusive photographs if nothing was turned up in the police raid.

The PCC in its recent annual report announced that there had been an 8% increase in complaints. It dealt with of which there were 4,698 last year. They made rulings in 1420 of the cases of which 45 went to formal adjudication. There was an increase in the number of complaints about privacy particularly in relation to journalists taking part in police raids and cases where photographs had been taken without consent.

European Court Decisions

[Times Newspapers Limited-v- the United Kingdom](#)

Details of this case were given in the March edition of *MediaLawLetter*. The European Court of Human Rights lost a significant opportunity to introduce the single publication rule and publication on the internet is now determined under UK law by reference to the 19th century case of the *Duke of Brunswick –v- Harmer*. I prepared a more detailed note on this case can be supplied to anyone [emailing me](#).

The court did recognise that there could be a problem of ceaseless liability but they did not think that it arose in this case. One had the unfortunate picture of a court overwhelmed with the volume of complaints to the court simply not having the time or the inclination to grapple with the important principles involved. The upshot of the case is that in this jurisdiction media defendants should, at the very least in cases where there has been a complaint, attach a notice to the archived article

recording the fact of a libel complaint. Very often it may be prudent to at least consider taking down the article bearing in mind the likelihood of litigation and the costs involved. Certainly the law in this jurisdiction does presently favour claimants when it comes to republication on the internet and, furthermore, it seems that the English courts are leaving it to Parliament to resolve this issues.

On past form it may be sometime before the legislative change is forthcoming. Let us hope that the House of Commons Committee proves me wrong. Jack Straw, the Justice Secretary, has announced that he is to examine the chilling menace of Internet libel. It is a little odd as his government opposed the Times' argument in favour of a single publication rule which would place a cap on liability for republication on the Internet.

Disclosure of Journalistic Sources

[Sanoma v Netherlands](#)

In the case of *Sanoma Uitgevers BV v Netherlands* (31 March 2009 – Application 38224/03) the Claimant publisher of *Autoweek* complained that their rights under Article 10 had been infringed because they had been compelled to give up information which could identify their journalistic sources. Journalists had attended an illegal car race at the invitation of the organisers and taken photographs on the basis that they would be altered to ensure that the organisers' identities would remain anonymous. Police later sought disclosure of the photographs to identify a vehicle used in an unrelated crime.

Although the claimant initially resisted the request to protect the anonymity of their sources, the photographs were eventually handed over following threats to close the claimant's office and the arrest of the claimant's editor in chief (who was released without charge). The ECHR said that protection for journalistic sources is one of the basic conditions in press freedom, confirming the decision in *Goodwin v UK* (1996) and considered there had been an interference with Article 10. However, despite this, and the 'regrettable lack of moderation' in the initial actions of the police and public prosecutors, it found, by four votes to three, that the interference *was* justified, because the police did not want to use the photographs to identify the journalistic sources for prosecution, but rather to identify a vehicle used in connection with separate, serious crimes.

(Continued on page 34)

The Other Side of the Pond: Developments in UK and European Law

(Continued from page 33)

The three dissenting judges added a very strongly worded opinion to the judgment, criticising the decision for merely wagging a judicial finger in the direction of the Netherlands authorities, sending out a dangerous signal to police forces throughout Europe and rendering it almost impossible for journalists to rest secure in the knowledge that, as a matter of general principle, their confidential sources and the materials obtained thereby are protected at law. Let us hope the minority view prevails.

Freedom of Information**[Tarsasag v Hungary](#)**

In the case of *Tarasag v Hungary* (14 April 2009 - Application no. 37374/05) the claimant, an NGO aiming to promote fundamental rights and strengthen civil society and the rule of law, complained that the failure of the Constitutional Court to disclose a complaint concerning amendments to the Hungarian Constitutional Code amounted to an infringement of their Article 10 rights. The request was made pursuant to the Hungarian Data Protection Act.

The Constitutional Court initially refused the request on the basis that the author of the complaint, a Hungarian MP, had not given consent (though his consent had not been sought) and then ruled that the complaint did not amount to data so could not be disclosed under the act. Following appeal the Court of Appeal held that the complaint did contain data, but that the data was personal and could not be accessed without the MPs approval.

The ECHR found unanimously that there had been a violation of Article 10. The public had a right to receive information of general interest and although most case law in this area related to the role of the media, in this case the applicant could be characterised, like the press, as one of society's 'watchdogs'. The subject matter of the dispute (the constitutionality of criminal legislation) was undoubtedly a matter of public interest and the failure to disclose that information was an interference. Although the interference was prescribed by law, it was not necessary in a democratic society.

The ECHR paid particular attention to the fact that it would be fatal for freedom of expression in the sphere of politics if

public figures could censor press and public debate in the name of personality rights by saying that their opinions on public matters constituted private data which could not be disclosed without their consent, and that these obstacles to access to information may discourage the media or related fields from pursuing such matters and playing their vital role as public watchdogs.

Advertising

There have been a number of interesting developments of which space permits only a brief mention. On 26 March 2009 the Committee of Advertising Practice and its broadcasting equivalent BCAP published the result of their extensive review aimed at ensuring that the codes remained relevant and effective. This aims to produce one single broadcast code and to deal with issues relating to children and to consumer protection and the whole issue of misleading advertising and to ensure that the code is compliant with such matters as Distance Selling Regulations. At the same time the Internet Advertising Bureau, the digital marketing trade body, has published a set of good practice principled for online behavioural advertising.

Copyright

Likewise, it is only possible to mention these developments briefly but on 13 March 2009 the UK government published a discussion paper entitled [Copyright in a Digital World: What Role for a Digital Rights Agency](#) which follows up the recommendation made in Lord Carter's [Digital Britain: The Interim Report](#). At the core of these proposals is the question of how ISPs might be required to deal with persistent infringers in the digital age.

A Digital Rights Agency would deal not just with the question of enforcement but also with questions of enablement in terms of ensuring that rights can be exploited with the necessary clearances obtained. There are also moves afoot in the European parliament to establish a 70 year performance right in place of the existing 50 years which has to be approved in individual companies which might just happen in time to extend the performance rights for Sir Cliff Richard (a contemporary of Elvis Presley but a different career path) and the early Beatles music.

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Venezuela Breached Rights of Journalists

Government Threats and Mob Violence a Violation of American Convention

By Eduardo Andrés Bertoni

Early this year, the Inter American Court found that Venezuela had breached its obligation under the [American Convention on Human Rights](#) to ensure the exercise of the freedom to seek, receive and impart information and the right to personal integrity protected under the Convention. [Rios et al. v. Venezuela](#) (Judgment of January 28, 2009) and [Perozo et al. v. Venezuela](#) (Judgment of January 28, 2009).

The Inter-American Commission on Human Rights (IACHR) brought the cases to the Court on behalf of journalists and workers of two TV stations (RCTV and Globovision) who had been the targets of threats, harassment, and verbal and physical aggression, including shootings.

In public speeches Venezuelan President Hugo Chávez and other high-ranking government officials repeatedly attacked private broadcasters as traitors, saying such things as they “transmit terrorist propaganda,” “create lies and cause panic and terror,” constitute a “fascist perversion” and report “garbage, lies, perversion, immorality.” President Chávez also encouraged violent protests against the broadcasters and defended attacks on them and on TV facilities by claiming that the people were “defending their values and principles.” In bringing these cases to the Court, the Commission also argued that Venezuela failed to properly investigate the attacks or take any preventive action.

The Inter-American Court agreed and decided for the first time that the attacks against journalists constitute a violation of Article 13 of the Convention, even if they are perpetrated by individuals with no ties to the government.

Article 13 protects freedom of thought and expression and provides in part that “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice.”

The basic rationale applied by the Court is that member states have an obligation under the Convention to guarantee the exercise of rights. The Court held that the effective exercise of freedom of expression is based on the existence of social conditions and practices which favor such exercise.

Freedom of expression may be illegally restricted by the State’s administrative or normative acts, or by de facto conditions which, either directly or indirectly, pose a risk to or increase the vulnerability of those who exercise or attempt to exercise this freedom, as well as by the acts and omissions of state agents or other individuals.

Under its obligation to guarantee the rights recognized in the Convention, the Court reasoned that States should not act in ways that promote, encourage, favor or increase such vulnerability and should adopt, where appropriate, any reasonable steps to prevent and protect the rights of the individuals affected, and to investigate any circumstances which may prejudice their position. *See Rios* para. 107.

The Commission also alleged that the Venezuela had violated the Convention, because of statements by high-ranking government officials, including the President of Venezuela, which heavily criticized the editorial stances of the broadcasters and threatened them with sanctions. In *Rios* (para. 139) as well as in *Perozo* (para. 151), the Court made specific reference to statements by public officials:

In democratic societies, statements by public authorities on issues of public concern are not only legitimate; they are also necessary. However, public officials are subject to certain limitations, as they are expected to reasonably verify (though not in a fully comprehensive manner), the facts on which their opinions are based, and in doing so, they should act with a greater degree of diligence than private citizens, in accordance with the responsibilities of their office, the impact that their statements may have on some sectors of the population, and to prevent the dissemination of misleading information to citizens and other interested parties. Public officials should also take into account their role as guarantors of fundamental rights, and therefore their statements may not disregard such rights nor directly or indirectly coerce or exert undue pressure on the rights of individuals who contribute to public debate by expressing their own thoughts. This special duty of care is further heightened in contexts of social conflict,

(Continued on page 37)

Venezuela Breached Rights of Journalists

(Continued from page 36)

disruption of public order and social or political polarization, as they pose specific risks to certain individuals or groups.

The Court found that in context some of the government statements were opinions about Globovision and RCTV participation in events that took place at a time of intense political polarization and social conflict in Venezuela. However, regardless of the situation or reasons giving rise to such statements, under the rule of law, the Court noted that conflicts must be settled according to the available domestic mechanisms and pursuant to international standards. Given the vulnerable position of the alleged victims and their relation to the media outlet in question, some of the expressions contained in the statements of the *public officials* may have been perceived as threats and had an inhibiting or self-censorship effect.

In both cases the Court found that the journalists were obstructed, blocked and inhibited from exercising their right to seek, receive and impart information and that Venezuela violated its obligation to exercise due diligence to prevent and investigate the attacks. *Rios* para. 334; *Perozo* para. 362.

Eduardo Bertoni is Director of the Center for Studies on Freedom of Expression (Centro de Estudios en Libertad de Expresion "CELE") at Palermo University School of Law, Buenos Aires, Argentina. He is the former Special Rapporteur on Freedom of Expression of the Organization of American States (OAS). Debevoise & Plimpton submitted amicus briefs in both cases on behalf of The Bar of the City of New York. The briefs are available at:

http://www.nycbar.org/pdf/report/dpny-22789364-v_English.pdf

and

http://www.nycbar.org/pdf/report/dpny_22745531_v1_Amicus.pdf

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First Circuit Rejects Webcasting of Hearing in High Profile File-Sharing Case

Local Rules and Judicial Conference Policy Bar Any Broadcasting

On mandamus review, the First Circuit this month held that webcasting of federal civil court hearings in Massachusetts is forbidden by local court rules and the Judicial Conference policy on cameras in courts. *In re Sony BMG Music Entertainment et al.*, No. 09-1090, 2009 WL 1017505 (1st Cir. April 16, 2009) (Torruella, Selya, Lipez, JJ.).

The Court, in an opinion written by Judge Bruce Selya, flatly rejected District Court Judge Nancy Gertner's view that she had discretion to allow webcasting, calling her ruling "unprecedented and palpably incorrect." The Court also rejected any First Amendment-based extension of the right of physical access to courtrooms to the broadcasting of court proceedings. Judge Selya noted that "emerging technologies" may change the way information about court proceedings is imparted, but current rules forbid broadcasting whether over the air or Internet.

Judge Lipez issued an interesting concurring opinion in which he agreed that the current rules strictly forbid broadcasting of civil trial proceedings, but added that:

this inescapable legal conclusion does not discredit the policy concerns that animated, at least in part, the district court's decision. Indeed, in my view, there are no sound policy reasons to prohibit the webcasting authorized by the district court. Therefore, this case calls into question the continued relevance and vitality of a rule that requires such a disagreeable outcome. *In re Sony* at *9.

Judge Lipez concluded that the rules and policy forbidding broadcasting "should all be reexamined promptly." *Id.* at *10.

The motion for webcasting was brought by [Joel Tenenbaum](#), a student at Boston University, who is being sued by the Recording Industry Association of America (RIAA) for downloading songs from a file-sharing server. Tenenbaum is represented Harvard Law School Professor Charles Nesson and the Berkman Center for Internet and Society. Tenenbaum filed for a Motion to Permit Audio-Visual Coverage by the Courtroom View Network of a hearing on his motion to add counterclaims against plaintiffs as part of his constitutional challenge to the damages provisions of the Digital Theft Deterrence Act. Following the First Circuit's decision in this case, Professor Nesson announced he would ask for a stay of proceedings pending federal court action to amend the

rules on camera coverage.

In January, Judge Gertner granted the motion, finding that the "[t]he public benefit of offering a more complete view of these proceedings is plain, especially via a medium so carefully attuned to the Internet Generation captivated by these file-sharing lawsuits.... Under the circumstances, the particular relief requested ... is uniquely appropriate." See *Capitol Records, Inc. v. Alaujan*, 593 F.Supp.2d 319 (D. Mass. 2009).

In so ruling, Judge Gertner interpreted Massachusetts Local Rule 83.8(a) as giving judges discretion to allow broadcasting. Local Rule 83.3 provides in relevant part:

(a) Recording and Broadcasting Prohibited. Except as specifically provided in these rules *or by order of the court*, no person shall take any photograph, make any recording, or make any broadcast by radio, television, or other means, in the course of or in connection with any proceedings in this court, on any floor of any building on which proceedings of this court are or, in the regular course of the business of the court, may be held.... (emphasis added).

Focusing on the words "or by order of the court," Judge Gertner held she had discretion to allow webcasting because "[a]s written, this residual clause does not carry any limitation; instead, it assigns the decision to permit recording or broadcast to the discretion of the presiding district court judge."

The First Circuit disagreed, holding that the exception "by order of the court" refers only to orders relating to the preservation of evidence, the perpetuation of records, and ceremonial, or naturalization proceedings – items mentioned in other subsections of Local Rule 83.3. "Given the structure of the rule as a whole, it is logical to conclude that the phrase "by order of the court" does not create a free-floating bubble of discretion but, rather, is confined to those situations set out in subsection (c)."

Professor Charles R. Nesson represented respondent Joel Tenenbaum. Jonathan Sherman, Dean Kawamoto and Melissa Felder, Boies, Schiller & Flexner LLP, represented Courtroom View Network, as amicus curiae. Petitioners were represented by Daniel J. Cloherty, Victoria L. Steinberg, Dwyer & Collora, LLP; and Eve G. Burton, Timothy M. Reynolds, Laurie J. Rust, and Holme Roberts & Owen, LLP.

What's "Fair" In Love And War?

By David Hosp and Mark Puzella

"Should we be allowing Google to steal all our Copyrights? ...Thanks but no thanks."

-- Rupert Murdoch, quoted in "Murdoch Wants A Google Rebellion," Forbes.com April 4, 2009

Introduction

The media industry appears headed toward a showdown over the practice of news aggregation on the Internet. Two days after Rupert Murdoch articulated his distaste for Google's aggregation practices and challenged news outlets to fight back, the Associated Press took up the fight. On April 6th, Dean Singleton, AP's Chairman, announced the organization's intent to "take all actions necessary" to fight "misappropriation on the Internet." Singleton did not clearly define what he meant by "misappropriation," and there is some question whether he intended to include in the AP's sights aggregation techniques used by Google. The battle lines are forming, though.

Certain practices that might be loosely gathered under the rubric of "news aggregation" clearly run afoul of various legal constructs. Wholesale verbatim copying of articles onto independent sites undoubtedly gives rise to liability under copyright law, and at least one court has recently held that the re-writing of breaking news stories without attribution could possibly state a claim under state law "hot news" theories.

The bigger question, however, is whether the verbatim copying of headlines and ledes by news aggregators to identify hyperlinks to the original sources of the news stories is legal. This is the most prevalent online practice—the practice employed by the likes of GoogleNews, Yahoo, and many online versions of major newspaper, like the New York Times' nytimesextra.com.

Several lawsuits filed in the past year have employed a number of different legal constructs to target this type of aggregation, including trademark, unfair competition, and "hot news" theories. The central question, however, yet to be judicially determined is: Does the aggregation of third-party headlines and a ledes in connection with hyperlinks to the original source websites qualify as a "fair use" under copyright law?

The answer, if the bulk of applicable precedent is followed, is that it should. Based on the factors enumerated in 17 U.S.C. Sec. 107, and on the manner in which they have been interpreted by courts in the past, it will be difficult for the AP, Rupert Murdoch and others to make a dent in the most prevalent news aggregation practice. If liability is to be found, it will likely require a departure from established precedent, or legislative action on current U.S. copyright law.

Fair Use Factors

Section 107 of the Copyright Act codified the common law concept of "fair use," and lists four factors to be considered in determining what use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and, (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four factors are nonexclusive, and courts may theoretically allow other considerations to weigh on the determination of what is fair if they deem necessary or appropriate to effectuate the purpose of the statute's intent. As a practical matter, however, these factors provide the fundamental structure according to which courts make their determinations. With respect to the use of headlines and ledes in news aggregation, while there is clearly some room for argument, each of these factors likely weighs in favor of a finding of fair use.

The Character of the Use

Courts typically consider three factors when examining the purpose and character of an alleged infringer's use: whether the use is (a) transformative, (b) commercial, and (c) in good faith. It is likely that each of these considerations favors a finding of fair use.

A use is considered transformative if it serves a different purpose from the original. Providing a link and a lede in aggregating news links should be deemed transformative because the function is to help users *find* news. In a number of previous cases, search engines' use of entire copyrighted images in

(Continued on page 40)

What's "Fair" In Love And War?

(Continued from page 39)

miniature form (known as "thumbnails") was deemed transformative because, "a search engine transforms the image into a pointer directing a user to a source of information." This is the exact purpose for which a news aggregator uses headlines and ledes.

News producers would argue that the use of a headline and lede is a "substitute" because they embody the "essence" of the original article, and some readers may be satisfied enough and never click through to original site. Previous cases, however, have found that even the use of essentially the *entire* work is transformative in the context of directing the public to the original website.

In addition, while most news aggregators are undoubtedly "commercial" websites, where the use is made in connection with one of the enumerated fair use categories such as news reporting, there is nevertheless a "strong presumption" that the use is productive. Even without this presumption, verbatim linking may not be deemed commercial under the fair use analysis because the critical "commercial use" question is whether the user stands to profit from exploitation of the copyrighted material *without paying the customary price*. News aggregators do not avoid paying the "customary price" because the articles excerpted are typically available for free to consumers.

Finally, while the good faith of the use is also relevant, lack of permission is beside the point as long as the defendant's use meets the standards of fair use. As a result, it is likely that on the balance of decided case law, the first fair use factor weighs in favor of a finding of fair use.

The Nature of the Copyrighted Work

Courts consider some works closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. When a copied work is factual as opposed to fictional or creative, a court is more likely to find fair use.

News reporting is fact intensive and generally entitled to the bare minimum of copyright protection. While news producers could argue – and likely support with testimony – that it takes creativity to select the words to use and that writing headlines and ledes is an "art." However, this likely could not overcome the well established legal principle that as news arti-

cles are entitled to *minimal* protection. As a result, the second factor should also weigh in favor of a finding of fair use.

The Amount of the Work Used

If a "use" copies only as much as necessary for the intended use, then the third factor will not weigh against fair use. Courts have previously held that use of an entire photographic image, though reduced in size, was "fair" in light of the purpose of an Internet search engine. One court has noted that it is necessary in directing users to original content to take enough "to allow users to recognize the image and decide whether to pursue more information" from the original website.

In the scenario outlined here, news aggregators provide only the smallest part of the claimed copyrighted content sufficient to identify the work and tell the reader what it is: the headline and lede. The amount taken is much less than the "entire works" considered in the context of thumbnails, and taking less would likely not allow users to recognize the subject of the article and decide whether to pursue more information from the link to the copyright holder's website.

Similarly, courts have found that even copying of entire works should not weigh against a fair use finding where the new use serves a different function from the original, and the original work can be viewed by anyone free of charge. News aggregators point users to the location of original news articles, which can be viewed by anyone free of charge. As a result, the third factor should also weigh in favor of a finding of fair use.

The Commercial Impact of the Use

A court must also consider whether a challenged use, if it became widespread, would result in substantially adverse impact on the potential market for the original work. Courts have noted that whether the use is a "substitute" informs whether the value of the original is affected. As discussed above, the use of a headline and lede is likely not a "substitute" because it serves a different purpose: directing the Web user to the source of the original. In addition, although there is a presumption of likelihood of market harm where the challenged use is "commercial," the presumption "does not apply to transforma-

(Continued on page 41)

What's "Fair" In Love And War?

(Continued from page 40)

tive uses because market substitution is at least less certain, and market harm may not be so readily inferred. Thus, content providers would likely have to demonstrate an actual market impact, and allegations of "theoretical" harm would likely be rejected.

It is likely that any asserted commercial harm in the context of news aggregation would necessarily be speculative. Nearly all original content producers give their news articles away for free on their own websites, and will be hard pressed to claim that their "market" for such free access has been adversely impacted. In addition, because news aggregation is likely to increase the traffic metrics used by advertisers to measure website marketability – such as unique monthly visitors and page visits – proving harm would be difficult.

News aggregation likely increases web traffic metrics for two reasons. First there are users who click on the link and visit the original content producer's site, thus increasing the unique monthly visitors. Once there, some percentage of users also may choose to return to the site directly and perhaps even on a regular basis. Second, by repeatedly linking to the original content producer's website, the news aggregator gives the site the benefit of its "Google Juice." Google operates, in part, by tracking how often a site is linked to and by whom. This metric quantifies (by way of a proprietary algorithm) whether a site is considered authoritative. News aggregators thus boost the original content producer's ranking on Google. This increased exposure is so highly desirable that an entire industry has developed around what is called Search Engine Optimization.

Moreover, a Court likely could take into account the fact that, absent circumvention by the aggregator, the original web-

site often has the ability to prevent linking, either through the use of robots.txt coding or by denying access for referrals from particular aggregation websites.

Because it is likely that any harm to the commercial value of the original new site's content is likely to be speculative, at best, the fourth factor will also likely weigh in favor of a finding of fair use.

Conclusion

The aggravation felt by the AP and by some newspaper owners like Rupert Murdoch is understandable. The news industry in general, and newspapers in particular, are facing its most challenging time in history. Newspaper circulation and advertising revenue is down significantly and the industry has not yet determined a practical way to effectively monetize news content on the Internet. As a result, bankruptcies, closures, and layoffs seem to be everywhere. Some drastic action must be taken if the ability to produce news content is to remain an economically viable business. However, absent a significant departure from established copyright law, legal action against news aggregation websites is not likely to lead to the profession's salvation.

David Hosp and Mark Puzella are partners in Goodwin Procter LLP who focus their practices on copyright and trademark litigation. They have been trial counsel in several widely followed copyright matters, including the Cablevision RS-DVR case and the recent GateHouse Media v. New York Times news aggregation litigation.

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