



# LIBELLETTER

August 1996

## FEDERAL COURT FINDS THAT TRANSMITTING SPORTS SCORES VIA PAGER IS COMMERCIAL MISAPPROPRIATION

By Paul M. Levy and Andrew L. Deutsch

A federal District Court judge for the Southern District of New York has recently held that disseminating scores and limited statistics about NBA basketball games during the games via a paging device constitutes a misappropriation of "the essence of NBA's most valuable property - the excitement of an NBA game in progress." The court entered a permanent injunction forbidding defendants from transmitting any NBA game information via the device during the game. *The National Basketball Ass'n and NBA Properties, Inc. v. Sports Team Analysis and Tracking Systems, Inc. (STATS) and Motorola Inc.*, 1996 U.S. Dist. LEXIS 10262 (Preska, J.).

The district court rejected the NBA's claim to copyright protection for the games themselves. And while the broadcasts of the games are capable of copyright protection, the court found no copyright infringement of the broadcasts arising out of STATS use of them as the source for the game statistics. The court found federal copyright law preempted state law claims, such as misappropriation, with respect to the broadcasts, but not as to the games.

### The Defendants' Activities

STATS is engaged in the business of collecting, analyzing and disseminating statistics. In the late 1980's, STATS de-

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## THE SUPREME COURT VIEW

LDRC asked a few of its members who closely follow the Supreme Court -- Floyd Abrams, Terry Adamson, Bruce Ennis and Luther Munford -- to offer a thought or two about the Court, its recent term, member's views on First Amendment doctrine, any ideas that they thought might be of interest as we both look back on the 1995-96 Term and approach the new term. We are grateful to them for taking the time to do so, and we believe that you will find their individual styles, approaches, and views exceedingly pleasurable and worthwhile reading.

Their essays can be found as Section II of this month's *LDRC LibelLetter*.

## MINNESOTA SHIELD FOR REPORTER/WITNESS LIMITED

By Paul R. Hannah

Last month, the Minnesota Supreme Court dealt what some consider a potentially fatal blow to the journalists' privilege against compelled testimony and disclosure of unpublished information under Minnesota law, at least in criminal cases. In its first decision directly construing Minnesota's 1973 journalist's shield law, the Court rejected the contention by journalists that unpublished information in their possession, other than the identity of a source, had qualified protection from disclosure. *State v. Turner*, \_\_ N.W.2d \_\_, File No. C5-95-2668 (July 18, 1996).

Moreover, the Court ordered a photojournalist to testify at a preliminary hearing at the demand of a criminal defendant because the photojournalist was a potential witness to the circumstances relating to the defendant's arrest. The Court rejected the photojournalist's argument that a qualified privilege protected him from testifying unless the de-

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## NEWSROOM SEARCH & SEIZURE:

### MEDIA HOSTILITY PARADING AS STRICT CONSTRUCTIONISM?

By Sam Colville, John Edwards and Cathy Richards

A tourist's fortuitous video taping of the abduction of a woman later murdered has sparked a First Amendment rooted dispute in Kansas City, Missouri between the county prosecutor and a local television station. WDAF-TV, NEWSCHANNEL 4 (then owned by Citicasters, now owned by New World) obtained a copy of the tape and aired excerpts. Kansas City police and local prosecutors then obtained and executed a search warrant for all copies of the tape, leaving the station in possession of only the excerpts it had already broadcast.

In obtaining the warrant, the police and prosecutors made no effort to comply with the Privacy Protection Act of 1980 ("the Act"), 42 U.S.C. §2000aa et

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**MARK YOUR CALENDARS!**

**LDRC FOURTEENTH ANNUAL DINNER**

**WEDNESDAY, NOVEMBER 6, 1996**

7:30 p.m.

**THE SKY CLUB**

**TWO HUNDRED PARK AVENUE, 56TH FLOOR  
NEW YORK CITY**

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

**KATHARINE GRAHAM**  
Chairman of the Executive Committee  
The Washington Post Company  
and

**ARTHUR OCHS SULZBERGER**  
Chairman of the Board  
Chief Executive Officer  
The New York Times Company

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## NEWSROOM SEARCH & SEIZURE

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seq. Notwithstanding, a panel of the Eighth Circuit has now ruled 2:1 that such failure does not necessarily violate the Act; that the prosecutor should be given the opportunity post-hoc to establish that the search and seizure complied with the Act. *Citicasters, Inc. v. McCaskill* Case No. 95-1894 (8th Cir. July 19, 1996)

This decision is troubling. Congressional efforts to severely limit newsroom searches and seizures, prompted by *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), have been reduced to a search now/justify later process.

*Zurcher* held that the First and Fourth Amendments did not afford news and information organizations special protection, and that such organizations were subject to search and seizure on more or less the same terms as anyone else. In so ruling, the Court extended an invitation to Congress to provide via legislation more protections than required by the constitution. Congress took up the invitation, and passed the Privacy Protection Act of 1980. The Act stringently limits when federal, state or local government officials are permitted to search a news organization and to seize its documentary materials.

Two exceptions under which a search and seizure of documentary materials may be permissible under the Act are where "there is reason to believe:" (a) that immediate seizure is necessary to prevent a death or serious bodily injury to someone, or (b) that giving notice pursuant to a subpoena duces tecum would result in the destruction, alteration or concealment of the materials. (See 42 U.S.C. § 2000aa(b)(2) and (3), respectively).

On most other occasions, government officials are to rely upon the cooperation of the media or a subpoena duces tecum to obtain such materials.

Here police and prosecuting attorneys obtained a search warrant without making any showing to the issuing

judge that circumstances existed within either of these exceptions. In response, WDAF brought suit against defendants, claiming that the seizure of the videotape violated the Privacy Protection Act.

### United States District Court Proceedings

Following a two-day evidentiary hearing, the U.S. District Court for the Western District of Missouri found that the Act applied, and that the prosecutor had violated it.

One of the primary issues involved whether the judge called upon to issue the warrant must consider the prohibitions the Act. It is this point of contention that carries the greatest implications for both sides in the case. The prosecutor sought to invoke both of the exceptions to the Act listed above. Moreover, she alleged she was entitled to invoke the exceptions after-the-fact with the benefit of hindsight, and that it was not fatal that she had failed to establish them prior to the seizure. The District Court rejected this contention. After examining the purpose and legislative history of the Privacy Protection Act, the District Court ruled that Congress had envisioned that a government official would state the basis for exceptions when applying for the search warrant. Furthermore, the Court found that, should circumstances exist which could constitute an exception, they must be clarified in an affidavit for a warrant, which would present the news organizations with an opportunity to present arguments to the contrary.

Therefore, because defendant failed to establish the basis for their exceptions in an affidavit when applying for a search warrant, and because they failed to provide plaintiff with a subpoena duces tecum, the Court found that "the search and seizure in this case constitut[ed] a violation of [the Act]" (See Court's Order of

February 1, 1996, p. 20).

Statutorily prescribed liquidated damages of \$1000 and costs, including attorney's fees, were awarded to plaintiff. The implications on the significance of the Privacy Protection Act, however, were paramount. By ruling in favor of WDAF-TV, the District Court affirmed the Act's power to protect materials in the possession of news organization.

### Appeal To The Eighth Circuit

Prosecuting Attorney McCaskill appealed the judgment to the Eighth Circuit Court of Appeals. Again the central issue of contention was the question of whether the Privacy Protection Act requires that the existence of exceptions be judicially reviewed before the issuance of a search warrant, or whether the constraints of the Act can be met by demonstrating the existence of exceptions after a search and seizure.

By a 2:1 decision, the panel majority (Circuit Judges Heaney and Magill were in the majority, and Senior Circuit Judge Bright dissented) reversed the District Court's ruling. The majority stated that because the Privacy Protection Act does not expressly require a presentation and consideration of exceptions to be made as a precondition to conducting a search, no such requirement can exist. The panel majority found that because Congress had failed to specify procedural steps within the text of the Act, the District Court was in error in relying upon the legislative history of the Act to "embellish [Congress'] legislative scheme with additional procedural innovations." 1996 WL 403067, \*4. The majority reasoned that although Congress could have included specific procedural regulations in the Act, it did not, choosing instead to "creat[e] a private cause of action as the exclusive remedy to ensure that the protec-

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## NEWSROOM SEARCH &amp; SEIZURE

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tions of the Act would be effective, and [allow] recovery of damages against those found liable for violations of the Act." *Id.*

In his dissenting opinion, Judge Bright expressed great concern over the ability of the Act to protect news organizations if justification of exceptions is allowed in hindsight. He stated: "By construing the Act so as not to require a prior judicial determination, the majority pulls the teeth out of the statute. The purpose of the Privacy Protection Act is to prevent the search and seizure of documentary materials from persons disseminating information. After-the-fact review can only punish violation [of the Act], not prevent it." 1996 WL 403067, \*9.

## Petition For Rehearing En Banc

On August 1, 1996, Appellee submitted a Petition for Rehearing with Suggestion For Rehearing En Banc. The Petition is currently under consideration. Appellant has been directed to file a response.

*Sam Colville, John Edwards and Cathy Richards are with the firm Holman, McCollum & Hansen, P.C. in Kansas City, MO*

NEWSROOM SEARCHES: NEW PROPOSAL THREATENS  
FEDERAL PROTECTIONS

A new proposal introduced by Senator Orrin G. Hatch (Utah), along with Senators Abraham, Grassley and Thurmond, threatens to contract federal protections against newsroom searches. Entitled the *Child Pornography Prevention Act of 1996* (S.1237), the bill would amend the Privacy Protection Act of 1980 ("Privacy Act") (42 U.S.C. 2000aa), which prohibits government officers and employees from searching for or seizing materials from newsrooms, by adding an exemption for pornographic material that features or exploits children.

Current exemptions to the Privacy Act are limited, but include when there is probable cause to believe that the possessor of the materials has committed or is committing the criminal offense to which the materials relate (other than simply possessing or withholding the document(s) at issue), including offenses related to certain restricted or classified documents, or if there is reason to believe seizure is necessary to prevent death or serious injury to a human being.

Purporting also to close the "computer-generated loophole and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-tech child pornography,"

Hatch's proposal would broaden the definition of child pornography and include computer generated images within its scope. *Hearing on S.1237, the Child Pornography Prevention Act of 1995, Before the Senate Judiciary Comm., 104th Cong. 1-3 (1996)* (June 4, 1996, News Release statement of Senator Orrin G. Hatch). Thus the act purports to protect not only pornography involving real children, but also virtual children.

The *Child Pornography Prevention Act* encompasses child pornographic materials that have traveled in interstate or foreign commerce by any means, including by computer. Thus a newsroom theoretically could be subject to a search by government authorities if it received a photograph in connection with a story which satisfied S.1237's definition of child pornography. The *Child Pornography Prevention Act* passed the Senate Judiciary Committee on July 30th and was placed on the Senate calendar.

## MARK YOUR CALENDARS!

## DEFENSE COUNSEL SECTION BREAKFAST

THURSDAY, NOVEMBER 7, 1996

7:00 A.M.

MANHATTAN CROWNE PLAZA

## JUDGE KIMBA WOOD DISMISSES "MIDNIGHT BLUE" PRIVACY/DEFAMATION ACTION

Reversing her earlier decision, *Geary v. Goldstein*, 831 F. Supp. 269 (S.D.N.Y. 1993), Judge Kimba Wood of the Southern District of New York dismissed the defamation and privacy claims brought by model Angie Geary, whose image in a television commercial was interposed with pornographic footage in a parody on "Midnight Blue," a longrunning cable program produced by defendant Al Goldstein. *Geary v. Goldstein*, No. 91 Civ. 6222 (8/7/96). Judge Wood reversed her prior conclusion that a determination as to whether or not a television broadcast was defamatory could be based on what some reasonable viewers might think if they only saw a portion of the program.

### Plaintiff's Claims

Plaintiff asserted two causes of action. First, she asserted a defamation claim under New York State law, claiming that the use of her image in a pornographic program "implicitly suggested to the viewer that she had consented to, was associated with, or derived benefit from, the use of her image therein." Second, she claimed violation of her right of privacy, based on the New York Civil Rights law Sections 50 *et. seq.* which prohibit the use of a living person's "name, portrait or picture" for purposes of "advertising" or "trade" without written consent.

### The Court's Decision: Defamation

In her earlier decision, Judge Wood held that the parody was "susceptible to being interpreted by a reasonable viewer as conveying the defamatory meaning alleged." *Geary*, 831 F. Supp. at 270, 275 & n. 6, 276 & n. 7, 277. However, upon reconsideration, she reversed her earlier holding, this time finding that a "reasonable viewer" would *not* believe that plaintiff had consented to appearing in the pornographic segment.

In her new opinion, Judge Wood re-

## A BROAD SUBSTANTIAL TRUTH DEFENSE IN TEXAS

By Tom Leatherbury and Bill Church

In a recent decision from a federal district court, Texas courts have continued to construe the substantial truth defense as broadly as possible when the press republishes allegations of wrongdoing made by the government. *Mullens v. The New York Times Co.*, CA 3-95-CV-0368-R (N.D. Tex. July 30, 1996) Plaintiff James Mullens, a former broker at Prudential Bache Securities in Dallas, sued *The New York Times* and its reporter over a 1993 article. The article, which reported the contents of sealed affidavits and pleadings filed by the FBI and the United States Attorney's office three years earlier in support of a seizure warrant, contained the following statements:

visited the issue of context: i.e. whether to include, as she had in her earlier opinion, "channel surfers" who would not view "Midnight Blue" in its entirety. This time around, Judge Wood held that "it was error for me to have included such a 'channel-surfing' viewer in the category of reasonable viewers" and that the appropriate context for ascertaining whether the segment at issue was susceptible of defamatory meaning was the one hour program *Midnight Blue* in its entirety.

New York law, she concluded, required that an allegedly defamatory statement must be analyzed in the context of the full text or program. While Judge Wood might believe that a newspaper reader is more likely to have full text of an article than a television viewer might have of a program, New York law made no such distinction.

Thus viewed, she held that a reasonable viewer would not conclude that the plaintiff was a consensual participant in the segment. First, the substantial difference in film quality between the pornographic and interposed commercial segments made clear that they derived from different sources. Second, the contents of the commercial and the pornographic segments were "dramatically different." The com-

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"Mullens made commissions from 1987 to 1990 in accounts investigators say were stuffed with money stolen from First Western Savings and Loan, a Texas savings bank that later failed. Savings executives laundered the money through shell company accounts at Prudential. A Government affidavit says witnesses described Mr. Mullens as a principal in the scheme. Marshals seized \$736,000 from those accounts in 1990, and the executives pleaded guilty to fraud. Mr. Mullens, who has never been charged, remains under investigation. . . .

Mr. Mullens, who recently resigned, did not return phone calls."

The accompanying photo caption read:

"A check issued to the Federal Marshals by Prudential's Dallas office from one trading account when the Government seized several accounts worth a total of \$736,000. The money had been stolen from a Texas Savings and loan by executives. The Prudential broker for the accounts remains under criminal investigation."

### Summary Judgment

The defendants moved for summary judgment on the grounds of substantial truth and qualified privilege to report on judicial proceedings. In addition to the FBI affidavit, defendants filed an affidavit from an assistant United States Attorney in which the AUSA stated that Mullens remained under criminal investigation at the time the article was published.

Mullens, who was never charged with any crime, countered that the article was false because he never participated in any fraudulent schemes and because he simply acted as a broker in handling the accounts. Mullens also claimed that he was entitled to discovery about how the *Times'* reporter obtained the sealed affidavit and that, while certain statements in the article were literally true, the article libeled him by implication because it wrongly connected him to the savings and loan executives who were guilty of criminal activity.

Chief Judge Jerry Buchmeyer of the Northern District of Texas compared the

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## PENNSYLVANIA COURT AFFIRMS \$1.49 MILLION AWARD IN K-MART DEFAMATION CASE

The Superior Court of Pennsylvania has affirmed an award against Kmart for \$1.4 million in punitive damages and \$90,000 in compensatory damages in a defamation suit brought by a former employee in *Rue v. K-Mart Corp.*, No. 02531, 1996 Pa. Super. LEXIS 1954 (Pa. Super. Ct. June 12, 1996). K-mart had held a meeting at which Rue's former co-workers at a company distribution center were told that she was fired for eating and concealing a bag of potato chips. After an unemployment compensation referee found this to be untrue, Rue sued for defamation.

K-mart challenged the trial court judgment on several grounds, all of which were rejected by the Superior Court panel. In a 23-page opinion, Judge Montemuro held that the findings from the unemployment compensation hearing relating to Rue's misappropriation of company property must be given preclusive effect. He found that K-mart had a full and fair opportunity to litigate the issue and that K-mart had ample incentive to participate in the hearing, and rejected K-mart's argument that the application of collateral estoppel would undermine the purpose of Pennsylvania's unemployment compensation laws by hindering the award process. The court then quickly dismissed K-mart's argument that the verdict and the judgment violate the employment at will doctrine, finding this argument irrelevant to the defamation action at hand.

The court also held that K-mart was not entitled to a conditional privilege in its communications, finding sufficient evidence for the jury to conclude that, "at the very least, Appellant failed to exercise due care in ascertaining the truth of its statement before communicating it to several of Appellee's co-workers." *Id.* at 20. The court noted evidence that Rue had worked for the company for over twelve years without any disciplinary problems; that the security officer's identification was not based on his personal recognition of her; that the company did not fully investigate the incident or follow its own guidelines; and that two co-workers were

willing to vouch for her innocence.

### Punitive Award Upheld

In terms of the excessiveness of the punitive damages award, the court found that there was a reasonable relationship between the amount of the award, the goals of punishment and deterrence and the character of the act, the nature and extent of the harm, and the wealth of K-mart, noting that the jury heard evidence that Rue suffered anxiety attacks, depression, and humiliation, and that she had difficulty finding another job. Punitive damages, the court stated, need not bear any proportional relationship to the award of compensatory damages. The court concluded, "we cannot find that the award so shocks the sense of justice as to find that the trial court abused its discretion by refusing to grant a new trial." *Id.* at 23.

Judge Popovich filed a dissent in

which he rejected both the application of collateral estoppel and the punitive damages award, finding the award patently unreasonable: "I do not understand how appellant's act of informing appellee's co-workers that she was dismissed for misappropriating a bag of potato chips was sufficiently outrageous conduct to warrant a punitive damages award of \$1.4 million, even if we consider appellant's great wealth."

Neither the dissent nor the majority cited the Supreme Court's recent decision in *BMW North America, Inc. v. Gore* (64 U.S.L.W. 4335 May 21, 1996), which requires that punitive damages properly reflect the degree of reprehensibility of the defendant's conduct as well as a rational ratio to the harm the plaintiff actually suffered. On June 26, K-mart filed a petition for reargument, which was pending at press time.

### KIMBA WOOD

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mercial segment showed the plaintiff dressed in a towel, having breakfast with a male companion dressed in a bathrobe; the pornographic segments showed couples engaged in "graphic sexual acts." Slip op. at 4.

### Privacy Claims Dismissed

Judge Wood also dismissed the statutory privacy claims, agreeing with the defendant that, in order to prevail, the plaintiff must present evidence to show that her "name, portrait or picture" was used within New York for "advertising purposes or for the purposes of trade without [her] written consent." Slip op. at 9. "It is clear," the Judge said, "that the Parody does not advertise a particular product."

Likewise, the Judge held, the plaintiff's image had *not* been used for "trade purposes." Citing *University of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S. 301, 305 (1st. Dept.), *aff'd*, 207 N.E. 2d 508 (N.Y. 1965), as well as dicta from other decisions of the New York Appellate Division, Judge Wood held that satiric use of an image does not constitute "trade purposes" under the New York Civil Rights Act.

### A BROAD SUBSTANTIAL TRUTH DEFENSE IN TEXAS

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FBI agent's affidavit with the article and held that the article was substantially true because it accurately reported the FBI agent's conclusions. Relying on *McIlvain v. Jacobs*, 794 S.W.2d 14 (Tex. 1990), the Court held that since the "overall 'gist' of the *Times* article accurately summarized the FBI's investigation . . . and Plaintiff's alleged involvement," the article was substantially true as a matter of law.

The Court did not address the defendants' privilege arguments and denied the plaintiff's request for additional discovery about the defendants' news gathering since the requested additional discovery related only to the privilege defense.

Together with *McIlvain*, another case in which defendants who republished a government report about alleged wrongdoing won summary judgment on truth, this opinion exempts libel defendants from proving the truth of the underlying charges as long as the defendants accurately report the charges.

*Tom Leatherbury and Bill Church of Vinson & Elkins in Dallas and Adam Lip-tak of The New York Times represented the defendants.*

## DEFAMATION CLAIM BASED ON DISSEMINATION OF JUDICIAL OPINION SURVIVES MOTION TO DISMISS

In an unpublished opinion, a federal district court judge for the District of New Jersey denied a motion to dismiss a libel complaint arising out of a party's dissemination of a judicial opinion. *National League for Nursing v. Jaffe*, No. 95-2193 (D.N.J. June 15, 1996)(unpublished) In denying the motion, the court rejected defendant's argument that her dissemination of the opinion was privileged under the fair report privilege and as a matter of constitutional law, as well as her contention that the statements at issue were neither false nor capable of defamatory meaning.

The judicial opinion disseminated by libel-defendant Jaffe was issued in an action she brought against plaintiffs in the Supreme Court of New York. Having resigned from her position as Director of Constituent Affairs for National League for Nurses (NLN), Ms. Jaffe filed a complaint asserting claims against NLN and Dr. Moccia, NLN's Chief Executive Officer, for intentional infliction of emotional distress and assault and battery arising out of her employment and the cessation thereof.

NLN and Dr. Moccia filed a motion to dismiss the complaint on the grounds that it failed to state a cause of action. In denying the motion, the New York Supreme Court Justice issued the opinion that, not surprisingly, recited Jaffe's allegations against NLN and Dr. Moccia, statements that NLN and Moccia contend are false and defamatory.

Ms. Jaffe sent a copy of that opinion to each of the following people: Peggy L. Chinn, Editor of *Advances in Nursing Sciences*; Barbara J. Brown, Editor of *Nursing Administration Quarterly*; and, Susan Sherman, RN, at Community College of Philadelphia. Ms. Chinn and Ms. Brown's magazines are published in the state of Maryland. (NLN and Dr. Moccia allege that Ms. Jaffe disseminated copies of the opinion to other publications and members of the nursing community.)

In each instance, Ms. Jaffe sent a copy of the entire opinion with a cover

note that stated:

"Enclosed is a decision rendered in the New York Supreme Court on December 9, 1994. I thought this might be of interest to your readers."

NLN and Dr. Moccia commenced the present litigation against Ms. Jaffe in May, 1995, alleging libel, trade libel and common law disparagement, and tortious interference with prospective economic advantage. According to the complaint, Ms. Jaffe published the false, defamatory and disparaging statements by disseminating the judicial opinion in which they appeared with the intent that these statements be republished, and expecting that the republication would harm plaintiffs. NLN and Dr. Moccia allege both actual malice and common law malice.

Ms. Jaffe filed a motion to dismiss the complaint for failure to state a claim. She argued that her dissemination of the opinion in the original action was absolutely privileged, both under the fair report privilege and as a matter of constitutional law and, in the alternative, that NLN and Dr. Moccia cannot demonstrate the requisite falsity and defamatory meaning for a cause of action in defamation.

Federal District Judge Ackerman rejected defendant's arguments. With respect to the fair report privilege, Judge Ackerman found that the "report" by Jaffe was, of course, fair and accurate. But, citing New Jersey law, Judge Ackerman held that the privilege is not available if the plaintiff can show that the defendant acted with malice. In order to demonstrate the requisite malice, plaintiff must allege and prove actual and common law malice. Finding that the NLN and Dr. Moccia's complaint contained allegations that would, if proven, defeat the fair report privilege, Judge Ackerman denied Ms. Jaffe the protection of the fair report privilege at the pleading stage of the litigation.

Ms. Jaffe also argued in her motion that her dissemination of the opinion

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## THE TAXATION OF LIBEL RECOVERIES AFTER H.R. 3448

By J. Michael Hines and  
Kevin P. Brandon

The Small Business Protection Act of 1996 (H.R. 3448 or the "Act"), will modify Internal Revenue Code Section 104's exclusion from gross income of certain damages received on account of "personal injuries or sickness."

Specifically, the Act limits the exclusion to "any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness" (emphasis added).

In addition, the Act specifically denies such exclusion to damages for emotional distress, except to the extent of medical expenditures attributable thereto.

As a result, damages that are of concern to those involved in libel actions, for the most part, may be outside Section 104's exclusion from gross income. These changes generally apply to amounts received after the date of enactment, which is expected to be in mid-August, but do not apply to amounts received pursuant to a written binding agreement, court decree, or mediation award in effect by September 13, 1995.

In order to avoid their impact, it may be useful to take a step back and review the recent developments leading up to the changes. The Omnibus Budget Reconciliation Act of 1989 ("OBRA") amended Section 104(a) by providing that the exclusion from taxable income "shall not apply to any punitive damages in connection with a case not involving physical injury or physical sickness."

This prompted arguments regarding whether such additional language could be taken as an indication of the intended excludability of punitive damages arising (i) in a case involving a physical injury, or (ii) prior to OBRA, in a case not involving physical injury. As an amendment to a statute is not necessarily proof that the unamended statute meant the op-

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DEFAMATION CLAIM BASED ON  
DISSEMINATION OF JUDICIAL  
OPINION SURVIVES  
MOTION TO DISMISS

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was absolutely privileged as a matter of constitutional law, relying in large part on *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975). Stating, however, that *Cox* only applies to truthful information contained in official court records, Judge Ackerman rejected this argument as well, holding that *Cox* does not apply in the instant case because NLN and Dr. Moccia alleged in their complaint that the opinion disseminated by Ms. Jaffe contains false and defamatory statements.

In so ruling, Judge Ackerman relied on *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), in which the Court rejected *Time's* argument that any report about a judicial proceeding should be protected by the actual malice standard. *Time* had published inaccurate information about plaintiff's divorce. From that, Judge Ackerman concluded that an accurate report of a judicial opinion, in which the underlying opinion contains allegedly false and defamatory statements, is also not protected under the *Firestone* interpretation of *Cox*; in effect, that *Cox* only applies when the information published is both true and contained in a court record. Judge Ackerman thus denied Ms. Jaffe's motion to dismiss insofar as it asserted either a fair report or a constitutional privilege.

Ms. Jaffe's arguments in the alternative fared no better. Ms. Jaffe argued that the statements at issue were not false, in that they accurately set out the allegations of her complaint. Further, the statements were not capable of defamatory meaning because, in the context of a judicial opinion, the statements would be understood to be what they were: allegations, not facts.

Citing a New Jersey mid-level appellate decision in which the dissemination of a complaint, rather than a judicial opinion, was at issue, (*Citizens*

THE TAXATION OF LIBEL  
RECOVERIES AFTER H.R. 3448

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posite, courts accepted these arguments to varying degrees, leaving the application of Section 104 somewhat murky.

The Supreme Court's decision in *U.S. v. Burke*, 112 S.Ct. 1867, 504 U.S. 229, 119 L.Ed.2d 34 (1992), a tax case arising out of a Title VII award, allowed for a reasonable reading of "personal injuries" under Internal Revenue Code Section 104(c) as broadly referring to any tortious (non-contractual) violation of a legal duty to another, regardless of the types of damages arising from such violation. This seemed to leave the door open for the exclusion from gross income under Section 104 of "dignitary" or nonphysical damages, whether compensatory or noncompensatory.

However, this broad reading was then undercut by the Court's subsequent decision in *C.I.R. v. Schleier*, 115 S.Ct. 2159, 132 L.Ed.2d 294 (1995), also a tax case, which arose out of an Age Discrimination in Employment Act award.

*Bank of New Jersey v. Libertelli*, 215 N.J. Super. 190 (App. Div. 1987), the court found that the absolute privilege accorded to judicial proceedings does not extend to statements published outside of a judicial proceeding to persons not connected with it. Judge Ackerman held that *Citizens Bank* indicates that the allegations of a complaint are, as a matter of law, capable of being false and capable of having a defamatory meaning.

Mr. Jaffe argued that dismissal of the defamation claims must result in the dismissal of the other claims. Because Judge Ackerman did not dismiss the defamation claims, he also denied the motion to dismiss on the other claims.

The Court's strict construction of "personal injuries" under the Internal Revenue Code Section 104 apparently excluded from income only those amounts which serve to compensate the taxpayer for injuries to the body or mind.

Punitive damages do not meet this standard because they do not serve as compensation for injury, but as punishment for, and deterrence of, certain types of behavior (under the Act, punitive damages now expressly fall outside of Section 104's exclusion from income). In addition, damages to reputation caused by libel are very unlikely to constitute *Schleier*-type injuries to the body or mind.

Therefore, prior to the Act, exclusion of libel damages may have been available to the extent such damages were received as compensation for injuries to body and mind, which most likely were emotional injuries. However, the Act now expressly provides that emotional distress shall not be excludable, except to the extent of any amounts actually paid for medical care attributable to such emotional distress.

Thus, in light of the Court's strict construction of "personal injuries" in *Schleier*, and the Act's limitation of the exclusion to damages (other than punitive damages) for physical injuries or sickness -- which may be even narrower than the *Schleier* construction -- it appears that post-Act amounts paid with respect to a libel claim other than for (1) physical sickness or injuries, or (2) medical expenses paid but not otherwise deducted which are attributable to emotional distress, are not excludable from gross income.

*J. Michael Hines is a partner and Kevin P. Brandon is an associate with DCS member firm Dow, Lohnes & Albertson in Washington D.C.*



## SANCTION UPHELD AGAINST LAWYER WHO PROSECUTED SECOND SUIT AGAINST SHIRLEY MCGREAL: RELIANCE ON THE CLIENT NOT ENOUGH

by Thomas R. Julin

In an opinion rendered July 16, 1996, the U.S. Court of Appeals for the Eleventh Circuit upheld a \$25,000 sanction against Paul Bass, the lawyer who prosecuted a tortious interference action on behalf Worldwide Primates, Inc. against Dr. Shirley McGreal, founder and chairperson of the International Primate Protection League.

The suit had claimed that McGreal interfered with Worldwide's primate importing business by sending government reports critical of Worldwide to one of Worldwide's clients, a primate research lab in Louisiana, but the suit ended abruptly by voluntary dismissal when Worldwide's president was indicted for violating federal laws relating to the sale of animals.

The decision is the judicial equivalent of the application of an anti-SLAPP statute, sanctioning counsel and client for using a frivolous lawsuit against an outspoken critic. But the decision is significant in a broader sense, because it imposes a duty on a lawyer to conduct an "independent investigation" of the facts before filing a lawsuit. Absent extenuating circumstances, the Eleventh Circuit held, "an attorney cannot simply rely on the conclusory representations of a client, even if the client is a longtime friend."

After the dismissal of Worldwide's suit, McGreal, who previously had been sued for libel in New York, sought sanctions under Rule 11 of the Federal Rules of Civil Procedure, arguing that the First Amendment protected her right to provide truthful information to researchers who might be considering making acquisitions through Worldwide. She also argued that Worldwide could not show that it had been harmed by her letters because the recipient of her letters had testified in a deposition that he knew of no harm that the letters had done to the lab's relationship with Worldwide.

U.S. District Judge Kenneth Ryskamp denied McGreal's request for sanctions, adopting a magistrate's conclu-

sion that McGreal had not met her burden of showing that the case lacked factual or legal merit. But the Eleventh Circuit reversed that decision in *Worldwide Primates, Inc. v. McGreal*, 26 F.3d 1092 (11th Cir. 1994), and ordered Ryskamp to impose a sanction against Worldwide. It also asked the district judge to consider whether a sanction should be imposed against Worldwide's lawyer as well.

The ruling noted damages are an essential element of a tortious interference claim under Florida law and that Florida had adopted Section 772 of the Restatement (Second) of Torts which provides that there can be no liability for interference by giving truthful information to another. The court declined to decide whether the First Amendment itself would have shielded McGreal's letter because common law protections were adequate to establish the frivolous nature of the lawsuit.

On remand, both Worldwide Primates and Bass retained separate counsel and claimed that each had misled the other. Worldwide argued that Bass should have warned it that its claim had no legal merit. Bass argued that Worldwide had led him to believe that its relationship had been harmed by McGreal's letters. Judge Ryskamp decided Worldwide and Bass each should pay a \$25,000 sanction. Worldwide chose to pay its sanction without appeal.

During oral argument of Bass's appeal to the Eleventh Circuit, Judge Rosemary Barkett, who has been the subject of recent attacks by GOP presidential candidate Bob Dole, expressed her personal view that the prosecution of the claim against McGreal amounted to "legal blackmail." She then wrote an opinion for the Court upholding the sanction against Bass and specifically rejecting his argument that reliance on his client justified his actions. Had Bass simply made a telephone call to the Louisiana research lab before filing the suit, Judge Barkett observed, Bass would have learned the case had no merit.

Bass filed a motion for rehearing on

August 5, 1996, asking the Eleventh Circuit en banc to review Judge Barkett's opinion. If the rehearing is denied, six years of litigation in Florida will be ended against McGreal who is perhaps better known as one of the defendants in a libel suit prosecuted in New York by *Immuno, A.G.*, an Austrian multi-national corporation that manufactures biologic products derived from blood plasma.

*Immuno* filed a libel action in 1984 to attack McGreal's opposition to its establishment of a research facility in Sierra Leone, West Africa for hepatitis research using chimpanzees. McGreal, through a letter to the *Journal of Medical Primatology*, claimed that the facility was designed to avoid legal restrictions against importation of chimpanzees and could decimate the wild chimpanzee population. That suit ended with not one, but two strong decisions from the New York Court of Appeals — one prior to *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695 (1990), and one after — vindicating McGreal's letter as a non-actionable expression of opinion. *Immuno A.G. v. Moor-Jankowski*, 74 NY2d 548, 549, NE2d 129, 549 NY52d 938 (1989); *Immuno A.G. v. Moor-Jankowski*, 77 NY2d 235, 567 NE2d 1270, 566 NYS2d 906 (1991)

McGreal found little satisfaction in the *Immuno* case, however, since her insurance carrier, over her strong objections, had settled the claims against her before the Court of Appeals ruled in her favor in an appeal that was prosecuted by a co-defendant, Jan Moor-Jankowski, the founder of the journal that published McGreal's letter.

Just months before the New York Court of Appeals' second *Immuno* decision, Worldwide Primates filed its tortious interference action against McGreal in Miami.

*Thomas R. Julin, Edward M. Mullins, and Denise R. Wallace of Steel Hector & Davis LLP in Miami, Florida, defended Shirley McGreal against Worldwide Primates' claim and prosecuted her Rule 11 motion.*

## INVASION OF PRIVACY CLAIM AGAINST TELEVISION TALK-SHOW DISMISSED

By Melanie E. Cohen

On June 4, 1996, the U.S. District Court for the Western District of Wisconsin dismissed on the pleadings a lawsuit that alleged invasion of privacy and infliction of emotional distress claims against Tribune Entertainment Company, the producer of *The Charles Perez Show*, a syndicated television talk-show. *Howell v. Goerdt*, 96-C-177-S (W.D. Wis. June 4, 1996) The plaintiff was a minor who had appeared as a guest on the program. When the plaintiff volunteered to appear on the show, the court held, she lost any expectation of privacy that she may have had in any "private facts" disclosed on the broadcast.

The case involved a 16-year old girl who had solicited an invitation to appear on a program addressing problems in relationships between stepmothers and stepchildren. During the taping, the plaintiff and her sister made a series of accusations against their stepmother. In response to their accusations and in an attempt to explain their troubled relationship, the stepmother read from what was alleged to be a copy of the plaintiff's police report:

[S]he has been engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud behavior . . . She's threatened or hit others . . . She's referred to herself as the biggest gangster in town . . .

The show was broadcast two weeks after the taping. During that period, the plaintiff did not object to the stepmother's reading the police report. When the plaintiff did contact the show and ask that the portion of the program with the police report be omitted, the show's representative informed her that it was too late. The show had already been aired.

In her lawsuit, the plaintiff claimed that the defendant invaded her right to privacy in violation of Wisconsin law by publicizing her juvenile record. Plaintiff

tiff alleged a violation of § 895.50, Wis. Stats, which defines the "private facts" invasion of privacy claim. She also claimed that Tribune Entertainment subjected her to intentional and negligent infliction of emotional distress.

The federal court granted Tribune Entertainment's motion for judgment on the pleadings and dismissed the complaint in its entirety. On the plaintiff's invasion of privacy claim, the court found that the show's practice was for guests to disclose personal information about themselves. Even though the plaintiff was a minor, the court said, "she should have known that private facts could be revealed." The plaintiff and her stepmother, the court found, simply followed the program's established practice.

In light of the plaintiff's voluntary appearance, the court also rejected her reliance on the fact that, in Wisconsin, juvenile records are generally confidential. The court found that "plaintiff lost her expectation of privacy in these records of which her stepmother had knowledge when she voluntarily made her private life public by appearing on the television show."

The court further found that the other statutory requirements of an invasion of privacy claim were not met. The disclosure of the facts that the stepmother learned from the police report cannot be viewed, the court said, as "highly offensive to a reasonable person of ordinary sensibilities." Nor was there any evidence, the court said, that the defendant acted unreasonably or recklessly as to whether there was a legitimate matter of public interest.

In light of its finding that the defendant did not violate the plaintiff's right to privacy, the court also found that the defendant was not negligent and dismissed the negligent infliction of emotional distress claim. The court concluded as well that the plaintiff had failed to allege facts to adequately sup-

port her intentional infliction of emotional distress claim.

Since the court concluded that the plaintiff had lost any expectation of privacy that she may have had in "private facts" by appearing on the show, it did not need to reach other issues raised by the plaintiff, including the stepmother's first amendment right to respond to her stepdaughter's accusations, and the producer's first amendment right to broadcast lawfully obtained truthful information.

The plaintiff has appealed the court's decision to the U.S. Court of Appeals for the Seventh Circuit.

*Melanie E. Cohen is with the firm LaFollette & Sinykin in Madison, Wisconsin.*

LDRC WISHES TO THANK THE FOLLOWING SUMMER INTERNS FOR THEIR CONTRIBUTIONS TO THIS MONTH'S LDRC LIBELLETTER.:

NORA FIELD  
NEIL ROSENHOUSE  
ETHAN SKERRY

## ARGUMENT HEARD IN "HIT MAN" CASE; DECISION EXPECTED SHORTLY

By Thomas B. Kelley and  
Seth D. Berlin

In March 1993, a man named James Perry murdered three people in Silver Spring, Maryland. Perry had been hired by Lawrence Horn to kill Horn's ex-wife, Mildred, and son, Trevor, so that Horn would inherit a \$1.7 settlement awarded to Trevor for medical malpractice that had left him a quadriplegic. Also murdered was Janice Saunders, Trevor's nurse. Both Horn and Perry were convicted, the former sentenced to death and the latter to life without parole. In their investigation, police learned that approximately one year prior to the murders Perry had ordered a book from the Boulder, Colorado publisher Paladin Enterprises, Inc. ("Paladin") entitled "Hit Man: A Technical Manual for Independent Contractors" ("Hit Man"). Prosecutors argued that Perry relied on the book's instructions in committing the murders.

As reported in the April LDRC LibelLetter, the victims' families have now brought wrongful death actions against Paladin and its president, Peder Lund, alleging that Hit Man aided and abetted Perry in committing the murders. The publisher has responded to the complaints by asserting that the book is protected by the First Amendment from such a charge.

### Summary Judgment Sought

To test its First Amendment defense, the publisher filed a motion for summary judgment based upon a Joint Statement of Facts. In the Joint Statement of Facts, agreed to by the parties only for purposes of the motion, it is conceded that defendants "intended and had knowledge that their publications would be used, upon receipt, by criminals and would-be criminals to plan and execute the crime of murder for hire, in the manner set forth in their publications." However, in the Joint Statement of Facts, plaintiffs concede that defendants also intended their books to be used by authors seeking information for

the purpose of writing books about crime and criminals, law enforcement officers, persons who enjoy reading accounts of crime for entertainment, persons who fantasize about committing crimes but do not thereafter commit them, and criminologists and others who study criminal methods.

### Paladin's Position

In the summary judgment motion, the publisher contends that speech that results in physical harm or causes a third party to violate the law cannot be subject to liability unless it "is directed to an audience of criminals or would-be criminals and serves no purpose beyond the commission of crime," or falls within the limited exception to the First Amendment articulated in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and its progeny.

Because Hit Man concededly was circulated to a mass audience and serves a number of purposes unrelated to the commission of crime, the publisher argues, it does not forfeit its First Amendment protection unless its content -- considered in the context in which it was publicly disseminated -- "is directed to inciting or producing imminent lawless action and is likely to produce such action."

### Plaintiff Responds

In response, plaintiffs raise a number of arguments. First, they contend that the "inciting an imminent lawless action" requirement of *Brandenburg* only applies to virulent advocacy and political protest, and thus should not provide protection to Hit Man. Alternatively, plaintiffs argue that defendants' intent in knowingly distributing the book to persons who would use it to commit murder is determinative of the *Brandenburg* inquiry (or at least that application of that test is an issue of fact for the jury to decide).

Finally, plaintiffs seek to convince the court to reject traditional First Amendment jurisprudence, which af-

fords protection unless the speech in question falls into one of a few well-recognized categories, and instead to apply, by analogy, a combination of the law of commercial speech, libel and obscenity. For example, plaintiffs argue that, if a publisher may, consistent with the First Amendment principles applicable to libel cases, be held liable for injury to a person's reputation, then a publisher should also be held liable for a person's death. Similarly, plaintiffs contend that Hit Man has no socially redeeming value and therefore, like obscenity, should not be afforded First Amendment protection.

### The Reply

In its reply, the publisher relies on the many courts that have applied the *Brandenburg* test to non-political speech to argue that there is no justification -- other than impermissible content-based discrimination -- for departing from an inquiry into whether the speech at issue falls into one of the few, clearly-defined categories of unprotected speech. The court has a constitutional duty, the publisher asserts, to apply this test in the first instance, particularly where there are no disputed issues of fact.

Moreover, Paladin also argues that its subjective intent in distributing the book is irrelevant to the *Brandenburg* inquiry; rather, the proper query is whether Hit Man, in light of its text and the circumstances in which it was disseminated, was likely to incite imminent lawless action. In applying this test, defendants point to many aspects of the work -- from its comic book-like cover to certain absurd instructions (such as not using the victim's toilet after committing a murder so fingerprints on the handle will not disclose the hitman's identity) -- that suggest that it is not meant to be taken seriously, and therefore is not likely to incite imminent lawless conduct.

Paladin also challenges the idea that a book could ever incite imminent action; rather, it argues, the very nature of

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## ABA CREATES MENTOR TEAM FOR "HIGH PROFILE TRIALS"

The American Bar Association has established a committee to provide "low-profile consultation" to judges and lawyers participating in high profile media trials. ABA President Roberta Cooper Ramo announced the formation of the group shortly after the conclusion of the O.J. Simpson trial, and has since assembled a team of 15 people to provide advice to attorneys and judges on issues relating to the media coverage of trials.

The group formally debuted in mid-July as the ABA "Resource Team for High Profile Trials." Judge William Hoeveler of the District Court for the Southern District of Florida, who presided in the trial of Manuel Noriega, is the chair.

Other members of the team are: Miami criminal defense attorney Neil Sonnett, who represented Noriega; Linda Fairstein, assistant D.A. for New York City and Chief of its Sex Crimes Prosecution Unit; Burnele Powell, dean and professor of legal ethics at the University of Missouri; O.J. defense team member Barry Scheck; Chicago criminal defense attorney Nan Nolan; Eric Holder, U.S. Attorney for DC; E. Michael McCann, Milwaukee County D.A. and prosecutor in the Jeffrey Dahmer case; Professor Geoffrey Hazard of the University of Pennsylvania Law School, an expert on legal ethics and director of the American Law Institute; Judge William Howard of the Ninth Circuit, who presided in the Susan Smith trial; and Bruce Collins, general counsel for C-SPAN, the only member of the media represented on the panel.

The group's advice will be confidential, although any party who seeks assistance is required to notify all the parties involved in the suit. According to its literature, the requesting party, be it the court itself or a party, can make public its involvement with the Resource Team, but the Resource Team will not advise the media or anyone else of the request (or even confirm that a request was made) or how it was handled.

The ABA says that the group will

maintain a position of strict neutrality at all times, and will not address the substantive legal issues of a given case. Rather, it anticipates providing practical advice on issues such as media relations, trial and jury management, court security, and cameras in the courtroom. The group has a contract with National Center for State Courts in Williamsburg, VA to establish a clearinghouse of resources including model court orders and motions. Neal Sonnett, a Miami defense attorney and member of the Resource Team, was quoted in the ABA's *Litigation News* (1996 Vol. 21, No. 4) as saying, "We will not advocate policy but will provide resources to the litigants and to the court."

Thomas Smith, director of the ABA's Criminal Justice Section in Washington, DC, will be the initial contact for those seeking the group's advice. He will then direct the query to the member or members of the team he feels can best address it. Smith says that of the five or six queries the team has handled since its inception in January, only one had come through his office. He would only reveal that it related to "an ethical problem that had to do with pre-trial publicity." The team can be contacted by phone at 202-662-1510 or via e-mail at [highprofile@attmail.com](mailto:highprofile@attmail.com).

Because the Resource Team will act in secrecy, it may be difficult to know what, if anything, the group actually does and its impact on news coverage of trials. While eschewing policy determinations, it is long on criminal lawyers and short on media representatives.

The Resource Team emphasis on acting in a confidential manner is understandable from its perspective, but it would add an unseen, unaccountable and therefore unchallengeable element to the judicial process in high profile cases. As media representatives, it is hard not to feel some concern about such a secret process.

## HIT MAN CASE

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reading a book allows for independent reflection, the antithesis of "imminent action."

Finally, defendants point to a host of other works -- from the Stephen King novel "Rage" to the film "Money Train" to rap and heavy metal music -- each of which has inspired violence by its audience, but each of which is protected by the First Amendment, to suggest that an adverse holding in this case is likely to chill the exercise of free speech in a number of areas.

### July 22 Oral Argument

On July 22nd, the Honorable Alexander Williams, Jr., of the United States District Court for the District of Maryland, Southern Division, heard oral argument on defendants' motion. While Judge Williams did not announce a ruling at the hearing, he indicated that, although he did not like the books in question, his opinion about these books could not serve as the basis for deciding whether they are protected, for if it did, he would be engaged in content discrimination. Judge Williams also indicated that he would review the books again to see if they fit into the *Brandenburg* category to decide whether they are capable of inciting. Finally, Judge Williams noted that the First Amendment protects a lot of speech that many of us might not like, unless the speech fits into three or four categories, suggesting that plaintiffs have an uphill battle. At the conclusion of the hearing Judge Williams indicated that he would issue a decision within 30 days.

*Thomas D. Kelley and Steven D. Zansberg of Faegre & Benson LLP in Denver, Colorado and Lee Levine and Seth D. Berlin of Ross, Dixon & Masback, L.L.P., in Washington, D.C. are counsel for the defendants in this case.*

## NINTH CIRCUIT UPHOLDS STATUTES THAT RESTRICT THE USE OF AUTOMATIC DIALING AND ANNOUNCING DEVICES

By Rex S. Heinke and  
Lincoln D. Bandlow

On July 2, 1996, the 9th Circuit U.S. Court of Appeals, in a 3-0 decision, held that two California statutes, which prohibit the use of Automatic Dialing and Announcing Devices ("ADADs") unless a live operator first identifies the calling party and obtains the called party's consent to listen to the pre-recorded message, do not violate the First Amendment. *Bland v. Fessler*, --- F.3d ---, 65 USLW 2055 (9th Cir. 1996). This decision comes as a further blow to those individuals who wish to use ADADs to disseminate speech.

An ADAD automatically dials a telephone number and, if a person answers the telephone and chooses to listen, it automatically plays a pre-recorded message to that person. Two California statutes, Public Utilities Code § 2874 ("PUC Statute") and Civil Code § 1770(v)(1) ("Civil Code Statute") (collectively the "Statutes"), impose a "live operator" requirement on the use of ADADs, i.e., they prohibit the delivery of pre-recorded messages by ADADs unless the message is preceded by a live operator who obtains the called party's consent before the pre-recorded message is delivered. The PUC Statute applies to all uses of ADADs (with limited exceptions), while the Civil Code only applies to commercial speech, i.e., messages that are related to the sale of goods or services.

Appellant William Bland used ADADs to generate leads for his small carpet cleaning company. In May 1994, the telephone company threatened to disconnect Bland's telephones if he did not stop using ADADs. Bland immediately stopped. Bland and appellant National Association of Telecomputer Operators ("NATO"), an organization of ADAD users, sued appellees California Public Utilities Commissioners and the California Attorney General, alleging that the Statutes violate the First Amendment. The district court upheld the

Statutes. Bland and NATO appealed.

Initially, the Ninth Circuit held that appellants did not have standing to challenge the Civil Code Statute because there was no genuine threat that the Attorney General was about to enforce it. However, on appellants' petition for rehearing, the Ninth Circuit withdrew its earlier decision and held that because the Attorney General had not stated that he would not enforce the Civil Code Statute, appellants had an actual and well-founded fear that the law would be enforced against them and thus had standing to challenge it.

The court went on to hold, however, that the Statutes do not violate the First Amendment. The court reviewed the PUC Statute under the time, place, and manner test for restrictions on speech, and held that the live operator requirement withstood this test. First, the court held that California has a significant interest in protecting the public's privacy from the annoyance and disruption of ADAD calls, whether received at home or at work and whether or not the individual is actually at the residence or office. Second, the court held that the live operator requirement was narrowly tailored to promote these interests, because it allowed telephone users to avoid ADAD messages they do not want to hear and because it prevented problems caused by unregulated ADADs (e.g., filled-up answering machines, failures to disconnect, etc.).

Third, the court held that there were no less restrictive means of accomplishing the government's objective. The court rejected appellants' argument that callers could simply place their names on a "do not call" list or screen their calls. A "do not call" list, according to the court, places the burden on the public to stop disruptive ADAD calls. Moreover, a "do not call" list forces people into making an all or nothing choice on ADAD calls, while a live operator requirement allows callers to choose call by call. Furthermore, self-

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## PRIOR RESTRAINT REJECTED

*Penthouse* magazine publishers Bob Guccione and General Media Communications, Inc. have twice thwarted efforts by "Baywatch" star Pamela Anderson Lee, and her husband, rocker Tommy Lee, to enjoin the publication of images from a copy of a home-made videotape that the Lees' claim was stolen from them earlier this year, and to strip *Penthouse* of any copies of the tape in its possession.

In *Lee v. Ingley* (Los Angeles County Superior Court Case No. BC 147283), Superior Court Judge John P. Shook denied the Lees' *ex parte* application for a temporary restraining order, which sought not only to block publication of the tape, but also an order requiring that all copies of the tape be "delivered up" to the Lees for destruction.

Relying on *New York Times Co. v. United States*, 427 U.S. 713 (1971), Judge Shook ruled that the Lees failed to make a showing sufficient to warrant the extraordinary relief of a prior restraint, notwithstanding their allegations that the videotape in *Penthouse's* possession was copied from a tape that was originally stolen from them. The court also ruled that a prior restraint was unavailable to prevent a potential invasion of privacy, even one allegedly involving highly private images, citing the California Court of Appeal's recent decision in *Gilbert v. National Enquirer, Inc.*, 43 Cal. App. 4th 1135 (1996).

Following the denial of their *ex parte* application, the Lees amended their complaint to add a civil claim for "receipt of stolen property" and for a prejudgment "writ of possession." The Lees simultaneously moved for a preliminary injunction and a writ of possession, essentially based on the same grounds as the *ex parte* application. After taking the matter under submission on August 8, 1996, Superior Court Judge Ronald M. Sohigian denied the Lees' motions in a written opinion issued the following day.

Like Judge Shook, Judge Sohigian

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## NINTH CIRCUIT UPHOLDS STATUTES THAT RESTRICT THE USE OF AUTOMATIC DIALING AND ANNOUNCING DEVICES

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help alternatives, such as screening calls and turning the ringer off when one does not wish to be interrupted, are not effective alternatives because some people cannot afford answering machines and turning the phone's ringer off forces people into isolation. Hanging up on the ADAD did not allow people to tell the caller not to call again and was not always immediately effective (although Federal law requires ADADs to disconnect within seconds of a hang up).

Finally, the court held that there were ample alternative forms of communication open to appellants, such as handbills, bill boards, magazines, newspapers, etc. The court rejected Bland's argument that these other methods had not proven to be as successful as ADADs, holding that the fact that more people can be reached more easily and cheaply is not the test.

The court then turned to the Civil Code Statute. The court held that because the Civil Code Statute regulates only commercial speech and such speech receives lesser protection than other forms of speech, it follows that if the PUC statute is constitutional, the Civil Code statute must be as well.

*Bland v. Fessler* is consistent with similar rulings upholding ADAD restrictions under the time, place, and manner or commercial speech tests. See *Moser v. FCC*, 46 F.3d 970 (9th Cir.), cert. denied, 63 U.S.L.W. 3819 (1995) (regarding federal ADAD statute); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) (regarding Minnesota ADAD statute); *State by Humphrey v. Casino Marketing*, 491 N.W.2d 882 (Minn. 1992) (regarding Minnesota ADAD statute), cert. denied, 113 S.Ct. 1648 (1993). However, there is contrary authority. See *Lysaght v. State of New Jersey*, 837 F. Supp. 646 (D.N.J. 1993) (striking down New Jersey ADAD restrictions); *Moser v. Frohmayer*, 845 P.2d 1284 (Or. 1993) (striking down

Oregon ADAD restrictions on state constitutional grounds).

*Bland* is limited in its analysis and is highly questionable in three primary areas. First, the court did not explain how the live operator requirement in any way advances the state's interest in preserving residential privacy. Any invasion of privacy occurs when the telephone rings, regardless of whether a machine or a live operator is on the other end. The court entirely ignored this point.

Second, the court's holding that a "do not call" list option is not a reasonable alternative is directly contrary to previous holdings by the U. S. Supreme Court and the Ninth Circuit that the availability of a similar option, in the context of door-to-door solicitation regulations, rendered a restriction on speech unconstitutional. See *Martin v. Struthers*, 319 U.S. 141 (1943); *Project 80's, Inc. v. Pocatello*, 942 F.2d 635 (9th Cir. 1991).

Finally, the court's holding regarding the Civil Code Statute ignored recent U.S. Supreme Court cases that have held that a regulation allegedly aimed at "commercial speech" will be evaluated under the standards applicable to fully protected speech if the purpose of the regulation is unrelated to stemming particular adverse effects of the content of the alleged "commercial" speech. See *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993).

Appellants are considering filing a cert. petition with the U.S. Supreme Court.

*Rex S. Heinke and Lincoln D. Bandlow are in the Los Angeles office of Gibson, Dunn & Crutcher LLP and represented appellants.*

## PRIOR RESTRAINT REJECTED

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relied on *New York Times Co. v. United States* and *Gilbert v. National Enquirer* to conclude that the extraordinary relief of a prior restraint was unavailable, notwithstanding plaintiffs' allegations that the tape was stolen and plaintiffs' alleged privacy and image-related interests in the tape. Judge Sohigian also ruled that plaintiffs' attempt to gain return of all copies of the tape was barred by the First Amendment, because plaintiffs actually sought to prevent publication and use of the tape, rather than return of the tape through such relief. Judge Sohigian did not rule on the underlying merits of the case.

The Lees' lawsuit stems from the alleged disappearance from their home of a videotape described in their complaint as depicting "explicit sexual and intimate relations," but described by Judge Sohigian as "made in part in settings which are not truly private." The Lees allege that the tape was stored in a safe that was stolen by construction workers who were remodeling their home. According to the complaint, a copy of the tape found its way into the hands of *Penthouse* publisher Bob Guccione, and an injunction preventing the publication of any portion of the videotape is necessary to avoid any threatened invasion of privacy. The Lees also claim that *Penthouse's* receipt and possession of a copy of the videotape constitutes conversion and receipt of stolen property, and seek the return of all copies in *Penthouse's* possession.

Bob Guccione and General Media Communications, Inc. are represented in the matter by James Grossberg, Alec M. Barinholtz, and Michele L. Lynch of Ross, Dixon & Masback, L.L.P.'s Irvine, California office.

## UPDATES:

### I. NETCOM AND SCIENTOLOGISTS SETTLE

The Church of Scientology has settled its copyright dispute with Netcom On-Line Communication Services, bringing to an end at least part of *Religious Technology Center v. Netcom On-line Communication Services Inc.*, one in the series of cases the church brought against its critics in 1995. Both the Church and Netcom have agreed not to discuss the terms of the settlement, which was reached on Friday, August 2, in San Jose, California.

The dispute between the church and Netcom arose when Dennis Erlich, formerly a church member and now a critic of Scientology, posted discussions critical of the church on a private Internet bulletin board. Netcom provides the on-line service while another named defendant operates the bulletin board. Seeking to enjoin Erlich, Netcom and the bulletin board operator, plaintiff Religious Technology Centers (RTC), a religious corpo-

ration licensed by the Church of Scientology, argued that Erlich's critical discussions made unauthorized use of the writings of L. Ron Hubbard in violation of copyright and trademark law.

Prior to settling, the church had engendered controversy by using an *ex parte* Temporary Restraining Order (TRO) against all three defendants to seize computer diskettes and other material from Erlich's home. Apparently church members also had demanded that Netcom use church-supplied software to monitor and "filter out" any messages regarding Scientology that Erlich might post.

Though Netcom and the bulletin board operator succeeded in having the TRO against them dissolved in February, 1995, Erlich remained subject to it. Judge Ronald Whyte of the Northern District of California later issued an injunction on the copyright claim against

Erlich, prohibiting him from "all unauthorized reproduction, transmission and publication of any of the works of L. Ron Hubbard that are protected under the Copyright Act of 1976." Whyte also vacated the writ of seizure that had enabled the church to take possession of Erlich's computer diskettes and materials, ordering that all materials be returned to Erlich. See *Religious Technology Center v. Netcom On-Line Communication Services, Inc., Erlich et al.* No. C 95-20091 (N.D. Cal. 1995) (For a more comprehensive discussion of the injunction, see the October 1995 LibelLetter at page 5.)

In November, 1995, Judge Whyte denied motions for Summary Judgment brought by Netcom and the bulletin board operator, but also denied RTC's motion for a preliminary injunction. 24 Med. L. Rptr. 1097 (N.D. Ca. 1995). See November 1995 issue of the *LDRC LibelLetter* at page 15.

### 2. SPJ BOARD ENDORSES NEW ETHICS CODE

On June 2, 1996, the Society of Professional Journalists ("SPJ") Board approved a draft of a revised Code of Ethics to present to its members at the SPJ's annual convention, to be held in Washington this September. The draft was submitted by the SPJ Ethics Committee. As reported in the November 1995 *LDRC LibelLetter*, the Society of Professional Journalists at its annual convention in 1995 had tabled efforts to revise its code of ethics. Among the issues on which the membership disagreed was whether or not to impose sanctions for violation of the Code. The proposed code, like the current code, does not have an enforcement clause.

The proposed code is divided into four sections. The first, *Seek Truth and Report it*, emphasizes that journalists should "be honest, fair, and courageous in gathering, reporting and interpreting information." The second, *Minimize Harm*, asks journalists to show good taste and to treat with respect those with whom they interact. The third, *Act Independently*

reminds journalists that their only obligation is to inform the public and that they should do so with vigilance. The final section, *Be Accountable*, directs journalists to admit mistakes and to encourage public discussion of journalistic conduct.

Like the code currently in force, the proposed code contains about 750 words. Key additions to the current code remind journalists to:

- Keep promises to confidential sources.
- \* Avoid undercover methods of gathering information except when other methods will not yield information vital to the public.
- \* Avoid stereotyping by race, gender, age, religion, ethnicity, geography, sexual orientation, disability, physical appearance or social status.
- \* Deny favored treatment to advertisers and special interests and resist their pressure to influence news coverage.
- \* Use special sensitivity when deal-

ing with children or other inexperienced people.

\* Be sensitive when seeking or using interviews or photographs of those affected by tragedy or grief.

Codes of ethics can impact litigation, as evidenced by the decision of the California Court of Appeal in *Khawar v. Globe*, No. BO84899 96 D.A.R. 6549 (6/5/96), reported in the June 1996 *LDRC LibelLetter*. In that case, the *Globe*, relying on allegations made by author Robert Morrow in his book *The Senator Must Die*, printed a story repeating Morrow's allegation that plaintiff was the true assassin of Robert Kennedy. In affirming the jury finding that the *Globe* was negligent in not undertaking its own investigation, the court cited violation of the ethics codes of the SPJ, as well as that of the American Society of Newspaper Editors' Statement of Principles, both of which admonish the media not to communicate unofficial charges or accusations.

## MINNESOTA SHIELD FOR REPORTER/WITNESS LIMITED

*(Continued from page 1)*

defendant proved that circumstances existed which would override the privilege.

In an unusual twist, the Supreme Court did not require that the photojournalist turn over his unpublished photographs to the defendant. The Court ruled that "nontestimonial, unpublished information, including photographs," must be reviewed by a trial court in camera before being turned over to a litigant. The balancing test the Court would require is somewhat ill-defined.

**The Ride-Along News Story**

In 1995, the *Saint Paul Pioneer Press* embarked upon a substantial project to study crime, its effects and the efforts to control it throughout the Minneapolis/St. Paul metropolitan area. As part of this study, *Pioneer Press* photographers participated in ride-alongs with police officers from various communities.

During one such ride-along, *Pioneer Press* photojournalist Chris Polydoroff was seated in the back seat of a St. Paul police cruiser during a patrol in which Steven Allen Turner was arrested for drug possession. A photograph taken by Polydoroff at the scene of the arrest was included with an article which described the arrest in question as a part of a larger story discussing more aggressive patrol and investigation techniques of the Saint Paul Police Department.

**The Subpoenas**

Turner subpoenaed Polydoroff to testify at his preliminary hearing and to produce his photographs taken at the time of the arrest. Polydoroff moved to quash the subpoena on the grounds that the defendant had not presented evidence which would set aside Polydoroff's qualified constitutional and statutory privileges against production of unpublished information and compelled testimony. Polydoroff's argument was that the defendant could not establish that Polydoroff's testimony and photographs

were relevant to the issues before the court in the preliminary hearing.

The trial court ultimately agreed with Polydoroff. The court found that Turner had not articulated a single evidentiary issue relating to his arrest about which Polydoroff had knowledge. Based on this failure of proof, the trial court found that Minnesota's statutory shield law and the qualified constitutional privilege protected Polydoroff and his photographs. Since the trial court believed that the defendant was engaging in a fishing expedition, he also found that the subpoena was burdensome and oppressive.

Turner sought a writ of prohibition from the Minnesota Court of Appeals, which rejected the defendant's petition in a two-sentence order. Amazingly enough, on this, the skimpiest of records, the Minnesota Supreme Court agreed to review the case.

**Defendant Relies on Branzburg**

From the beginning, the criminal defendant's argument was simple. The United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), had rejected arguments of reporters that they possessed a constitutional privilege against testimony in cases in which they had personally witnessed events which were central to ongoing criminal investigations. Therefore, no qualified constitutional privilege could shield Polydoroff or his photographs.

Furthermore, argued Turner, Polydoroff could not rely on Minnesota's statutory shield, because it had been construed in several decisions of the Minnesota Court of Appeals to apply only in situations where the identity of a confidential source was at stake.

**Minnesota High Court**

Several observers of the oral argument opined at its conclusion that the Court was evenly split over the question. Two justices of the seven-justice court

seemed perplexed at the assertion that reporters were different from any other citizen when called upon to testify.

One justice advanced a construction of the shield law which denied protection for any information other than that which would identify a confidential source. One justice wondered aloud why the defendant had chosen to proceed with a petition for an extraordinary writ.

The three remaining justices quizzed Turner's counsel regarding the supposed relevance of Polydoroff's testimony and/or photographs. In all, the Court displayed a distinct lack of appreciation for both the broad and fine points of the arguments supporting the existence of a reporters' privilege. Observers predicted a split or compromise decision.

**No Shield Law Privilege**

The decision in *Turner* was authored by Chief Justice A.M. (Sandy) Keith, who wrote for a unanimous Court. The Minnesota shield law was given short shrift by the Court. Written in 1973 in response to the *Branzburg* decision, the shield law contained a broad public policy provision, which stated that "the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information." Minn.Stat. §595.022.

Unfortunately, the statute was horribly drafted beyond this general statement of purpose. The drafters of the statute were focused on *Branzburg*, and specifically on its rejection of reporters' arguments that they should be able to protect the identities of their sources. Thus, the operative sections of the shield law referred specifically to protection of sources. Nonetheless, since 1973, numerous trial courts in the state were persuaded by the public policy section of the statute, and had concluded that the statute protected both the identity of confidential sources and unpublished information in the possession of the press.

Two recent decisions of the Min-

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## MINNESOTA SHIELD FOR REPORTER/WITNESS LIMITED

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nesota Court of Appeals had read the operative language of the statute so narrowly that the protection apparently afforded to unpublished information disappeared. The Supreme Court agreed with these tight constructions, finding that the statute only protected the identity of sources and unpublished information which would tend to identify "the person or means through which the information was obtained." The Court ignored the suggestion that such a reading of the operative sections of the shield law would render as meaningless a significant provision of the stated purpose of the legislation.

#### No First Amendment Privilege

The second prong of the decision related to the question whether a qualified constitutional privilege would provide any protection to a reporter who witnessed events pertaining to a criminal action. The Supreme Court answered that question with a resounding "No!"

"We concur with the majority of courts that have not excused a reporter from testifying concerning events personally witnessed simply because the witness is a reporter. In *Branzburg*, the Court explicitly rejected the reporters' argument that the government must make a preliminary showing of relevance or that the information is unavailable elsewhere before the reporter will be required to appear before the grand jury. 408 U.S. at 701. Since *Branzburg*, most courts considering the issue have agreed that the First Amendment does not protect a reporter from testifying about events personally witnessed. *United States v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977); *United States v. Criden*, 633 F.2d 346 (3rd Cir. 1980), cert. denied, 449 U.S. 1113 (1981); *In re Ziegler*, 550 F.Supp. 530, 532 (W.D.N.Y.

1982); *Dillon v. City of San Francisco*, 748 F.Supp. 722, 726 (N.D.Cal. 1990); *Bell v. City of Des Moines*, 412 N.W.2d 585, 588 (Ia. 1987)(reporter cannot use qualified privilege to testify as an eyewitness). Accordingly, we reject [the newspaper's] argument that *Polydoroff* is privileged to refuse to testify concerning the events he observed on October 11, 1995.

"In our view, the Supreme Court has declared that no qualified constitutional privilege exists under the First Amendment that would protect reporters from compelled testimony in a criminal case."

#### No State Constitutional Privilege

Having disposed of the First Amendment argument, the Court refused to construe the free speech/free press provision of the Minnesota Constitution to provide protection to reporters against forced disclosure of information, since "every citizen has a duty to appear and testify," and the "inconvenience" suffered by reporters and photographers "is no more compelling than the inconvenience suffered by any other citizen who must disrupt his or her daily activities to comply with a subpoena."

Having decided that reporters and photographers had no right to require a criminal defendant seeking their testimony to prove relevance, need and unavailability before obtaining such testimony, the Court then established a similar threshold which must be met before reporters "will be forced to disclose non-testimonial, unpublished information (i.e., written notes and photographs)." The Court felt that "concerns of overburdening the news media justify the implementation of an *in camera* procedure" before a news organization is required to disclose its information to a litigant. The *in camera* review of the information sought by the litigant is "an appropriate

means of balancing the defendant's need for evidence to support his or her claims against the public's interest in a free and independent press."

Unfortunately, the Court did not discuss, or even cite, cases which have analyzed the qualified constitutional privilege. It did cite several decisions which balanced the interest of a witness in confidentiality against a litigant's need for the information. However, none of the cases involved an interest with constitutional implications. Nor did the Court attempt to articulate the standard which the trial court should apply in performing such a balancing test.

The Minnesota Supreme Court amputated the statutory protection previously afforded to unpublished information in the hands of the press. Although it is possible that such protection could be grafted back into the statute by the Minnesota legislature, recent publicity relating to the ethical shortcomings of several legislators makes such an operation problematic.

What is most unsettling about the Court's decision is the complete lack of concern for the now vast body of case law which has established a philosophical rationale for the qualified constitutional privilege against compelled disclosure of the work product of reporters and photographers. While the actual holding of the case may be narrow in scope, the decision will likely give no great comfort to the reporter who is subpoenaed in the future to testify in a case, not because that reporter observed the events which led to the case, but because the reporter has other information the litigants believe might have some bearing on the matter. Perhaps the reporter spoke to the litigants or the witnesses. Perhaps the reporter has conducted an independent investigation into the circumstances of the case. While the holding in *Turner* does not directly support such a subpoena, the decision certainly does not establish a rationale for quashing it.

DCS member Paul R. Hannah represented the Saint Paul Pioneer Press.

## FEDERAL COURT FINDS THAT TRANSMITTING SPORTS SCORES VIA PAGER IS COMMERCIAL MISAPPROPRIATION

(Continued from page 1)

veloped a computer system program for capturing and reporting facts concerning sports games during the course of such events. This program began with coverage of major league baseball and was expanded to include statistics on NBA basketball and NFL football. STATS employs independent contractors in cities where basketball games are broadcast via television or radio. The reporters, through their own personal computers, connect with STATS' computer system and enter a program designed by STATS which permits them to record the facts of a game as they are seen or heard. The information recorded is factual and statistical; the system permitting only entry of a limited number of specific game facts. No description or expression of the game can be, or is, transmitted.

The information entered by the independent contractor reporters, after having been processed by STATS' computer, is converted to a data feed usable in the Motorola SportsTrax product (SportsTrax) and other services. SportsTrax is a portable paging device which provides the scores of on going NBA games, updated approximately every two minutes, and reported about 30 seconds after a scoring event occurs. It also permits a limited number of player and team statistics to be transmitted at half-time and game end.

In sum, STATS and Motorola reported to users of SportsTrax facts and statistics, devoid of any description or expression, after they had been broadcast into the public domain by radio and/or television.

The defendants argued that the NBA did not overcome the strong presumption against a prior restraint on freedom of speech. STATS and Motorola contended that they disseminated truthful information on a matter of public interest and, as such, fell fully within the ambit of First Amendment protection.

### The District Court Found that an Injunction Would Not Constitute a Prior Restraint

Although conceding that both entertainment and news enjoy First Amendment protection, the District Court was dismissive of the defendants' prior restraint argument. The predicate for the District Court's position was *Madsen v. Women's Health Center, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_, 114 S. Ct. 2516, 2524 n.2 (1994) wherein it found a distinction between injunctions which constitute merely literal prior restraints, in that they have incidental prospective effects on protected speech, and those which constitute unconstitutional prior restraints. This distinction the court found requires two assessments. If the injunction has content-neutral justification and does not represent an absolute bar on expression then it is not, the court found, a prior restraint. The fact that the court determined that the defendants commercially appropriated the NBA's proprietary rights in violation of New York's content-neutral common law justified the injunction.

The defendants argued that *Madsen* was distinguishable from the injunction against the reporting of facts and statistics sought by the NBA. *Madsen* resulted from a Florida state injunction restricting the conduct of anti-abortion demonstrators from interfering with the activities of a Florida abortion clinic. The injunction was violated by the demonstrators who continued to impede access and further subjected clinic personnel to protests and harassment at their homes. The Florida court widened the scope of its injunction so as to create a "buffer zone" around the clinic so as to protect patients and clinic personnel.

The Supreme Court upheld the injunction, rejecting the petitioner's position that the injunction was necessarily content based because it was addressed only to the speech of the protesters. It held that the purpose of the injunction was without reference to the content of

the regulated speech and that the state court restrictions on the petitioners were incidental to their anti-abortion message.

STATS and Motorola contrasted the Supreme Court's ruling in *Madsen* with the injunction sought by the NBA in that the remedy sought by the NBA directly referred to and depended upon the content of the regulated speech. They argued that the NBA was seeking to prohibit STATS and Motorola from reporting scores and statistics of NBA games in progress, based solely on that information's content. Unlike *Madsen*, the defendants argued, an injunction would not be directed at conduct and only "incidental" to speech, it would restrain speech precisely because of its content. Nonetheless, the Court held that the remedial purpose of New York's content-neutral common law, resulting from the misappropriation of the NBA's proprietary rights, justified injunctive relief.

In reaching its decision, the Court did not address the argument raised by STATS and Motorola that First Amendment protection is accorded the publication of truthful information on matters of substantial public concern. *The Florida Star v. B.J.F.*, 491 U.S. 524, 533-38 (1989); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-96 (1975). Nor did the Court discuss the vigorous support that timely news reporting received in *Procter & Gamble Co. v. Bankers Trust Co.*, \_\_\_ F.3d \_\_\_, 1996 WL 91135 (6th Cir., March 5, 1996).

### Taking Scores and Statistics from Copyrighted Broadcasts Held Not Copyright Infringement

The District Court rejected the NBA's claim that by taking scores and other factual statistics from copyrighted broadcasts of NBA games, the defendants committed copyright infringement of both NBA game broadcasts and NBA games. The Court had little difficulty with the claim of infringement of the broadcasts, finding that the defendants

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**FEDERAL COURT FINDS THAT TRANSMITTING SPORTS SCORES  
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game and facts from specific NBA games, both of which are beyond the realm of protectibility." The NBA's claim that copyrights in the games were infringed was rejected on the grounds that sports events such as NBA games are not "original works of authorship" falling within the subject matter of copyright. The District Court declined to follow dictum in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986), cert. denied, 480 U.S. 941 (1987), which had suggested that the performances of sports players were copyrightable.

**The District Court's Unusual Preemption Analysis**

The NBA also asserted a claim that the defendants unlawfully misappropriated the NBA's property interests in NBA games and in NBA game broadcasts in violation of New York common law. The defendants argued that this state-law misappropriation claim was preempted under section 301 of the Copyright Act. The Court found that the claim was preempted as it relates to the NBA's rights in game broadcasts, but not as it relates to the NBA's rights in the games themselves.

With respect to the game broadcasts, the District Court ruled that both elements of statutory preemption were present: the misappropriation claim sought to vindicate rights equivalent to the exclusive rights provided by the copyright act in 17 U.S.C. § 106, and the work to which the claim was directed (an audiovisual work) was within the type of work falling within the scope of federal copyright law (the "subject matter requirement"). However, having found that sports events were not within the subject matter of copyright, the District Court concluded that the NBA's claim for misappropriation of NBA games was not preempted.

The District Court was now faced

with an analytic problem. Defendants did not attend NBA games, but obtained the facts they reported from watching copyrighted television broadcasts. Defendants argued that preemption must be determined by reference to the work they used to obtain the facts, and that a claim that they copied facts from a copyrighted broadcast was unquestionably preempted. The District Court attempted to resolve this contradiction by applying an unprecedented theory of "partial preemption." It held that misappropriation of rights in a broadcast of a game necessarily also involves misappropriation of rights in the underlying game, since there would be no broadcast "but for the skill, labor, and expenditure used to create the game." Because the underlying game is not protected by copyright, the District Court held that in all such instances, the branch of the misappropriation claim addressing the game would survive preemption.

This conclusion seems to ignore the purpose of the statutory preemption doctrine, which is to "avoid the development of any vague borderline areas between State and Federal [copyright] protection." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985) (citing H.R. Rep. No. 1476, 1976 U.S.C.C.A.N. at 5746). What the defendants took, as the District Court itself acknowledged in its copyright analysis, was "the idea of an NBA game and facts from specific NBA games." The Supreme Court's decision in *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340 (1991), holds that such facts are not entitled to copyright protection even if gathered through great labor and effort by the plaintiff. The District Court's analysis appears to contradict *Feist* by extending copyright-like protection to facts as long as the facts occur as part of an event which is created by a plaintiff's labor and effort. Such protection for facts would also appear to run contrary to federal decisions

finding preempted state-law claims based on use of uncopyrightable matter embodied in a work subject to copyright, and to the doctrine expressed by the Supreme Court in the patent context, that a Congressional determination that subject matter should be in the public domain precludes the states from providing any protection to that matter.

**Use of Facts from NBA Games Is Held to Be Misappropriation of the Games**

The District Court held that defendants had engaged in unfair competition under New York law by misappropriating the "excitement and entertainment of [an NBA] game in progress" in reporting the scores from the game. It concluded that the NBA had a proprietary interest in "real-time NBA game information" (a term which it extended to include everything from a report of a score to a play-by-play broadcast) which was infringed by the defendants' transmitting "the changing scores and leads [of an NBA game] on a real-time basis" (i.e., during the game).

While mentioning the well-known decision in *International News Service v. Associated Press*, 248 U.S. 215 (1918), which prohibited one news service from copying another's "hot news" bulletins and selling that information in competition with the plaintiff, the District Court placed primary reliance on a series of old New York trial court decisions. These decisions restrained defendants from using radio broadcasts or motion pictures of a sporting event to make play-by-play broadcasts competitive with the plaintiff's own licensed broadcasts.

Defendants had argued that these cases were not applicable for three reasons: (1) they involved taking most or all of the entire exhibition, whereas SportsTrax transmitted only limited statistics about the game; (2) SportsTrax was not competitive with the NBA or its licensees, and (3) reporting newsworthy

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**FEDERAL COURT FINDS THAT TRANSMITTING SPORTS SCORES  
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licensees, and (3) reporting newsworthy facts about exhibited events is protected under the First Amendment (citing the "human cannonball case", *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977)). The District Court rejected these arguments. It found that the "quantity and contemporaneous nature" of the information carried on SportsTrax, which allowed the user to follow the general trend of the game, was commercial misappropriation; that a misappropriation claim did not require any showing of competition between plaintiff and defendants; and that SportsTrax was not akin to news coverage of a game, but was a "\$200 toy." Thus the Court enjoined defendants' misappropriation, directing defendants from transmitting via the SportsTrax device "scores, statistics, information, and/or data about any NBA game while that game is in progress ..."

**Consequences of the Decision**

If the Second Circuit does not reverse the District Court's decision on preemption and misappropriation, publishers and reporters may face significant problems in the future in reporting sports statistics and other sports news without league authorization. Most importantly, the District Court decision appears to give sports leagues and others who stage events for profit a monopoly on the reporting of any information about those events — even information as squarely factual as the score of a game. Moreover, there is no apparent time limit to this monopoly, for nothing in the District Court's decision suggests that the league's rights in game facts and statistics terminate when an NBA game is over. Those publishers who are used to treating sports news and statistics as "free" may have to revise their thinking.

In addition, the District Court's decision gives short shrift to the evolving field of the "new media." SportsTrax is

part of a current trend in which the news ordinarily found in a newspaper or broadcast is "unbundled," the facts of particular interest to the consumer are selected and transmitted through new methods of communication, such as pagers or via the Internet, and a premium price is charged for the service. The District Court's characterization of the device as a "\$200 toy" fails to recognize this movement; rather, it echoes the early days of television, which was also labeled a toy. A judicial refusal to recognize SportsTrax as a legitimate form of news reporting may pose a serious threat to those who are planning to use pagers, computers, and other new methods of bringing timely information to the public.

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## LIBELLETTER

August 1996 Section II

### *The United States Supreme Court: First Amendment Perspectives*

Last month with the LDRCL LibelLetter we included summaries of the petitions for certiorari filed with the Supreme Court during the 1995-96 Term which raise libel, privacy and related media and First Amendment issues, and their disposition. During the term, we have reported in the LDRCL LibelLetter about Supreme Court decisions on media-interesting First Amendment issues. And last month we re-published an essay by New York University Law School Professor Burt Neuborne expressing his views that this Supreme Court, while appearing as the most protective and the most responsive to

First Amendment arguments of any court in history, is, in fact, using the First Amendment to reinforce concentrations of private power over information.

We decided that it would be valuable to ask some lawyers who follow the Supreme Court for some thoughts on this Court, this Term and the First Amendment.

LDRCL asked Floyd Abrams, Terry Adamson, Bruce Ennis and Luther Munford for their views. We want to thank them all for their essays, which follow.

**BY FLOYD ABRAMS**

The Supreme Court gave proponents of press freedom a special gift this year. It declined to hear any case involving libel or privacy.

The result is that the law stays as it was -- still more protective of the press than anywhere else in the world; still filled with doctrinal weapons which lead to the dismissal of most cases at or before trial or after jury verdicts against the press; still lacking in much in the way of protection against occasionally vindictive judges and more than occasionally angry jurors.

It may seem more than a bit curious that a Court that is viewed by some as so unremittingly partial to First Amendment arguments (See Burt Neuborne's article published in these pages last month) should leave me with such a sense of relief when it leaves this body of law alone. But then, I don't share Burt's view that the First Amendment always wins in this Court. Doctrinally, for example, I view the recent Supreme Court offering in the cable indecency case (*Denver Area Educational Telecommunications Consortium, Inc. v. FCC*) as not only unsatisfying but dangerous. And I don't look forward with much confidence to what the Court is likely to offer in other areas involving "new" -- or not so old -- technology. The Internet may remain more

or less free of regulation for a while more. If it does, I'm afraid that it will only be because Congress could not restrain its natural enthusiasm to joust with the First Amendment in a manner so unmistakable that the Court simply can't overlook it. As for prior restraint law, Justice Stevens' denial of a stay to McGraw-Hill in its battles (*ultimately, but belatedly*, wholly successful) in the Sixth Circuit surely can't leave anyone with too much security about the Court's orientation.

What about libel? Most of the cases the court passed on this year were media victories, some rather expensively so. The denial of a writ from CBS' victory in the *Auvil* case (the Washington state apple growers litigation) is heartening; so was the fact that the Court left standing rules in South Carolina (*Parker v. Evening Post Publishing Co.*) and Texas (*Dolenz v. Southwest Media Corp.*) that a court dedicated to narrowing press freedoms might have found inviting.

So why am I so grateful that the Court passed on all libel and privacy cases? It's because its state of mind (to coin a felicitous phrase) about the press just isn't very affirmative. Not at all. It's because the chance of persuading this court to adopt (as op-

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posed to not reversing) *New York Times Co. v. Sullivan* is about nil. And that the chances of persuading it to expand that ruling (or to do anything it views that way) are even slighter.

How do I know? I don't. Why do I think so? Because no court -- even one less unenthusiastic about the press than this -- would likely do so. The press doesn't make everyone angry all the time. But it doesn't make anyone enthusiastic most of the time. It's reminiscent of the old story of Lyndon Johnson, beset by opposition to the war in Vietnam, turning to Dean Acheson and asking "Why doesn't the country love me?" "Because", Acheson famously explained, "you're not very loveable."

So, alas, with much the press. And with too much of it that the public and the courts think of when they hear the word "media."

I don't mean by this that significant cases involving large doctrinal issues may not still be won in

the Supreme Court. There are some libel/privacy issues which I think the Court may yet agree to review -- and which the media defendants might well win. The need for a narrowly drafted neutral reportage privilege is one. The need for some clarity as to when a corporation is a public figure is another. (The Court's denial of a writ of certiorari in the *American Cyanamid* case does not change my mind on that one.) The establishment of some potential limits on punitive (or even compensatory) awards beyond those articulated in the *Gore* case is a third.

On balance, though, I repeat my warning from above. The press may well do best if this court continues to contract the commerce clause, to expand the contract clause and to start to focus on the marvelous ambiguities of the Second Amendment.

*Floyd Abrams is with the firm Cahill Gordon & Reindel in New York City.*

## BY TERRY B. ADAMSON

In initially exploring a doctrinal analysis to this term's several important First Amendment decisions, nagging questions of a decision that may be before the Court next term kept creeping into the equation. The conjecture revolved around the decision of the Third Circuit in June (and a parallel case in New York) in the Internet case in which two provisions ("indecent" and "patently offensive" criminal provisions) of the Communications Decency Act (CDA) of 1996 were held constitutionally invalid. It thus became personally challenging, though far riskier than merely opining, to present in this brief format a view of the current body politic of the Court and its evolving First Amendment "doctrine" by venturing a prediction of the decision and variant rationales in this case when, as is likely, it reaches the Supreme Court.

A generalized overview follows: First, a number of the Justices are increasingly reflecting a libertarian view of the First Amendment. Second, many members of the Court are willing to undertake

doctrinal experimentation and a willingness, as exemplified in the area of commercial speech in *44 Liquormart v. Rhode Island*, to abandon prior formulations, although the historic themes of promoting self-government and the free market of ideas continue to dominate discussions by different routes. Third, as exemplified by the lengthy and fractured opinions in *Denver Area Educ. Telecommunications Consortium, Inc. v. FCC*, one group is extremely cautious in applying historic doctrine to new technologies; another group extols the virtue of applying prior doctrines to new communication challenges and information distribution. Fourth, each of the Justices seems determined to write at length as to his or her variant views. The latter point, the one indisputable truth, makes it even more difficult to divine a common First Amendment jurisprudence to future applications.

Thus, the Third Circuit's *American Civil Liberties Union v. Reno*, will likely be affirmed by

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## TERRY B. ADAMSON

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the Court, perhaps unanimously, in a series of individual opinions that could span the length of opinions in the *Denver* decision that upheld one portion and struck two other provisions from the Cable Television Consumer Protections and Competition Act of 1992.

In the *Denver* case, Justices Breyer's and Kennedy's opinions offer contrasting conceptions of how the Court will likely address novel First Amendment questions such as application to the Internet. Justice Breyer spoke for a plurality of four and cautiously resisted the invitation of Justices Kennedy and Ginsburg to apply established First Amendment doctrine to cable television. Rather, Justice Breyer noted that orthodox analysis may prove unworkable when applied to dynamic, novel technology. Although chided by Kennedy as "adrift," the Breyer plurality assessed each provision of the Cable Act under an ambiguous standard—putatively less demanding than strict scrutiny, yet not as lenient as some variant of heightened scrutiny. Instead of strict scrutiny, Justice Breyer spoke in terms of "close judicial scrutiny;" compelling interest was substituted for "extraordinary problem;" and "carefully tailored" replaced narrowly tailored under Breyer's provisional First Amendment doctrine for cable.

Justice Kennedy, however, was willing to subject the Cable Act to the traditional burdens of strict scrutiny analysis. Rather than offer ambiguous standards with little predictability, Justice Kennedy found existing First Amendment doctrine—namely, public forum analysis—adequate to strike as unconstitutional all three contested provisions of the Cable Act. Expressing sympathy for courts and lawyers, Justice Kennedy lamented the plurality's imprecise and potentially unprotective standard: "This is why comparisons and analogies to the other areas of first amendment case law become a responsibility, rather than the luxury the plurality considers them to be."

There are obvious and important differences between the Cable Act and the CDA, but the con-

cerns that animated Justice Breyer's and Kennedy's opinions should have considerable impact on the CDA appeal. The Internet case is unlikely to appease those seeking clarification about the standard articulated by Justice Breyer. If anything, the novelty and complexity of the Internet dwarfs the technological issues involved with cable—and portends potential applications to a multiple of issues that extend far beyond "indecency" and variously asserted governmental interests—including potential reach to issues involving libel and privacy, copyright, and potential statutory and regulatory application. Justice Breyer's cautious ad hoc approach to resolving technologies of first impression and the corresponding level of First Amendment protection is likely to continue. Indeed, in concurring with Justice Breyer, Justice Souter underscored the plurality's patience when he matter-of-factly noted that "round half-century passed before the clear and present danger of *Shenk v. United States* evolved into the modern incitement rule of *Brandenburg v. Ohio*."

If Justice Kennedy's opinion in *Denver* underscores his increasingly ardent First Amendment jurisprudence and applies it to rapidly developing new technologies and modes of communication, he will likely seek an existing doctrine most analogically similar to the Internet. He may find Judge Dalzell's Third Circuit opinion attractive. Judge Dalzell, as did Judge Sloviter, rejected assertions that the Internet regulations should be subjected to the lower scrutiny historically afforded broadcast media. Finding the Internet to be "the most participatory form of mass speech yet developed," Judge Dalzell, in a well-articulated and expansive rationale, found that the Internet "deserves the broadest possible protection from government-imposed, content-based regulation" similar to that afforded the print media. Because Justice Kennedy in *Denver* pursued definitive speech-protective standards, he and Justice Breyer will likely part ways in the doctrinal approach in striking the CDA provisions as violative of the First Amendment.

The Chief Justice may find the Breyer more

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cautious approach attractive, and thus assign writing tasks for a plurality to Breyer, who may be joined by Stevens, Souter, and O'Connor. Justice O'Connor, who frequently and lengthily scrutinizes factual context, and Kennedy most frequently occupy the decisive core center of the Court in many of its most difficult cases. Context and the consideration that any intrusion in important rights must be narrowly drawn, drive the Court as a whole. Justice Ginsburg may join Kennedy in a separate concurrence. Justices Scalia, Thomas, and probably Rehnquist, will probably concur, though it is less clear, but their emphasis in *Denver* was the First Amendment right of cable operators to ban indecent

programs. That is not present in the Internet case, but Scalia and Thomas may reflect a concern that despite ambiguous "safe harbors" as affirmative defenses, the CDA makes operators of Internet services potentially liable for indecency communicated through them by virtue of the statute's vagueness and broadness.

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**BY BRUCE J. ENNIS**

The Court issued two decisions resoundingly supportive of free speech that bolster the current Court's growing reputation as "the fiercest defender of the First Amendment in the Court's history."<sup>1</sup> In *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, the Court chose unanimously to widen the bounds of protected commercial speech by striking down a ban on advertising liquor prices -- a type of regulation the Court has refrained from overturning in the past. In *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 1996 WL 354027 (June 28, 1996), a majority found mandatory controls on indecent cable programming invalid.

Both cases generated splintered opinions, indicating somewhat more clearly which Justices prefer to approach First Amendment cases by developing and then applying a limited range of categories, and which Justices focus more specifically on the particular interests at issue and arrive at the appropriate disposition by balancing the relevant factors.

Especially in areas where strict scrutiny has been overtly or covertly found inapplicable, such as commercial speech and indecent speech, categorical analysis may be nearly as malleable as a balancing approach. Thus, particularly in those cases, the Jus-

tices' differing evaluations of the governmental and private interests involved may play a significant role in determining outcome.

*44 Liquormart* suggested that the existing boundaries of the commercial speech category may not be permanent. At least three, and likely four, Justices challenged the established definition of not-fully-protected commercial speech as any speech that merely proposes a commercial transaction. Justice Stevens, consistent with his writing in earlier cases, claimed that "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." 116 S. Ct. at 1507. Instead, he argued, commercial speech should receive less than full First Amendment protection only where there is a danger of fraud. Truthful and nonmisleading commercial speech, he wrote, should receive full First Amendment protection. Significantly, he is no longer alone in this view. He was joined by Justice Ginsburg and Justice Kennedy.

At the same time, Justice Thomas wrote separately to criticize the *Central Hudson* test as an "inherently nondeterminative . . . case-by-case bal-

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ancing 'test' unaccompanied by any categorical rules . . . ." *Id.* at 1520. Furthermore, Justice Thomas found the ban on advertising liquor prices unconstitutional on the ground that the government has no legitimate interest in keeping "legal users of a product or service ignorant in order to manipulate their choices in the marketplace." *Id.* at 1515-16. Justice Stevens, and the two Justices who joined his opinion, clearly had the same reservations, as Justice Stevens stressed that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."

Thus, whether the *Central Hudson* test is considered a categorical approach, as a number of commentators have suggested, or a balancing test, as Justice Thomas argued, there is clearly a growing restlessness about its contours. Nonetheless, the *Central Hudson* test continues to be accepted by Justice O'Connor, joined by Justices Souter, Breyer and Chief Justice Rehnquist. Justice O'Connor argued against "adoption of a new analysis for the evaluation of commercial speech regulation." *Id.* at 1522.<sup>2</sup>

The fragmented opinions in *Denver Area Consortium* showed the Justices grappling even more uncertainly with the difficulties of fashioning an appropriate approach. Here, the Justices were fragmented both in terms of analysis and outcome. Of those Justices more inclined to approach First Amendment issues by developing and applying appropriate categories, two (Justices Ginsburg and Kennedy) would have invalidated all three sections of the law; and three (Chief Justice Rehnquist, and Justices Scalia and Thomas) would have upheld all three sections. Nor were those Justices who approach such problems by identifying and balancing the relevant factors fully aligned.

Kennedy, joined by Ginsburg, lashed out at the plurality's mode of decision-making: "The opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance: it applies no standard, and by this omission loses sight

of existing First Amendment doctrine." 1996 WL 354027 at \*33. Kennedy and Ginsburg adhere to a categorical and rule-based approach - they would apply the strictest level of scrutiny to the content-based provisions at hand and strike them down. Thomas, Rehnquist, and Scalia also adhered to a categorical and rule-based approach, but found different categories applicable, explaining, for example: "[l]abeling leased access a common carrier scheme has no real First Amendment consequences." *Id.* at \*60.

Justice Souter was unwilling to establish a new category or apply an existing one, explaining: "[U]ntil a category of indecency can be defined both with reference to the new technology and with a prospect of durability, the job of the courts will be . . . [to] recogniz[e] established First Amendment interests through a close analysis . . . ." *Id.* at \*32 (Souter, J., concurring). Justice Breyer expressed the same reluctance to rely on a categorical approach in this case because "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes." *Id.* at \*10. Justices Stevens ("I am convinced that it would be unwise to take a categorical approach to the resolution of novel First Amendment questions arising in an industry as dynamic as this," *id.* at \*26 (concurring)), Souter ("in charting a course that will permit reasonable regulation in light of the values in competition, we have to accept the likelihood that the media of communication will become less categorical and more protean," *id.* at \*31 (concurring)), and O'Connor ("I agree . . . that we should not yet undertake fully to adapt our First Amendment doctrine to the new context we confront here," *id.* at \*33 (concurring in part and dissenting in part)) agreed.

Although the Justices' rhetoric portrays a battle between the categorical and balancing modes of constitutional interpretation, increasingly it may be the characterization of the interests at stake that determines outcomes. In *44 Liquormart*, whether under categorical analysis or under a balancing ap-

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proach, the Justices criticized the government's attempt to discourage alcohol consumption by banning price advertising. In *Denver Area Consortium*, Justice Breyer was criticized by defenders of the categorical approach for assessing whether the regulation "properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." 1996 WL 354027 at \*11. But the true differentiating factor was the Justices' differing evaluations of the relevant interests. Thus, Breyer maintained that "Justice Kennedy's focus on categorical analysis forced him to disregard the cable system operators' interests." *Id.* at \*13.

Although the Court's rhetoric centers around choices of an appropriate level of scrutiny, and continues to rely on categorical distinctions such as "content-based" versus "content-neutral," the opinions in both cases indicate the importance of each Justice's view of the relevant interest at stake. As Breyer explains: "most important, the effects of Congress' decision on the interests of programmers, viewers, cable operators, and children are the same whether we characterize Congress' decision as one that limits access to a public forum, discriminates in common carriage, or constrains speech because of

its content." *Id.* at 15.

It is clear from this Term's decisions that different modes of First Amendment analysis still appeal to different Justices. In the end, however, the outcome under both the categorical and balancing modes may turn largely on the Justices' differing evaluations of the importance of the various interests involved.

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#### Endnotes

1 Burt Neuborne, Pushing Free Speech Too Far, *New York Times*, July 15, 1996, at A13.

2 Within the context of *Central Hudson*, however, the Court's unanimous rejection of Rhode Island's justifications reinforces its decision in *Rubin v. Coors Brewing Company* last Term and demonstrates again that governments have no greater leeway to regulate speech concerning allegedly "socially harmful activities," *cf. Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); that the Twenty-First Amendment does not alter First Amendment scrutiny when the speech at issue concerns liquor and the restrictions are imposed by states; and — most importantly — that commercial speech restrictions must be sensible and defensible measures to pass constitutional muster. The author represented Coors in the Supreme Court.

LUTHER T. MUNFORD

It has been suggested that the better part of valor for an LDRC member is to keep news gathering and publishing cases away from the current Supreme Court. That Court, after all, is much like the one that undermined the opinion doctrine in *Milkovich v. Lorain Journal Co., et al.*, 497 U.S. 1 (1990), rejected a First Amendment defense to promissory estoppel in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and weakened the actual malice standard in *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991).

For this reason, the best news from the 1995 Term may be that there is no news on libel, privacy, access or prior restraint from the Court's 1995 mer-

its docket. The Court decided a number of important First Amendment cases, but none of them involved these doctrines that are of central concern to all gatherers and publishers of news.

The Term's First Amendment opinions nevertheless provide some food for thought for those who represent reporters and publishers. Among other things, a review of those cases, together with Justice Stevens' in-chambers opinion in *McGraw-Hill Companies, Inc. v. Proctor & Gambel Co.*, 64 U.S.L.W. 3181 (No. A-276, Sept. 21, 1995), suggests the type of case that an LDRC member might want to take to the Supreme Court: A case involv-

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ing core speech, infringed by a bright-line rule, recently invented by a state legislature or court. A few examples illustrate this point.

The Court believes in protecting core speech. For example, in *O'Hare Truck Service, Inc. v. City of Northlake*, 64 U.S.L.W. 4694 (No. 95-191, June 28, 1996) and *Board of County Commissioners v. Umbehr*, 64 U.S.L.W. 4682 (No. 94-1654, June 28, 1996), the Court extended to government contractors freedom from discrimination based on either political affiliation or political speech. Additionally, the Court in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 64 U.S.L.W. 4663 (No. 95-489, June 26, 1996), found the role of political parties to be so important as to require invalidation of Congressionally-mandated contribution limits.

The Court does not like bright-line rules. In fact, it mowed down bright-line rules wherever it found them, and substituted facts-and-circumstances constitutional tests. In *O'Hare*, for example, the Court rejected a well-understood distinction between government employees and independent contractors and substituted such defenses to claims of political bias as "rewarding good performance" and avoiding the "appearance of favoritism." *O'Hare* at 4698. A similar distaste for bright-line rules may have motivated the ruling in *Forty-four Liquor Mart, Inc. v. Rhode Island*, 64 U.S.L.W. 4313 (No. 94-1140, May 13, 1996). There the various opinions appear to have done away with the sweeping doctrine announced in *Posadas de Puerto Associates v. Tourism Co., P.R.* 478 U.S. 328 (1986), that the greater power to prohibit conduct necessarily carried with it the lesser right to regulate speech. To the extent the fractured Court agreed, it agreed that some variant of the more nuanced least-restrictive-means test found in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), is to be applied in all commercial speech cases. Also, one reading of Justice Stevens' in-chambers opinion in *McGraw-Hill* is that he thought factual analysis should temper the

absolute prohibition against prior restraint.

Finally, as shown by *Denver Area Educational Television Consortium, Inc. v. FCC*, 64 U.S.L.W. 4706 (Nos. 95-124, 95-277, June 28, 1996), novel regulation can get even Congress in trouble. Conversely, historical practice equates with constitutional virtue in the eyes of Justices Antonin Scalia and Clarence Thomas. Justice Scalia despaired that the parties in *Forty-Four Liquor Mart* had failed to brief the ban on liquor price advertising from an historical standpoint, and he dismissed the Court's expansion of First Amendment rights in *O'Hare* with the aphorism that a constitutional rule was either "a matter of history or else it is a matter of opinion." *O'Hare Truck Service, Inc.* at 4699.

One footnote of particular media interest: Justice Souter's opinion in *Denver Area Educational Television* contains the first reference in a U. S. Supreme Court opinion to the World Wide Web and the first Web site addresses. *See id.* at 4720 n.4. Whether or not one agrees with his thesis that changing technology means changing law, he illustrated his point nicely.

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