



## MEDIA LAW LETTER

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**MLRC ANNUAL DINNER**

**NOVEMBER 12, 2003**

**IN THE TRENCHES REVISITED:**

**WAR REPORTING AND THE FIRST AMENDMENT – PART II**

**MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on**

**Howard H ("Tim") Hays, Jr.,**

**former owner and publisher of the Press-Enterprise of Riverside, CA.**

**Presented by Gary B. Pruitt, Esq.,**

**Chairman of the Board, President & Chief Executive Officer of The McClatchy Company.**

***PANEL***

**Cheryl Diaz Meyer**  
**The Dallas Morning News**

**Mary Beth Sheridan**  
**The Washington Post**

**Michael Weisskopf**  
**TIME Magazine**

***MODERATED BY***

**Brian Williams**  
**NBC News**

## Judge Posner Skeptical About Reporters Privilege

By Eric S. Mattson

Breaking ranks with most Circuit Courts of Appeals, the Seventh Circuit has suggested, without quite saying so, that the First Amendment provides no special protection against subpoenas for reporters or authors. *McKevitt v. Pallasch*, Nos. 03-2753 & 03-2754, \_\_\_ F.3d \_\_\_, 2003 WL 21847712 (7th Cir. Aug. 8, 2003).

### ***Subpoena From Irish Criminal Trial***

The case arose across the ocean, in Ireland, where Michael McKevitt was being tried on terrorism-related charges. The main prosecution witness was David Rupert, the subject of a biography being written by several Chicago newspaper reporters. Seeking fodder for cross-examination, McKevitt's lawyers requested access to tapes, transcripts and notes from the reporters' interviews with Rupert.

The initial application (filed under 28 U.S.C. § 1782, which authorizes district courts to order the production of information for use in foreign proceedings) said nothing about the reporter's privilege. The lawyers initially sought *ex parte* relief, but Judge Ronald A. Guzman ordered them to give notice to the reporters. Expedited briefing and argument on the privilege issue followed.

Late in the afternoon on July 2, 2003, Judge Guzman issued his ruling. He found that the privilege had been overcome and that the reporters must produce their tapes of the interviews. Among the points considered by the judge was the fact that Rupert, the interviewee, had no objection to disclosure of the tapes.

The reporters were ordered to bring the tapes to court the next morning at 9:30. About half an hour before the deadline, the reporters sought a stay from the U.S. Court of Appeals for the Seventh Circuit. The magistrate judge who was to take custody of the tapes agreed to wait until the afternoon to see what the higher court would do. Around 10:30 a.m. – 90 minutes after the request for stay was filed – the Seventh Circuit issued an unsigned order denying the stay. It promised to give an explanation later.

On July 4, 2003, after angst and soul-searching, the reporters produced the tapes to the FBI, which was to review them for national security concerns before providing them to McKevitt's counsel. McKevitt's counsel reportedly used the tapes at trial on certain collateral issues, but McKevitt was convicted and sentenced to 20 years in prison.

### ***Posner Explains Stay Denial***

On August 8, 2003, Judge Posner, joined by Judges Manion and Rovner, explained the basis for the Seventh Circuit's denial of the request for a stay. Despite the absence of full adversarial briefing on the subject, the court suggested, without unequivocally holding, that there is no reporters' privilege. Because the tapes had been turned over, the court dismissed the appeal as moot.

The court began its analysis by reviewing *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Seventh Circuit noted that Justice Powell had joined the five-justice majority that rejected a First Amendment privilege (at least under the facts of that case), while also authoring a concurring opinion suggesting that the privilege question "should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings." Combined with other arguments, the line-up of justices in *Branzburg* has led most Courts of Appeal – "rather surprisingly," in Judge Posner's view – to conclude that there is a reporter's privilege, "though they do not agree on its scope." The Seventh Circuit is one of the few that had not opined on the subject.

### ***Skepticism Overt***

Perhaps because the issue had not been briefed, either in the district court (where the lawyers for McKevitt did not directly challenge the existence of the privilege) or in the

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## **Consumers Union Files Cert Petition in Suzuki Lawsuit**

Consumer Union, publisher of *Consumer Reports* magazine, filed a petition for certiorari to the U.S. Supreme Court seeking review of a Ninth Circuit decision that reinstated a claim for product disparagement based on a negative review of the Suzuki Samurai sports utility vehicle. *Suzuki Motor Corp. v. Consumers Union*, 292 F.3d 1192 (9th Cir. 2002), *superseded on denial of rehearing en banc by Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110 (9th Cir. 2003), *petition for cert. filed*, (August 18<sup>th</sup> 2003).

In a 1988 magazine article, and in a subsequent anniversary issue and pledge drive, *Consumer Reports* described the

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### Judge Rips Reporters Privilege

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appellate court, the Seventh Circuit did not definitively answer the question. But its skepticism was overt. From *Branzburg*, the court concluded that “the interest of the press in maintaining the confidentiality of sources is not absolute.”

As for non-confidential material, the Seventh Circuit stated that courts that allow protection in such cases “may be skating on thin ice.”

In the heart of its opinion, the court said this:

“It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other

subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.”

And the court made clear that the compelled disclosure of non-confidential information creates no problems under the First Amendment.

### Allows “Reasonable in the Circumstances” Test

What this analysis overlooks, of course, are the very concerns that the court acknowledged earlier in its opinion: “harassment, burden, using the press as an investigative arm of government, and so forth.” Even the majority opinion in *Branzburg* noted that “grand juries must operate within the limits of the First Amendment as well as the Fifth,” a sentiment that the Seventh Circuit quoted but did not take to its logical conclusion.

Still, the court held out a reed for a quasi-privilege by announcing a “reasonable in the circumstances” test. The “circumstances” could arguably include the “pivotal function of reporters to collect information for public dissemination” and the “paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.” See *Gonzales v. NBC*, 194 F.3d 29, 33 (2d Cir. 1999) (quoting *McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.)*, 680 F.2d 5 (2d Cir. 1982), and *Baker v. F. & F. Inv.*, 470 F.2d 778, 782 (2d Cir. 1972)).

The “circumstances” might also include the parties’ ability to obtain the same information from a non-journalistic source. In other words, the same factors that are now considered in assessing the journalists’ privilege might still be considered, albeit without the comforting blanket of the First Amendment.

Kathleen L. Roach and Elizabeth W. Milnikel, Sidley Austin Brown & Wood LLP, represented Pallasch and McRoberts.

Damon E. Dunn, Funkhouser Vegosen Liebman & Dunn, Ltd., represented Herguth.

Reuben L. Hedlund and Sarah Jean Deen, Hedlund & Hanley LLC, and John W. Boyd and Nancy Hollander, Freedman Boyd Daniels Hollander Goldberg & Cline P.A., represented McKevitt.

*Eric S. Mattson is with Sidley Austin Brown & Wood in Chicago, IL.*

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### Consumers Union Files Cert Petition in Suzuki Lawsuit

vehicle as “Not Acceptable” due to a propensity to roll over. In 2002, and in an amended decision in 2003, the Ninth Circuit reversed summary judgment in favor of Consumers Union, holding there was sufficient evidence of actual malice to defeat summary judgment based on evidence that Consumer Union engaged in “rigged testing,” failed to adequately investigate flaws in its testing, and, because it was in debt at the time of testing, it had a “financial motive” to publish “a blockbuster story to raise CU’s profile and increase fundraising revenues.” Over a vigorous dissent by Judge Ferguson, the court also rejected the application of the “independent examination” standard in reviewing summary judgment in a media libel case.

In a stinging dissent from a denial of rehearing en banc (on a 13-11 vote), Judge Kozinski found no direct evidence that the testing methods were flawed. “If Suzuki can get to trial on evidence this flimsy,” he wrote, “no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics.” 330 F.3d at 1121. And he concluded, “I would long hesitate before letting anyone I care about drive or ride in one of these vehicles.” *Id.* at 1123.

Consumer Union’s petition asks: 1) Whether and to what extent the “independent examination” rule of *Bose Corp. v. Consumers Union* applies to a court’s disposition of a publisher’s motion for summary judgment? 2) Whether the First Amendment permits an inference of actual malice to be drawn from (i) the publisher’s substantive and well-articulated disagreement with the government; or (ii) the publisher’s financial status?

## Missouri Supreme Court Finds Professional Hockey Player Has Right of Publicity Claim Over Comic Book Character With His Name and Identity

### *Reverses Trial Court JNOV and Remands for New Trial*

By Joseph E. Martineau

Previous issues of the *LDRC LibelLetter* (July and November 2000) reported on the case of *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc. et al.*, No. 972-9415, Div. 3 (Circuit Court for the Twenty Second Judicial Circuit, St. Louis City, Missouri). In the case, a former professional hockey player sued a comic book creator alleging misappropriation of name because a character in the comic book was named after the hockey player. In July 2000, after a two week trial, a jury awarded \$24.5 million, representing roughly 20% of the revenues the defendants had derived from the comic book and related materials. That verdict was later reversed by the trial court on a motion for judgment notwithstanding the verdict.

In July 2002, the Appellate Court for the Eastern District of Missouri affirmed the trial court's JNOV, holding that the use of the plaintiff's name in the comic book and a derivative television series was protected under the First Amendment. See *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc. et al.*, No. ED 78785 (Mo.App.E.D. July 23, 2002) ("[www.osca.state.mo.us](http://www.osca.state.mo.us)").

### *Supreme Court Overturns*

On July 29, 2003, the Missouri Supreme Court reversed the trial court's JNOV and effectively vacated the appellate court's favorable opinion. Judge Stephen Limbaugh held that the plaintiff had made a submissible case for violation of his "right of publicity."

He held further that the use of the plaintiff's name and identity was not protected under the First Amendment because evidence admitted at trial tended to show that there was a commercial purpose in using the plaintiff's identity and because that use outweighed any use for artistic or expressive purposes. *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc. et al.*, No. SC84856 (Mo. July 29, 2003), 2003 WL 21783708 ("[www.osca.state.mo.us](http://www.osca.state.mo.us)"). The court used a test which it coined the "predominant use test." The case was remanded for a new trial because of an error in instructing the jury.

### *Spawn and the Two "Tony Twists"*

In 1992, Todd McFarlane left a successful career illustrating *Spider-Man* and other comic books for Marvel Comics and started his own comic book called *Spawn*. *Spawn* is about a CIA assassin named Al Simmons, who was killed as part of a plot by his corrupt boss. Simmons went to hell, but made a deal with the devil to return to earth so he could see his wife Wanda. Instead of returning in human form, however, the devil resurrected Simmons as a Hellspawn, a ghastly being, unrecognizable from his former living self. As a Hellspawn, or *Spawn* for short, he has superhuman powers, but struggles with how to use them.

The first issue of *Spawn* was the largest selling comic book ever. Beginning with the sixth issue, a vicious, foul-mouthed mafia don appeared. Though unnamed in that issue, in later issues, the mob boss was referred to as "Antonio Twistelli" and eventually "Tony Twist." *Spawn's* extraordinary success spawned other *Spawn* related materials, including a line of toys, a movie and an adult animated series -- some of which included the Twist character.

Around the time McFarlane was starting *Spawn*, a hockey player named Tony Twist, who became known for his ability to pummel opposing players, entered the National Hockey League ("NHL"). He eventually came to play as an "enforcer"<sup>1</sup> for the *St. Louis Blues*. During the mid-90s, Twist acquired local prominence as a sports celebrity and promoter of charitable causes, as well as some national recognition as the best fighter on the ice, including prominent mention in a *Sports Illustrated* article "Fighting for a Living" and an appearance on an episode of HBO's *Real Sports*. Twist's hockey career ended in August 1999 when on the same day the Blues decided not to renew his contract, he sustained serious injuries in a motorcycle accident.

Though the subject of some dispute at trial, the jury and each court that considered the case concurred that McFarlane, an avid hockey fan, had intentionally used the name of the hockey player for the fictional mobster and that the plaintiff served as an inspiration for the comic book character. McFarlane had virtually admitted as much in an inter-

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***Doe (Tony Twist) V. TCI Cablevision of Missouri, Inc. et Al.***

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view in his own comic books and in an interview with a comic book trade magazine.

Beyond the similarity of name, the real and the *faux* Twist lacked any resemblance. They did not look alike; their professions were not the same; and they hailed from different parts of the world. In discovery, and to some extent at trial, the plaintiff tried to contend that both had similar personas as “enforcers” in their respective trades.<sup>2</sup>

***The Trial Court’s Holdings***

From the inception of the case, the defendants asserted a defense under the First Amendment and a defense that the fictional Twist was not the hockey player. Based on the argument that no person could possibly believe that the comic character actually portrayed the plaintiff, the trial court dismissed a defamation claim on “of and concerning” grounds, but allowed the misappropriation claims to proceed.

The defendants eventually raised the same defenses in a motion for summary judgment. However, the trial court rejected the First Amendment defense, characterizing it as a “knee-jerk First Amendment rationale.” Instead, the trial court ruled that, notwithstanding the First Amendment, a misappropriation claim would exist against the author of a fictional work using a celebrity’s name (i) if the name was intentionally used for the purpose of advancing the author’s economic interest *and* (ii) if an economic advantage was in fact derived *or* the celebrity suffered harm as a consequence. As to the issue of whether readers of the comic books purchased them because of the perceived relationship between the fictional character and the real life celebrity, the trial court ruled that although it was dubious, this was a fact issue for jury resolution.

In later granting the JNOV, the trial court continued to apply the same analysis. In rejecting the jury’s verdict, it held that the plaintiff had failed to make a submissible case because he failed to prove that the comic book creator used the name intending to derive a commercial advantage from such use or that he had derived economic advantage as a specific result of using the name of the hockey player.

***The Appellate Court’s Opinion***

Although the appellate court agreed with the result reached by the trial court in entering its JNOV, it rejected the

trial court’s reasoning. Unlike the trial court, the appellate court recognized the First Amendment as a formidable barrier to the plaintiff’s claims, and one that should have ended the plaintiff’s case early -- well before the \$24.5 million verdict.

***The Supreme Court’s Opinion***

The Missouri Supreme Court re-examined the ruling of the trial court that Twist failed to make a submissible case, but made no reference to the holding of the appellate court that the First Amendment protected the use of Twist’s name and identity. In reversing the JNOV, the court found that the evidence could support a violation of Twist’s right of publicity. Further, because it found that the use was predominately for commercial purposes, it was not protected under the First Amendment.

***Right of Publicity***

The supreme court described the tort of misappropriation of name as one of the four invasion of privacy torts. In turn, it recognized the right of publicity as a unique type of misappropriation claim designed “to protect a person from losing the benefit of work in creating a publicly recognizable persona.” According to the court, the required elements of proof in such a claim were (i) the defendant intentionally used the plaintiff’s name as a “symbol of his identity” (meaning that the name must be understood by the audience as referring to the plaintiff); (ii) without consent; and (iii) with the intent of deriving a *commercial* advantage.

The supreme court disagreed with the trial court ruling that Twist failed to present a submissible case that his name was used as a “symbol of his identity.” The court found that the use of the same name and the use of a similar persona of “enforcer” created “an unmistakable correlation” between the two Twists in identity. The court stated further that this element was also supported by Twist’s fame as an NHL star and by comments made to him and to his mother by hockey fans who believed that Twist was affiliated with the *Spawn* character.

The court found the same evidence sufficient to prove that McFarlane and his codefendants acted intentionally to create the impression that Twist was associated with *Spawn*, and therefore was sufficient to establish their intentional use

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***Doe (Tony Twist) V. TCI Cablevision of Missouri, Inc. et Al.***

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of the name for the purpose of advancing their commercial interests. Intentional use of Twist's name and identity to advance commercial interests was also exemplified by actions taken to market products, including the court said (with no support in the record) those with the likeness of the Twist character, directly to hockey fans. In addition, the court categorized statements that readers would continue to see current and past hockey players' names in the books as inducements to readers to continue to purchase the comic book in order to see the name of Twist and other hockey players.

***Right of Publicity and the First Amendment***

The supreme court then addressed whether the use of the name and identity was "for the purpose of communicating information or expressive ideas about that person" such as in news, entertainment and creative works, and thus protected speech under the First Amendment. The court found an expressive component to the use of Twist's name and identity based on the metaphorical reference to tough-guy "enforcers." However, it held that the literary value was sufficiently outweighed by the commercial value so as to overcome First Amendment protections. The court characterized the use of Twist's identity and name as "predominately a ploy to sell comic books and related products rather than an artistic or literary expression...." When this occurs, the court stated, "[f]ree speech must give way to the right of publicity."

***Rejects "Relatedness" & "Transformative" Tests***

The court considered and rejected the "relatedness" test of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION that provides First Amendment protection for the use of a person's identity in expressive works where the name of an identified person is not used to attract attention to that work *solely* for the purpose of obtaining a commercial benefit.<sup>3</sup>

The court also considered but did not follow the "transformative" test of California that provides First

Amendment protection when the use contains "significant expressive content other than plaintiff's mere likeness."<sup>4</sup> Both tests in practice, the court decided, stretched the application of the First Amendment by protecting *any* expressive use of a name and identity. The court said: "Though these tests purport to balance the prospective interests involved, there is no balancing at all — once use is determined to be expressive, it is protected."

The court believed that its "predominate use" test best balanced the competing interests of the property right to the commercial value of a name and identity and the right of an artist to free speech. Under that test:

If a product is being sold that predominantly exploits the commercial value of an individual's identity, that product should be held to violate the right of publicity

and not be protected by the First Amendment, even if there is some 'expressive' content in it that might qualify as 'speech' in other circumstances. If, on the other hand, the predominant purpose of the product is to make expressive comment on or about a celebrity, the

expressive values should be given greater weight.

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***The court characterized the use of Twist's identity and name as predominately a ploy to sell comic books and related products rather than an artistic or literary expression...."***

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***Instructional Error and Remand for New Trial***

The supreme court ruled that plaintiff had made a dismissible case under the standard it pronounced, and that the trial court erred in granting JNOV. However, it did hold that a new trial was appropriate given that the trial judge had failed to instruct the jury that they had to find that the defendants used the plaintiff's name "with the intent to derive" or "for the purpose of deriving" a commercial advantage. According to the court:

Although the evidence supported a finding that respondents used Twist's name and identity "with the intent to derive a commercial advantage," alternatively, the jury could have found that respondents had no intent to obtain a commercial advantage -- that there was a different purpose for using the name -- and to the extent that some advantage was obtained, it

*(Continued on page 10)*

***Doe (Tony Twist) V. TCI Cablevision of Missouri, Inc. et Al.****(Continued from page 9)*

was merely incidental. In fact, respondent McFarlane so testified in his defense, adding that the real reasons he used Twist's name were one, it's a pretty cool name, and, two, it's easy to remember, it's an easy thing -- cause I create a lot of characters, you need sort of easy ways to remember names. . . . And again . . . [with] Twist, you always sort of have a Twist ending. . . .

***Author's Analysis***

The *Twist* opinion puts Missouri at odds with the holdings in most other jurisdictions. Where an item subject to a claim of infringement of the right of publicity involves pure expression, *i.e.* an item that has no utility independent of expression (*e.g.*, a newspaper, a book, a movie, and yes even a comic book), most courts have applied a test that protects it unless the use is exclusively commercial in the First Amendment sense of commercial speech (*e.g.* an advertisement for a product or service).

The test employed by the Missouri Supreme Court -- the predominant use test -- gives too little regard to the First Amendment interests of free expression that are at stake. While the test may have viability in applying right of publicity claims to items not involving pure expression, *i.e.* items having utility independent of expression (*e.g.* coffee mugs, tee shirts, and possibly even sports trading cards as in the *Cardtoons* case<sup>5</sup>), applying such an analysis to purely expressive works creates a grave risk of severely impinging the creative energy and efforts of those who inform and entertain us. In the now legally meaningless words of the *Twist* appellate court:

To extend the right of publicity to allow a celebrity to control the use of his or her identity in a work of fiction would grant them power to suppress ideas associated with that identity, placing off-limits a useful and expressive tool. This, in turn, would effectively revoke the poetic license of those engaged in the creative process. To proscribe their right to use certain names, works, thoughts and ideas would ultimately apply to the rest of us, impeding our ability to express ourselves.

Further, the test adopted by the *Twist* court further compli-

cates an already confusing area of the law. Finally, it creates a divergent, more celebrity-favorable standard for Right of Publicity claims in the State of Missouri than elsewhere. In this regard, one must now ponder whether celebrities (*e.g.* Johnny and Edgar Winter<sup>6</sup>), who find the law in most of the country less favorable to rights of publicity claims, will now come to Missouri seeking relief which they could not get elsewhere.

John E. Bardgett, Sr., Robert D. Blitz, Thomas Avery, Clayton, James P. Holloran, St. Louis, for Appellant.

Michael A. Kahn, Peter W. Saisich, III, Geoffrey G. Gerber, Edwin D. Akers, Jr., Melanie R. King, St. Louis, for Respondents.

<sup>1</sup> According to the appellate court, "[t]he role of an 'enforcer' in hockey is to protect goal scorers from physical assaults by opponents." At trial, the plaintiff described the role of enforcer as a "policeman" on the ice. Another witness characterized the role as that of a "goon." In any event, the role is a long standing one in professional hockey, accepted and expected by many fans of the sport, even if not "officially" endorsed by the NHL.

<sup>2</sup> This vague similarity was noted by the supreme court, which also noted that the defendants "agree (perhaps to avoid a defamation claim) that the use was not a parody or other expressive comment or a fictionalized account of the real Twist."

<sup>3</sup> RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995). The comment lists examples of protected uses of a name including creative works of fiction and nonfiction produced for profit but states that "if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other's identity in advertising." *Id.*

<sup>4</sup> *Citing Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003). In *Winter*, Johnny and Edgar Winter brought suit under California's right of publicity statute regarding the use in a comic book of two villains named Johnny and Edgar Autumn. *Id.* at 476. The characters were drawn with hair and albino features similar to the musicians. *Id.* The court held that the comic books did not depict the musicians literally and were "merely part of the raw materials from which the comic books were synthesized." *Id.* at 479. Under the California rule, the court stated that a purpose to generate interest in a product and to increase sales is irrelevant to the application of protections under the First Amendment. *Id.*

<sup>5</sup> *Cardtoons v. Major League Player's Ass'n.*, 95 F3d 959 (10th Cir. 1996).

<sup>6</sup> *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003).

*Joseph E. Martineau is with Lewis, Rice & Fingersh in St. Louis, Missouri.*

## Florida Commercial Misappropriation Statute Caught in “The Perfect Storm” Eleventh Circuit Certifies Question to Florida Supreme Court

By Gregg D. Thomas

The Eleventh Circuit Court of Appeals has affirmed a portion of a federal court’s ruling in favor of Warner Bros. and other defendants in a case arising out of the motion picture “The Perfect Storm” but has asked the Florida Supreme Court to determine whether Florida’s Commercial Misappropriation statute, Section 540.08, applies to the film. *Tyne, et al. v. Time Warner Entertainment Co., L.P. d/b/a Warner Bros. Pictures, et al.*, Case No. 02-13281 (11<sup>th</sup> Cir. July 9, 2003), 2003 WL 21538654 (C.A.11 (Fla.),2003).

The Eleventh Circuit issued its ruling exactly fourteen months after a federal trial court in Orlando granted summary judgment in favor of Warner Bros. on all of Plaintiffs’ privacy and misappropriation claims.

Based upon Sebastian Junger’s best-selling book, the film concerns a massively powerful weather system that formed off the coast of Massachusetts in October 1991, and the fate of the people caught in its wake, including the crew aboard the *Andrea Gail*, a fishing vessel that was lost at sea during the storm.

The Eleventh Circuit found that the trial court properly granted summary judgment in favor of Warner Bros. on Plaintiffs’ false light claims.<sup>1</sup> Two of the Plaintiffs, daughters of the deceased captain of the *Andrea Gail*, claimed that the film portrayed their father in a false light. Recognizing that actions based upon relational rights of privacy are “heavily disfavored,” the Eleventh Circuit held that the film’s treatment of the Plaintiffs’ father was not sufficiently “egregious” to give rise to any independent violation of Plaintiffs’ own privacy rights and affirmed the trial court’s dismissal of those claims in Warner Bros.’s favor.

### Trial Court Decision

As to Plaintiffs’ statutory claims, the Eleventh Circuit sought assistance from the Florida Supreme Court in determining the extent, if any, to which Florida’s commercial misappropriation statute, Section 540.08, applies to the film. Section 540.08, Florida Statutes, prohibits the use of a person’s name or likeness “for purposes of trade or for any com-

mercial or advertising purpose” without the person’s consent. *See Fla. Stat. § 540.08(1) (2000)*. The statute also contains exemptions for news reports and presentations having current and legitimate public interest and for resale of artistic works. *See Fla. Stat. § 540.08(3) (2000)*.

The trial court held that Section 540.08 prohibits only the unauthorized use of a person’s name or likeness to “directly promote a product or service,” and that the use of Plaintiffs’ names in “The Perfect Storm,” as well as in any advertising or promotion of the film, did not constitute the direct promotion of a product or service. The trial court also held that the motion picture was entitled to First Amendment protection and would be exempted from liability under the statute’s “current and legitimate public interest” exemption.

### 11th Circuit Certifies Question

***The Eleventh Circuit expressed concern about the need for a public interest exemption in the statute if, as the trial court held, the statute applied only to the direct promotion of a product or service.***

The Eleventh Circuit expressed concern about the need for a public interest exemption in the statute if, as the trial court held, the statute applied only to the direct promotion of a product or service. As a result, the Eleventh Circuit certified the following question to the Florida

Supreme Court: “To what extent does Section 540.08 apply to the facts of this case?”

The Plaintiffs have filed their brief on this certified question in the Florida Supreme Court. Warner Bros.’s brief is due late August. Both sides anticipate support from several amicus curiae. Oral argument likely will occur in late fall.

Stephen J. Calvacca, Orlando, FL, W. Edward McLeod, Winter Park, FL, Jon L. Mills, Gainesville, FL, represented the Plaintiffs-Appellants.

*Gregg D. Thomas is a partner in the Tampa office of Holland & Knight LLP. Along with partner James J. McGuire and associate Deanna K. Shullman, Holland & Knight LLP represented all three defendants, Time Warner Entertainment Co., L.P., d/b/a Warner Bros. Pictures, Baltimore/Spring Creek Pictures, L.L.C., and Radiant Productions, Inc.*

<sup>1</sup> Plaintiffs did not appeal the trial court’s adverse ruling on their publication of private facts claims.

## UPDATE: Michigan Supreme Court Will Not Review Court of Appeals Ruling in Jenny Jones Case

The Michigan Supreme Court determined that there were no questions presented in need of review in the case brought by the family of a man shot by a fellow guest on the Jenny Jones Show. See <http://www.tvweek.com/news/web72203.html>.

Last October, the Michigan State Court of Appeals held that Jenny Jones and Warner Brothers owed no duty to one-time guests for the behavior of other one-time guests after the show and away from the studio. *Graves, et al. v. Warner Bros., et al.*, 253 Mich.App. 486 (2002), 666 N.W.2d 665.

Jonathan Schmitz had been invited as a guest on the Jenny Jones Show, “during which defendant [Schmitz] was surprised by [Scott] Amedure’s revelation that he had a secret crush on him. After the taping, defendant [Schmitz] told many friends and acquaintances that he was quite embarrassed and humiliated by the experience and began a drinking binge.” *Id.* at 488, citing *People v. Schmitz*, 231 Mich.App. 521, 523 (1998).

Upon finding a “sexually suggestive note from Amedure on his front door,” Schmitz purchased a shotgun and ammunition, “drove to Amedure’s trailer, where he confronted Amedure about the note. When Amedure just smiled at him, defendant walked out of the trailer... retrieved his shotgun and...fired two shots into Amedure’s chest, leaving him with no chance for survival.” *Id.* at 488-489, citing *People v. Schmitz*, 231 Mich.App. 521, 523 (1998). In the criminal case, Schmitz was convicted of second-degree murder. See *People v. Schmitz*, 231 Mich.App. 521 (1998).

Amedure’s survivors brought this civil action against Warner Brothers, believing that it had some liability and responsibility in Schmitz’s murder of Amedure – arguing that it would not have occurred but for the show. At the trial, the jury had found in plaintiffs’ favor and a judgment of \$29,332,686 was entered.

The Michigan State Court of Appeals reversed and remanded, noting that there is only a duty obligating a person to aid or protect another when there is a special relationship between the parties. Finding no special relationship at the time of the murder, the Court of Appeals said: “Logic compels the conclusion that defendants in this case had no duty to anticipate and prevent

the act of murder committed by Schmitz three days after leaving defendants’ studio and hundreds of miles away” *Graves*, 253 Mich.App. at 497.

The Michigan Supreme Court has now let the Court of Appeals ruling stand.

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## Second Circuit Holds That Statements Made In Dispute Over Authenticity Of Art Are Not Commercial Speech Covered By The Lanham Act

By Edward H. Rosenthal

In the recent case of *Boule v. Hutton*, 328 F.3d 84 (2d Cir. 2003), the Second Circuit declined to extend the availability of the Lanham Act to claims for false representation outside the context of mainstream commercial advertising. Judge Cote ruled that statements concerning the authenticity of works of art were not commercial speech within the purview of the Lanham Act. At the same time, however, the Court left open the possibility that statements made to reporters about a matter of public interest could constitute deceptive practices under New York's General Business Law or unfair competition by disparagement.

The facts of the case, as well as its procedural history, are complicated. There have been three lengthy District Court opinions, one following a bench trial, as well as the above-cited decision by the Court of Appeals. After more than five years of litigation, the plaintiffs have been awarded about \$7,000, but the case still may not be over, given the remand to the District Court for further proceedings on several of the plaintiffs' legal theories.

### Background

Plaintiffs Claude and René Boule are French art collectors with a specialty in Russian Constructivism. Neither are professional art dealers. Claude is an art historian and René is a retired dentist.

In the early 1980s, the Boules purchased 176 paintings attributed to a Russian painter named Lazar Khidekel ("Lazar") from a Russian art dealer. Given the severe restrictions at that time on the acquisition and exportation of Russian avant-garde art, the Boules were unable to obtain the provenance of the paintings, and did not take steps to confirm their authenticity.

Between 1988 and 1991, the Boules became acquainted with Lazar's son and daughter-in-law, Mark and Regina Khidekel. At one point, the Boules and Mark and Regina agreed to present a joint exhibition of their respective collections of Lazar's works. Later, when the Boules announced plans for an exhibition of Lazar's works in Montreal, Mark and Regina expressed strong

interest in attending and participating in the show.

In 1991, Mark agreed to sign certificates of authenticity of Lazar's works for the Boules. For this service, Mark charged 2,500 FF for each certificate. Because Mark insisted on being paid in cash (he said he did not have a checking account) and the Boules only had 40,000 FF on hand, Mark signed certificates for only 16 of the works. Each certificate was signed after careful examination by Mark, and most included the statement: "I, Mark Khidekel, having examined the artwork shown to me measuring . . . , hereby confirm that it is the work of my father, Lazar Khidekel, and that it can be identified as a study." Mark later denied having signed the certificates, testimony which the District Court rejected, concluding that Mark had lied under oath on this subject.

While Mark and Regina did not end up participating in the exhibitions of Lazar's works held in different galleries in Canada during 1992 and 1993, they did not at that time question the authenticity of the works shown.

### Hutton Galleries

By the mid-1990s, Mark and Regina were offering some of their paintings through the Hutton Galleries in New York. A few paintings were sold. During this time, Mark, Regina and Ingrid Hutton made a number of statements that impugned the authenticity of the Boules' collection. The statements which are at the heart of most of the Boule's claims fall into four main categories:

- **Verbal Statements.** On several occasions Ingrid Hutton made statements to individual curators and dealers verbally questioning the authenticity of certain of Lazar's works in the Boule's collection.
- **Catalog Statement.** The 1995 Hutton Galleries Catalog accompanying the showing of Lazar's works owned by Mark and Regina included the statement: "We present for the first time anywhere the works of Lazar Markovich Khidekel." The catalog also stated that neither Mark nor his family had ever sold or parted with any of his works.

(Continued on page 14)

## Statements Over Art Are Not Covered By Lanham Act

(Continued from page 13)

- **Repudiation Letter.** Mark, Regina and Ingrid Hutton sent a letter under the letterhead of Hutton Galleries to at least 25 museums specifically repudiating the catalog of the 1992 exhibit of Lazar's works in Montreal
- **Statements to Reporters.** In a 13-page article in *ARTnews* on the general topic of incorrectly attributed Russian works, Mark and Regina are quoted as saying that the Boule works had nothing to do with Lazar, and that neither Lazar nor his family ever sold or parted with any of his works. Moreover, Mark and Regina claimed that they had told the Boules that the works were not authentic. In an article published by a Montreal publication *Le Devoir*, Regina denied that Mark signed the certificates of authenticity and is quoted as saying: "I am categorical: these works are not by [Lazar]."

### The Lawsuit

In 1997, the Boules commenced litigation against Mark and Regina as well as against the art dealer, Ingrid Hutton, and Leonard Hutton Galleries. The main thrust of the complaint was that the defendants had violated Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(b), by promoting the sale of their works at the Leonard Hutton Galleries by falsely disparaging the authenticity of the Boules' collection. The Boules also brought a panoply of state law claims including, among others, claims for defamation, common law unfair competition by disparagement, deceptive practices under New York's General Business Law, and breach of contract (arising from Mark's repudiation of the certificates of authenticity).

### The District Court Proceedings

Defendants moved for summary judgment dismissing the Boules' claims under the Lanham Act, arguing among other things that the Boules lacked standing to bring these claims and that the statements were not made in commercial advertising and/or were not representations of fact within the meaning of the Lanham Act. In October 1999, the District Court granted summary judgment dismissing the Boules' Lanham Act claim with the exception of the claim based on the catalog statement. *Boule v. Hutton*, 70 F. Supp. 3d 378 (S.D.N.Y. 1999) (Cedarbaum, J.).

The District Court first held that while the Boules were not traditional commercial entities, they had sufficient economic interest to have standing to sue under the Lanham Act. Then, after holding that there was sufficient commercial activity in the United States or impact on interstate commerce to justify application of the Lanham Act, the Court proceeded to analyze each of the statements.

With respect to the Verbal Statements, the court, citing the District Court's opinion in *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 942 F. Supp. 209 (S.D.N.Y. 1996), *affirmed*, 314 F.3d 48 (2d Cir. 2002), held that the alleged statements by Hutton to various individuals were "reactive" rather than "proactive" and therefore, could not be considered commercial advertising or promotion under the Lanham Act. Similarly, the District Court dismissed as merely reactive the claims based upon the statements to *ARTnews*.

The Lanham Act claims with respect to the Repudiation Letter were dismissed on the ground that plaintiffs had not provided any evidence that this document would be understood by recipients as making any representations of fact concerning the nature, quality or characteristics of any goods or services. The District Court did, however, sustain the Lanham Act claim based upon the statements in the Catalog that this was the first time any of Lazar's works were available.

### The Trial

In 2000, a bench trial was held on the Boules' remaining Lanham Act claim and their state law claims. The District Court held that while the Boules had established that Mark and Regina had endorsed the authenticity of the Boules' collection, the Boules had failed to prove that the works were in fact authentic. *Boule v. Hutton*, 138 F. Supp. 2d 491 (S.D.N.Y. 2001). On this critical issue, the District Court found that the evidence as to authenticity was in "equipoise." As a result, because it found that falsity is an essential element of the Boules (remaining) Lanham Act as well as the claims under New York's General Business Law, product disparagement and unfair competition, the Boules could not carry their burden of proof.

(Continued on page 15)

### Statements Over Art Are Not Covered By Lanham Act

(Continued from page 14)

With respect to the defamation claims, the District Court ruled that the failure to prove authenticity of the works precluded the Boules from prevailing. But plaintiffs did prove the falsity of the statement by Mark and Regina in *ARTnews* that they had initially informed the Boules that the works were not authentic as well as the statements in *Le Devoir* denying that Mark signed certificates of authenticity.

Since the Boules could not prove special damages with respect to these statements, in order to recover they had to show that the statements were defamatory per se. On this issue, the District Court held that because the Boules were not professional art dealers, but only collectors, they could not claim damage to their professional reputation as dealers. But because Claude was an art historian and writer in the field of Russian avant-garde art, statements which implied that she continued to allow her works to be displayed despite having been informed that they were not authentic could be presumed to injure her reputation. The District Court found for Claude on the defamation claim and awarded her nominal damages of ten dollars.

The District Court further determined that Mark had breached his contract to furnish certificates of authenticity when he repudiated the authenticity of the Boules' collection. Applying a theory of restitution damages, the District Court awarded the Boules the amount (40,000 FF, or just over \$7,000) that they had paid to Mark for the certificates. A motion to reopen the case based on new evidence on the issue of authenticity was denied, *Boule v. Hutton*, 170 F. Supp. 2d 441 (S.D.N.Y. 2001).

### Court of Appeals: Defining Commercial Advertising & Promotion

Not surprisingly, the Boules appealed. With respect to the Lanham Act claims, plaintiffs only appealed the dismissal of the statements in *ARTnews* and in the Repudiation Letter. As for the *ARTnews* statements, the Court of Appeals affirmed the District Court's grant of summary judgment dismissing the Boules' Lanham Act claim. The Court

applied the three-part test for determining whether given statements constitute commercial advertising or promotion set forth in its 2002 decision in *Fashion Boutique of Short Hills, Inc. v. Fendi USA, Inc.*, 314 F.3d 48, 56-58 (2d Cir. 2002). The statement must:

- 1) constitute commercial speech;
- 2) made for the purpose of influencing consumers to buy defendant's goods or services; and
- 3) while the statements need not be part of a classic advertising campaign, they must be disseminated sufficiently to the relevant purchasing public. Because it found that the Boules and Mark and Regina were competitors in the sale of Lazar's art, the Court of Appeals did not need to reach the issue, also avoided in *Fendi*, as to whether the Lanham Act requires that the opposing parties be competitors.

The Court of Appeals held that the plaintiffs had offered sufficient evidence to meet the second and third prongs of this test. They had introduced evidence that defendants intended to influence customers to buy their own collection of Lazar's

paintings and that they expected their statements to *ARTnews* to be disseminated to virtually every important dealer of Russian Supremacist art.

But the Court of Appeals held that the statements made by defendants and quoted in *ARTnews* were not commercial speech. The Court held that because the statements were "inextricably intertwined" with the coverage of an issue of public concern – fraud in the art market – they were fully protected by the First Amendment and therefore not within the purview of the Lanham Act.

Significantly, in a concurring opinion, Judge Calabresi noted that in *Fashion Boutique*, the Second Circuit had held that the test for "commercial advertising or promotion" under the Lanham Act is the same as the definition of "commercial speech" for purposes of First Amendment analysis. Judge Calabresi raised the possibility that this ruling could be called into question by the Supreme Court in the then-pending case of *Nike, Inc. v.*

(Continued on page 16)

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**Because the statements were  
"inextricably intertwined" with the  
coverage of an issue of public concern – fraud in the art market – they  
were fully protected by the First  
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the purview of the Lanham Act.**

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### Statements Over Art Are Not Covered By Lanham Act

*(Continued from page 15)*

*Kasky* (the writ of certiorari later dismissed by the Supreme Court as improvidently granted)

With respect to the statements in the Repudiation Letter, the Court of Appeals disagreed with the analysis by the District Court and determined that the Boules had raised triable issues of fact as to whether the statements would be appreciated as representations of fact. But it proceeded to hold that because the District Court had properly found that the evidence on the issue as to whether the paintings were authentic as in equipoise, the Boules could not, as a matter of law, establish that the statements were false thus dooming this particular Lanham Act claim.

### State Law Claims

The Court of Appeals did disagree with the District Court's denial of the Boule's claims under Section 349 of the General Business Law and under New York's common law of unfair competition by disparagement. With respect to certain of these claims, the Court of Appeals held that the Boules did not need to establish the authenticity of Lazar's works in order to prevail. For example, the District Court had ruled that the statements made to *ARTnews* and *Le Devoir* about Mark's purportedly not having signed the certificates were false. The Court of Appeals remanded to the District Court the question whether these false statements would constitute a violation of Section 349 or unfair competition by disparagement. The Court of Appeals further held that a claim under Section 349 was available not only to a consumer, but also to a competitor who could prove that a given statement was likely to mislead a reasonable consumer.

### Conclusion

Where does this leave us? Both the District Court and the Court of Appeals refused to permit use of the Lanham Act as a vehicle for pursuing claims involving false statements far outside of the normal bounds of commercial advertising and promotion. Nonetheless, plaintiffs were permitted to pursue alternative claims for many of these same

statements under various common law theories, including defamation, deceptive business practices, and unfair competition by disparagement. And while plaintiffs were unable to obtain significant damages after a bench trial, it is not at all clear that a jury would have been as reluctant to award substantial damages, particularly if it felt the way Judge Cedarbaum did, that Mark had lied under oath when he testified that he did not sign the certificates of authenticity.

Finally, Judge Calabresi's concurrence presents a warning as to what might have happened had the Supreme Court reached the merits of and affirmed the lower court decision in *Nike, Inc. v. Kasky*. A holding now or at some future time that expands the definition of commercial speech to include statements which are reactive or otherwise not specifically intended to promote the sale of goods or services could greatly expand the reach of the Lanham Act.

Gerald A. Rosenberg, Katten, Muchin, Zavis & Rosenman, New York City, represented the Boules.

Martin R. Gold, (Robert P. Mulvey, on the brief) Rubin-Bau, LLP, New York City, represented Ingrid Hutton and Leonard Hutton Galleries, Inc.

Anastasios Sarikas, Astoria, NY, represented Mark Khidekel and Regina Khidekel.

*Edward H. Rosenthal is with Frankfurt Kurnit Klein & Selz, P.C. in New York City.*

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***The Court of Appeals further held that a claim under Section 349 was available not only to a consumer, but also to a competitor who could prove that a given statement was likely to mislead a reasonable consumer.***

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***MLRC would like to thank summer interns — Kelly C. Aldrich, University of Washington School of Law, Class of 2004, Anastasia B. Heeger, Brooklyn Law School, Class of 2004, Carter Nelsen, University of Michigan Law School, Class of 2005 and Lauren Perlcut, Columbia University School of Law, Class of 2005 for their contributions to this month's MLRC MediaLawLetter.***



## Kentucky Jury Deadlocks, and Mistrial in Libel Case Is Declared

By Trina R. Hunn

A federal court jury in Covington, Kentucky deadlocked during deliberations in a libel action brought by a local college professor, Clinton G. Hewan, against Fox News Network, LLC. After the jury deliberated over four days, Judge David Bunning of the United States District Court for the Eastern District of Kentucky declared a mistrial. *Hewan v. Fox News Network LLC*, 01-125.

### *Prof's Comments Provoke Controversy*

Hewan commenced his action against Fox News in June 2001. Hewan claimed that he had been defamed by the publication of a news article on the Fox News website, Foxnews.com, titled "Prof's Kill-a-Cop Comments Prompt Outcry at College Near Cincinnati." The article reported on statements that Hewan allegedly made at a student forum on race relations on the campus of Northern Kentucky University ("NKU") in April 2001. The forum took place shortly after the shooting of an unarmed black man by a police officer in Cincinnati, Ohio – an incident that caused riots and civil unrest in downtown Cincinnati (just minutes from the NKU campus).

As first reported by the NKU student newspaper, *The Northerner*, Hewan spoke at the student forum on the topic of the recent shooting and riots in Cincinnati. His remarks were reported as follows:

'I do not advocate any violence as an initiate,' he said. 'But in the case of willful murder, the family should go out and get that policeman.'

Hewan said the family of Timothy Thomas, as an acceptable way to stand up for themselves, should 'quietly stalk that S.O.B. and take him out.'

Hewan's statements at the Forum, as reported in *The Northerner*, created a controversy both on the NKU campus and beyond. His statements were reported widely by many media outlets, including The Associated Press, *The Cincinnati Enquirer* and other local newspapers. The statements were also covered by the local television stations in the Cincinnati and Covington areas, and they were disseminated over the Internet.

Seven days after *The Northerner* article appeared, Fox News reported on the controversy in its article which included comments from the plaintiff's attorney and from the NKU administration.

### *Professor Denies Comments*

In Hewan's action against Fox News, Hewan claimed that he had not said the words as reported by *The Northerner*. Hewan also complained that the headline and the lead paragraph in the Fox News article defamed him. The lead paragraph in the Fox News article characterized Hewan's comments as a call for "deadly vigilante justice."

(Continued on page 18)

## Supreme Court in Minnesota: Plaintiff Can be Public Figure for One Defendant but Not the Other

In an analysis based upon an unduly narrow definition of public figure, the Minnesota Supreme Court found that plaintiff Gus Chafoulias, local "businessman and community leader who has achieved success as a local real estate developer," was a public figure for purposes of the ABC News report on sexual harassment in one of his hotels, but was not necessarily a public figure for purposes of the attorney for the women who sued him and his business. *Chafoulias v. Peterson*, C2-01-1617 (August 14, 2003).

The opinion, written by Justice Hanson, with a dissent by Justice R.A. Anderson (joined by Justice Gilbert), affirmed the grant of summary judgment to ABC finding that there was insufficient evidence of actual malice. As to Lori Peterson, a source for the ABC broadcast and for reports by other local media, who actively publicized the claims against Mr. Chafoulias, the Supreme Court sent the matter back for further findings on issues related first to the public figure finding. Key: whether Peterson created the controversy that enveloped Chafoulias or whether he injected himself into it.

A further discussion of this decision will be found in the September issue of the MLRC MediaLawLetter.

## Kentucky Jury Deadlocks, and Mistrial Is Declared

*(Continued from page 17)*

Prior to trial, the court denied in part Fox News's motion for summary judgment. The court ruled that Hewan was neither a limited purpose public figure nor a public official. However, the court did dismiss the plaintiff's claim for false light invasion of privacy. Under Kentucky law, to recover on such a claim, the plaintiff must prove constitutional malice. The court determined that there was insufficient evidence as a matter of law of constitutional malice. The effect of the ruling precluded a claim by plaintiff for punitive damages on his libel cause of action.

### *Witnesses Pro and Con*

During the trial, Fox News called several witnesses who confirmed that Hewan had said the words as reported by Fox News, including the student reporter who initially reported Hewan's statements in *The Northerner*, the University President (who investigated the statements), the Dean of Students at NKU (an eyewitness), and the Vice President of Student Affairs at NKU (another eyewitness). Hewan's supervisor, the Dean of the College of Arts and Sciences at NKU, also testified that Hewan admitted to her that he had said the words reported in *The Northerner* the day after the article was published. The Fox News reporter, Nick Schulz, also testified concerning the steps that he took to research and write the Fox News article.

Hewan called as witnesses five students who were members of the student organization that sponsored the forum on race relations. They testified that Hewan had not said the precise words as reported in *The Northerner*. Their accounts of Hewan's actual statements, however, varied significantly, and one of the student witnesses admitted that Hewan said the words reported in *The Northerner*, although he said that the words were reported "out of context." Hewan also called three reputational witnesses to testify on his behalf.

### *Jury Questionnaire*

After hearing all of the testimony in the action over five days, the eight jurors were asked to determine four special interrogatories (1) whether the Fox News article was defamatory; (2) whether the Fox News article was substantially true; (3) whether Fox News published the article negligently; and (4) whether the Fox News article harmed the

plaintiff's reputation. (In the event that the jury decided unanimously in favor of the plaintiff on all four questions, it could award plaintiff compensatory damages.)

The jury began its deliberations on the afternoon of July 21, 2003 and continued to deliberate until the afternoon of July 24, 2003. Judge Bunning asked Hewan's counsel if he would stipulate to a less than unanimous verdict pursuant to Rule 48 of the Federal Rules of Civil Procedure. The counsel refused. Judge Bunning then asked the jurors whether they would be able to reach a unanimous verdict if given additional time to deliberate. The jurors responded that they were deadlocked, and Judge Bunning thereupon declared a mistrial.

The Court will soon set a date for the retrial. In the meantime, Fox News has asked Judge Bunning to certify for immediate appeal to the U.S. Court of Appeals for the Sixth Circuit (pursuant to 28 U.S.C. § 1292(b)) the issue of Hewan's status as a limited purpose public figure. If the Court certifies the issue and the Sixth Circuit accepts the appeal, a favorable decision on the appeal would eliminate any retrial because the District Court has already found the absence of constitutional malice as a matter of law.

Trial Counsel for Fox News were Slade R. Metcalf, Trina R. Hunn, and Jason Conti of Hogan & Hartson L.L.P., New York City, and Mark D. Guilfoyle of Deters, Benzinger & LaVelle, P.S. of Covington, Kentucky. Trial Counsel for plaintiff Clinton G. Hewan were Marc D. Mezibov and Christian Jenkins of Sirkin, Pinales, Mezibov & Schwartz LLP of Cincinnati, Ohio.

*Trina Hunn is an associate with the firm of Hogan & Hartson L.L.P. in New York City.*

#### ***Any developments you think other MLRC members should know about?***

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## Courts Continue Trend Toward Limiting Personal Jurisdiction In Internet Cases

### *Fourth Circuit and New York Federal District Court Follow Reasoning of Young v. New Haven Advocate*

By Robert D. Lystad

In July, both the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the Southern District of New York followed the reasoning of the Fourth Circuit's decision in *Young v. New Haven Advocate*, 315 F.3d 256, 262 (4th Cir. 2002), in holding that maintaining jurisdiction based on an out-of-state defendant's Internet activity requires that the activity be intentionally targeted at or directed to the forum state.

The Fourth Circuit decision of *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers*, 2003 U.S. App. LEXIS 13443 (4th Cir. July 2, 2003), 334 F.3d 390 (C.A.4 (Md.), 2003) affirmed the dismissal of a trademark infringement action for lack of personal jurisdiction. The court de-

termined that the plaintiff, a Maryland corporation, could not satisfy its burden to establish jurisdiction in Maryland over the defendant, a Chicago corporation, based solely on the fact that the defendant's website was accessible in Maryland and that the defendant maintained a business relationship with a Maryland-based web hosting company.

In *Realuyo v. Villa Abrille*, 2003 U.S. Dist. LEXIS 11529, 2003 WL 21537754 (S.D.N.Y. July 8, 2003), the Southern District held that it could not assert personal jurisdiction in a libel action over the defendants, all residents of or corporations in the Philippines, based merely on the posting of an article that allegedly defamed a New Jersey resident who practiced law in New York. The court found that publication on the Internet alone was insufficient to assert jurisdiction because there was "no prima facie showing that the defendant[s] posting was directed towards the potential New York audience so as to defame the plaintiff in the forum state." *Realuyo*, 2003 U.S. Dist. LEXIS 11529 at \*31 (citing *Young*, 315 F.3d at 263).

When it issued its *Young* decision in December 2002, the Fourth Circuit became the first federal appeals court to hold that the fact that allegedly defamatory information is accessible in a specific geographic location via the Internet is not by itself sufficient to support jurisdiction against out-of-state defendants. Mere weeks after the *Young* decision was issued, the Fifth Circuit held similarly in *Revell v. Lidov*, 317 F.3d 467, 475-76 (5th Cir. 2002), concluding that in order to establish specific jurisdiction in an Internet defamation case, a plaintiff must have knowledge of the particu-

lar forum in which the plaintiff's reputation will be harmed, and the allegedly defamatory article or its sources must in some way connect with the forum state.

The decisions in *Carefirst* and *Realuyo* signal that the trend that began with *Young* and *Revell* is con-

tinuing, paving the way toward establishing more definitive, consistent answers to jurisdictional questions in Internet-related cases.

#### ***Carefirst: The District Court Decision***

Carefirst of Maryland ("Carefirst"), one of the country's largest health care insurance companies, is incorporated in and has its principal place of business in Maryland. Carefirst brought suit in the U.S. District Court for the District of Maryland, alleging infringement and dilution of its trademark by Chicago-based Carefirst Pregnancy Centers ("CPC"), a non-profit, evangelical pro-life advocacy organization, which has its principal place of business in Illinois. Carefirst alleged that CPC selected the name "Carefirst" despite having notice of both Carefirst's federal registrations for the "Carefirst" name as well as its common law use of the name.

*(Continued on page 20)*

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***The decisions in Carefirst and Realuyo signal that the trend that began with Young and Revell is continuing, paving the way toward establishing more definitive, consistent answers to jurisdictional questions in Internet-related cases.***

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## Personal Jurisdiction In Internet Cases

(Continued from page 19)

By the time the suit was filed, CPC had entered into a contract with a web hosting and development company, NetImpact, Inc., incorporated in Delaware and headquartered in Maryland, from which CPC purchased several Internet domain names used to direct Internet users to CPC's own website. Carefirst also named NetImpact as a defendant in its suit.

In granting CPC's motion to dismiss for lack of personal jurisdiction, District Judge Catherine C. Blake found that CPC operated primarily in Chicago; had no office, telephone listing, employees, agents or sales representatives in Maryland; had never directly solicited funds from Maryland residents; and had received minimal charitable contributions from Maryland residents, nearly all of which had been received by mail rather than via CPC's website. Thus CPC's sole contact with Maryland, the court found, stemmed from its operation of an Internet website accessible from anywhere in the world through any one of several web addresses.

In sum, the District Court found that CPC's only connections with Maryland arose from the fact that its website could be accessed from Maryland, and that the website's host was a Maryland-based corporation. On the basis of those two factors alone, the court concluded that CPC did not have sufficient contacts with Maryland to support personal jurisdiction in a Maryland court.

### ***4th Circuit Applies Young In Carefirst***

In its ruling, a three-judge panel of the Fourth Circuit unanimously affirmed the District Court's dismissal of the case for lack of personal jurisdiction. The court said that under *Calder v. Jones*, 465 U.S. 783 (1984) and its decision in *Young*, Internet communication must be purposefully directed into a forum with the express intent of engaging in business or other interactions within that state in particular.

Carefirst argued that CPC expressly aimed its trademark-infringing conduct at the forum state of Maryland by setting up a semi-interactive website that was accessible in Maryland and maintaining a relationship with a Maryland-based web hosting company. It further argued that CPC possessed the requisite intent, under *Calder*, of conducting commercial activities or directing business toward Maryland CPC's acceptance of donations from Maryland residents, its submission of e-mails to Maryland residents who make contributions, and its establishment of a toll-free telephone number over which Maryland residents could make donations or obtain other counseling services.

The court rejected Carefirst's arguments, however, finding that under *Young*, the fact that CPC engages in

these activities alone was not enough, and CPC must have also acted with the "manifest intent" of targeting Marylanders via these activities in order to be subject to personal jurisdiction in Maryland. *Carefirst*, 2003 U.S. App. LEXIS 13443 at \*24 (citing *Young*, 315 F.3d at

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***Extending Calder to the present case, wrote Judge Koeltl, "would result in a defendant who simply places allegedly defamatory information on a passive internet web site being 'subject to personal jurisdiction in every State...'"***

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264). The court determined that whether CPC actually intended to target Maryland residents could be determined only from examining the character of CPC's website. In so doing, the court found that the only concrete evidence of online exchanges between CPC and Maryland residents was a single donation initiated by Carefirst's counsel, and that the website had a "strongly local character," targeting Chicago residents.

The court concluded, therefore, that CPC could not have reasonably anticipated being haled into a Maryland court on the basis of setting up a "generally accessible" website and doing business with a web hosting company that "merely facilitated the purchase of CPC's domain names and rented CPC space on its servers," which were not even located in Maryland. The *Carefirst* decision was written by Judge Robert B. King and joined by Chief Judge William W. Wilkins and Judge Diana Gribbon Motz.

(Continued on page 21)

## Personal Jurisdiction In Internet Cases

(Continued from page 20)

### *The Realuyo Decision*

In *Realuyo*, the U.S. District Court for the Southern District of New York considered whether the plaintiff, a New Jersey resident with place of business in New York, could establish personal jurisdiction in New York over several foreign defendants, including the writer of the allegedly defamatory article, the speaker (a former Philippine ambassador to Argentina) of the allegedly defamatory statements contained in the article, the Philippine newspaper that published the article, and the Internet news service that posted the article online. All defendants were citizens of the Philippines or companies incorporated and headquartered in the Philippines. The defendants moved to dismiss the complaint for lack of personal jurisdiction.

District Judge John G. Koeltl found that none of the defendants were subject to jurisdiction in the New York courts. With regard to the Internet news service, INQ 7, the court noted that its website was maintained on computer servers located in the Philippines and that all of the content for the site was prepared in the Philippines. In addition, INQ 7 owned no property, employed no agents, and maintained no bank accounts in New York. Of the more than 6,000 registered users of the website, 332 listed a New York state address, and INQ 7 itself maintained business contacts with only two New York state corporations: an advertising agency that occasionally purchased space on the website and a media company that purchased news content from INQ 7 for distribution to other news companies.

Judge Koeltl determined that the actual business transactions that INQ 7 maintained with New York businesses were not such that the claim of defamation could be said to arise from those relations sufficient to establish a "substantial relationship between the transaction and the claim asserted" under *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 43 (N.Y. 1988).

The court next considered whether the mere availability of the article on INQ 7's website, where it could be downloaded in New York at no cost, and the existence of 332 non-paying New York site registrants, could be considered transaction of business in New York and whether a claim of defamation arose from those contacts.

The court held that the passive nature of the website, the comparatively few interactions of INQ 7 with subscribers

located in New York, and the lack of any allegation of purposeful contact on the part of the Internet news service with New York or its residents all contributed to a finding that INQ 7 could not reasonably have expected to be haled into court in New York based on the posting of an allegedly defamatory article. Extending *Calder* to the present case, wrote Judge Koeltl, "would result in a defendant who simply places allegedly defamatory information on a passive internet web site being 'subject to personal jurisdiction in every State...'" *Realuyo*, 2003 U.S. Dist. LEXIS 11529 at \*31-32 (quoting *Young*, 315 F.3d at 263).

In *Carefirst*, the plaintiff was represented by Ruth Mae Finch of Stevens, Davis, Miller & Rosher LLP of Washington, D.C. The defendants were represented by Frederick Christopher Laney of Niro, Scavone, Haller & Niro of Chicago. In *Realuyo*, the plaintiff was represented by Kenneth F. McCallion of McCallion & Associates LLP of New York. The speaker of the allegedly defamatory statement was represented by John R. Keough of Wawsche, Sheinbaum & O'Regan PC of New York. The Philippine media defendants were represented by Meichelle R. MacGregor of Cowan, Liebowitz & Latman PC of New York.

*Robert D. Lystad is a partner in the Washington office of Baker & Hostetler LLP and served as counsel to the Tribune Co. media defendants in Young v. New Haven Advocate. Michael Powell, a Baker & Hostetler LLP summer associate and current Harvard Law School student, assisted with this article.*

### Ohio Court on Newsman's Privilege

"Although judicial interpretations of the scope of the Branzburg decision have not always been consistent, court have uniformly held that any privilege or protection from compelled disclosure by news reporters belongs to the journalist, and not the informant or news source." Holding in *City of Akron v. Shawn Cripple*, C.A. No. 21385 (Ct of Appeals of Ohio, Ninth District July 23, 2003)

## Naval Officer Wins \$75,000 For Web Site Statements

### *Accusations in Labor Dispute Damaged Officer's Honor, Court Rules*

A judge awarded \$75,000 in compensatory damages in late July to a former public works director at the U.S. Naval Air Station in Brunswick, Maine in a libel suit over comments posted on the Internet by a former president of a union representing workers at the base. *Ballard v. Wagner*, No. 00-CV-26, 2003 WL 21911157, (Me. Super. Ct., Sagadahoc County bench verdict July 22, 2003).

The case stemmed by a website, [www.morelies.com](http://www.morelies.com). The site – which has been removed and is now registered to another entity – served as a newsletter for the National Association of Government Employees, Local R1-77, and was maintained by Chris Wagner, then president of the local.

From late March until early June 2000, the site accused Lt. Alan J. Ballard, who oversaw maintenance and construction on the base, of using a private contractor for overtime maintenance despite a union agreement with his superiors for unionized base staff to do the work. The site also stated that Ballard neglected various maintenance issues and safety hazards on the base, “allowed his commanding officer to hang out and dry” by lying to him.

Ballard sued for libel and intentional infliction of emotional distress, naming as defendants Wagner, Local R1-77, the local's attorney, the parent union, and the site's webmaster. The suits against the webmaster and the parent union were dismissed, as were the emotional distress claims. The claims against the local's attorney were placed on hold.

Superior Court Justice William Broderick heard the case in a three-day bench trial.

### ***Actual Malice Shown***

In his 15-page verdict, Broderick ruled that Ballard was a public official, and thus must show that Wagner acted with actual malice. The judge then held that the plaintiff had met this burden, since the evidence showed that Ballard hired the private contractor before another officer reached the agreement with the union. Once the conflict was discovered, the commanding officer decided to honor the contract that Ballard had negotiated.

Thus, the court ruled, Wagner's statement calling Ballard a liar “is almost certainly a falsehood. At the very least, it is clear and convincing that Mr. Wagner recklessly disregarded the truth.”

Several times in the opinion, Judge Broderick referred to the importance of reputation and honor in the military. “Lt. Ballard testified as to the anguish he suffered,” Broderick wrote, adding that he found that testimony to be credible.

He testified that the unofficial motto of the post-Vietnam Navy is Honor, Courage and Commitment. The first word is Honor. By all accounts, Lt. Ballard took the Navy motto very seriously. To be branded a liar, even in the context of a labor dispute, is a very serious charge. It ruined Lt. Ballard's last several months in the Navy. When a person has the end of an honorable 23-year career ruined in this totally unjustifiable and uncalled for manner, that person is entitled to compensation.

Broderick awarded Ballard \$75,000, plus interest and costs, against Wagner and the union local. He also set a September hearing on punitive damages.

Wagner and the union local were represented by Thomas J. Freda of Monahan & Padellaro in Cambridge, Mass., who said that he would file post-trial motions after the court rules on punitives. Plaintiff Ballard was represented by Michael A. Feldman of Brunswick, Maine.

## 2003 MLRC BULLETIN

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## Ninth Circuit Says Ok to Description of Psychiatric Expert as “Looney Tunes” and “Nuts”

By Joseph R. Tiffany II and Krista J. Martinelli

In *Lieberman v. Fieger*, 2003 WL 21886382 (9th Cir. (Cal.) Aug. 11, 2003), the Ninth Circuit rejected defamation and intentional infliction of emotional distress claims arising from an attorney’s televised references to a psychiatric expert, who had testified in a highly publicized murder case involving the “Secret Crush” feature on the Jenny Jones television program, as “Looney Tunes,” “crazy,” “nuts” and “mentally unbalanced.” The court’s opinion, by Judge Thomas, adhered to the Ninth Circuit’s post-*Milkovich*, three-part “totality of the circumstances” test to determine that the statements in question did not imply assertions of objective fact.

### *Looney Tunes and California Nuts*

In a March 1995 episode of the Jenny Jones television program, Scott Amerdure described his “secret crush” on Jonathan Schmitz. Shortly afterward, Schmitz killed Amerdure and was charged with first degree murder. Psychiatrist Carole Lieberman testified as a defense expert at the trial in which the defense argued diminished capacity and Schmitz was convicted of second degree murder. After the murder trial, the victim’s family brought a wrongful death action against Schmitz and the Jenny Jones show. The victim’s family was represented by Michigan attorney Geoffrey Fieger and his firm. The case decided by the Ninth Circuit arose from a dispute between Lieberman and Fieger relating to Lieberman’s participation as an expert in the wrongful death action.

Lieberman’s complaint alleged that she had been retained as an expert in the wrongful death action by Fieger and his firm to provide testimony regarding Schmitz’s intent and capacity. Fieger’s firm paid her a \$2,500 retainer, and she was deposed. Afterward, she submitted a bill for \$22,600 to Fieger’s firm. When Fieger declined to pay the

bill Lieberman sued Fieger and his firm for breach of contract and fraud, and issued a press release announcing the lawsuit and demanding a boycott of the Jenny Jones show.

Shortly after being served with the complaint, Fieger was interviewed by Court TV, which was covering the wrongful death trial. After expressing dissatisfaction with Court TV’s coverage, Fieger made the following televised statements in response to questions about the Lieberman complaint:

- That a defense attorney in the criminal case had told him “in no uncertain terms” that Lieberman was “mentally unbalanced” and “a terrible witness who was disliked by the jury”;
- That “this thing [the wrongful death trial] is being broadcast world-wide and it brings out the Looney Tunes. This is one of the Looney Tunes”;
- That in “the criminal case, she [Lieberman] had the audacity to submit a bill of \$100,000,” but the court “laughed at her and gave her zero”; and
- That the description “of the nuts growing on trees” in California was “not that far off.”

After Fieger made these televised comments, Lieberman amended her complaint adding claims for defamation and intentional infliction of emotional distress. Lieberman’s defamation claim against Fieger asserted that:

“Fieger claimed to have been informed that Plaintiff, a licensed California psychiatrist, was ‘mentally unbalanced,’ that she was ‘crazy,’ was ‘a Looney Tune,’ was the subject of ridicule by a court pertaining to her expert testimony in a case, was ‘a nut growing on trees’ in California and had improperly charged money to [Fieger’s law firm] for a retainer.”

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***The court’s opinion adhered to the Ninth Circuit’s post-Milkovich, three-part “totality of the circumstances” test to determine that the statements in question did not imply assertions of objective fact.***

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(Continued on page 24)

## Ninth Circuit Rejects Libel Claim

(Continued from page 23)

### **The Ninth Circuit Analysis**

The Ninth Circuit opinion starts from the proposition that California's applicable slander statute (Cal. Civ. Code § 46) is limited by the First Amendment's protection of "statements of opinion on matters of public concern that do not contain or imply a provable factual assertion." Opinion, p. \*2, citing *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995). Finding that "the central question" in this case is whether Fieger's statements constituted "constitutionally protected opinions," the court characterized the "threshold question" as whether "a reasonable factfinder could conclude that the contested statement implies an assertion of objective fact." Opinion, p. \*2, citing *Partington*, 56 F.3d at 1153; *Underwager*, 69 F.3d at 366. The court reiterated the Ninth Circuit's three-part "totality of the circumstances" test to answer this question:

"(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact;

(2) whether the defendant used figurative or hyperbolic language that negates that impression; and

(3) whether the statement in question is susceptible of being proved true or false."

Opinion, p. \*2, citing *Partington v. Bugliosi*, 56 F.3d 1145, 1153 (9th Cir. 1995); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990).

The court agreed fully with the "thorough analysis" of these applicable factors by District Court Judge George H. King of the Central District of California. First, the court agreed with Judge King that the "general tenor" of Fieger's televised interview "grew out of a larger legal battle" that was the subject of public attention, and that Fieger made the statements after having just been served with the complaint and after having engaged in a "heated exchange" with Court TV personnel over coverage of the wrongful death trial.

With regard to the second factor (the specific context and content of the statements), the court also concluded that "no reasonable viewer" would have interpreted Fieger's state-

ments as factual; rather, the statements would be understood as "colorful expressions" and "hyperbole," and in this context, the phrase "mentally imbalanced" would have been viewed as a "stream of rhetoric."

Rejecting Lieberman's claims that the district court misconstrued the general tenor and the specific context of Fieger's remarks because the television audience was not aware of the legal dispute between her and Fieger, and Fieger was "calm and dispassionate" during the Court TV interview, the court concluded that "careful examination of the video tape and transcript [of the Court TV interview] do not support her claims." Opinion, p. \*4.

In particular, the court pointed out that the tape of the interview demonstrated that Fieger was holding the Lieberman complaint in his hand during the televised session; that Fieger spoke "incredulously" when he discussed Lieberman's claims; and that the subject of the Lieberman

litigation had been immediately preceded by a heated exchange in which Fieger accused Court TV of biased coverage of the wrongful death trial. The court concluded that "[a] reasonable viewer would know" that Fieger was "hotly disputing the claims" in Lie-

berman's complaint. Opinion, p. \*4.

With regard to the third factor (susceptibility to being proven true or false), the court found that none of the remarks contained verifiable assertions. Characterizing Fieger's comments as "epithets," the court noted that the district court had cited "numerous cases holding that similar epithets were not provable as false." Opinion, p. \*3. Accordingly, the court concluded that the allegedly defamatory statements constituted constitutionally protected expressions of opinion.

### **Rejects New Claims of Libel**

The court also rejected additional claims raised by Lieberman on appeal regarding several allegedly defamatory statements involving "explicit factual assertions capable of being disproven." These included:

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**"No reasonable viewer" would have interpreted Fieger's statements as factual; rather, the statements would be understood as "colorful expressions" and "hyperbole."**

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(Continued on page 25)



### Ninth Circuit Rejects Libel Claim

(Continued from page 24)

- (1) a statement regarding the amount of the bill she submitted,
- (2) the statement that the criminal trial judge had “laughed” at her fee statement and
- (3) the claim that “she was a terrible witness disliked by the jury.” Noting that the complaint did not put these statements in issue, the court went on to find that even if it construed the complaint broadly to cover the statements, they were not actionable.

As to the amount of Lieberman’s bill, the court determined that even if the statement was “false” and “unprivileged,” it was devoid of defamatory meaning. Opinion, p. \*3. The court found Fieger’s statement that the criminal court “laughed at her and gave her zero” constituted a hyperbolic and colorful description of the truth—namely, that the court denied her request for expert witness fees. Opinion, p. \*3, citing *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1403 (1999). (“In Lieberman’s case, as in *Ferlauto*, [a]lthough the judge may not have literally laughed, authors are not limited to a sterile narrative of facts.”) Finally, the court concluded that Fieger’s statement repeating Schmitz’s criminal attorney’s opinion that “she was a terrible witness disliked by the jury” was not actionable because it reflected a statement of personal viewpoint, not an assertion of objective fact. Opinion, p. \*3, citing *Partington*, 56 F.3d at 1153. Accordingly, both the criminal attorney’s statement and Fieger’s repetition of it constituted constitutionally protected statements of opinion.

The Ninth Circuit also affirmed the district court’s dismissal of Lieberman’s claim for intentional infliction of emotional distress and fraud. The emotional distress claim was dismissed based on California and Ninth Circuit authorities holding that such a claim could not be maintained where the same facts were found insufficient to maintain a claim for defamation. The court also agreed with the district court’s dismissal of the fraud claim on the ground that there was no evidence that Fieger intended to deceive Lieberman. The parties settled the breach of contract claim.

#### *The Ninth Circuit View of Opinion*

In this latest in a series of decisions since the Supreme Court’s opinion in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Ninth Circuit has continued to adapt its

analytic approach to *Milkovich*, while adhering to the contextual analysis that characterized its pre-*Milkovich* jurisprudence. See Bruce W. Sanford, *Libel and Privacy* § 5.3, pp. 151-152 (2d ed. 2002 Supp.). In finding that the alleged defamatory statements in this case were not actionable, the Ninth Circuit reiterated the three-part test for determining falsity which it originally enunciated in *Unelco Corp. v. Rooney*, 912 F.2d at 1053, and “flesh[ed] out” in *Partington v. Bugliosi*, 56 F.3d at 1153. The decision continues the Ninth Circuit’s approach of careful consideration of the “totality of the circumstances” to determine whether a statement implies the assertion of an objective fact.

The case was before Circuit Judges Sidney R. Thomas (who authored the opinion) and Richard A. Paez, and District Judge Edward C. Reed, Jr. (United States District Court for the District of Nevada), sitting by designation. Plaintiff-Appellant Dr. Carole Lieberman was represented by Paul S. Zimmerman and Howard S. Rosen of the Law Offices of Rosen and Zimmerman, Woodland Hills, California. Defendants-Appellees Geoffrey N. Fieger and Fieger, Fieger & Schwartz were represented by William S. Davis and Erik L. Jackson of Arter & Hadden, LLP of Los Angeles, California.

*Joseph R. Tiffany II is a partner and Krista J. Martinnelli is an associate in the Silicon Valley Office of Pillsbury Winthrop LLP.*

### Texas Court Reduces Mental Anguish Damages in Public Figure Libel Case

By Jim Hemphill

After the Texas Supreme Court upheld a jury verdict of liability in a defamation case brought by a sitting judge but remanded for reconsideration of the \$7 million mental anguish damage award, a lower appeals court has found the award unsupported by the evidence and ordered the plaintiff to accept a remittitur to \$150,000 or to retry the case. *Bunton v. Bentley*, --- S.W.3d ---, 2003 WL 21831533 (Tex. App. – Tyler, Aug. 7, 2003, no pet.) (James T. Worthen, Chief Justice).

The defendant, Joe Ed Bunton, hosted a local-access cable TV program carried in the small East Texas towns of

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**Mental Anguish Damages in Public Figure Libel Case Reduced**

*(Continued from page 25)*

Palestine and Elkhart. Bunton repeatedly referred to the plaintiff, Judge Bascom W. Bentley III, as “corrupt” during several episodes of the show. The Texas Supreme Court upheld the judgment of liability against Bunton in *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002), but remanded the mental anguish award for reconsideration, suggesting that it might violate both Texas law and constitutional limits on such awards.

Judge Bentley testified at trial that Bunton’s remarks had a substantial effect on his home life. However, he never sought any professional mental health counseling and there was no disruption in his ability to perform as a judge, teach at a local community college, or participate in community organizations and social activities.

On remand, the Court of Appeals treated the case as one of slander per se, despite Texas authority characterizing broadcast defamation as libel. Since Bunton’s statements were per se slanderous, the court said, a presumption of damages arose. However, that presumption was rebutted, at least in part, by the evidence that Judge Bentley did not have to seek professional counseling, was essentially unaffected in his professional life, and suffered no economic loss tied to his emotional anguish. Thus, the \$7 million award was unsupported by evidence.

Without articulating any objective standards but rather using “our sound judicial judgment and discretion,” the Court of Appeals found that \$150,000 would be a reasonable figure for mental anguish damages. The court gave Judge Bunton fifteen days to accept the remittitur; if it is not accepted, a new trial will be ordered.

Joe Ed Bunton, pro se. Ronald Dee Wren and Armando De Diego, for Jackie Gates. Mike Hatchell, for Bascom W. Bentley, III.

*Jim Hemphill is a partner in Austin’s George & Donaldson, L.L.P., which was not involved in Bentley v. Bunton.*

***Any developments you think other MLRC members should know about?***

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**Carolyn Condit Alleges Defamation for Republication of National Enquirer Statements**

After settling a libel suit with the National Enquirer, Carolyn Condit has filed suit against USA Today, its publisher the Gannett Company, and New York-based News Corporation (ostensibly as the parent company of the Herald Sun in Melbourne, Australia) for republishing the National Enquirer’s original “libel” that Carolyn Condit “confronted [Chandra] Levy in a phone call days before the intern’s disappearance.” The USA Today also included that “the tabloid said the clash occurred after Levy told Carolyn Condit that Gary Condit would be leaving her to start a new family with Levy.”

Carolyn Condit is bringing the suit in New Mexico because the statute of limitations is longer there (up to three years after the libelous publication) than in her state of domicile, California (only a one-year statute of limitations for libel). She is asking for general damages, punitive damages, and an apology in a form to be approved by her and the Court and published after the defendants have no further chance of appeal.

She has also filed suit in Hawaii against News Corp and the Australian paper.

Her suit against News Corp and the Herald Sun raises the interesting questions of jurisdiction as the actual owner and publisher of the Australian papers is an Australian corporation, and the newspaper that Mrs. Condit asserts carried the stories apparently was not distributed in hard copy in New Mexico or Hawaii (or possibly even in the United States). Thus, the only means for reading the stories would have been via the Internet.

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## Use of “Kidnapped” Substantially True in *Harrison v. Sun-Times* *Innocent Construction Rule Requires Headline be Read With Inside Article*

Answering certified questions, the Appellate Court of Illinois held that the use of “kidnapped” in the front page leader of an article in the Chicago Sun-Times was a substantially true description of a federal district court’s order. *Harrison v. Chicago Sun-Times* (Ill. App. Ct., 2003 WL 21497271). The federal district court, as reflected in its order, had concluded that the plaintiff in the present defamation suit had wrongfully removed her daughter (as prohibited under the Hague Convention) from Italy during the course of a custody dispute.

For the Illinois Appellate Court, Judge Smith writing for himself and Judges McNulty and O’Malley, also held that under the innocent construction rule, a front page leader article must be read in conjunction with a full article contained inside the newspaper, and that the statement at issue could be construed innocently.

Finally, the court found that the leader was protected by the fair report privilege as it was an accurate “abridgment” of the district court’s ruling.

### *Underlying Custody Battle*

Harrison married an Italian national (Tabacchi) and lived with him outside Rome where they had a child. After several years of marriage in Italy, the couple had problems and in 1999 Harrison took their daughter to her brother's residence in Chicago. Harrison filed for divorce and custody in Illinois while her husband filed for separation and custody in Italian courts. The Italian court ruled for Tabacchi, granting him temporary custody and ordered the child's return. Tabacchi also filed a petition in U.S. federal district court under the Hague Convention on the Civil Aspects of International Child Abduction. The district court held that Harrison wrongfully removed the child under the Hague Convention and ordered the child's return to Italy.

### *Sun-Times Article and Certified Questions*

In May 2000, the Chicago Sun-Times published an article on the district court’s ruling on Tabacchi’s Hague petition. On the front page was a photo of Harrison and her daughter above a two sentence “leader” article and

headline (along with a reference to the full article inside the paper). Both the “leader” and headline (“Kidnapped Girl Must Go Home”) stated that Harrison had “kidnapped” her daughter. The full article provided a factual background, and explained the district court’s decision.

The paper ran a correction two days later clarifying that Harrison had not been found guilty of kidnapping. In April 2001, Harrison filed claims for defamation (per se) and false light against the Sun-Times which alleged that the “leader” and front page headline falsely declared that Harrison was guilty of criminal kidnapping. The trial court denied the Sun-Times motion to dismiss the defamation claim but granted the motion for false light.

The trial court granted a Sun-Times motion to have three questions certified for immediate appeal: whether the allegedly defamatory statement is substantially true; “whether the statement, contained in a front page ‘leader’ article, must be read together with an inside article, and if so, whether it is capable of an innocent construction”; and whether the statement is a fair report of the district court’s decision on the Hague petition.

### *Substantial Truth: “Kidnapped” Conveyed Proper Gist of Earlier Decision*

The court first discussed the Sun-Times defense that the story was substantially true. After analyzing dictionary definitions of “kidnapped” and other related words, and the language and earlier interpretations of the Hague Convention, the court concluded that the use of “kidnapped” by the Sun-Times was substantially true as it properly conveyed the gist of the district court decision.

In Illinois, even though the issue of truth is normally one for the jury, in cases where no reasonable jury could find that truth had not been proven the issue becomes a matter of law. The Sun-Times argued that “kidnapped” articulated the “gist or sting” of the district court’s Hague petition decision. On the other hand, Harrison contended that “kidnapped” insinuated that she had been convicted of criminal kidnapping under Illinois state

*(Continued on page 28)*

### Use of “Kidnapped” Substantially True in *Harrison*

*(Continued from page 27)*

law. The court therefore had to determine whether “kidnapped”, “refers only to this specific offense in our criminal code or whether the word has other connotations as well.”

Dictionary definitions of “kidnapped” were not dispositive as they provide similar definitions for both “kidnapped” and “abducted”.

Next, the court examined the language of the Hague Convention, specifically whether the wrongful removal of a child is the same act as “kidnapping” under the Convention even though the Convention does not provide for criminal penalties. Despite using the phrase “international child abduction” in lieu of “kidnapping”, numerous authorities have described the Convention as dealing with acts described as “kidnapping”.

The U.S. government has repeatedly used “kidnapping” when discussing the Convention, such as in congressional hearings and the International Parental Kidnapping Crime Act of 1993 (IPKCA) which prohibits similar acts of child removal discussed in the Convention and imposes criminal penalties on such acts.

The court also took notice of several federal court decisions which have used “kidnapped” in association with the wrongful removal of a child in a custody dispute. Importantly, court decisions on the Hague Convention also describe the Convention as prohibiting “kidnapping”. (*citing Feder v. Evans-Feder*, 63 F. 3d 217, 221 (3d Cir. 1995)).

“Kidnapping”, the court held, refers to acts prohibited under the Hague Convention, such as abduction, in the common usage of child custody situations. Had the Sun-Times substituted “kidnapped” with “wrongful removal under federal and international child abduction law”, the gist of the leader would have been the same. The court concluded therefore that the use of “kidnapped” in the leader was substantially true and properly conveyed the gist of the district court’s Hague order.

#### ***Innocent Construction***

The court held that the innocent construction rule weighed in the Sun-Times favor because under the rule, the statement “Deidre Harrison kidnapped Beatrice

Tabacchi” must be read in conjunction with the full article inside the issue. Because the leader clearly referred to the full article and its location inside the paper, the leader and full article had to be read together. The full article’s accurate description of the district court’s order (and apparent sympathy to Harrison’s situation) therefore gives an innocent construction to the allegedly libelous statements in the leader. Judge Smith further explained that even if the leader and full article were not read together, the leader could have an innocent construction because “kidnapped” does not only refer to a criminal offense, but also the wrongful taking of a child.

#### ***Fair Report Privilege Applicable***

Finally, the court held that the fair report privilege should apply to the leader as it accurately and fairly reported the district court’s Hague order, namely that Harrison had violated the Hague Convention. The complex nature of the order, involving issues of international law, and space limitations on the front page, forced the Sun-Times to provide a concise summary of the decision and the use of “kidnapped” was an accurate “abridgement” of the order (and as described above, substantially similar to the language in the Convention).

For Harrison: Lawrence V. Jackowiak of Law Offices of Lawrence V. Jackowiak (Chicago).

For Chicago Sun-Times: Damon E. Dunn and Maria D. Elliot of Funkhouser Vegosen Liebman & Dunn (Chicago).

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## Sprague v. American Bar Association

### ***Court Denies Defense Motions for Summary Judgment on Actual Malice, Compensatory & Punitive Damages***

In July, there were two significant developments in Richard Sprague's libel suit against the American Bar Association (No. 01-382). Sprague's suit against the ABA stems from an article in the October 2000 issue of the *ABA Journal* in which Sprague, a well-known attorney, was described as "perhaps the most powerful lawyer-cum-fixer in the state." Plaintiff claims that the word "fixer" accuses him of unethical conduct while defendants contend that the word was used in a laudatory sense to describe Sprague as an effective advocate and problem-solver. In an earlier opinion, the court found that "fixer" has both meanings. In two separate opinions, Judge Yohn of the Eastern District of Pennsylvania denied defense motions for summary judgment, first on actual malice, then on compensatory and punitive damages.

On July 18, in denying the motion on actual malice, the court held that the evidence presented by plaintiff could convince a reasonable jury to find that defendants knew, or recklessly disregarded the possibility that readers would apply the defamatory meaning of "fixer" to Sprague. Importantly, Judge Yohn rejected the defendants' attempt to apply *Bose Corp. v. Consumers Union* and its progeny to the actual malice inquiry for an arguably ambiguous communication. Instead, the court held that actual malice can be established by evidence that defendants were aware of the defamatory definition of an ambiguous word.

On July 31, Judge Yohn denied defense motions for summary judgment on the issues of compensatory and punitive damages. The court determined that plaintiff had presented sufficient evidence of genuine issues of material fact on damages. Specifically, Sprague had presented evidence sufficient to allow a jury to infer actual harm, such as loss of reputation, deterioration of professional relationships, and emotional distress. While the

court explained it did not have to make a determination on presumed damages, it reviewed the current state of Pennsylvania law on presumed damages and various policy reasons that speak against presumed damages. Additionally, the motion for summary judgment on punitive damages was denied because the court concluded that the defendants' use of an ambiguous word was sufficient evidence to present a jury question on common law malice.

#### ***Sprague's Suit for Libel***

The article at issue concerned the shooting of a black Philadelphia man by a white police officer, an incident in which many prominent members of Philadelphia's legal community, including Sprague (a former district attorney, and successful plaintiffs' attorney), became involved. After being notified by counsel of plaintiff's displeasure at the use of the term "fixer," the *Journal* ran a clarification stating it intended to use the word as a complimentary reference to Sprague's problem-solving skill. Nevertheless, Sprague brought claims of defamation against the ABA, the *Journal* and author Terry Carter. Sprague claimed that the term "fixer" implied that he had improperly "fixed" cases.

Contending that the term "fixer" as used in context was not capable of a defamatory meaning, defendants moved for judgment on the pleadings, supporting the motion with 107 examples of positive uses of "fixer" to describe prominent lawyers in the press. Judge Yohn denied the motion in November 2001, holding that in the context of the entire article, the term was sufficiently ambiguous so as to permit a defamatory mean-

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***The court held that the evidence presented by plaintiff could convince a reasonable jury to find that defendants knew, or recklessly disregarded the possibility that readers would apply the defamatory meaning of "fixer" to Sprague.***

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*(Continued on page 30)*

### Sprague v. American Bar Association

(Continued from page 29)

ing to be understood. 2001 U.S. Dist. LEXIS 18707 (E.D. Pa. Nov. 14, 2001) (See LDRC LibelLetter December 2001 at 29.) In April of 2002, the parties stipulated that Sprague was a limited-purpose public figure. (See LDRC MediaLawLetter April 2002 at 14.)

#### **Actual Malice: Jury Could Conclude Defamatory Meaning of “Fixer”**

In denying defendants’ motion for summary judgment on actual malice, Judge Yohn held that there was sufficient evidence presented for a jury to find actual malice. In doing so, he rejected the application of *Bose* and other cases requiring a showing of intent to communicate a defamatory meaning when the communication at issue is ambiguous. Judge Yohn found that the issue before the court was one of first impression in the Third Circuit, defining the issue as the application of the actual malice standard “to a publication that contains a word of dual meaning, where one meaning is unquestionably defamatory, and the other is unquestionably not.” Turning to other circuits for guidance, the court chose the Ninth Circuit’s analysis in *Solano v. Playgirl* which articulated the question as:

“whether the defendant ‘either deliberately cast its statements in an equivocal fashion in the hope of insinuating a false import to the reader, or that it knew or acted with reckless disregard of whether its words would be interpreted by the average reader as false statements of fact.’” (Quoting *Solano v. Playgirl*, 292 F. 3d 1078, 1084 (9th Cir. 2002).)

#### ***Bose Does Not Apply***

The defendants argued that the court was bound by the Supreme Court’s decision in *Bose Corp. v. Con-*

*sumers Union*, 466 U.S. 485 (1984), which held that a defendant may be held liable for the use of ambiguous language only through clear and convincing evidence that defendants were aware that the language at issue was defamatory in the context of how it was used. However, Judge Yohn rejected this argument and held that *Bose* did not apply.

According to Judge Yohn, the issue in *Bose* was the defendant’s interpretation of an ambiguous event, while in the present case it was the use of an ambiguous word. As explained by the court,

“in the event that a jury finds that ‘lawyer-cum-fixer’ was perceived in its defamatory sense, the falsity of this statement would not be the result of defendants’ rational interpretation of an ambiguous event; instead it would be the result of their

choice to use a word capable of defamatory meaning. In essence, the ambiguity in this instance is of defendants’ own creation, and this does not implicate the factual scenario in *Bose*.”

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**[Judge Yohn] rejected the application of *Bose* and other cases requiring a showing of intent to communicate a defamatory meaning when the communication at issue is ambiguous.**

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Therefore, if defendants are found liable in this case, it will be because of the editorial decision to include “fixer,” not because of a disagreement over defendants’ interpretation of an ambiguous event. Judge Yohn’s rejection of *Bose* in the present case suggests the adoption of a test that disregards the possibility that the choice of a word with both defamatory and non-defamatory meanings can be understood to be the defendant’s interpretation of an ambiguous event or situation.

For the court this emphasis on placing the fault on the defendants’ choice of words also negates the First Amendment concerns raised in *Bose*. The Supreme Court, in that case, was concerned with the potential of self-censorship and “suppression of truthful material.” (*Bose* at 513 (citing *Herbert v. Lando*, 441 U.S. 153, 171-172 (1979)).) The court stated that, if the word was used in a defamatory manner, there was no truthful

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### Sprague v. American Bar Association

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information disseminated in the publication at issue. For that reason, the only type of censorship will be of the “use of terms that are commonly used in derogatory ways when derogation is not intended and is known to be false.”

#### ***Plaintiff’s Evidence Raises Genuine Issues***

In the present case, the court concluded that there was sufficient circumstantial evidence to support a jury finding that defendants used the term “fixer” ambiguously with the goal of “insinuating a false import to the reader”; or that defendants knew, or recklessly disregarded the possibility, that readers would interpret “fixer” in a defamatory sense.

First, Carter (the article’s author) admitted during a deposition that he was aware of the defamatory meaning of “fixer” and had looked up the word in a dictionary. Despite no evidence that Carter looked up the definition before the article was written, Judge Yohn concluded, because this was a motion for summary judgment, the court had to reasonably infer the time in plaintiff’s favor (in other words that Carter read the definition before publication).

Second, the *Journal’s* Managing Editor, Debra Casens, stated in her deposition that she knew of the possible defamatory interpretation of “fixer” and assumed that an average *Journal* reader would know both defamatory and non-defamatory definitions of the word.

Third, the *Journal* had previously used the word “fix” in a defamatory manner in other articles. The court took this to be “valid evidence” that could support a jury determination that the *Journal* knew of the defamatory meaning of “fixer.” Judge Yohn disregarded the *Journal’s* evidence that it had also used the term in a positive manner in the past. He explained that past positive usage did not negate the need to examine the defendants’ subjective intent in the present suit.

Fourth, the court found that the article did not include modifiers that would have removed any defama-

tory meaning of “fixer.” Fifth, for the court, the deletion of information from the first draft of the article concerning plaintiff’s experience is also relevant to a jury consideration of actual malice, although the court acknowledged that the inference to be drawn from that evidence is “highly debatable.” Finally, defendants were also aware of the potential harm that could be caused to a lawyer’s reputation by an accusation of “fixing” cases, as evidenced by Carter’s admission in deposition that such an accusation was one of the worst that could be leveled at an attorney.

The court concluded that plaintiff’s evidence raised genuine issues of material fact and could lead a reasonable jury to find that defendants intentionally used an ambiguous word to cast aspersions on Sprague; or that

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***Under Judge Yohn’s analysis, the clear and convincing standard can be met if a defamation defendant is aware of a potential defamatory interpretation of an ambiguous word, even if he intends a non-defamatory meaning and believes the context makes it clear.***

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they recklessly disregarded the possibility of readers attaching a defamatory meaning to “fixer.” Under Judge Yohn’s analysis (a rejection of *Bose*), the clear and convincing standard can be met if a defamation defendant is aware of a potential defamatory interpretation of an ambiguous word, even

if he intends a non-defamatory meaning and believes the context makes it clear.

The court also briefly discussed an alternative application of the actual malice standard to the case, noting it would also lead to a denial of defendants’ summary judgment motion. If the jury found that “fixer” was used by defendants in a defamatory manner, the jury would then need to determine whether defendants knew, or recklessly disregarded the possibility that it was false. Defendants, however, have already conceded that when the article was published they knew “plaintiff was not a ‘fixer’ in the defamatory sense.”

In a footnote, Judge Yohn took special notice of Justice White’s concurring opinion in *Greenbelt Cooperative Publishing Association, Inc. v. Bresler*, 398 U.S. 6 (1970). Specifically, Justice White’s conclusion that *New York Times v. Sullivan* should not preclude liability

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### **Sprague v. American Bar Association**

*(Continued from page 31)*

for the use of a word with a defamatory and non-defamatory meaning when the defendant makes a good faith claim to have intended to use the non-defamatory definition. Justice White, and it appears Judge Yohn, would hold the media to a very high standard of editorial discretion and not immunize the media from liability for the use of ambiguous language without taking proper consideration of the possibility readers may apply the defamatory meaning of a word, thereby injuring a plaintiff's reputation. *(Citing Greenbelt Cooperative Publishing Association at 22-23.)*

Defendants have moved for certification for interlocutory appeal on Judge Yohn's analysis and denial of summary judgment on the issue of actual malice.

#### ***Compensatory Damages: Sprague Presented Sufficient Evidence of Actual Harm***

In his complaint, Sprague claimed that he is entitled to both actual and presumed damages. Sprague asserted he suffered general actual harm in the form of loss of reputation and emotional distress; and as a defamation plaintiff may also recover presumed damages. In its motion, defendants argued Sprague had not presented evidence of actual harm, and could not recover for presumed damages. The court denied defendants' motion for summary judgment on the issue of compensatory damages, holding that Sprague had presented sufficient evidence of actual harm. Specifically, the court found that Sprague had presented evidence that the article "adversely affected others' estimation of plaintiff's character, harmed his professional relationships, and caused, and continues to cause, him emotional distress."

First, the court explained that it must examine both federal and Pennsylvania state law on defamation damages, and that under both a showing of general damages was sufficient to recover for actual damages. Pennsylvania courts had previously recognized that "injury to reputation does not work its greatest mischief in the form of monetary loss." *(Quoting Agriss v. Roadway Express, Inc., 483 A. 2d 456, 473 (Pa. Super. 1984).* Determining whether reputational harm exists, the court looked at the impact the allegedly libelous publication had on plaintiff's image in the minds of others.

The court determined that a reasonable jury could determine that the article adversely affected others' image of Sprague. While the defense argued that all of plaintiff's witnesses stated that the article did not affect their opinion of him, the court placed great importance on the fact that these witnesses were personal acquaintances and did not believe the accusation associated with the use of the term "fixer." Judge Yohn explained,

"A rational inference from this evidence would be that those who read the article without personal knowledge of plaintiff would have no reason to disbelieve the alleged defamation, which would possibly result in plaintiff's reputational loss."

Additionally, Judge Yohn took notice of the Journal's 400,000 readers.

Sprague also presented sufficient evidence of deterioration in his professional relationships caused by the article because a judge testified that she did not want to speak with Sprague out of fear of being associated with a perception of him as a "fixer." Citing Pennsylvania precedent, the court held that general harm may be evidenced by professional acquaintances avoiding contact with the plaintiff.

Additionally, the court held that there were genuine issues of fact regarding Sprague's claim of emotional distress. Judge Yohn briefly discussed plaintiff's evidence of distress, such as the humiliation Sprague endured while being considered for a position with the Justice Department (Sprague had to inform the Attorney General and White House of the Journal article and his designation as a "fixer"); and trepidation of standing before judges whose image of him might have been tainted by the article.

#### ***Issue of Presumed Damages Left Undecided***

Because it denied the summary judgment motion on compensatory damages and found that Sprague had presented sufficient evidence of actual harm, the court concluded it did not have to decide the issue of whether plaintiff could recover presumed damages under Pennsylvania law. Judge Yohn discussed various Pennsylvania precedents and described the state of the law as unsettled. Until Pennsylvania courts had conclusively overturned the Pennsylvania law permitting the recover of presumed damages,

*(Continued on page 33)*



### Sprague v. American Bar Association

(Continued from page 32)

the court here could not grant summary judgment to defendants on the issue. Sprague had also satisfied the Constitutional requirements of presumed damages because of the court's earlier holding that there was sufficient evidence for a jury to consider the issue of actual malice.

Despite finding that Pennsylvania law did not clearly preclude presumed damages, the court took time to explain several reasons why presumed damages should not be allowed. First, compensatory damages are sufficient to compensate a plaintiff for any possible reputational injury. Second, juries have no way to calculate presumed damages, considering a plaintiff is not required to present any evidence of harm. Third, Pennsylvania's low threshold in proving actual damages already permits nearly all defamation plaintiffs to present evidence of reputational harm.

#### ***Punitive: Clear & Convincing Not Required For Common Law Malice***

The court also denied defendants' motion for summary judgment on punitive damages. As with compensatory damages, the court had to examine the validity of the motion through both federal and state law. The court had already found that Sprague had satisfied the Constitutional requirement by providing genuine issues of fact regarding actual malice by demonstrating that defendants had used an ambiguous word with knowledge that it had two meanings. Under Pennsylvania law, a public figure plaintiff must also prove common law malice, which the court held a jury could find based on the use of an ambiguous word.

Defendants claimed that Sprague had to meet a "clear and convincing" standard in order to prove common law malice. Judge Yohn dismissed this argument explaining that Pennsylvania courts had already established "preponderance of the evidence" as the appropriate standard, even for public figure plaintiffs. (Citing *Sprague v. Walter*, 656 A. 2d 890, 923 (Pa. Super. 1995).

Alternatively, defendants claimed that plaintiff could not even satisfy the lower preponderance of the evidence

standard. After examining the evidence presented and the defendants' conduct, the court concluded that summary judgment for defendants was inappropriate at this time. The court explained that Pennsylvania courts had adopted the Restatement's definition of common law malice as, "conduct that is 'outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others...conduct which is malicious, wanton, reckless, willful, or oppressive...". (Citing *DiSalle v. P.G. Pub. Col.*, 544 A. 2d 1345, 1364 (quoting *Restatement (Second) of Torts §908(2)*).

The court again discussed plaintiff's evidence indicating that defendants were aware of the defamatory meaning of the word "fixer" before publication. Other evidence included defendant Carter admitting that saying a lawyer "fixed" cases was perhaps the worst accusation that could be applied to an attorney.

### **Sprague Sues...Again** ***Lawyer Brings Defamation Suit Against Radio Talk Show Host and Infinity Broadcasting Over Statements Concerning Allen Iverson Case***

Richard Sprague has filed a suit against Howard Eskin (a Philadelphia radio show host) and Infinity Broadcasting for defamation in Philadelphia Common Pleas Court. The suit is based on comments made by Eskin during his radio program concerning Sprague's successful defense last year of basketball star Allen Iverson against criminal charges. Specifically, Sprague asserts that during shows broadcast last summer, Eskin suggested several times that Sprague bribed a prosecution witness and purposefully spread false rumors so as to influence the outcome of the case. The suit also claims that Eskin continued to make the allegedly slanderous statements after being notified of their falsity by several sources. Sprague is asking for \$50,000 in compensatory damages along with punitive damages in order to "punish the defendants for their outrageous conduct".

Sprague is represented by Kline & Specter.

## New York Supreme Court Gives Sprewell Green Light to Pursue Libel Claim

By Slade Metcalf

New York Supreme Court Judge Marcy S. Friedman is allowing New York Knick Latrell Sprewell to continue his libel action against the New York Post for four allegedly defamatory articles. Sprewell contends that Post articles published on October 4, 5, 7, and 8, 2002 discussing an incident on his yacht were defamatory. The articles relayed “eyewitness accounts that Sprewell took a swing at a guest, missed and hit a wall, and Sprewell’s denial of such events.” *Sprewell v. NYP Holdings, Inc. and March Berman, et al.*, No. 122923102, Decision/Order (N.Y.S. Ct. June 30, 2003). Sprewell also claims that the articles were defamatory in that they “discussed Sprewell’s delay in reporting the injury to Knicks’ management, and the Knicks’ response to the injury or delay in reporting it,” which consisted of a \$250,000.00 fine and a temporary ban from the team. *Id.* at 2.

The New York Post moved to dismiss on the basis that the articles were not defamatory *per se* and that even if some statements were defamatory, they were not libelous *per se* and not actionable unless proof of special damages was presented, which they claimed Sprewell had not adequately pleaded. *Id.*

### Publicity of Prior Incident

Judge Friedman determined that there was defamatory meaning and that Sprewell had adequately pleaded special damages. Specifically, Judge Friedman dismissed the Post’s contention that the articles had not imputed a crime and, because the actions reported were less serious than the “more violent, highly publicized physical attack on his coach, P.J. Carlesimo,” and thus could not have lowered his reputation any more. *Id.* at 3, citing Reply Memo, at 6; Memo. In Support at 23-24).

Judge Friedman noted that New York state case law has long held “that extrinsic facts may be considered in determining whether a writing is libelous *per se* where the extrinsic facts are ‘presumably known to [the] readers’ of the statement.” *Id.* at 4, citing *Hinsdale v. Orange County Publs.*, 17 NY2d 284, 290 (1966); *Sydney v. Macfadden Newspaper Publ. Corp.*, 242 NY 208, 214 (1926). Thus, the prior publicity of the Carlesimo incident, Judge Friedman noted, actually “cuts against... defendants’ argument that a further imputation of violent conduct to plaintiff cannot increase the damage to Sprewell’s reputation.” *Id.* at 5.

### Imputation of a Crime

Judge Friedman determined that the statements in the Post were “susceptible to the defamatory connotation that plaintiff committed a crime of violence.” *Id.* at 6. Moreover, Judge Friedman noted that “courts have held that a serious misdemeanor may form the basis for a claim of defamation *per se* particularly where, as here, it involves a crime that puts another in fear of physical harm.” *Id.*, citing *De-Filippo v. Xerox Corp.*, 223 AD2d 846 (3d Dept. 1996) *lv dismissed* 87 NY2d 1056; *Sweeney v. Prisoners’ Legal Servs. of New York, Inc.*, 146 AD2d 1 (3d Dept. 1989) *lv dismissed* 74 NY2d 842.

Distinguishing a recent decision, *Burdick v. Verizon Communications, Inc.*, (\_\_\_AD2d \_\_\_, 758 NYS2d 877 (4th Dept. 2003)), Judge Friedman noted that here “the imputations of violence and criminality in connection with the incident may be interpreted by the average reader in light of the widespread publicity as to plaintiffs prior acts of alleged violence.” *Id.* at 7. [*Burdick* involved the “defamatory connotation of statements that the plaintiff, while engaged in a labor protest, ‘hit’ or ‘took a swing at a woman crossing the picket line in her car.’” *Id.* at 7.]

### Defamation in Profession

Sprewell also claimed that the Post articles defamed him in his profession “by implying that he deliberately concealed an injury, thus violating his employment contract with the Knicks.” *Id.* at 8. Judge Friedman determined that “plaintiff’s performance as a professional basketball player requires not merely physical fitness and skill, but adherence to the rules for team members and to his responsibilities as a Knick.” *Id.* at 9; discussion citing *Golub v. Enquirer/Star Group, Inc.*, 89 NY2d 1074 (1977). Thus, these statements could be read as defamatory.

### Pleading Special Damages

Having decided that the statements were “reasonably susceptible to a defamatory connotation, and that such statements would, if believed by the jury, constitute libel *per se*” thus not requiring proof of special damages, Judge Friedman still reached the special damages issue. Sprewell’s pleading of special damages was deemed adequate because his com-

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**NY Sup. Ct. Gives Sprewell Green Light to Pursue Libel Claim***(Continued from page 34)*

plaint “identifies the Knicks’ fine as a specific, identifiable pecuniary loss, and alleges a causal relationship between the articles’ publication and that loss.” *Id.* at 11, citing *Lieberman v. Gelstein*, 80 NY 2d 429, 434-435 (1992).

In conclusion, Judge Friedman directed the parties to appear for a preliminary conference on July 17, 2003.

Latrell Sprewell is being represented by the law firm of Lazer, Aptheker & Trabulus. Defendant NYP Holdings is being represented by MLRC member firm Hogan & Hartson, LLP.

*Slade Metcalf is with Hogan & Hartson, LLP in New York City.*

## California Court Applies Anti-SLAPP Statute to Mix of Speech

### *Holds Reporter is Not a Public Figure*

By Ronald Guttman

On July 28, 2003, the California Second District Court of Appeal held that California Code of Civil Procedure § 425.16 (“Section 425.16”) – commonly referred to as the “Anti-SLAPP statute” – applies to causes of action arising from a mix of both covered speech (speech concerning a public issue) and speech/acts falling outside the statute. *Nikke Finke v. The Walt Disney Company et al.* (B160267), 2 Cal.Rptr.3d 436 (Cal.App. 2 Dist., July 28, 2003).

In so doing, the Appellate Court reversed the Los Angeles Superior Court and dismissed Plaintiff Nikki Finke’s causes of action against The Walt Disney Company for slander and unfair business practices although leaving intact her claims of libel and interference with contract. The opinion was written by Justice Earl Johnson, joined by Justices Norvell F. Woods Jr. and Aurelio N. Munoz.

#### **Reporting on Disney “Pooh” Dispute**

Plaintiff Nikki Finke (“Finke”) is a newspaper reporter who had a contract with the New York Post to write about the entertainment business for the paper’s business section. During January 2002, Finke authored two articles that were published in the New York Post regarding The Walt Disney Company (“Disney”) and its involvement in litigation concerning merchandising rights to the Winnie-The-Pooh characters. Disney contends that Finke’s articles contained certain inaccuracies and Disney wrote a letter to the New York

Post requesting it correct the record.

The New York Post subsequently severed its relationship with Finke. It is Disney’s position that it does not know why Finke was dismissed nor did it have any involvement in the matter. Finke responded by filing suit against both the New York Post and Disney.

#### **California’s Anti-SLAPP Statute**

If a lawsuit arises from speech concerning a matter of public interest, California Code of Civil Procedure § 425.16 (“Section 425.16”) permits a defendant to file a Special Motion to Strike the complaint and, in order to defeat the motion, the plaintiff must come forward with admissible evidence establishing a probability that she will prevail at trial. Disney filed a Special Motion to Strike pursuant to Section 425.16, and Finke opposed.

Section 425.16 involves a two-prong analysis. First, the moving defendant has the burden of establishing that the statute applies to the plaintiff’s claims -- that the claims arise from speech concerning a matter of public interest. If the defendant establishes the applicability of Section 425.16, the burden then shifts to the plaintiff to show a probability that she will prevail.

#### **Trial Court: Not Covered by SLAPP Law**

The presiding Los Angeles Superior Court held that, while portions of Finke’s causes of action arose from speech concerning a matter of public interest and were therefore covered by Section 425.16, the causes of action also in-

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***The Appellate Court reasoned that, if the mere presence of a single uncovered act could preclude application of [the Anti-SLAPP Law], plaintiffs would be able to easily plead around the statute, thereby rendering it largely ineffective.***

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## Cal. Ct. Applies Anti-SLAPP Statute to Mix of Speech

(Continued from page 35)

cluded speech and conduct that was not covered by the statute (a “mixed cause of action”). According to the trial court, in order for Section 425.16 to apply, every act supporting the cause of action must be covered by the statute and, if the cause of action includes a single act falling outside the statute, Section 425.16 does not apply.

The lower court then concluded that, notwithstanding the presence of certain covered speech, Finke’s allegations of uncovered speech rendered the Section 425.16 inapplicable, and the court denied Disney’s motion accordingly. Disney appealed.

### Appellate Court Reverses on SLAPP Issues

On appeal, the Second District disagreed with the lower court’s analysis and reversed. The Appellate Court held that Section 425.16 applies to a cause of action arising from speech concerning a matter of public interest, even if the claim also includes allegations falling outside the statute. The Appellate Court reasoned that, if the mere presence of a single uncovered act could preclude application of Section 425.16, plaintiffs would be able to easily plead around the statute, thereby rendering Section 425.16 largely ineffective.

In reviewing the causes of action pleaded by Finke against Disney consisting of intentional and negligent interference claims, libel and slander, intentional and negligent infliction of emotional distress and unlawful business practices, the Court of Appeal ruled that all were subject to the Anti-SLAPP statute. The Court found that the complaint alleged two predicate acts by Disney which singly or in combination gave rise to each of Finke’s causes of action –

- (1) alleged defamatory statements concerning her fairness and accuracy in reporting on the *Pooh* litigation and
- (2) alleged threats to withdraw advertising and impose other economic sanctions against the Post unless Finke was fired. These alleged acts were without a doubt “speech” because they were said orally or in writing by Disney.

In response to Finke’s claims that such threats or statements about her biases and/or prejudices were not protected First Amendment conduct because they were for the purpose of having her terminated from her position at the Post, the Court of Appeal found that the statements were rationally connected to Finke’s reporting on the *Pooh* litigation and to hold otherwise would be to “arbitrarily divorce the statements from the context in which they were made.”

### Leaves Certain Claims Standing

After holding Section 425.16 applicable and reversing the trial court accordingly, the Second District then addressed the second prong of the statute – whether Finke had produced evidence establishing a “probability of prevailing” at trial. The Appellate Court held that Finke had failed to substantiate her causes of action for slander and unfair business practices, and dismissed both claims with prejudice. However, with respect to the libel and interference claims, the Appellate Court found that Finke had met her initial burden of demonstrating a “probability of prevailing” at trial.

### Rejects Disney Privilege Claims

Having decided that §425.16 applied to all of Finke’s causes of action, the Court of Appeal then turned its attention to the second prong of the Anti-SLAPP analysis – whether the plaintiff had demonstrated a probability of success on the merits of her claims. This prong looks only to determine whether plaintiff establishes a probability of success on the merits – a showing that her claims have at least “minimal merit.”

In making this determination, the Court looked to whether Disney’s privilege defenses would preclude such a *prima facie* showing. The Court rejected Disney’s claim that its statements to the Post were protected by California’s Civil Code’s litigation privilege, a “common interest” privilege and/or under a constitutional or common law right of fair comment.

### Reporter Wasn’t Public Figure

The Court then addressed whether plaintiff was a public figure. Interestingly, the Court ignored plaintiff’s extensive statements in her pleadings that she was a well-known and respected entertainment business journalist and with little discussion found that Finke was neither an all purpose nor a limited purpose public figure and as such, Finke had no independent access to the media to counter Disney’s accusations against her.

Plaintiff is represented by O’Donnel & Shaeffer, Los Angeles, California.

*Ronald Gutman is with Christiansen, Miller, Fink, Jacobs, Glasser, Weil & Shapiro, Los Angeles, and represents The Walt Disney Company in this matter.*

## California Appellate Court Denies Anti-SLAPP Motion in Case Involving Allegations of Criminal Activity

### *Court Finds Newsletter is Not Public Forum*

California Court of Appeal upheld the denial of defendant's anti-SLAPP motion in *Weinberg v. Feisel*, (2003 WL 21715847, (Cal. App. 3 Dist.)). Plaintiff brought claims of libel, slander and intentional infliction of emotional distress over allegations defendant made in an association's newsletter and letters that plaintiff stole some of defendant's token collection. Judge Scotland, for the court, held that defendant had not proven his actions were protected activity as they did not relate to an official proceeding, were not made in a public forum, nor involved an issue in the public interest. Finally, the court refused to find that an allegation of criminal misconduct is automatically an issue in the public interest.

#### **Comments at Issue**

Both parties are token collectors and members of the National Token Collectors' Association. The NTCA has approximately 700 members and publishes a monthly newsletter called *Talkin' Tokens*. Defendant claims that at a token show in either 1998 or 1999 plaintiff stole one of defendant's coins. Plaintiff denied taking the coin when confronted by defendant and has denied it ever since.

After engaging plaintiff, defendant began a "campaign," as described by the court, with the goal of having plaintiff thrown out of the NTCA. Defendant's acts included taking out two advertisements in *Talking Tokens*' in which he described the disappearance of the coin and alleged another collector had taken it (although he did not mention plaintiff); mailing letters to over 20 collectors naming plaintiff as the culprit, and that other collectors have had similar concerns and experiences about plaintiff before; and making statements to the police detailing plaintiff's violent tendencies and past stealing. At no time did defendant file a report with the police concerning the missing coin, nor a criminal complaint against plaintiff.

Plaintiff filed suit against defendant and subsequently, defendant filed an anti-SLAPP motion which was denied by the trial court. The defendant then appealed.

#### **Defendant's Actions Not Protected Activity**

The appeals court affirmed the denial holding that defendant's actions did not fall under any of the four categories of protected activity under California's anti-SLAPP law. First (and second), defendant's statements were not made during or in connection with an official proceeding because he did not file any criminal charges nor civil suits against plaintiff.

Next, the statements were not made in a public place, or public forum relating to a public issue. The court held that *Talkin' Tokens* was not a public forum under the anti-SLAPP statute; that the newsletter was not sufficiently open to general public access because it is a means of selective communication (in this case, a publication for a hobby organization having 700 members to which both parties belonged).

#### **Allegation of Criminal Activity Not Automatically in Public Interest**

Finally, Feisel's comments were not made regarding an issue in the public interest or during an exercise of the right to petition. Clearly, Feisel was not petitioning the government for a redress of grievances. The court held that merely accusing someone of criminal activity does not place the issue in the public interest. Feisel did not file any criminal charges or civil suits against Weinberg, but only made private comments to a select group of private individuals concerning a controversy between two other private individuals: himself and the plaintiff.

Even though the statute does not provide a definition for "issue of public interest", the court cited various precedent which provide some guidance. Specifically, an issue in the public interest should concern a substantial number of people (citing *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 762 (1985)); not be mere curiosity (citing *Time, Inc. v. Firestone*, 424 U.S. 448, 454-455 (1976)); and have some closeness with the statements at issue (citing *Connick v. Myers*, 461 U.S. 138, 148-149 (1983)). The speaker should also be motivated by the pub-

(Continued on page 38)

## California Appellate Court Denies Anti-SLAPP Motion in Case Involving Allegations of Criminal Activity

(Continued from page 37)

lic interest in making the comments, and not by the desire to further a personal controversy. (citing *Connick v. Myers at 148.*)

The court also found persuasive the decision in another California appellate case, *Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (105 Cal. App. 4th 913). In *Rivero*, the court concluded that statements alleging misconduct by a union member which were published by the union were not made in the public interest. The controversy only concerned a limited number of individuals and did not receive any media or public attention. Most importantly, the *Rivero* court refused to recognize that a private controversy could be turned into a public one merely through the publication of the facts to a greater number of individuals. Following *Rivero*, Judge Scotland held that the controversy in the present case was private, regardless whether defendant was able to harm plaintiff's reputation to a select group.

Finally, the court refused to agree with defendant's contention that an accusation of criminal activity is always in the public interest. Judge Scotland explained that other courts have repeatedly refused to grant statements such as these an automatic place in the public interest. (Citing numerous California and Supreme Court precedent including *Wolston v. Reader's Digest Assn. Inc.*, 443 U.S. 157, 168-169 (1979)). According to the court,

"Otherwise, wrongful accusations of criminal conduct, which are among the most clear and egregious types of defamatory statements, automatically would be accorded the most stringent protections provided by law, without regard to the circumstances in which they were made..."

For Weinberg: Dennison, Bennett & Press; and James H. Goudge (Woodland Hills, CA).

For Feisel: David S. Ettinger and Karen M. Bray of Horvitz & Levy (Encino, CA).

## Porn Publisher's Conviction Reversed

The conviction of *Screw* magazine publisher Al Goldstein, who was convicted in 2002 and served six days of a 60-day jail sentence for harassing his former secretary through various means that included his magazine and public access cable program, was overturned in mid-July by a panel of the New York Supreme Court Appellate Division. *People v. Goldstein*, No. 2002-754 (N.Y. Sup. Ct., App. Div. July 17, 2003).

During a three-day trial in February 2002, Goldstein admitting making vulgar and threatening comments in phone calls to the secretary, Jennifer Lozinski, and to mailing her a videotape of his public access cable program and a *Screw* editorial that insulted her by name and gave her home address. See *LDRC MediaLawLetter*, March 2002, at 29.

The unanimous appellate court reversed the conviction because of statements made during trial by the prosecutor, Brooklyn Assistant District Attorney David Cetron. The court said that although no single statement warranted reversal, when taken as a whole statements of Cetron's such as accusing Goldstein's trial attorney of lying deprived Goldstein of a fair trial.

The court rejected, however, Goldstein's argument that his comments regarding Lozinski were protected by the First Amendment, and stated that "a jury could properly find" that the statements constituted harassment.

Goldstein was represented in the appeal by Herald Price Fahringer of Lipsitz Green Fahringer, Roll, Salisbury & Cambria, LLP in Manhattan. The prosecution's appeal was handled by A.D.A. Shulamit Rosenblum.

### MLRC BULLETIN 2003:1

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## A District Court Upholds Summary Judgment Denial In Claim Whether Picture Fits the Crime

A federal district court in Pennsylvania has denied the *New York Times*' motions for certification of an interlocutory appeal or reconsideration of the court's denial of summary judgment in a libel suit. *Franklin Prescriptions, Inc. v. The New York Times Company*, 2003 WL 21404407 (E.D.Pa. June 19, 2003).

On October 25, 2000, the *Times* published an article entitled "A Web Bazaar Turns Into a Pharmaceutical Free for All." Among other things, the article discussed the dangers of using the Internet to obtain prescription drugs. A picture of part of Franklin's website that advertised the prices of prescription drugs ("web grab") accompanied the article. Neither the article nor the graphics mentioned that Franklin did not take orders for prescription drugs over its website. The web grab had been reviewed by various *Times* employees, one of whom admitted to seeing Franklin's statement on the website that it did not take online drug orders.

Reconsideration would be inappropriate, the court held, as it did not find any new evidence or manifest errors of law. Nor did Judge Cynthia Rufe find sufficient differences of opinion on controlling questions of law for an interlocutory appeal involving Franklin's private figure status, the choice of Pennsylvania law, or whether Franklin needed to show the *Times* endorsed the alleged defamatory meaning.

### ***Franklin is Private Figure***

Judge Rufe rejected the *Times* argument that Franklin should be considered a limited-purpose public figure, instead deeming it a private figure. The *Times* argued that its article discussed benefits and risks of using the Internet to find low-priced prescription drugs and that Franklin's ads about its drug prices were relevant to the article's discussion of the Internet's use for competitive price shopping. Rejecting this argument, the court characterized the controversy reported in the *Times* article as the danger of purchasing prescription drugs online. The court said that Franklin could not be considered an "online pharmacy," as it did not sell drugs from its website, which was informational only.

The court distinguished the leading public figure case in the area, *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273 (3d Cir.1980), on the ground that, unlike the meat advertiser in *Steaks*, Franklin did not place itself in any controversy, let alone at the center of one. Moreover, the \$1000 Franklin

spent on advertising through its website was more similar to an advertisement in a telephone directory than the \$16,000 "advertising blitz" in *Steaks*.

### ***Issue Remained on Reckless Disregard***

The court also said that even if Franklin were deemed a limited-purpose public figure, the summary judgment motion should still be denied, as a genuine issue of material fact remained as to whether the *Times* published the article with "reckless disregard for its falsity." The court held that the *Times*' juxtaposition of the "web grab" with its article could imply that Franklin was an illegal online pharmacy, even though that *Times* knew that it was not. In this connection, the court adopted the plaintiff's factual assertion that the *Times* had edited or cropped the picture of Franklin's web

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## First Amendment Decisions Online

The First Amendment Center has launched a searchable, on-line library of all of the U.S. Supreme Court's First Amendment decisions.

The center's First Amendment Library, which includes the decisions and other material focus on First Amendment issues, is accessible online at <http://www.firstamendmentcenter.org/faclibrary/index.aspx>.

The library includes cases regarding all aspects of the First Amendment: freedom of expression, including freedom of speech, free press issues, and the rights of assembly and to petition the government; and freedom of religion, including free exercise and establishment clause issues. The library also includes information and cases on federal and state freedom information laws, and articles on various First Amendment topics.

The U.S. Supreme Court decisions are searchable by name, year and topic.

The First Amendment Center is an operating program of the Freedom Forum, a nonpartisan, international foundation dedicated to free press, free speech and free spirit for all people.

## Pa. District Ct. Upholds Summary Judgment Denial

(Continued from page 39)

site to omit the statements that Franklin does not take online orders and requires prescriptions for all drug sales. (The *Times*' testimony was that it did not edit anything, but merely used a picture of whatever portion of the web site filled a single computer screen and that that picture contained all of the information that was relevant to the story and implied no illegality.)

### *Pennsylvania Law Will Apply*

As the court was exercising diversity jurisdiction, it had to choose between Pennsylvania law, as urged by the plaintiff, or New York law, requested by the *Times*. Pennsylvania's procedure for choice of law is to determine (1) if the law of the two states conflict and (2) if so, which state has the most significant "contacts or relationships" with the issue. Libel laws differ between the two states, in that New York private figure plaintiffs must show that the media defendant acted in a grossly irresponsible manner, while Pennsylvania plaintiffs need only show mere negligence.

The court determined that Pennsylvania had the greater interest in the issue; vindicating the reputation of and compensating one of its businesses outweighed New York's interest in free discussion and prevention of financial injury to one of its corporations. The court added that Franklin Prescriptions could have survived a summary judgment motion in either jurisdiction, however, as there remained a question of fact as to whether *Times*' omission of the website's statement that it does not take online orders constituted gross irresponsibility.

### *Defamation by Implication*

The court found that publication of the web grab alongside the article could lead an ordinary reader to infer that the publication referred to Franklin, even though Franklin was not named in the text of the article. Moreover, because the *Times* described some online pharmacies as "unscrupulous" and "outside the law," without naming Franklin among the exceptions, the article was capable of a defamatory meaning and should be considered by a jury.

The court noted that Pennsylvania cases recognize defamation by implication and rejected the *Times*' contention that a "trend in the case law" requires the plaintiff to show the defendant intended or endorsed the defamatory implication.

George Bochetto of Bochetto and Lentz, PC, Philadelphia, represented the plaintiff. Carl Solano and Jennifer DuFault James, Schnader, Harrison, Segal & Lewis LLP, Philadelphia, PA, represented the defendant, along with George Freeman of the *New York Times*.

## Host, Governor Settle Talk Show Cancellation Suit

Arkansas Governor Mike Huckabee and the Arkansas Education Television Network (AETN) agreed in mid-July to pay Democratic activist and talk show host Roby Brock \$15,000, plus \$16,000 in legal expenses, to settle his lawsuit over the network's announced cancellation of his program after he criticized the governor. The network also agreed to continue to broadcast the program through September 2004. *Brock v. Huckabee*, No. 4:02-CV-238 (E.D. Ark. dismissed July 11, 2003).

AETN, a state agency which operates five public television stations in Arkansas, told Brock on April 9, 2002 that it was cancelling his monthly program, "Talk Business on AETN," three days after Brock urged a Young Democrats group to work against the Republican governor's re-election.

After hearing evidence that aides to the governor had complained about the program to AETN and the show's sponsors, federal District Court Judge Bill Wilson issued an injunction on April 25, 2002 which prevented AETN from cancelling the contract under which it sold time to Brock for his program.

During the injunction hearing, Huckabee testified said that he was unaware of the aides' actions, and all defendants denied any wrongdoing in the settlement.

After the settlement was announced, a spokesman for the governor issued a statement to the Fort Smith *Times Record* that "all of us in the governor's office who were sued were dropped from any burden at all and AETN's insurance carrier settled the case with Brock, so maybe we can all go on to more important things than having to defend ourselves against nonsense like this."

Brock was represented by Morgan Welch, James G. Schulze and Donald K. Campbell III of Eubanks, Welch, Becker & Schulze LLP in Little Rock. Huckabee, AETN and the other defendants were represented by Timothy Gerard Gauger of the Arkansas Attorney General's Office.



## New York Senator Charles Schumer Asks for Leak Investigation

Leaks, it appears, flow uphill too.

Sen. Charles Schumer (D-NY) has asked the FBI to investigate a leak of classified intelligence information to *Time* magazine and *Chicago Sun-Times* columnist Robert Novak.

Schumer's request comes less than a year after the FBI and Justice Department raised Capitol Hill hackles by asking that members of congressional intelligence committees submit to lie detector tests to help determine the origin of leaks. See *MLRC MediaLawLetter*, Aug. 2002, at 57. Committee members rebuffed that request, but several Senators gave the FBI materials indicating their contacts with reporters. See *MLRC MediaLawLetter*, Sept. 2002, at 40.

Novak, in his July 14 column, published the name of CIA undercover agent Valerie Plame, wife of retired ambassador and recent Bush critic Joseph Wilson. Novak wrote that two senior administration officials contacted him and told him about Plame, that she was a CIA specialist in weapons of mass destruction. *Time* reported in July that some government officials told its reporters essentially the same thing.

Wilson later accused the administration of leaking his wife's identity in an effort to intimidate him, according to a July 25 report in *Newsday*.

Wilson traveled to Niger in February 2002 on behalf of the CIA to investigate intelligence claims that Iraq had tried to buy uranium from that country. He uncovered nothing to substantiate the claims, and later said he told as much to the CIA, but President Bush included the uranium story in his 2003 State of the Union address.

In an op-ed piece published in *The New York Times* on July 6, 2003, Wilson criticized the federal government for including the Niger claims in its decision to invade Iraq. Novak wrote that the Administration sources told him that Plame suggested sending Wilson to Niger.

Administration critics, including Schumer, have complained that the leak to Novak and *Time* could constitute a felony violation of the federal Intelligence Identities and Protection Act of 1982, 50 U.S.C. 421-26, because the

administration sources blew the cover of a covert CIA officer halting her undercover assignments and potentially endangering her overseas contacts.

The Act, an obscure provision discussed in only one appellate case, provides punishment in certain circumstances where a person with access to classified information intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information. See *Halkin v. Helms*, 690 F.2d 977 (D.C. Cir. 1982).

Severity of punishment varies depending on whether the person disclosing the agent identity gleaned it through authorized access to classified information that identified the agent (10 years in prison and/or a fine), gleaned it through authorized access to other classified information (5 years and/or a fine), or gleaned the it without authorized

access to classified information but disclosed it in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence

activities of the United States (3 years and/or a fine). 50 U.S.C. 421.

The statute bars prosecution of anyone other than the direct offender unless such a person acted in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States or had authorized access to classified information. 50 U.S.C. 421(b).

That makes it unlikely that any journalists could face prosecution even if the government seeks to charge the original source of the Plame information.

The Intelligence Identities and Protection Act was signed by President Reagan in 1982, partly in response to a 1975 book by former CIA agent Philip Agee, according to *Newsday*. It has been used only rarely, according to *Newsday*, and apparently never in a case involving leaks to the press.

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Intelligence Identities and Protection  
Act of 1982, 50 U.S.C. 421-26**

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## Webmaster of Anarchist Site Gets One Year in Prison

The webmaster of an anarchist Web site, <http://www.raisethefist.com>, that contained links to bomb-making instructions has been sentenced to a year in prison after pleading guilty to violating a federal law that prohibits the distribution of information about explosives and weapons of mass destruction with the intent that the information be used for violent crimes.

Sherman Austin, 20, pleaded guilty in February to violating 18 U.S.C. 842 (p)(2)(A). On August 4, U.S. District Judge Stephen Wilson sentenced him to triple what the prosecutor had recommended under a plea bargain. The judge also ordered Austin to pay a \$2,000 fine and barred him for three years from using a computer without approval.

The plea deal had called for him to serve four months.

Austin admitted linking to the "Reclaim Guide" which contains information about bombs. He reportedly told FBI agents he wanted the Web site to teach people about police brutality. [A Carnegie Mellon professor has posted portions of the "Reclaim Guide" at <http://www-2.cs.cmu.edu/~dst/raisethefist/exit/weapons.html>.]

Austin was arrested in February 2002 at a New York City demonstration against the World Economic Forum. After being charged with violating 18 U.S.C. 842 (p)(2)(A), he was returned to California.

Sen. Dianne Feinstein, D-Calif., was instrumental in the passage of 18 U.S.C. 842 (p)(2)(A) which was signed into law in 1999. Several similar bills introduced by Feinstein were passed by the Senate, but later killed in committee. In 1996, Congress directed the Justice Department to determine the constitutionality of regulating the distribution of bomb-making information. In a 1997 report, the Justice Department concluded that such a law would survive constitutional scrutiny as long as the statute requires "knowledge" that another person intends to use the information for an unlawful purpose.

In making its recommendation that any such law contain a clear "knowledge" prong, the Justice Department relied heavily on the district court's decision in *Rice v. Paladin Enterprises, Inc.*, 940 F. Supp. 836 (D. Md. 1996), which held that the First Amendment precluded a finding that the publisher of a manual on assassinations could not be held civilly liable for a killing carried out by a reader of that manual. Shortly after the Justice Department report, the Fourth Circuit reversed the district court decision in *Paladin*, holding that the First Amendment does not pose a bar to finding the publisher liable "as an aider and abetter of [a] triple contract murder." *Rice v. Paladin Enterprises, Inc.*, 128 F. 3d 233 (1997), *cert. denied*, 523 U.S. 1074 (1998). See also *LDRC LibelLetter* May 1997 at 9 and November 1997 at 1.

The statute reads:

It shall be unlawful for any person -

(A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence; or

(B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

***Any developments you think other  
MLRC members should know about?***

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## Secret Service Sees Threat in Los Angeles Times Cartoon

The U.S. Secret Service paid a visit to the L.A. Times, seeking to interrogate Pulitzer Prize-winning editorial cartoonist Michael Ramirez about a cartoon in the newspaper on July 20th. The cartoon, shown below, apparently was understood by the Secret Service to suggest violence against the President.

“We take all images such as this very seriously...regardless of the politics behind any speech, images of the president, such as this, raise concern.” Quoted Matt Drudge on Sunday night, July 20<sup>th</sup> from an unidentified Secret Service source. Ummmmm.....



According to an interview Ramirez did with NPR's On the Media, when the Secret Service agent actually arrived at the newspaper in Los Angeles, he was directed to L.A. Times legal counsel instead of Ramirez.

The cartoon is a takeoff of a memorable 1968 photograph from the Vietnam War showing Vietnamese police Gen. Nguyen Ngoc Loan shooting a man he said was a Viet Cong in the right temple on a Saigon street.

The Times quoted Ramirez as saying he was not advocating violence against Bush but trying to show that the president is the target of political assassination over his use of faulty intelligence to back up claims of Iraq's nuclear weapons program.

The Washington office of the Secret Service, in response to inquiries by Congressman Christopher Cox (R-CA), Chairman of the House Committee on Homeland Security, denied that Washington Secret Service was involved or even knew of decision to question Ramirez – but there is at least some indication that may not have been altogether the case. The source quoted by Matt Drudge,

who was the first to report that the Secret Service was planning an inquiry into the matter, was identified by Drudge as an anonymous *Washington-based* Secret Service source.

Congressman Cox, in his letter to the Director of the Secret Service, Ralph Basham, decried “the use of federal power to influence the work of an editorial cartoonist” and characterized it as reflecting “profoundly bad judgment.”

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### Secret Service Confiscates Journalism Grad Student's Notes

Not content to simply investigate editorial cartoonists, the Secret Service, according to American University School of Communication's website, <http://www.soc.american.edu>, confiscated the notes of an American University graduate journalism student on school assignment to gather information at the British Embassy in Washington. The American University School of Communications reported on August 15th that the Secret Service – upon receiving a demand to do so from School of Communication Dean Larry Kirkman – returned the notes on August 14<sup>th</sup> and apologized both by telephone and in person for what was obviously a mistaken use of the Service's authority.

Graduate student Dena Gudaitis, drew her class assignment out of a bucket just like her 33 other classmates. The task was to visit the area and write a “slice-of-life” article. However, unlike her classmates who drew such places as the zoo or a public golf course, Gudaitis was assigned the British Embassy.

According to the School of Communications article, after identifying herself to a British Embassy guard and to Secret Service personnel at the Embassy, her notes were taken and her purse was searched.

The Secret Service blames heightened security post-9/11. However, American University Journalism division director, Wendell Cochran, was troubled by the fact that Gudaitis identified herself as a reporter, which he suggests should have ended the issue. The incident is being treated as a teaching and learning experience for all those involved.

## Secret Service Sees Threat in LA Times Cartoon

*(Continued from page 43)*

“The reported suggestion by the Secret Service that Mr. Ramirez should take into account the possible reaction of unstable people to editorial opinion expressed in graphics implies a standard that would render adult discussion of serious issues impossible...Mr. Ramirez is owed an apology, and the public is owed an explanation both of how this happened and why it will not happen again.”

Ironically, perhaps, Ramirez was described in a number of press reports as is one of the few openly and avowedly pro-Bush conservatives in his line of work.

On NPR, Ramirez noted:

I’m going to be doing a cartoon where I take the exact same image that caused this controversy and I’m replacing the South Vietnam police chief with a gigantic howitzer labeled “Secret Service,” and I’m going to have me instead of the president, and I have a thought bubble which reads: “Over-reacting a little bit, aren’t you?”

## Restrictive Order Bars Photographs of Witnesses in Massachusetts Murder Trial

A Massachusetts Superior Court judge barred the news media from taking pictures of two witnesses in a convict’s attempt to get a new criminal trial. Cameras were not allowed at the judicial inquiry into the 1988 murder of 12-year-old Darlene Tiffany Moore, for which Shawn Drumgold has been serving a life sentence. The witnesses expressed concern for their safety, fearing they might be killed by “the real killers.” Suffolk Superior Court Judge Barbara Rouse considered this in deciding their fears were “valid” and they had shown the requisite “substantial likelihood of harm.” The restrictive order was entered despite objections by lawyers from WCVB-TV and the Boston Globe. Two witnesses, Olisa Graham and Gemini Hullum, came forward placing Drumgold blocks away from the scene of the murder which prompted the inquiry into a new trial. During the inquiry, the two witnesses who feared retaliation, Ricky Evans and Tracie Peaks, testified that the police had coerced them into falsely identifying Drumgold as the killer.

## New Orleans D.A. Requests that News Media Not Publish Names of Witnesses

On July 31<sup>st</sup>, New Orleans District Attorney Eddie Jordan requested that the media refrain from naming witnesses to violent crimes. The demand comes after the killings of two key witnesses in two separate murders. However, these two witnesses who were killed were never identified in the media. Both refused to accept the District Attorney’s offers to protect them. The District Attorney admitted as much, saying “Will it eliminate the problems of retaliation? Obviously, no.”

Media response has been sympathetic to the problem, but ambiguous as to whether they will comply with the D.A.’s request. The Associated Press reported that Fox 8 News in New Orleans would respond case by case and that WDSU-TV had noted that it “has consistently been sensitive in its coverage of the individuals and issues involved in criminal trials.”

However, Jim Amoss, editor of The Times-Picayune was less obtuse, saying that the paper will continue to give full reports of public testimony in criminal cases:

“The newspaper will not withhold the identities of people whose names have already been disclosed.”

In an article by Gwen Filosa in The Times-Picayune, it was pointed out that defense lawyers can obtain the names of witnesses by filing routine motions in court, and that all court proceedings are open to the public. Times-Picayune articles also reminded readers that a defendant has a constitutional right to confront his accusers in open court.

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## Kobe Bryant Rape Case: A Buffet of Media Issues

By Steven D. Zansberg

In case you spent the month of July orbiting earth in the space station, and didn't have cable, Los Angeles Lakers' megastar, Kobe Bryant was charged on July 18<sup>th</sup> with one count of felony sexual assault in Eagle County, Colorado. This highly publicized case, which several commentators have already dubbed "the trial of this century" was heralded by competing press conferences on the day the charges were filed: The first by Mark Hurlbert, the Eagle County District Attorney, the second in the Los Angeles Staples Center (Bryant's home court), in which Bryant remorsefully admitted he had committed adultery with a 19 year old woman who worked at the concierge desk at the Spa and Resort at Cordillera. (Bryant was staying there the night before he had knee surgery at a Vail, Colorado-based sports medicine clinic.)

At his press conference, Bryant steadfastly maintained his innocence and claimed that he had engaged in consensual sex with the young woman. Bryant's attorneys, while repeatedly disclaiming any efforts to "try this case in the media," nevertheless asserted his innocence, labeled the sheriff's office biased, criticized their lack of adequate investigation, and stated that the physical evidence supported Mr. Bryant's position.

Even prior to the filing of the criminal charges on July 18<sup>th</sup>, the Eagle County Sheriff's office had issued a Press Release on July 1 announcing that they had arrested Bryant (who turned himself in and posted \$25,000 bond). The Sheriff's Press Release was followed immediately by a Press Release from Bryant's attorneys labeling the Sheriff's Office biased and unfair.

### ***Arrest/Search Warrants Sought***

Also prior to the filing of the charges against Bryant, five news media companies (The Denver Post, The Los Angeles Times, The Orange County Register, NBC, KNBC-TV, and CNN) moved to unseal the arrest warrant and search warrant affidavits that were in the Eagle County court file. [All of the Court's Orders and pleadings are available at [www.courts.state.co.us/exc/media/eagle/courtdocs.htm](http://www.courts.state.co.us/exc/media/eagle/courtdocs.htm)]. County Court Judge Fred Ganett set a briefing schedule and later ordered

that a hearing be held on or before July 31 on the motion to unseal the court files.

Predictably, Bryant's counsel opposed unsealing on grounds that release of the information in the court file would deprive Mr. Bryant of a fair trial. Additionally, Bryant claimed his own right to privacy would be violated by release of information in the court file.

The People, through District Attorney Mark Hurlbert, filed a brief asserting Mr. Bryant's fair trial rights, the privacy rights of the alleged victim, and the ongoing investigation would be jeopardized by unsealing the file. Both Bryant and the People denied that there is any constitutionally-based right of access to search warrant and arrest warrant affidavits in the court file.

On July 31, 2003, a three hour hearing was convened, and televised live on Court TV. At the end of the hearing, the Judge ordered the parties to file proposed Findings of Fact and Conclusions of Law. Judge Ganett returns from vacation on August 18, and a written ruling on the Motions to Unseal is expected shortly thereafter.

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***Case dubbed "the trial of this century" was heralded by competing press conferences on the day the charges were filed.***

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### ***Gag Order & Leaks Investigation***

On July 24<sup>th</sup>, prior to the hearing on access, Judge Ganett, responding to the widespread and daily news coverage devoted to the case – including articles depicting the alleged victim's prior suicide attempts, and reports of what witnesses had observed the night of the alleged assault – Judge Ganett issued *sua sponte* a gag order on the trial participants requiring them to refrain from making any extra-judicial statements that would violate Rules 3.6 and 3.8 of the Colorado Rules of Professional Conduct.

Subsequently, Bryant's counsel pointed to a series of reports in the *Rocky Mountain News*, ABC News, ESPN News, and FOX News, citing sources within law enforcement describing physical evidence including the allegation that the alleged victim had "suffered physical trauma in the vagina area," and asked the Court to enforce the Order concerning pre-trial publicity and to sanction the law enforcement agents who were their sources for these reports. At the advisement on August 6, 2003, Judge Ganett explained that

*(Continued on page 46)*

## Bryant Rape Case Raises Issues for Media

(Continued from page 45)

he was authorizing the Sheriff of a neighboring county (Pitkin County), to investigate the “leaks” to the press and to report his findings to the court.

### *The “Decorum Order” - A Prior Restraint*

A second *sua sponte* order, dubbed a “Decorum Order,” was entered by Judge Ganett (and signed by the Chief Judge of the District) on July 28<sup>th</sup>. In that Order, the Court stated that

“all persons are advised that the privacy of the alleged victim is of significant importance to this Court and any media or other person who broadcasts, publishes, or otherwise disseminates an image or name of such person may be subject to exclusion from certain proceedings and/or other legal sanctions.”

In addition to this prior restraint on publication, the Court imposed a series of severe restrictions on the news gathering activity of the media both within and outside the Eagle County Justice Center. Specifically, all cameras, cell phones, video phones, tape recorders or other recording devices are barred entirely from the courthouse. No interviews are to be conducted within the courthouse. There is to be no photography within the courthouse or looking into the courthouse from outside the courthouse. Photography of the alleged victim and her family, witnesses, prospective jurors and jurors is prohibited as they come and go from the courthouse; in addition, photographers must maintain 15 feet from all other persons and must shoot from a fixed position. Finally, the media are prohibited from attempting to interview any of the parties, their families, witnesses, prospective jurors, jurors, or court staff on any of the public property surrounding the courthouse.

### *Media Asks Court to Modify Order*

On July 30<sup>th</sup>, the five media entities seeking access to the court file, plus FOX News, filed a “Motion to Clarify and/or Modify the Court’s Decorum Order.” The Motion pointed out that the prohibition against publishing the name or image of the alleged victim was a prior restraint of publication that was plainly unconstitutional under firmly settled Supreme Court precedents. Accordingly, the movants asked the court

“to clarify that its apparent directive prohibiting the publication of the alleged victim’s name or image

[was] intended only as an hortatory or suggestive admission, that is not, in fact, an order of the court ‘whose violation’ would be punishable by imposition of exclusion from proceedings ‘and/or other legal sanctions,’ which the court cannot constitutionally impose.”

Alternatively, the Motion asked the Court to simply rescind that portion of the Decorum Order. The media’s motion also pointed out that the restrictions on newsgathering activities within the courthouse and in the environs surrounding the courthouse were unconstitutionally overbroad. The movants acknowledged

“the legitimate governmental objective in imposing reasonable and content-neutral ‘time, place, or manner’ restrictions on news gathering that adequately protect the free flow of pedestrian traffic, and maintain the solemnity and decorum of the judicial proceedings being conducted within the courtroom.”

Nevertheless, the motion asserted, “the scope of the restrictions [that have been imposed] on constitutionality protected news gathering activities on public property is overbroad.” At the August 6<sup>th</sup> advisement, Judge Ganett stated that the parties have until August 14<sup>th</sup> to file responses to the Motion to Clarify and/or Modify the Decorum Order, and stated that the court would address the media’s motion upon his return from vacation on August 18<sup>th</sup>.

### *Media Seeks Cameras in Court*

No sooner had Judge Ganett announced that the Preliminary Hearing would occur on October 9, 2003, than several news organization filed requests for “expanded media coverage,” (cameras in the courthouse) to cover that proceeding. Judge Ganett subsequently issued an order permitting the parties to respond to the requests for cameras in the courtroom on or before August 22<sup>nd</sup>. It is likely that counsel for Mr. Bryant (and, possibly, the People) will not only oppose the motions for cameras in the courtroom, but will also move to close the Preliminary Hearing to the public, as counsel for Scott Peterson has done (unsuccessfully) in California.

*Steven Zansberg, Tom Kelley, Chris Beall of Faegre & Benson’s Denver Office represent the news media entities discussed in this article in seeking access to records and proceedings in the Kobe Bryant case, and in challenging the Court’s Decorum Order.*

## Florida Street Vendor Statute Declared Constitutional: Newspaper Vendors Told (Not) to Hit the Road

By Deanna K. Shullman

A federal trial court in Miami has refused to halt a police crackdown on sales of newspapers by street-corner vendors. Two South Florida newspapers sought a preliminary injunction against the enforcement of Section 316.130(5) of the Florida Statutes, which provides that “[n]o person shall stand in the portion of the roadway paved for vehicular traffic for the purpose of soliciting a ride, employment, or business from the occupant of any vehicle.” Fla. Stat. § 316.130(5) (2002).

In denying the requested injunction, Judge Patricia Seitz found that the statute is a content-neutral regulation of speech and is constitutional. *Sun-Sentinel Co. v. City of Hollywood*, Case No. 03-60535, 2003 WL 21756865 (S.D. Fla. July 25, 2003).

The City of Hollywood began applying the statute to newspaper vendors in March 2003, citing concerns for traffic and pedestrian safety.

*The South Florida Sun-Sentinel* and *The Miami Herald* challenged the constitutionality of the statute because

it prohibits street vendors from entering the roadway to make a sale. The street vending program has been in place since the early 1980s, and newspapers across the state sell hundreds of thousands of copies of their publications to passing motorists each day during the morning rush hour. The newspapers complained the statute was vague, overbroad, and a content-based restriction on speech.

Shortly after filing their complaint, the newspapers asked the trial court for a preliminary injunction against enforcement of the statute by City of Hollywood police officers. Relying on a Middle District of Florida case striking down a similar statute earlier this year, *see Bischoff v. Florida*, 242 F. Supp. 2d 1226, 1253 (M.D. Fla. 2003), the newspapers argued that by prohibiting only speech directed at soliciting a ride, employment, or business, the statute “selectively proscribes” speech activity – i.e. it “impermissibly prefers” speech by any speaker *not* conveying a commercial message or seeking a ride “over all other activity that retards traffic” without *any* showing that the permitted speech is any less disruptive than the prohibited speech. For example, speech directed at political campaigning would not fall under the statute. The newspapers also argued that the statute was

vague and overbroad.

Judge Seitz of the Southern District of Florida disagreed with the newspapers and the Middle District’s reasoning in *Bischoff* and found that the statute was a content-neutral regulation on speech. The court held that the proper test for determining whether a statute is content neutral is to determine whether “the state disagrees with a speaker’s message” and found that there was no evidence that the City of Hollywood had begun enforcing the statute because of any disagreement with the message the newspapers convey.

The court further found that the statute was narrowly tailored to serve the government’s interest in roadway safety and left open ample alternative vehicles for selling newspapers, such as convenience store purchases, home or office subscriptions, and news racks. The court also noted that

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***[T]he newspapers argued that by prohibiting only speech directed at soliciting a ride, employment, or business, the statute “selectively proscribes” speech activity.***

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newspaper vendors permissibly may stand in the median or sidewalk to solicit sales, as long as they do not enter the roadway. In short, the court found that the newspaper readers “would have ample opportunities to obtain the Plaintiffs’ news of the

day.”

The court also rejected the newspapers’ vagueness challenge. Citing inconsistencies in the way Hollywood police officers tasked with enforcing the statute have interpreted the law, the newspapers argued that words like “soliciting” and “business” were unconstitutionally vague. The court disagreed and held that “the testimony of two police officers compared to the knowledge of scores of police officers does not demonstrate that police officers generally do not know what activity Section 316.130(5) prohibits.” Some degree of police judgment was constitutionally permissible, the court concluded. The court also held that the statute did not sweep too broad so as to unconstitutionally restrict permitted speech activity on sidewalks and medians and other areas on public streets not covered by the statute.

The newspapers have not decided whether to continue their constitutional challenge to the statute.

*Deanna K. Shullman is an associate at Holland & Knight LLP. She, along with partners Sanford L. Bohrer, Gregg Thomas, and James B. Lake represented both The South Florida Sun-Sentinel and The Miami Herald in the matter.*

## Pop-up Ads for Competitors Win the Latest Round

By Jon Katz

On June 24, 2003, a federal trial court granted partial summary judgment against U-Haul's lawsuit contesting the technology that enables competitors' pop-up ads to be displayed during visits to U-Haul's and other companies' Internet sites. The case is *U-Haul International, Inc., v. WhenU.com, Inc., et al.* Civ. Act. No.03-1469-A (E.D. Va.) (Judge Gerald Bruce Lee).

U-Haul's complaint alleges copyright and trademark infringement, and trademark dilution, due to pop-up ads appearing during visits to Internet pages that contain U-Haul's intellectual property. The lawsuit also alleges unfair competition for allegedly misleading the plaintiff's visitors that U-Haul has a contractual relationship with the competitors who appear on the pop-up ads. U-Haul further alleges misappropriation of advertising content and interference with prospective economic advantage, and unjust enrichment. Finally, U-Haul alleges a violation of Virginia's Business Conspiracy Act, claiming that WhenU.com's pop-up ads amount to a scheme to willfully and maliciously injure U-Haul's business.

The successful summary judgment motion of defendants WhenU.com and Avi Naider insists that the defendants did not unlawfully misuse any intellectual property, as the pop-up ads do not contain any reference to U-Haul and do not contain any of U-Haul's intellectual property. Instead, the pop-up ads for U-Haul's competitors show up for Internet users whose computers contain technology that enables WhenU.com's pop-up ads to appear.

On June 24, 2003, the trial court granted summary judgment against all of U-Haul's claims, except to permit U-Haul to re-file its claims of misappropriation, interference with prospective economic advantage, unjust enrichment, and violation of Virginia's Business Conspiracy Act. U-Haul has not yet re-filed those issues.

The trial court issued its two-page summary judgment order without any explanation for its decision, other than to confirm that its written reasons are forthcoming. To monitor the date that the trial court issues its opinion, which has not yet been filed, subscribe to and visit the court's docket through PACER ([http://](http://www.pacer.uscourts.gov)

[www.pacer.uscourts.gov](http://www.pacer.uscourts.gov)).

Meanwhile, WhenU.com is also defending against pop-up ad lawsuits filed in June 2003 by Overstock.com, Wells Fargo and 1-800-contacts.com. Another pop-up ad company, Gator Corporation, is defending against consolidated lawsuits against its pop-up ads. The Gator litigation is being handled by the Judicial Panel on Multidistrict Litigation in Washington, D.C.

The sole plaintiff, U-Haul International, is represented by Richmond's Sands, Anderson, *et al.*, and the Los Angeles firm of Jeffer, Mangels, *et al.* The defendants are WhenU.com, which is the company that provides the pop-up technology; Avi Naider; Budget Rent A Car System, Inc.; Moversbay.com; Door to Door Storage; and Conductive Corporation. The defense lawyers are Washington, DC's Hale and Dorr, LLP, and Lutzker & Lutzker, LLP.

*Jonathan L. Katz is a partner at Marks & Katz, LLC in Silver Spring, Maryland.*

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## 10th Circuit Court of Appeals Upholds Constitutionality of Colorado Statute Governing Secrecy of Grand Jury Investigations

### ***Court says witness in JonBenet Ramsey case cannot publish accounts of her grand jury participation.***

After testifying in front of the grand jury, Linda Hoffman-Pugh, the housekeeper for John and Patsy Ramsey, wishes to publish a book about her experiences in the investigation of the murder of JonBenet Ramsey. Colorado requires that grand jury investigations, including testimony, be kept secret. Afraid she might be held in contempt of court, Hoffman-Pugh sought and was granted a District Court judgment declaring she could not be prosecuted for revealing information. The 10th Circuit Court of Appeals reversed. *Hoffmann-Pugh v. Keenan*, 2003 WL 21804383, \*2, 2003 WL 21804383 (C.A.10 (Colo.)) (10th Cir. Aug. 6, 2003).

#### ***District Court Declaratory Judgment: Secrecy Rule Violates First Amendment***

Because it required Hoffman-Pugh to remain quiet after the grand jury's term had ended, the District Court, citing *Butterworth v. Smith*, 494 U.S. 624 (1990), held that the Colorado secrecy rule violated the First and Fourteenth Amendments. In *Butterworth*, the U.S. Supreme Court struck down a Florida statute which permanently prohibited a grand jury witness from disclosing grand jury testimony and also the "content, gist, or import" of the testimony.

#### ***10th Circuit Court of Appeals Reverses: Secrecy Rule Narrowly Tailored***

In an opinion written by Circuit Judge Stephanie K. Seymour and joined by Judges William J. Holloway and David M. Ebel, the 10th Circuit ruled that *Butterworth* did not require an invalidation of Colorado's grand jury secrecy rule. The Court noted the crucial difference between the Florida and Colorado statutes: the Florida statute prohibited "information the witness possessed prior to participating in the grand jury investigation" while the Colorado statute limits its prohibition to "information which he may have obtained as a result of his participation in the proceedings of the grand jury." *Ibid.*

Hoffman-Pugh had included in her complaint that she wished to publish a book that "will include her appearance before the Boulder grand jury... and recount her testimony." *Id.* at \*3. In the Court's opinion, "drawing the line at what

Ms. Hoffman-Pugh knew prior to testifying before the grand jury protects her First Amendment right to speak while preserving the state's interest in grand jury secrecy." *Ibid.* Though this grand jury's term had expired, there had been no indictment or grand jury report issued. *Id.* at \*1. The Court of Appeals noted:

"Because there is no statute of limitations on the crime of murder under Colorado law, however, a new grand jury could consider evidence and continue the investigation." *Ibid.*

Thus,

"at least so long as the potential remains for another grand jury to be called to investigate an unsolved murder",

Hoffman-Pugh cannot disclose information concerning her participation in the grand jury proceedings. *Id.* at \*4.

#### ***A Possible Avenue for Relief?***

Doling out a little advice, the Court of Appeals did note that "there is a way for Hoffman-Pugh to free herself even from this restriction [prohibiting the disclosure of grand jury information]." *Ibid.* The Court of Appeals suggested Hoffman-Pugh apply, under Rule 6.9 of the Colorado Rules of Criminal Procedure, for a copy of her testimony "and a determination that secrecy is no longer required." *Ibid.*, citing Colo. R.Crim.P. 6.9(b)(c). If this occurred, the case would be deemed closed and Hoffman-Pugh could write the book she always wanted.

In the meantime, Hoffman-Pugh vows to leave blank a 32-page chapter where the testimony would have been printed. In addition, she wishes to appeal the decision to the U.S. Supreme Court.

William F. Nagel, Assistant District Attorney (Andrew Ross Macdonald, Assistant County Attorney, with him on the briefs), Boulder County Attorney's Office, Boulder, CO, for Defendant-Appellant.

Darnay Robert Hoffman of New York, NY, submitted a brief for Plaintiff-Appellee but did not appear for oral argument.

## Senate Rejects Provision to Bring Homeland Security Department Under FACA

The Senate has narrowly rejected a measure to subject advisory councils to the Department of Homeland Security to the open meeting requirements of the Federal Advisory Committee Act (FACA).

The Federal Advisory Committee Act, 5 U.S.C. App. 2, requires advisory committees to federal agencies to make public all reports, records or other documents used by the committee, provided that the documents do not fall within Freedom of Information Act exemptions. The legislation creating the Department of Homeland Security allowed the new department's advisory committees to be exempt from the provisions of FACA. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 871 (a), 116 Stat. 2135, 2243 (2002).

By a vote of 50-46, the Senate rejected an amendment proposed by Sen. Robert Byrd (D-W.Va.) that would have prohibited funding for any advisory committee that has been exempted from FACA. Rollcall Vote No. 303, 108th Cong. (July 24, 2003) (rejecting S.Amdt. 1373 to H.R. 2555 (Department of Homeland Security Appropriations Act, 2004)), *reported at* 149 Cong. Rec. S9866 (daily ed. July 24, 2003).

In January, Sen. Joseph Lieberman (D-Conn.) introduced a separate bill which would make FACA applicable to the Department of Homeland Security. *See* S. 41, 108th Cong. (2003). That bill has languished in committee.

"The American people have a right to know that the Department of Homeland Security is acting in their best interests, not simply in the interests of any administration's friends in the private sector," Byrd said in introducing his amendment. "This knowledge will strengthen our homeland security efforts, not weaken them, and will ensure public confidence in the policies that any administration – not only this one, but any future administration – chooses to follow."

While the legislation allows for the creation of additional councils, the Homeland Security Act included a provision specifically creating the Homeland Security Advisory Council, which is charged with providing advice and recommendations to the Homeland Security Secretary about U.S. homeland security needs. Along with security policy experts and representatives from

law enforcement, the 818-member committee also includes members from Lockheed Martin, Dow Chemical and Cisco Systems.

Byrd noted that, "with six CEOs and a member of the board of directors from three top companies, the Homeland Security Advisory Council represents some of the top business interests that are in competition for government contracts related to homeland security.

"With a \$40 billion homeland security budget and the expectation that the Federal Government will spend hundreds of billions of dollars in the coming years on homeland defenses," he continued, "corporate America is salivating over the money that is to be made from the grants and contracts being doled out by the Homeland Security Department."

Byrd was joined in introducing his amendment by Sen. Lieberman, Sen. Carl Levin, D-Mich., and Sen. Hillary Rodham Clinton, D-N.Y.

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## Free Press Issues Swirl in Iraq, Terror Fight

### *U.S. Soldiers Disciplined for Gripping to Press*

Soldiers of the Army's Second Brigade, Third Infantry Division who complained about their prolonged deployment in Iraq to ABC News were apparently disciplined after making the comments.

"It was the end of the world," one officer told the *San Francisco Chronicle* after the story was broadcast on the evening news July 15 and on "Good Morning America" the next day. "It went all the way up to President Bush and back down again on top of us. At least six of us here will lose our careers."

The soldiers, who had been told earlier that week that they would be heading home after 11 months, then were told that they would remain in Iraq, criticized Pentagon officials including Secretary of Defense Donald Rumsfeld.

"I would ask him why we are still here," one soldier said when asked what he would tell Rumsfeld. "I don't have any clue as to why we are still in Iraq."

"If Donald Rumsfeld were here, I'd ask him for his resignation," said another.

Both soldiers were shown on camera and identified by name, in keeping with the Pentagon's policy that all statements by soldiers should be on the record.

After the broadcasts, the new head of U.S. Central Command, Gen. John Abizaid, publicly reminded the troops that "none of us who wear this uniform are free to say anything disparaging about the secretary of defense, or the president of the United States." While soldiers could be court-martialed for making such comments, Abizaid said that "whatever action may be taken, whether it's a verbal reprimand or something more stringent, is up to the commanders on the scene."

The ABC News story also apparently upset White House officials whose response was to launch a smear campaign against the reporter. Web site operator Matt Drudge told the Washington Post's "Reliable Source" column that "someone from the White House communications shop" told him that the reporter who filed the story, Jeffrey Kofman, is gay and is a Canadian citizen.

Drudge's site trumpeted these facts for several hours on July 16. [Note that this is the second time Matt Drudge appears in this publication — see p. 43 — reporting leaks later denied by government officials.]

### *Free Press Struggles in Iraq*

An independent press continues to emerge in Iraq. The demise of the Hussein regime has led to an explosion in media available to Iraqis, both from in the country and from abroad. Many of the new domestic media are sponsored by ethnic or political groups.

The organization Internews has established a Interim Media Commission to foster the creation of independent and professional media in Iraq. The commission will be guided in its work by principles established at a conference held in Athens in early June. See *MLRC MediaLawLetter*, June 2003, at 58; the principles are available at [http://www.internews.fr/iraq\\_media\\_conference/framework.html](http://www.internews.fr/iraq_media_conference/framework.html).

But this media awakening has not been without some fits and starts.

On July 17, American coalition troops burst into and ransacked the offices of the *Al Mastaquilla* newspaper, and arrested the newspaper's owner. The raid came four days after the paper published an article titled "Death to all spies and those who cooperate with the United States; killing them is religious duty," and threatening to "publish a list, which names the individuals who are cooperating with the US occupation in order to make the people give their judgment against them." The newspaper's editor told CNN that the article was quoting religious leaders.

A coalition press release said that the newspaper's incitement to violence was a violation of international law and of an order on "prohibited media activity" issued by the Coalition Provisional Authority on June 10. (<http://www.cpa-iraq.org/pressreleases/PR22mustaqila21July03.html>) The order is available at <http://www.cpa-iraq.org/regulations/CPAORD14.pdf>.

There were also reports of American troops raiding the offices of *Al-Adala*, the newspaper of the party representing Iraq's Shiite majority. On Aug. 8, the Interna-

(Continued on page 52)

### Free Press Issues Swirl in Iraq, Terror Fight

(Continued from page 51)

tional Federation of Journalists and the Committee to Protect Journalism raised concerns over coalition forces' detaining several journalists for various periods, including reporters for Al Jazeera, Iranian State Television, and Turkish media. The groups also protested the beating and holding of Japanese television reporter Kazutaka Sato after he filmed bodies of Iraqis killed during a coalition raid on a house in Baghdad.

Meanwhile, the coalition-installed head of Iraqi Television quit in early August, saying that the Pentagon was not providing enough funding for the coalition-controlled network to compete with other Arab broadcasters. Director Ahmad al-Rikaby, who had been living in exile in London since he was one, was employed by Science Applications International, Inc., a company with a Pentagon contract to relaunch the former Hussein-government television operation.

### Iraq Souvenirs Returned; Book Author Arrested

The U.S. Customs Service returned most of a reporter's souvenirs from Iraq, but agency also arrested a book author for alleging smuggling ancient artifacts from the country.

Joseph Braude, author of *The New Iraq*, was arrested Aug. 9 at John F. Kennedy Airport in New York after arriving from London. The Customs Service said that Braude had three, 4000-year old cylindrical stone seals when returning from a previous trip, on June 11. He was arrested after the agency investigated the seals and their origin.

### Reuters Reporter Killed

Reuters cameraman Mazen Dana was killed by American troops while filming at a prison where the United States is holding Iraqi prisoners. The prison had been attacked by Iraqi loyalists earlier in the day.

A U.S. Army spokesman said that the soldiers had mistaken Dana's camera for a rocket-propelled grenade launcher, and expressed regret for the incident.

Dana was the 18th journalist or assistant to die while covering the war in Iraq and its aftermath. Two others – Frederic Nerac and Hussein Othman, both of ITN – have been missing since the earliest days of the war.

On July 17, U.S. Customs Fines, Penalties and Forfeiture Specialist Susanne M. Cain ruled that *Boston Herald* reporter Jules Crittenden could keep most of the items he brought back from covering the war in Iraq.

Customs officers had seized the 55 items – which included a flag from an Iraqi Republican Guard base, a brass cast of Saddam Hussein, and a military-edition Koran -- when Crittenden returned to Boston in late April after working as an embedded reporter with the 3rd Infantry Division. See *MLRC MediaLawLetter*, May 2003, at 52. The items also included reporting equipment owned by the newspaper.

But Cain ruled that Crittenden was not entitled to a painting of Hussein, and the government kept military gear that it had issued to Crittenden.

Crittenden was represented in the Customs proceeding by Jeffrey Hermes of Brown Rudmick Berlack Israels, LLP.

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## MLRC 50 State Survey: EMPLOYMENT LIBEL AND PRIVACY LAW 2003

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## Advisory Group in Ireland Recommends Libel Reform

### Comments on Proposals Solicited

By Pamela Cassidy

*Dublin, August 2003*

On June 20<sup>th</sup> the Minister for Justice and Law Reform published the report of the Defamation Advisory Group. The competing rights to freedom of expression and the citizen's good name have equal Constitutional protection in

Ireland, and that protection is detailed in a 1961 Defamation statute. The Advisory Group recommends the modernisation and codification of defamation law and procedure in a new statute. The Minister has invited comments from anyone with an interest in a consultation period that will end in December. The main recommendations are summarised below (divided into substantive and procedural).

### Romance Novelist Loses Copyright Case in India

India's Supreme Court has refused to stop a "Bollywood" television series that romance author Barbara Taylor Bradford claims is a plagiarism of her novel, "A Woman of Substance."

In an August 4 decision, India's highest court refused to stay an order by the Calcutta High Court to allow the broadcast of the 260-episode series entitled, "Karishma: Miracle of Destiny." Bradford's book follows the rise of a woman from poverty to wealth and power. Karishma involves a woman who begins as a street sweeper who comes to head an international corporation.

Bradford did, however, notch a minor victory. The Supreme Court nixed an order that Bradford pay damages to the series producer – Sahara Media Entertainment – for the delay. The series was pulled off the air one day after it began broadcasting in May.

According to *The Times of India*, Bradford's attorneys asked in court to address whether the copyright in a literary work is restricted to the exact language used in the particular work and does not extend to the theme, plot, character and incidents of the copyrighted work.

"This judgment will further embolden infringers to violate intellectual property rights in India, especially by the Bollywood community," New York-based Bradford said in a statement. Bradford reportedly has said she will not pursue the matter.

According to *The Guardian* (London), Sahara claimed the soap was based on a story by a leading scriptwriter. Ejaz Maqbool, a lawyer for the firm, said: "It's a complete victory for us."

### *Defamation Fast Track*

Speedy justice for reputational damage is imperative, urged leading advocate Éamon Leahy SC<sup>1</sup> at a media seminar last year,<sup>2</sup> and the Group agree. They propose two forms of fast track relief, first where a plaintiff has requested, and been refused, a timely apology; and second where a plaintiff or defendant can demonstrate that the defence/claim has little prospect of success. The successful plaintiff can obtain a declaration that the published words are false and defamatory, a correction order and an injunction. But he is not entitled to damages – not a cent. And this may well make the fast track provisions so unattractive as to be irrelevant to the majority of defamation plaintiffs. An award of damages is widely regarded as an essential element of vindication. If it is to work, this reform has to tempt defamation Plaintiffs.

Mr Leahy had a novel suggestion on damages: the successful fast track plaintiff will obtain *special* damages only. If he presses on to full trial (for his fast-track relief was in addition to, not in place of, the plaintiff's right to a full trial) seeking an additional award of general damages for indignation, hurt etc., he could be cross-examined as to why he was not satisfied with the initial award.

In a further new departure the Group proposed that the court can, when making a correction order, specify the contents of the correction. This goes beyond Mr Leahy's proposals. At present a publisher cannot be forced to subscribe to a 'correction' with which he disagrees. If he refuses, Mr Leahy suggests that the court should direct a report of the verdict in a position of equal prominence to the original allegations. This is not merely an academic point: a correction gives the plaintiff's reputation a clean

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## Ireland Libel Law Proposal

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bill of health. That may prove frustrating for a publisher who is satisfied that the charge is true but cannot prove it to the standard required in a civil court.

### ***Apology Without Liability***

The Group's proposal that evidence a publisher 'made or offered an apology to the plaintiff .. shall not be construed as an admission of liability' is an attempt to address publishers' concerns that a timely apology exposes them to claims for unlimited damages, since they cannot protect their position on damages or costs by a private payment into court ("lodgement"). If the Group's recommendation as to a lodgement without admission of liability is accepted [see summary of recommendations below] then publishers will have this protection (welcome news, long overdue).

But is it realistic to insist, in addition, that a judge or jury, or indeed the plaintiff, ignore a public apology at trial? It has a curious logic – to admit publicly that you got it wrong but maintain, nevertheless, that you are not liable for the wrong. A lodgement is not disclosed to judge or jury until after verdict (for obvious reasons). But a public apology will be common knowledge.

The proposal follows a 1991 recommendation by the Law Reform Commission, who defined 'apology' as 'simply a matter of courtesy and draws the reader's attention to the fact that matter concerning the plaintiff is somehow in dispute .. it is quite distinct from a correction, retraction or any form of admission that the publisher was in error'. By contrast the Concise Oxford defines apology as 'the regretful acknowledgement of fault or failure'. Even if the Group were to include the LRC definition of apology, this proposal may prove unworkable in practice.

### ***New Limitation Periods***

Good news for publishers, and a warning for practitioners to keep a wary eye on time: the Group recommends the abolition of the distinction between libel and slander and a reduction in limitation periods to one year (unless there are exceptional circumstances within six years of publication).

### ***Privilege and Public Interest Publication***

Qualified privilege, a defence based on a nexus of duty and interest, is a vital protection for the honest individual in the ordinary conduct of social and business affairs. It applies in situations as various as staff complaints / advice within family relationships / volunteering information to the police. The Group make two recommendations, the first gives statutory basis to the general principles (whilst preserving existing common law privilege)<sup>3</sup> but confines the protection to communications made 'to a particular person or group of persons only'.

The second recommendation formulates a new defence of 'reasonable publication' to the world at large of public interest information, provided the publisher takes various factors into account including the extent of public concern about the information, whether it concerns the public functions or activities of the subject, the seriousness of allegations, their source, and whether the information contains the substance of the plaintiff's response. An effective right of reply *before* publication is novel, as is the assessment of whether the allegations relate to the public functions of the subject. A consideration of whether the information relates to the 'public functions or activities' of the plaintiff is a departure from English law (which bases privilege on the status of the *information*) and in line with US law<sup>5</sup> (which bases privilege on the status of the *individual*).

### ***Increased Jurisdiction Circuit Court***

Quicker, cheaper access to justice is the thinking behind the recommendation that the jurisdiction of the Circuit Court be increased from £30,000 to £50,000 for defamation claims, but the actual result may be to deprive plaintiffs, and indeed publishers, of their right to jury trial. Supreme Court Justice Hardiman has said, speaking extra judicially, that 'the verdict of a jury is felt to carry a degree of authoritative vindication difficult to replace in any other way'.

Similarly Mr Leahy: 'the best judges of what is or is not defamatory is the jury' and 'there are powerful arguments to be made for involving juries in the administration of justice'.

A more balanced recommendation, offering real choice, would give the High Court a greater discretion on costs in jury and complex cases.

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## Ireland Libel Law Proposal

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### **Press Council**

An innovative, carefully constructed proposal offering speedy correction where the press are adjudged, by a government appointed Press Council, to have fallen below ethical standards is to be incorporated in a Code of Conduct. The Group recommends a statutory basis to 'secure public confidence' in the process, thereby rejecting voluntary regulation. This is a departure from English practice, where the Government continues to be reluctant to interfere with the voluntary Press Complaints Commission. Also recommended is mandatory compliance with the Code. The Council will have power to direct publication of a summary of its adjudication, or a correction, and can apply to the Circuit Court to compel compliance. A Press Council claimant, who must make his complaint within 3 months of publication, will forgo his right to sue over the publication, and his right to damages. The Council's remit will include issues of defamation, privacy, non-defamatory but inaccurate information and material defamatory of the dead.

### **Procedural Reform**

The recommendations are significant, but for real progress a more fundamental reform may be necessary, involving fully pleaded cases within a strict timetable, pre-trial automatic disclosure of documents and witness statements, and early judicial case management. This 'cards on the table' approach facilitates a realistic assessment of the merits of each case, and promotes timely settlement. The English experience is that procedural changes (accompanied by a defamation pre-action protocol) have proved more significant than legislative reform.

### **What the Reforms Will Mean in Practice**

Nevertheless, the substantive reforms proposed are likely to result in quicker, cheaper defamation case disposal which is good news for publishers, and good news for defamation complainants.

### **Want to Comment on the Reforms?**

The full text of the Advisory Group Report is available on the Minister's website at: [http://](http://www.justice.ie/802569B20047F907/vWeb/wpRXHR5NSJVY/)

[www.justice.ie/802569B20047F907/vWeb/wpRXHR5NSJVY/](http://www.justice.ie/802569B20047F907/vWeb/wpRXHR5NSJVY/). Submissions may be made in writing to Room 8, Civil Law Reform, Bishop's Square, Redmond's Hill, Dublin 2 Ireland, or by e-mail to [defamation@justice.ie](mailto:defamation@justice.ie) or by fax to 00 353 14790201 on or before Wednesday 31<sup>st</sup> December 2003. NOTE that all submissions are subject to release under the Freedom of Information Act.

### **Summary of Recommendations**

- Fast-track procedure where a judge sitting without a jury can give summary relief, excluding damages
- Clarification of circumstances in which a Plaintiff can obtain aggravated damages
- New, statutory defence of reasonable publication
- New, statutory defence of 'innocent publication' for distributors, printers, broadcasters, internet service providers
- New, statutory Press Council with power to formulate a press Code of Conduct, investigate complaints and order corrections
- Reduction of limitation period from 6 years (libel) and 3 years (slander) to one year, save for exceptional circumstances
- Longstanding common law definition of defamation given a statutory basis
- Distinction between libel and slander abolished
- Jurisdiction of the Circuit Court to be increased to €50,000 for defamation cases

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## **Volunteers for Task Force on Irish Law Reform Sought**

Jim Borelli and Kurt Wimmer, Co-Chairs of MLRC's International Law Committee, are looking for volunteers for a small task force on this Irish libel law reform proposal. The task force would be asked to review the report and draft written comments for submission to Irish authorities on the matter. Please let Jim Borelli know ([Jim.Borelli@mediaprof.com](mailto:Jim.Borelli@mediaprof.com)) if you would like to participate in this effort.

### Ireland Libel Law Proposal

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- Modern reformulation of the defences of fair comment, justification, privilege
- Modern reformulation of malicious falsehood
- Modern reformulation of the defence of unintentional defamation
- Statutory basis for the defence of consent
- New statutory rule that a single cause of action lies for multiple publications, including publication by electronic means
- Criminal libel to be replaced by publication of 'gravely harmful statements'
- Defamation action survives the death of the Plaintiff
- Press conference giving an account of a 'public meeting' attracts statutory qualified privilege
  
- Procedural reforms
  - Defendant can make payment into court without admission of liability
  - Plaintiff who accepts payment can make a public statement in court
  - The making of an apology, or an offer of an apology, is not an admission of liability
  - Both parties can make submissions to the jury on damages, and the judge can direct the jury on damages
  - Supreme Court can substitute its own award of damages on appeal
  - Meaning – reasonably capable rather than arguably capable - can be determined by the court at a preliminary stage
  - Defamation plaintiff must verify on oath particulars of claim
  - Dismissal for want of prosecution motion where plaintiff has taken no step on the record for a year
  - A conviction or acquittal by a court in the state is evidence of that conviction/ acquittal and the facts on which it is based

*Pamela Cassidy is a Dublin Solicitor and a partner with BCM Hanby Wallace. She also spent 12 years working with a leading media firm in London, so has experience of both jurisdictions.*

<sup>1</sup> Respected by all, mourned by his many colleagues and friends, Mr Leahy died aged 45 in July.

<sup>2</sup> Summarised in the Media Law Digest March 2002, [www.bcmhanbywallace.com/mediadigest](http://www.bcmhanbywallace.com/mediadigest)

<sup>3</sup> Head 21 (3) (b).

<sup>4</sup> Classic exposition in *New York Times v. Sullivan* 376 US 254 (1964)

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## **50 State Survey 2003-2004:**

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## UK Parliament Report Recommends Stronger Press Self-Regulation and Statutory Privacy Law

By Marietta Cauchi

A United Kingdom parliamentary report on privacy and the media published June 16 recommends more effective press self-regulation under the aegis of a Press Complaints Commission with increased enforcement powers. The report also recommends Parliament consider enacting statutory privacy law as an alternative to ad hoc development through judicial decisions. The report issued by the select committee for culture, media and sport is available online at: [www.parliament.the-stationery-office.co.uk/pa/cm/cmcmucmeds.htm](http://www.parliament.the-stationery-office.co.uk/pa/cm/cmcmucmeds.htm).

### **Background: Ad Hoc Protection for Privacy**

Privacy law in the UK is relatively new. It began with the inception of the Human Rights Act in October 2001, which implemented the European Convention on Human Rights. Article 8 of the ECHR gives an individual “the right to respect for his private and family life, his home and correspondence,” and generally is assumed to require that signatory states recognize a cause of action for invasion of privacy. But UK appellate courts have generally been reluctant to apply a new privacy law, preferring to rely on traditional principles of defamation, breach of confidence and infringement of intellectual property.

For example, in the watershed case of *A v B Plc and Another*, [2002] EWCA Civ 337, (reversing an order enjoining a newspaper from publishing true articles about a soccer player’s adulterous affairs), the Court of Appeal noted that judges need not determine if a new privacy tort exists. Lord Woolf, the Lord Chief Justice, made it clear that breach of confidence provides a remedy for violations of Article 8. “In the great majority of situations, if not all situations, where the protection of privacy was justified,” he wrote, “an action for breach of confidence now would, where appropriate, provide the necessary protection.”

But proceedings for breach of privacy as a separate cause of action persist. Many of these are dealt with by temporary – but dispositive – injunctions at the trial court level with little publicity. Others, such as the celebrity cases *Douglas v Hello! and Others*, [2003] EWHC 786, and *Naomi Campbell v Mirror Group Newspapers*, [2002] EWHC 499 (QB), have resulted in decisions that are anything but clear.

At the trial of her action against Mirror Group Newspapers, Naomi Campbell did not pursue the contention that she had a separate cause of action for breach of privacy for the newspaper’s disclosure that she was attending Narcotics Anonymous meetings. But at trial she won her claim for damages for breach of confidentiality and breach of the Data Protection Act because an article about her addiction featured details of her treatment that could be considered “sensitive personal data.” The Court of Appeal later reversed this judgment, holding that the publication of peripheral details about Campbell’s treatment, such as her attendance at Narcotics Anonymous, was justified and in the public interest. *Campbell v. MGN Ltd.*, [2002] EWCA Civ. No: 1373.

Michael Douglas and Catherine Zeta-Jones won their claim against Hello! Magazine for breach of their right of commercial confidence when the magazine published photographs of their wedding that had been exclusively sold to rival OK! Magazine. But the court found that there was no invasion of privacy, providing a victory of sorts for the media defendants. Judge Lindsay echoed Lord Woolf’s remarks that the law of confidentiality is usually sufficient to protect an individual’s right to privacy under the ECHR. And where it is not, he said, it is up to Parliament and not the courts to correct that inadequacy.

### **Report: Time for a New Privacy Law?**

The U.K. members of Parliament responsible for the recent report picked up on Judge Lindsay’s remarks in the *Douglas* case and urged ministers to consider enacting a privacy law – not, they said, to punish the press but to provide some certainty in this area of the law which is subject to ad hoc and inconsistent court rulings.

Most of the report calls for an overhaul of the Press Complaints Commission – the self-regulatory body formed by UK newspapers and periodicals – to make it more proactive and powerful and less likely to be perceived as biased in favor of the press. The main recommendation is the establishment of a new procedure so that complainants can immediately ask the PCC for an adjudication on their complaint rather than first mediating their complaint.

The report also urges the PCC to set up a pre-publication team to deal with inquiries from members of the public who

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### UK Report: Press Self-Regulation & New Privacy Law

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do not want media publicity and to liaise with the relevant newspaper editors. This process is aimed at settling issues that arise before publication but fall short of “prior restraint” or “press censorship.” The report says the PCC, through its pre-publication team, should be proactive in events likely to cause intense media scrutiny, such as disasters where people are in grief and shock.

Having earlier this year tightened up the Code of Practice to ban payments to witnesses in criminal trials, the report now asks the PCC to ban the practice of paying policeman for information. The report also recommends that the Code of Practice should be updated to include e-mail and other electronic communications in its rules on interception. A copy of the Code is available through the PCC’s website: [www.pcc.org.uk](http://www.pcc.org.uk).

#### ***Composition of PCC***

The report contains a number of proposals about the constitution of the PCC. PCC chairman, Sir Christopher Meyer, said that he plans to increase non-media “lay” majority by one and that the selection process would be transparent.

Other recommendations concerning the PCC’s independence include:

- Editor commissioners would serve a fixed term, with those whose publications persistently offend being removed from the commission;
- The Code Committee, which considers changes to the Code of Practice and which is composed entirely of editors, would be reconstituted with a “significant minority of lay members”; and
- An independent person should be appointed to hear appeals against PCC adjudications and to conduct an annual external audit of the PCC’s processes and practices.

#### ***Sanctions Proposal***

The report says that existing sanctions should be made more effective and new ones introduced. For example, PCC adjudications should be more prominent with “tasters” being printed on the front page of the offending publication and the full text inside. And publications should automatically annotate archives as to their accuracy and sensitivity and be responsible for removing the relevant article from all publicly available databases.

Among other new proposals the report suggests one “gently punitive” measure and one “modestly compensatory” measure against offending publications:

- the annual registration fees paid by newspapers to Pressbof, the body that funds the PCC, should be geared according to the number of adjudications made against each publication in the previous year
- the industry is also asked to consider a fixed scale of fines for the most serious cases with the compensation being paid to a charity of the complainant’s choice. Currently newspapers are only required to publish adverse findings by the PCC.

Finally, the report suggested that offending newspapers should be required to compensate a vindicated complainant for out-of-pocket costs, such as the acquisition of a trial transcript, but not legal costs.

#### ***Conclusion***

While a privacy statute might clarify principles such as available defenses and damages, it would in all likelihood straitjacket the media, drawing immutable lines between what can and can’t be published. The recommendations for stronger self-regulation, if adopted, might forestall legislation. The report’s proposals appear designed to restoring the PCC’s credibility with the public as an effective self-regulator after much recent criticism.

The PCC was notably branded a “pussycat” and “largely autocratic” by TV newsreader Anna Ford after it rejected her complaint that the publication of long-lens photographs of her on a beach holiday with her family was an intrusion of her privacy under the Code of Practice. The PCC similarly rejected the complaint of disc jockey Sara Cox, over the publication of topless photographs of her taken while on a secluded beach. She later sued the People newspaper in court, obtaining a quick settlement, adding to the public perception that the PCC does not currently have sufficient powers to adequately address complaints. If the PCC does not beef up its practices and procedures, and with the judiciary singularly concerned about making new law, a privacy statute may yet become a reality.

*Marietta Cauchi is a financial journalist with Dow Jones Newswires in London and, before that, was a media lawyer at Finers Stephens Innocent in London.*

## Landmark U.K. Communications Bill Reforms Structure for Content Regulation

By Kurt Wimmer

On July 17, 2003, a dramatic overhaul of the United Kingdom's communications regulatory structure received Royal assent after a rocky two-year path toward adoption. The 590-page Communications Act 2003 will rationalize the structure under which independent media (and, to some degree, the BBC) are regulated in England, Scotland, Wales and Northern Ireland; it will permit U.S. companies to invest in the U.K. broadcast marketplace for the first time; and it will implement several provisions of the E.U.'s landmark Telecommunications Directives from 2002.<sup>1</sup> Perhaps most importantly to news organizations, it will install one "super regulator" in the place of several bodies that currently regulate the media. By far, the most dominant subject of the Communications Act 2003 is the regulation of telecommunications and other electronic communications services, an area that is far beyond the scope of this article, but the impact of the Act on content regulation in the U.K. should not be underestimated.

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***Perhaps most importantly to news organizations, it will install one "super regulator" in the place of several bodies that currently regulate the media.***

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### ***UK Regulatory System Streamlined***

The regulatory structure for the media in the United Kingdom has always been complex. No fewer than five regulatory agencies can have jurisdiction over various types of media and communications regulation and content disputes — the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC), the Radio Authority (RA), the Office of Telecommunications (OfTel) and the Radiocommunications Agency.

In addition, an Information Commissioner has a role in determining whether journalistic practices constitute "processing personal data" under data protection legislation, a self-regulatory Press Complaints Commission Content considers readers' and viewers' complaints, and the BBC's Board of Governors regulates the public broadcaster.

Under the Communications Act, much of this landscape will be rationalized. One regulator — the Office of Communications, or Ofcom — will handle most regulatory and content issues. For Americans used to the converged regulatory practice of the FCC, Ofcom's jurisdiction will be familiar. Additionally, however, Ofcom will have a role in media content — one of its four stated goals is to "protect the public from any offensive or potentially harmful effects of broadcast media, and to safeguard people from being unfairly treated in television and radio programmes."<sup>2</sup> On this score, Ofcom will take over significant content regulation from the ITC and the BSC. The types of issues that can be addressed by these entities, based on recent actions, can range from requiring televi-

sion programmers to warn viewers of sexual content in upcoming programs to criticizing programmers for "distasteful" programming (such as a video clip showing a "bad parent" swinging a toddler over his head or the host of Big Brother "humiliating" a contestant).

### ***Content Regulation***

To further Ofcom's content mandate under the new Communications Act, a "Content Board" will be created. Although the Act is not a paragon of clarity on this point, Ofcom has stressed that the Content Board will not regulate the Internet or the printed media.<sup>3</sup> It will focus solely on television (terrestrial broadcast, cable and satellite) and radio. Ofcom will be permitted under the Act to determine the goals of the Content Board, in addition to the Act's stated goals of increasing "media literacy" and effective self-regulation. Ofcom's current view on the role of the Content Board provides that:

The Content Board will want to understand, analyse and champion the voices and interests of the viewer, the listener and the citizen. The Content Board will aim to reach those parts of the public interest that competition and market forces cannot

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## U.K. Bill Reforms Structure for Content Regulation

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and do not reach. The key themes it will grapple with are content quality and standards – the Content Board is in effect the Content Quality & Standards Board. Other themes are diversity, plurality, regionalism/localness and of course ‘public-service broadcasting’ – at times going beyond commercial considerations to wider public concerns.<sup>4</sup>

Ofcom’s Content Board will not have direct responsibility for licensing, but will have the ability to provide “input” to licensing decisions.

### *Three Tiers of Content Regulation*

Ofcom has expressed its ambitions to regulate broadcast content in three “tiers.” Tier One is characterized as “negative content regulation” — harm, offense, accuracy, impartiality, fairness and privacy.<sup>5</sup> Ofcom intends to draft “codes of practice” in each of these areas, and it intends to consult with broadcasters, the public and other interested parties. It also will bring advertising into this tier as well. Although the BBC is generally outside the regulatory ambit of Ofcom’s powers under the new Act because it is self-regulated by its own Board of Governors, Ofcom intends to include the BBC as one of the broadcasters that it will regulate.

Ofcom’s Tier Two of content regulation will encompass the extent to which broadcasters are complying with requirements for quotas for independent television production, European content production and U.K. content production. The issue of local quotas, first introduced under the EU’s Television Without Frontiers framework in the 1980s, has been extended by the Act to require certain levels of independent television production, particularly by the BBC, to foster the U.K. film and video industry.

Finally, Tier Three of Ofcom’s content regulation authority will consider the public service broadcasting obligations of private television channels. Each channel will be required to submit a yearly plan, and its progress toward achieving the goals in its plan will be assessed annually. Beyond these “tiered” content concerns, the Content Board will provide input on whether particular mergers in the media marketplace should be permitted.

Ofcom will not, however, be the sole content regulator in the United Kingdom. The Information Commissioner,

who is responsible for increasingly dicey issues concerning data protection, will continue to be organized entirely separately from Ofcom. In addition, the Press Complaints Commission, a self-regulatory body that has come under separate pressure for change,<sup>6</sup> will continue to be separate and distinct from Ofcom.

### *Media Ownership*

Perhaps the most controversial element of the Communications Act has been its treatment of non-European ownership of television and radio stations. The Act has taken a decidedly internationalist stance on media ownership. Unlike the United States, which typically refuses to permit non-U.S. ownership of media properties unless the country in which the aspiring owner is located would permit U.S. companies to own its domestic outlets, the U.K. adopted an open marketplace. The new Act simply abolished restrictions in the Broadcasting Act 1990 that limited foreign ownership of broadcast stations. Companies from outside Europe, and particularly in the United States, now can bid to own U.K. media properties.

Like the United States, U.K. law also had regulated media concentration. The Act adopts a more relaxed approach to multimedia mergers, finding that cross-media mergers are subject to a public interest test by regulators. Companies are free to propose mergers, but the Department of Trade and Industry and the Secretary of State will consider the effect of the merger on the choice and quality of program transmissions in determining whether to approve it.

In addition, the Act maintains some longstanding limits on media concentration. ITV, the major independent broadcaster, cannot be purchased by a major national newspaper group.

The public service test will apply when any national newspaper group with at least 20 percent penetration attempts to acquire Channel 5 or an independent national radio service. This test also will apply when any company attempts to acquire any Channel 3 service, if ITV or Channel 5 propose to acquire any national radio service, or when any two national radio services propose to merge. Rules preventing religious organizations from holding broadcast licenses have been abolished, but rules keeping

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## U.K. Bill Reforms Structure for Content Regulation

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political organizations from holding broadcast licenses have been kept. Rules on local concentration were adopted as well.

### *More to Come . . .*

The Act implements only a handful of the rules established by the EU for the regulation of electronic communications. Notably, it does not implement the new privacy regulations required by those directives, which must be transposed into national law by this October. The new telecommunications data protection directive will require recipients of unsolicited commercial email for direct marketing, or “spam,” to affirmatively “opt in” to receiving such email messages (with exceptions for preexisting business relationships). It also will require websites that use “cookies” to disclose that such devices are used and provide users with an opportunity not to receive them. A draft proposal has been issued to implement these rules in the U.K. with an expectation that they will be adopted by the EU’s October 2003 deadline.

*Kurt Wimmer is a partner in the Washington office of Covington & Burling, and was managing partner of its London office until August 2003.*

<sup>1</sup> The full text of the Act is available at <http://www.hmso.gov.uk/acts/acts2003/20030021.pdf>.

<sup>2</sup> See “What Ofcom Will Do,” [http://www.ofcom.org.uk/about\\_ofcom/what\\_ofcom\\_does/index.htm](http://www.ofcom.org.uk/about_ofcom/what_ofcom_does/index.htm)

<sup>3</sup> Because the Act is implementing the EU’s technology-neutral Telecommunications Directives, it speaks in terms of content transmitted by “electronic communications networks.” This is true as to the Content Board as well (see Act, Section 13), leading many in the Internet community to express concerns that the Content Board could take jurisdiction over Internet content. There is no explicit guarantee in the Communications Act itself that the Content Board will limit its efforts to broadcasting, but Ofcom has made explicit concessions, after debates in the House of Commons and the House of Lords on this point, that it does not view its content jurisdiction as extending to the Internet.

<sup>4</sup> See “Strategic Focus,” [http://www.ofcom.org.uk/about\\_ofcom/content\\_board/index.htm](http://www.ofcom.org.uk/about_ofcom/content_board/index.htm).

<sup>5</sup> See *id.*

<sup>6</sup> See “UK Parliament Report Recommends Stronger Press Self-Regulation and Statutory Privacy Law” on p. 57 of this *MediaLawLetter*

## Pentagon Report Justifies Firing on Hotel

### *Tank Round Killed Two Journalists, Injured Three*

A Pentagon investigation into the firing upon a Baghdad hotel where many journalists were staying has concluded that the action was justified and was “proportionate” to the threat facing American troops at the time.

The tank round fired at the upper floors of the hotel killed two journalists: Reuters television cameraman Taras Protsyuk and cameraman Jose Couso of the Spanish Telecinco network. See *MLRC MediaLawLetter*, April 2003, at 65. Both were apparently filming the ongoing battle from the hotel’s terraces. Three other journalists were injured.

According to the Pentagon report on the incident, the U.S. Army’s 4-64 Armor division had been dealing with heavy Iraqi resistance as it attempted to seize control of an intersection leading to the Jumhuriya Bridge in downtown Baghdad on April 8. During the battle, according to the report, the A Company was told that other soldiers had obtained an Iraqi radio, and had heard that the Iraqi troops were being directed by a “spotter” in a building on the other side of the Tigris River.

This would have placed the spotter on the same side of the river as the Palestine Hotel, where about 100 journalists were staying.

The report says that a A Company commander told his troops to look for Iraqi spotters in the buildings across the river, and some soldiers observed people on the top terraces of one building and saw flashes of light coming from that direction. The tank fired at the figures, the soldiers unaware that the building was the Palestine Hotel. The report says that after the 120mm tank round was fired upon the hotel, the Iraqi fire at the American troops ceased.

A Pentagon statement thus concludes that the tank “properly fired upon a suspected enemy hunter/killer team in a proportionate and justifiably measure response.”

## Television Association Study Reports on Influence of TV

The Media Comparisons Study 2003, conducted by the Television Bureau of Advertising (the trade association for local television broadcasters), reported — not surprisingly — that television is the most watched, most relied upon, and most influential news source in terms of advertising when compared to the other major media — newspapers, Internet, magazines, and radio. See <[www.tvb.org/rcentral/index.html](http://www.tvb.org/rcentral/index.html)> for Media Trends Study link (accessed on July 30, 2003).

### *Reach*

The percentage of people reached by TV was in the high 80s-90% for all demographic breakdowns (including age, gender, education level, occupation, household income). In a total comparison with other media, 90% of those adults (18+ years of age) polled were reached by TV, 65.2% by newspapers, 72.8% by radio, 48% by magazines, and 51.1% by Internet. Both men and women tune into TV each day more than any other medium.

### *Time Spent*

Adults spend many more minutes per day (258.4) watching TV than they do with any other major medium, with radio coming in a distant second at 120.7 minutes (32.4 minutes for newspapers, 18.3 minutes for magazines, and 65.8 minutes for Internet). Gender does not account for much of a difference.

### *Advertising*

Adults find advertising on television to be significantly more authoritative than advertising in the other major media (48.5% said television ads were authoritative, with newspapers coming in a distant second at 26.3%).

81.8% of adults find television advertising to be much more influential than ads in other media, with newspapers a distant second at 8.5%.

### *Primary Source of News*

43.6% of adults cite broadcast television as their primary source of news. 28.0% cite cable news networks, and newspapers came in third with 12.1% (radio with 9.2%, public TV with 3.9%, and Internet with 3.2%).

Broadcast and cable television were neck-and-neck for which medium is the most influential news source, with

46.6% citing broadcast television and 36.9% citing cable news networks. Newspapers came in third with 6.4%, public TV with 4.4%, radio with 3.7%, and Internet with 1.9%.

Broadcast and cable television are also neck-and-neck for which source adults turn to most for breaking news, with 45.6% citing broadcast television and 40.7% citing cable news networks. Radio came in third with 5.4%, Internet at 4.0%, public TV at 3.4%, and newspapers last at 0.9%.

As for the most exciting news source, 46.1% of adults cited broadcast television and 38.6% cited cable news networks. Radio came in third with 4.7%, followed closely by public television with 4.5%, newspapers with 3.3% and Internet with 2.8%.

### *Community Involvement*

50.4% of adults cited broadcast television as the medium most involved in the community. Newspapers were second with 22.4%. Radio was third with 14.1%. Cable news networks were fourth with 6.3%, followed closely by public television with 5.3% and Internet with 1.5%.

### *Methodology*

1,017 adults were surveyed via telephone (randomly selected using telephone number), 51.6% female and 48.4% male. To determine what occurs on a typical day, respondents were asked about their media usage “yesterday.” The following is a sample question:

Which of the following would you say is: (1) your primary news source (2) the source you turn to first for information about local weather, traffic and sports, (3) the information source you turn to first when a breaking news story is in progress, (4) the most influential source of news, (5) the most exciting source of news, (6) the media outlet that is most involved in your community? Major broadcast networks (such as ABC, CBS, Fox, NBC) and their affiliated stations, local independent television stations, cable news channels (such as CNN, CNBC, MSNBC, Fox News Channel and Headline News), public television stations, newspapers, radio stations, Internet.

[The order of the media was rotated in “all cases”.] See [www.tvb.org/rcentral/index.html](http://www.tvb.org/rcentral/index.html) (accessed on July 30, 2003).

## Survey Finds Increased Support for First Amendment Rights

The First Amendment Center, funded by the Freedom Forum, released the results of its State of the First Amendment Survey 2003, conducted by the Center for Survey Research and Analysis at the University of Connecticut. The Survey polled 1,000 adults nationwide in an effort to extrapolate the level of public support for First Amendment rights. Given the timing of the survey, it sheds light on post-9/11 views of civil liberties, especially in the midst of the war on terrorism and the war in Iraq. In addition, questions were asked regarding the FCC's vote to further deregulate media ownership rules.

The Survey can be downloaded at the First Amendment Center's website, [www.firstamendmentcenter.org/about.aspx?item=state\\_of\\_First\\_Amendment\\_2003](http://www.firstamendmentcenter.org/about.aspx?item=state_of_First_Amendment_2003).

The survey is broken into several sub-categories, corresponding to primarily three of the First Amendment rights: free speech, free press, and freedom of religion. Those polled were asked questions regarding general orientations toward the First Amendment; freedom of speech; civil liberties during wartime; corporate ownership of media; and freedom of religion and the establishment clause.

All in all the First Amendment Center was pleased with the survey results, saying that "public support for First Amendment freedoms may be returning to pre-9/11 levels." *See Survey Foreward*, at 2.

### ***General Attitudes Toward the First Amendment***

Disheartening though it may be to those passionate about the First Amendment, most adults surveyed could not name all of the rights guaranteed within the amendment. When asked "Can you name any of the specific rights that are guaranteed by the First Amendment?" 16% were able to name freedom of the press; 63% named freedom of speech; 22% named freedom of religion; 2% named the right to petition; 11% listed the right of assembly/association; 21% named other rights; and 37% did not know or refused to answer.

A much higher percentage of people in 2003 than in 2002 disagreed with the statement, "The First Amendment goes too far in the rights it guarantees," 42% said they strongly disagreed and 18% said they mildly disagreed. Only 19% said they strongly agreed and 15% said they mildly agreed.

In 2002, 41% of those surveyed strongly agreed, 8% mildly agreed, while 32% strongly disagreed and 15% mildly disagreed.

### ***Freedom of the Press***

That said, there is less support for press freedom specifically. When asked generally about the press's freedom to do what it wants, 46% said they enjoy too much freedom, 43% said the freedom was about right, and 9% said too little.

Regarding government restrictions on press freedom, 48% said the press has the right amount of freedom, 36% said the press enjoys too much, and 13% said too little.

Indeed, when asked whether they agreed with the statement, "Newspapers should be allowed to publish freely without government approval of a story", 48% of respondents strongly agreed; 22% mildly agreed; 13% mildly disagreed; and 15% strongly disagreed.

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***When asked generally about the press' freedom to do what it wants, 46% said they enjoy too much freedom, 43% said the freedom was about right, and 9% said too little.***

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### ***War Coverage***

Overall, those surveyed thought the news media did a good to excellent job covering the 2003 war in Iraq, with 28% rating the coverage excellent and 40% rating the coverage good. 21% rated it fair, while only 8% rated it as poorly covered.

But, when asked whether they agreed with the statement, "Newspapers should be allowed to freely criticize the U.S. military about its strategy and performance", 32% strongly agreed; 22% mildly agreed; 14% mildly disagreed; and 30% strongly disagreed.

Embedding reporters won a fairly enthusiastic response. 37% of those surveyed strongly favored the use of embedded reporters in war coverage; 28% said they mildly favored the practice; 12% mildly opposed; and 19% strongly opposed the practice.

However, a majority of those surveyed agreed that war reports should be subject to government censors. With regard to the statement, "The government should be able to review in advance what journalists report directly from military combat zones." 44% strongly agreed with the statement; 23% mildly disagreed; 15% mildly disagreed; and 15% strongly disagreed.

Respondents are concerned about the access to informa-

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## Survey Finds Increased Support for 1st Amendment Rights

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tion regarding the war on terrorism, with 48% indicating that there is too little access to information; 12% saying too much access; and 38% citing just about the right amount. However, the majority of those surveyed believe the media has not been too aggressive in asking government officials for information regarding the war on terrorism.

### ***Freedom of Speech***

Most of those surveyed (63%) think the amount of freedom Americans have to speak freely is just about right. 23% think Americans have too little freedom to speak freely, and 12% think there is too much freedom.

When asked whether they agreed with the statement, "People should be allowed to express unpopular opinions", 74% of those surveyed strongly agreed; 21% mildly agreed; 3% mildly disagreed; and 2% strongly disagreed.

Those surveyed disagree with the notion that law enforcement agencies should be allowed to monitor which books or other materials patrons check out of public libraries, as part of the war on terrorism. 48% strongly disagreed; 19% mildly disagreed; 14% mildly agreed; and 16% strongly agreed with the practice.

When asked whether the Constitution should be amended to prohibit burning or desecrating the American flag, 55% of respondents said it should not, while 44% said it should.

### ***Freedom of Religion/Establishment Clause***

Most of those surveyed (66%) believe Americans have the right amount of religious freedom, 24% thought too little, and 8% thought there was too much freedom of religion.

With respect to the recent Ninth Circuit ruling finding the phrase "one nation under God" unconstitutional, respondents were asked whether that school practice violated the constitutional principles of separation of church and state. 68% believed it did not violate the Constitution, while only 26% felt it did violate the constitutional principle.

Most surveyed support voucher programs, where the federal government provides vouchers or credits (to pay for costs) which parents could use to send children to non-public schools, including those with a religious affiliation. 40% strongly agreed with the practice and 22% mildly agreed. In opposition, 23% strongly disagreed while 12% mildly disagreed.

### ***Media Consolidation***

Has consolidation of media ownership decreased the number of viewpoints available? 52% said "yes", 24% thought the number was not affected by conglomeration, and 17% actually believe consolidation increases the number of viewpoints.

Overall, the majority of those surveyed (53%) believe consolidation decreases the quality of information available. 24% thought the quality would not be affected, and 19% believe there is an increase in quality. 44% of those surveyed believe the corporate owners have a great deal of control over the content of their news media; 24% think corporate owners wield a fair amount of control; 15% think there is not very much control; and 4% said there is no content control at all.

The FCC ownership deregulation policy met with opposition. 31% said they strongly oppose and 23% said they mildly oppose the policy. 19% said they strongly favor and 19% said they mildly favor the policy.

### ***Public Schools***

Overall, most surveyed thought that the American educational system did a fair or poor job of teaching students about First Amendment freedoms. 29% said "poor", 33% answered "fair", 25% thought "good", while only 6% thought the educational system did an excellent job of teaching First Amendment rights.

Results were somewhat mixed when respondents were asked about student expression on a public school campus. 38% strongly disagreed and 27% mildly disagreed that high school students should be prohibited from expressing their opinions about the war on school property during a period of active military combat. 19% strongly agreed and 14% mildly agreed that they should be prohibited.

However, there was nearly an even split as to whether school officials should be allowed to prohibit high school students from wearing T-shirts, armbands or other insignia expressing their opinions about the war on school property during a period of active military combat. 31% strongly agreed that students should be prohibited from wearing such materials, while 31% strongly disagreed. In the middle, 17% mildly agreed that they should be prohibited, while 19% mildly disagreed that they should be prohibited from such activity.



## ETHICS CORNER

### Does Sarbanes-Oxley Apply to Media Lawyers?

By Bruce E. H. Johnson

The Public Company Accounting Reform and Investor Protection Act of 2002, popularly known as the Sarbanes-Oxley Act (the "Act"), was passed by Congress and signed into law by President Bush in July 2002, in response to various corporate accounting scandals such as Enron, WorldCom, Tyco, and Global Crossing. The Act significantly changes reporting and accounting duties at public corporations. But the Act also reaches lawyers working for those (and apparently other) companies. Section 307 of the Act directly authorizes the Securities and Exchange Commission to regulate the practice and ethics of lawyers who are involved in securities transactions.

#### ***Rule 205: Inform the CEO***

On January 23, 2003, the SEC adopted its lawyer conduct rule, 17 C.F.R. Part 205, under Section 307 of the Act. The SEC's new Rule 205 is entitled "implementation of standards of professional conduct for attorneys" and became effective on August 5, 2003. Rule 205 applies to lawyers who have a lawyer-client relationship with, and are providing SEC or securities-related legal services to, an issuer. Rule 205.2(a)(2)(i). Under Rule 205.3(b)(1), if an attorney subject to the rule "becomes aware" of "evidence of a material violation" of the securities laws (or a breach of fiduciary duty or similar violation), he or she must report that evidence to the issuer's CLO (Chief Legal Officer), or to both the CLO and CEO.

The term "evidence of a material violation" is defined by the SEC in the negative. Under Rule 205.2(e), it is

"credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur."

The SEC definition of "evidence of a material violation" is thus an objective, rather than subjective, standard. The term "material violation" encompasses any material violation of the securities laws "or a breach of fiduciary duty or similar violation by the company or any of its agents."

#### ***Lawyers Inside & Out Must Act***

Upon receiving a report of "evidence of a material violation," the issuer's CLO must investigate it. If the CLO determines there has been no violation, he or she must so notify the reporting lawyer. Otherwise the CLO must cause the issuer to adopt an "appropriate response," and must notify the reporting lawyer of that response.

Under Rule 205.3(b)(3), unless the reporting attorney "reasonably believes" that the client has made "an appropriate response within a reasonable time," the attorney must then report further up the line to the issuer's audit committee, an independent board committee, or the issuer's board. SEC Rule 205.3(b)(3). Another safe-harbor alternative for reporting purposes is an issuer-established "qualified legal compliance committee" of the board of directors.

#### ***Crime If Mislead Auditors***

The internal reporting duties of Rule 205 are not the only risks that lawyers face under the Act. In addition, Section 303 of the Act makes it a crime to "mislead" an auditor so as to render financial statements "materially misleading." On May 20, 2003, the SEC adopted its final rule implementing this statutory provision.

Section 303(a) of the Act makes it unlawful "for any officer or director of an issuer, or any other person acting under the direction thereof, to take any action to fraudulently influence, coerce, manipulate, or mislead" any accountant who's auditing the issuer's financial statements "for the purpose of rendering such financial statements materially misleading."

This new rule took effect on June 27, 2003. The SEC has announced that the statutory phrase "under the direction" includes a broader category of behavior than simple "supervision." The Commission claims that persons acting "under the direction" of an issuer's officer or director could include partners or employees of the issuer's law firm or accounting firm, as well as other "securities professionals." The SEC rule requires fraudulent intent in the case of attempts to "influence" auditors, but no such intent is required in the case of efforts to "mislead, coerce or manipulate" auditors.

Finally, the SEC has stated that the language in the rule

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## Does Sarbanes-Oxley Apply to Media Lawyers?

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(“for the purpose of rendering such financial statements materially misleading”) essentially adopts “a negligence standard” and therefore that the “purpose” requirement is satisfied if the lawyer “knew or should have known” that the conduct would render the issuer’s financial statements materially misleading. The Commission’s commentary lists several examples of conduct that could violate the new standard. For example, the Commission notes that lawyers “providing an auditor with an inaccurate or misleading legal analysis” (even if the lawyer does not know that the analysis is inaccurate or misleading) would be a violation of the statute.

### *Relevant to Media Lawyers?*

Securities lawyers have spent several months familiarizing themselves with the Act, and with the SEC regulation and comments that have been issued addressing lawyer duties under the Act. (Sometime within the next several weeks or months, the SEC will also issue proposed regulations addressing whether federal regulations should require corporate lawyers to become “whistleblowers” against their clients in certain situations, notwithstanding their traditional duties of client confidentiality, which may include mandating certain “noisy withdrawal” activities in certain situations.)

All of this discussion may be of interest to securities lawyers, you may ask, but it doesn’t really affect media defense lawyers, does it? The answer is less than clear.

Generally speaking, the SEC’s lawyer regulations apply to lawyers who are “appearing and practicing” before the Commission.

Many media companies are public companies or subsidiaries of public companies, and thus subject to SEC regulations. Under these circumstances, if a non-securities lawyer prepares a document that is attached to a securities filing by a securities lawyer, it is possible that the SEC will deem that the non-securities lawyer is “appearing and practicing” before the Commission if he or she give advice “in respect of” the securities laws regarding this document. Informally,

some SEC officials have suggested that merely knowing that a document that you prepared is being appended to a securities filing satisfies the “appearing and practicing” requirement. (Indeed, some commentators have gone even further and have suggested that merely making a determination that a client is not a public company, and thus not required to make certain SEC filings, could itself constitute “appearing and practicing” before the Commission.)

### *Imputed Knowledge?*

In addition, it is possible that the knowledge of a non-securities lawyer in a firm (of the possible or probable liability in a media case, for example) will be imputed to the securities lawyer by the SEC to find a violation on the part of the securities lawyer.

For example, if one of the firm’s lawyers is evaluating a potential liability (or analyzing a corporate asset which has a legal nexus, such as intellectual property rights), then that lawyer’s knowledge might be imputed to any partners in that firm. To the extent that “material information” is omitted from securities filings, even if such information relates to transactions or litigation matters that are being handled by non-securities lawyers in a firm, there is a risk of Sarbanes-Oxley liability.

In that regard, media lawyers should note that the SEC’s regulations may require the up-the-ladder reporting duties even if the lawyer subjectively believes that there has been no material violation. Under the SEC’s rules, “credible evidence” means that it is “reasonably likely” that a violation has occurred or is about to occur. According to the SEC, the definition of “reasonably likely” is “more than a mere possibility” but may be less than “more likely than not.”

### *Document Retention Rules*

In addition, Sarbanes-Oxley also addressed document retention and destruction issues – with amendments that may be used to snare lawyers involved with both public and pri-

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***To the extent that “material information” is omitted from securities filings, even if such information relates to transactions or litigation matters that are being handled by non-securities lawyers in a firm, there is a risk of Sarbanes-Oxley liability.***

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## Does Sarbanes-Oxley Apply to Media Lawyers?

(Continued from page 66)

vate companies. The Act added several new criminal statutes, presumably to address public concerns that arose in the wake of the famous Arthur Andersen document destruction episode.

Thus, Section 802 of the Act creates a new criminal statute, 18 U.S.C. § 1519, which states that whoever

“knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation to or contemplation of such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”

This statute clearly enhances the Government’s ability to prosecute obstruction of justice involving alteration or destruction of documents, including electronic documents. The language is potentially broad enough to encompass the destruction of corporate documents even before an investigation occurs, and does not require any willful or corrupt state of mind.

### Watch Out for Editing

In addition, Section 1102 of the Act, amends existing 18 U.S.C. § 1512, by inserting a new subsection providing for criminal liability by anyone who

“corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding; or . . . otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this Title or imprisoned not more than 20 years, or both.”

The definition of “official proceeding,” as defined in 18 U.S.C. § 1515, includes virtually any federal judicial, congressional, or agency proceeding.

Does the removal of metadata, or a similar routine editing activity by a lawyer, fall within the ambit of this new statute? (In that regard, it should be recalled that the obstruction of justice jury verdict in *United States v. Arthur Andersen* ap-

parently turned on the jury’s evaluation of an internal memorandum by an Andersen in-house attorney, Nancy Temple, suggesting some editorial changes to a draft document that the attorney knew might be discoverable in subsequent litigation. The verdict led to the destruction of the Andersen accounting firm.)

### Whistleblower Protection: Did it Codify *Cohen v. Cowles* Risks?

There are several other Sarbanes-Oxley risks, not seemingly aimed at lawyers but which may affect the practice of lawyers for corporate clients generally – and which are not limited by their terms to securities lawyers or public companies. In addition to creating civil remedies for unlawful retaliation, Section 1107 of the Act also makes it a felony offense for any person who

“knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.”

These criminal sanctions may apply against anyone retaliating against a protected “whistleblower”, even where no federal offense is deemed to have occurred, as the provision calls for protection of those employees reporting information “relating to the commission or possible commission of any Federal offense.”

Moreover, the courts will eventually decide what type of conduct by employers and their lawyers, which could be something as innocuous as seeking to enforce a legally-binding nondisclosure agreement, could constitute “action harmful” to the employee. Problems with confidential sources could trigger such liability – indeed, the Act may have federalized the promissory estoppel risks of *Cohen v. Cowles Media*.

In their own dealings with employees and former employees, media entities are not immune from this sort of “whistleblower” risk. One recent example is Jane Akre’s and Steve Wilson’s controversial dispute arising out of a Fox television station’s coverage of bovine growth hormone issues, which resulted in Akre winning a Tampa jury verdict in 2000 (later overturned on appeal) when the jury believed that she was fired because, according to the verdict form, she had

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## Does Sarbanes-Oxley Apply to Media Lawyers?

(Continued from page 67)

“threatened” to complain to the FCC about an alleged “broadcast of a false, distorted, or slanted news report which she reasonably believed would violate the prohibition against intentional falsification or distortion of the news on television if it were aired.” **ADD MLL CITES.**

### *Clash With State Ethics Rules*

These changes – including the increasing federalization of Bar regulations by federal agencies – remain controversial. For example, on July 26, 2003, the Washington State Bar Association adopted an interim formal ethics opinion that warns lawyers in that state who represent corporations not to disclose to the Securities and Exchange Commission certain information that the SEC's professional conduct rules permit them to reveal, unless the disclosure is also allowed by the state's own professional conduct rules.

In addition, while raising concerns about whether the SEC's interference in state bar duties and enforcement provisions is constitutional, the WSBA opinion cautions the state's lawyers not to take comfort in the “good faith” provision of the SEC's new regulations, which shields a lawyer from discipline under inconsistent state standards if the lawyer “complies in good faith” with the agency's rules.

### *ABA Report and Proposals*

On a related note, in spring 2003, the ABA Task Force on Corporate Responsibility (the Cheek Commission) submitted to the ABA Board of Governors its final report that deals with lawyer obligations in cases of corporate client misconduct. The ABA recently voted on this report at its August 2003 annual meeting, which suggested allowing more latitude to lawyers who want to become whistleblowers about their clients' activities.

Among its recommendations, the ABA Task Force proposed the following changes to the ABA Model Rules of Professional Conduct:

- (1) amend ABA Model Rule 1.13 to require lawyers who have knowledge of “facts from which a reasonable lawyer, under the circumstances, would conclude” (even if the lawyer's beliefs later prove to be incorrect) that an officer, employee, or person associated with an organization has committed or intends to commit “a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organiza-

tion, and that is likely to result in substantial injury to the organization” to report this information up-the-line, even to the board of directors if necessary, and permit disclosure of corporate lawyer-client communications to third parties if the company's “highest authority” refuses to act “with respect to a clear violation of law” and the lawyer “reasonably” believes “that the violation is reasonably certain to result in substantial injury to the organization”;

- (2) amend Model Rule 1.6 to broaden lawyers' discretion to reveal client confidences when reasonably necessary to prevent or mitigate corporate conduct will result in substantial financial or property injury to third parties; and
- (3) amend Model Rule 1.6 to require disclosure of client confidences when necessary to prevent client criminal conduct including violations of federal securities laws, that will result in substantial financial or property injury to third parties.” These ethics rules, if adopted by various state courts, would apply to corporate lawyers irrespective of whether or not their clients are subject to SEC public filings.

The Cheek Commission report was the subject of extensive debate and discussion at the ABA annual meeting in San Francisco, and these issues were all covered extensively in the news media. In several votes, all of the Cheek Commission proposals were approved by majorities in the ABA's House of Delegates. (There was one modification by the ABA House of Delegates, a “friendly amendment” to Model Rule 1.13 which changed the triggering requirement for up-the-ladder and further reporting under Model Rule 1.13 to “actual knowledge” of wrongdoing or intended wrongdoing.)

Now, state supreme courts and bar associations around the United States will also be pressed to follow in the wake of the ABA and further relax the traditional rules of confidentiality for corporate lawyers. Media lawyers will not be immune from these major shifts in the law of lawyering. As Ralph Elliott of DCS member firm Tyler Cooper & Alcorn noted in a recent article in *Connecticut Lawyer*, “[l]awyers in all areas of practice should . . . be sensitive to the requirements of Sarbanes-Oxley and its implementing regulations. They are not just for securities lawyers. They apply to all of us, and will inevitably have an effect on the law governing lawyers generally in the years to come.”

*Bruce Johnson is a partner in Davis Wright Tremaine's Seattle office, and a member of the DCS Ethics Committee.*

## Fox News Sues Al Franken and Publisher Over Book Title

### *News Network Claims Book Title Infringes on Trademark*

As all of America knows, Fox News sued author Al Franken and his publisher, Penguin Group (USA), over Franken's new book "Lies and the Lying Liars Who Tell Them: A Fair and Balanced Look at the Right". Fox claims that the title infringes and dilutes the news network's trademark in its slogan "Fair and Balanced" which it claims to have registered in 1998. Fox moved for a preliminary and permanent injunction which would prevent Penguin from using "fair and balanced" in the title, pictures of any Fox News' on-air talent (such as Bill O'Reilly) either on the book cover or in any promotional or advertising material for the book, and/or any other trademark or logo calculated to confuse the public that Fox had a role in the creation of the book. Arguments have been scheduled for August 22 before federal Judge Denny Chin of the Southern District Court of New York.

#### *Temporary Injunction Denied*

The suit was commenced in New York State Supreme Court in New York City and was served on Penguin Group on August 12<sup>th</sup>. The case was removed to federal court on August 14<sup>th</sup>. By letter dated August 19, Fox requested a TRO immediately restraining defendants from further distribution of the book pending oral argument then scheduled for August

22<sup>nd</sup>. Defendants opposed the application for a TRO and it was denied by Judge Chin on August 20<sup>th</sup> in an order in which he noted, among other things, that the argument on the preliminary injunction would be two days later and that Fox had not previously sought a temporary restraining order.

#### *Fox: Title Infringes/Dilutes Trademark*

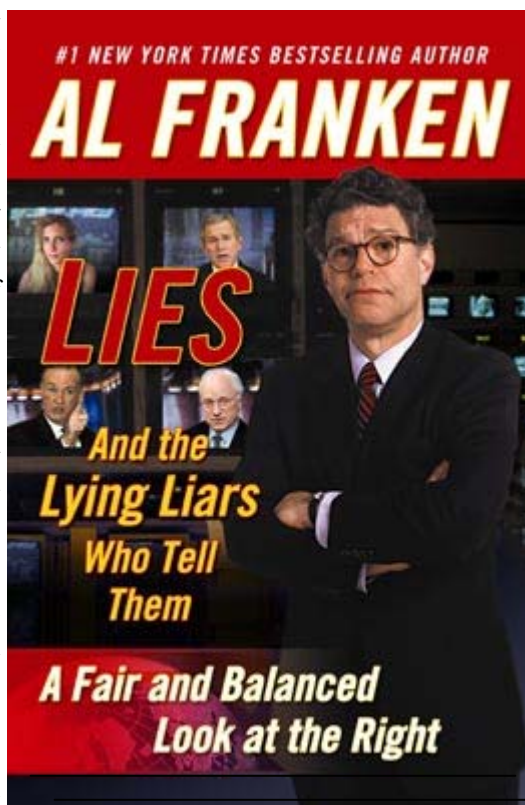
Fox's suit includes claims for trademark infringement and dilution under New York (G.B.L. §133; G.B.L. §360-1) and U.S. statutory law (15 U.S.C. §1114 (1)), and unfair competition under U.S. statutory (15 U.S.C. §1125(c)) and New York common law.

In its complaint, Fox states that it has used "Fair and Balanced" as its primary slogan and that it trademarked the phrase in 1998. According to Fox, "Fair and Balanced" is used in numerous ways both on the network and through advertisements in other media. Fox also uses the slogan on various merchandise, such as coffee mugs and neckties, which additionally depict the Fox News logo.

Fox contends that the title of the book, as well as the cover, is intended to "exploit Fox News' trademark" and confuse consumers into

thinking that Fox either endorses or had a part in the creation of the book, or that Franken is somehow associated with Fox News. The use of "fair and balanced", according to Fox, will "blur and tarnish" the network's reputation due to this association.

Fox takes direct aim at Franken's image and reputation as a political critic/commentator claiming he is, "neither a journalist nor a television news personality," and, "not a well-respected voice in American politics; rather, he appears to be shrill and unstable. His views



#### **UPDATE:**

**At time of publication, the Associated Press reported that Judge Denny Chin denied Fox's motion for a preliminary injunction in the network's suit against Al Franken and Penguin Group. According to the AP, Judge Chin described Fox's claim as "without merit, both factually and legally."**

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**Fox News Sues Al Franken and Publisher Over Book Title**

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lack any serious depth or insight.” The complaint states that any apparent association between Franken’s “sophomoric approach” and Fox’s “first-rate” journalists would unfairly dilute the Fox News trademark. Fox proposes that under the test applied in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F. 2d 492 (2d Cir.), cert. denied, 368 U.S. 820 (1961), there is a high likelihood of confusion among consumers over Fox’s participation in the book’s creation.

Fox cites the book’s cover which features Franken standing with four television monitors behind him, on one of which is a picture of Fox personality Bill O’Reilly on a Fox News set. Fox claims this cover imitates the look of one of O’Reilly’s earlier books. Along with the use of the Fox trademark, this depiction of O’Reilly increases the potential dilution of the trademark and confusion among consumers as to the level of cooperation between Fox and Penguin.

Moreover, Fox states in its memorandum of law that a defense of parody is not available to Penguin because the title and cover are not parodies. Specifically, the cover does not suggest that the work is both an original as well as a parody. There is no other hint on the cover to suggest the use of “fair and balanced” is a parody, as well as the trademarked slogan of Fox News. Even if the title was a legitimate parody, the defense was still not available as Penguin could have used different, non-infringing language and still conveyed the same message and theme.

In its complaint, Fox claims that any potential harm to defendants would be negligible as the suit is only focused on preventing the use of the current title and cover, not the content itself. Penguin can continue to advertise the book using a different title and cover until the completion of the current litigation. However, Fox would suffer irreparable harm if the court permitted the use of Fox’s trademark and an association between Fox and Franken to be made.

***Penguin: Cover/Title are Protected Parody***

In its letter to the court dated August 18, and its memorandum of law opposing the preliminary injunction, the defendants contend that the suit is “so antitheti-

cal to free expression concerns protected by the First Amendment as to make plain that no possibility, let alone ‘likelihood’ of success on the merits, exists here.”

The defendants argue that Second Circuit and Southern District precedent support protection of the use of another’s trademark when used for communicative messages, and not the identification of a product’s origin. (Brief citing *Yankee Publishing Inc. v. News America Publishing Inc.*, 809 F. Supp. 267 (S.D.N.Y. 1992)). Defendants, citing *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), note that the Second Circuit has expressed concern about “over extension of Lanham Act restrictions in the area of titles” which might intrude on First Amendment values. Whether or not the expression at issue fits into a category such as “parody” – although defendants argue that the cover and title here assuredly fit within that term – the Second Circuit has afforded special protection for use of trademarked matter in the communication of an “expressive message.”

The use of “Fair and Balanced” was not intended to imply an association between Fox News and the book, defendants argue. Indeed, in a letter to the court, defendants note that in pre-complaint correspondence, Fox counsel referred to the juxtaposition of the title and the photograph of Bill O’Reilly as “false and defamatory” – hardly the basis for confusion as to whether Fox endorsed the book.

Rather, the intent was to present a parody by using the slogan of a conservative news organization in the title of a book criticizing conservatives. Ironic wordplay is also evident in that “Fair and Balanced” contrasts with the main title “Lies, and the Lying Liars Who Tell Them” which is clearly not a “balanced” viewpoint.

Southern District and Second Circuit precedent also hold that parodies are protected even if the parody “may not have been widely understood”. (Quoting *Yankee*, 809 at 280). Penguin however contends that the parody here works as it projects itself both as an original work and take-off of the phrase “Fair and Balanced”. Penguin also rejects Fox’s argument that in order to fall under within the parody protection, the cover requires a more explicit disclaimer that the book is a parody.

Defendants dispute that the title and cover would

(Continued on page 71)

**Fox News Sues AI Franken and Publisher Over Book Title***(Continued from page 70)*

confuse consumers as to the participation of Fox in the book's creation. Penguin argues that in artistic uses of trademarks, the *Polaroid* test should not be strictly applied. However, a critical question, defendants note, in any Lanham Act case is "likelihood of confusion." Even utilizing the *Polaroid* test on that issue, defendants argue that their use of "Fair and Balanced" would not confuse consumers.

More critically, defendants argue, Fox in its papers conceded that there was no evidence of actual confusion among consumers over the title and cover, claiming this was so because the book has not yet been published. Defendants dispute this contending that the title and cover of the book were "widely used to market" it months before suit was brought. Indeed, the book reached number one status on Amazon.com by August 18<sup>th</sup>.

Defendants argue that laches should also preclude plaintiff's claim for equitable relief. Fox was given ample notice of both the title and cover of the book yet did

not institute proceedings until ten weeks after first becoming aware of the book cover and six weeks after its last communication with Penguin on the issue. During that interval, over 250,000 copies of the book were printed and shipped to retailers across the country.

For Fox: Dori Ann Hanswirth, Tracey A. Tiska and Katherine M. Bolger of Hogan & Hartson

For Penguin: Floyd Abrams, Dean Ringel and Nicholas Golden of Cahill Gordon & Reindel; and Ronald S. Kad-den of Von Maltitz, Derenberg, Kunin, Janssen & Giordano (NY)

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**80 Eighth Avenue, Suite 200**  
**New York, NY 10011**

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**MLRC ANNUAL DINNER**  
**NOVEMBER 12, 2003**

**MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on**

**Howard H (“Tim”) Hays, Jr.,  
former owner and publisher of the Press-Enterprise of Riverside, CA.**

**Presented by Gary B. Pruitt, Esq.,  
Chairman of the Board, President & Chief Executive Officer of The McClatchy Company.**

Tim Hays was in charge of the Press-Enterprise when the newspaper not once, but twice, convinced the Supreme Court of the United States to recognize and expand rights of access to America’s courtrooms. *Press-Enterprise Company v. Superior Court of California* was argued 20 years ago this October and decided in January 1984. Its sequel, generally known as *Press-Enterprise II*, was decided in June 1986.

For his strength and courage of conviction, and, of course, his willingness to spend what it took of his own money to take the cases all the way to the top of the legal system, Mr. Hays deserves the profound gratitude and honor of the public and the media.

Following the Brennan Award, the Dinner will feature another sequel, a continuation of the discussion begun last year regarding government secrecy’s impact on military and security coverage – an issue that threatens to overwhelm the principles Tim Hays championed.

**IN THE TRENCHES REVISITED:  
WAR REPORTING AND THE FIRST AMENDMENT – PART II**

***PANEL***

**Cheryl Diaz Meyer  
The Dallas Morning News**

**Mary Beth Sheridan  
The Washington Post**

**Michael Weisskopf  
TIME Magazine**

***MODERATED BY***

**Brian Williams  
NBC News**



## **AUGUST *MediaLawLetter* ADDENDUM**

### **Judge Chin Denies Preliminary Injunction Fox Dismisses Suit**

On Friday, August 22, Judge Denny Chin of the federal Southern District of New York denied Fox's motion for a preliminary injunction against Penguin and Al Franken. The court ruled that Fox's claim for trademark infringement and dilution was, "wholly without merit, both factually and legally". Specifically, the court held that there was no likelihood of confusion among consumers as to whether Fox (or Bill O'Reilly) was involved with the creation of the book due to defendants' use of Fox's trademark ("Fair and Balanced"). It also stated that even if there was a danger of such confusion, "the First Amendment trumps" it here. Fox News subsequently dropped its suit on August 25.

Judge Chin denied Fox's motion from the bench. He found that there was no likelihood of confusion among consumers over Penguin and Franken's use of Fox's trademark, or the cover in general. The court decided that Fox had not satisfied the standard of, "irreparable harm, a likelihood of success and a balancing of equities in its favor."

Examining the cover in its entirety, the court decided that it was "highly unlikely" that consumers would believe either O'Reilly or Fox had any part in the origin of the book. Despite Fox's argument to the contrary, Judge Chin believed that book consumers, especially those who would purchase a book containing social/political commentary, would be sophisticated enough to know that Fox didn't sponsor this book. Fox viewers would know that O'Reilly is not endorsing the book.

Discussing Fox's trademark in "Fair and Balanced", the court held that the mark was a weak one, "because the words are used so frequently, particularly in the context of journalism, the press and the media." In fact, Judge Chin stated that, "it is highly unlikely that the phrase 'fair and balanced' is a valid trademark...I can't accept that that phrase can be plucked out of the marketplace of ideas and slogans."

The court also held that there was no bad faith exhibited by either Penguin or Franken in the use of Fox's trademark. Despite clearly using Fox's trademarked phrase, the use was that of a parody, there was no intent to mislead consumers as to anyone's relationship.

Finally, Judge Chin explained that even assuming the trademark was valid, defendants' use of the mark was a parody protected by the First Amendment. Book titles have been granted great First Amendment protection under the Lanham Act and Second Circuit precedent. The use of the trademark here was not for a commercial purpose, but rather as a form of artistic expression. The court took notice that O'Reilly himself used a trademarked phrase for his book title, "The Good, the Bad, and the Completely Ridiculous in American Life." Even if the parody at issue results in "tarnishment or dilution" of the trademark, defendants' use here was protected as it was an "artistic expression" and it was "fair criticism."

For plaintiff: Dori Ann Hanswirth, Tracey A. Tiska, and Katherine M. Bolger of Hogan and Hartson.

For defendants: Floyd Abrams and Dean Ringel of Cahill, Gordon and Reindel. Ronald S. Kadden, Von Maltitz Derenberg Kunin Janssen & Giordano.