

MLRC Media Law Resource Center

MEDIA LAW LETTER

Reporting Developments Through August 28, 2009

SUPREME COURT

- U.S.** **Twombly and Iqbal: New Tools For Early Disposition of Defamation Claims In Federal Court** **3**
Complaint Must State a "Plausible" Claim for Relief
Bell Atlantic Corp. v. Twombly; Ashcroft v. Iqbal
- U.S.** **Sidebar: Iqbal v. Ashcroft** **5**

LIBEL & PRIVACY

- N.D. W. Va.** **Hello Iqbal, Goodbye Lawsuit** **7**
Court Dismisses Defamation Action Against Author and Publisher Filed by a Convicted Felon
Serian v. Penguin Group
- Tex. App.** **Divided Court Denies Summary Judgment to Newspaper Over Political Ad** **12**
Ad Not Protected by Fair Report Privilege; Not Substantially True
Freedom Communications Inc. d/b/a the Brownsville Herald
and the Valley Morning Star v. Coronado, et al.
- S.D.N.Y.** **Sufficient Evidence of Actual Malice to Send Libel Case Against Author to Trial** **13**
But Summary Judgment Granted for Publisher; No Duty to Fact Check Book
Stern v. Cosby
- D.C. App.** **District of Columbia Applies First Amendment Protections to** **15**
Anonymous Internet Communications
High Threshold to Obtain Identity of Anonymous Individual
Solers, Inc. v. John Doe
- N.Y. Sup. Ct.** **Google Ordered to Identify Anonymous Blogger** **17**
No Anonymity for Creator of Website Called "Skanks of NYC"
Cohen v. Google, Inc.
- Ga. Sup. Ct.,** **Three Bloggers Face Trials** **18**
E.D. Va., *One Win, One Loss, One Draw*
N.Y. Sup. Hammit v. Busbin; Cretella v. Kuzminski (E.D. Va.); Sollami v. Shepard
- Cal.** **Sweet Victory For Nestlé In Misappropriation Case** **21**
Single Publication Rule Applies to Misappropriation, Publicity Claims
Christoff v. Nestle
- 2d Cir.** **Court Affirms Dismissal of Putative Class Action Libel** **23**
Suit Against "American Gangster" Movie
Group Libel Doctrine Bars Claim
Diaz v. NBC Universal, Inc.

NEWSGATHERING

- N.Y. Sup. Ct. Court Dismisses Alleged Breach of Oral News Embargo Claim by Disgruntled Source** **24**
Reluctant to Enforce Vague, Oral Contract Where First Amendment Rights May Be Affected
 Aretakis v. Hearst

COPYRIGHT

- 9th Cir. Voluntary Dismissal And Fee Awards In Copyright Cases** **26**
Ninth Circuit Reverses Course
 Cadkin v. Loose
- E.D. Tex. Court Reject's Copyright Plaintiff's New Trial Motion in Infringement Suit Over Movie** **28**
Defense Verdict Not Against Weight of Evidence
 West v. Perry
- E.D. Pa. Fair Use Stake Driven Through The Heart Of Monster Copyright Claim** **30**
Use Of The Magazine Covers And Artwork Was Fair
 Warren Publishing v. Spurlock d/b/a Vanguard Productions
- N.D. Cal. Copyright Claim Against Blogger Dismissed** **33**
Use of Plaintiff's Photos on Gripe Site Deemed a Fair Use
 Sedgwick Claims Management Services, Inc. v. Delsman

INTERNET

- N.D. Cal. Complaint Against Google for Ringtone Advertisements Dismissed** **34**
Plaintiff Failed to Plead "Plausible" Facts to Avoid Section 230
 Goddard v. Google, Inc.
- S.D.N.Y. Shooting Victim's Complaint Against Craigslist for Sale of Gun Dismissed** **34**
Complaint Barred by Section 230
 Gibson v. Craigslist

ACCESS

- 2d Cir. Second Circuit Denies Public Access To Wiretap Material In Spitzer Case** **35**
Rejects Common Law and First Amendment Claims for Access
 In the Matter of the Application of the New York Times Co.
 to Unseal Wiretap & Search Warrant Materials

***Twombly* and *Iqbal*: New Tools For Early Disposition of Defamation Claims In Federal Court**

By Samuel Fifer and Gregory R. Naron

Two Supreme Court decisions -- *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and the even more recent *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) -- have adopted a new and rigorous test for what constitutes a well-pleaded complaint sufficient to withstand a motion to dismiss in federal court. While these decisions disclaim any desire to impose a "fact pleading" requirement, they have expressly displaced the long-standing, liberal application of federal notice pleading enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957).

Some find this change both profound and unwelcome; Senator Arlen Specter has introduced legislation (entitled the "Notice Pleading Restoration Act")¹ that would overrule *Twombly* and *Iqbal*. Watching how courts apply this new rule will show whether --and how-- they can be applied to litigating defamation claims in federal court. It is enough to say that *Twombly* and *Iqbal* will likely embolden media defendants to raise issues -- in particular, actual malice -- on a Rule 12(b)(6) motion, rather than awaiting summary judgment disposition, after discovery.

***Twombly* Overrules *Conley's* Interpretation of Rule 8**

The notice pleading standard of Federal Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests"; a complaint "does not need detailed factual allegations."² However, *Twombly* rejects the notion that the Federal Rules "dispensed with the pleading of facts altogether": "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do . . . Factual allegations must be enough to raise a right to relief above the speculative level."³

The complaint in *Twombly* claimed an antitrust conspiracy under the Sherman Act. The "crucial question" in such a claim is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express'; parallel business behavior alone is not enough."⁴ Hence, allegations of parallel conduct "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."⁵ The Court held the

complaint failed to adequately plead the requisite factual context to render plaintiff's claim "plausible."

The Court's "plausibility" pleading standard displaced *Conley v. Gibson's* oft-quoted dictum that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁶ Under a "literal reading of *Conley's* 'no set of facts'" language, a "wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery."⁷ The Court held this was not -- and never was -- the law.

Iqbal* Follows and Expands on *Twombly

Iqbal held *Twombly's* "plausibility" standard was not limited to the antitrust context, and further clarified that "[t]wo working principles underlie our decision in *Twombly*":

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [This is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not "show[n]" -- "that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).⁸

Applying this two part analysis, *Iqbal* concluded that plaintiff's complaint did not cross "the line from conceivable to plausible." First, his "bare assertions, much like the pleading of conspiracy in *Twombly* amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." Second, the complaint's allegations -- that the government defendants' detention of "thousands of Arab Muslim men" after September 11 was motivated by discriminatory animus -- did not

(Continued on page 4)

***Twombly* and *Iqbal*: New Tools For Early Disposition of Defamation Claims In Federal Court**

(Continued from page 3)

“plausibly suggest an entitlement to relief,” in view of the other, “more likely explanations” for defendants’ actions.⁹

***Twombly* and *Iqbal* Define What is a Well-Pleaded Defamation Complaint in Federal Court**

Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), a federal court sitting in diversity is bound to apply state substantive law and federal procedural law.¹⁰ When a state law and the Federal Rule conflict, the Federal Rule controls; “*Erie* ... has never been invoked to void a Federal Rule.”¹¹ Prior to the Federal Rules, defamation claims were often “discouraged by requirements that such contentions be set forth in considerable detail”; however, “the federal rules do not require special pleading.” Instead, “Rule 8 and its notice pleading standard applies” to defamation cases.¹² That Rule 8 notice pleading standard is now defined by *Twombly* and *Iqbal*.

Nevertheless, the traditionally disfavored status of defamation claims plays directly into one of *Twombly* and *Iqbal*’s themes: the practical concern that “a plaintiff with ‘a largely groundless claim’ be allowed to ‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”¹³ *Iqbal* held this concern was particularly acute where qualified immunity was involved, since such immunity was designed to “free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’”¹⁴ By the same token, courts have expressed the view that where a complaint attacks “conduct which is *prima facie* protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required.”¹⁵

Actual Malice Dismissal under Twombly and Iqbal

Of course, one of the keystone protections against the chilling effect of a defamation suit is the “actual malice” rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), which requires proof that defendant either had a subjective awareness of the defamatory statement’s probable falsity, or acted with reckless disregard of its truth or falsity. *Times* malice is typically raised by way of summary judgment -- or decided at trial -- rather than on a motion to dismiss. However, the *Twombly/Iqbal* standard arguably enhances the odds for dismissal on actual malice grounds.

One recent district court case, *Diario El Pais, S.L. v. The Nielsen Co., (US), Inc.*, applied the *Twombly* “plausibility” standard in

granting a 12(b)(6) motion to dismiss a libel claim (complaining of the publication of allegedly erroneous estimates of the number of visitors to plaintiffs’ website); the court held plaintiffs’ “conclusory and unsupported assertions that the Defendant knew the revised audience estimates were inaccurate” were “insufficient to meet the pleading requirements for actual malice.” Moreover, plaintiffs’ own allegations showed that defendant took actions “clearly inconsistent with a ‘reckless disregard’ for the truth”; and their “contentions that a different methodology would have produced a more accurate result do not amount to allegations that Defendant acted with actual malice.” Accordingly, the complaint did not “allege facts that render ‘plausible’ the actual malice element.”¹⁶

Finally, notwithstanding some contrary suggestions in the cases, it is generally recognized that actual malice is not subject to Federal Rule 9’s “heightened” pleading standard. “Rule 9(b) requires particularity when pleading ‘fraud or mistake,’ while allowing ‘[m]alice, intent, knowledge, and other conditions of a person’s mind [to] be alleged generally.’”¹⁷ But even though Rule 9 “excuses a party from pleading discriminatory intent [or malice] under an elevated pleading standard,” it does not confer a “license to evade the less rigid -- though still operative -- strictures of Rule 8”¹⁸ -- namely, that such a malice allegation be “plausible.”¹⁹

Conclusion

Plaintiffs could always plead themselves out of court by alleging facts inconsistent with an actual malice finding.²⁰ Now, however, the exacting language and reasoning of *Twombly* and *Iqbal* will permit defendants to demand a more searching examination of actual malice plausibility at the pleading stage. In those cases, even though the facts pleaded were consistent with the possibility of unlawful concerted action (*Twombly*) or discriminatory motive (*Iqbal*), such conclusions were not plausible -- i.e., there were other, “more likely explanations” for defendants’ actions.²¹ That analysis would seem to apply equally to an attack on actual malice pleadings, and is a potentially potent weapon for defense counsel. To demonstrate *Twombly/Iqbal* plausibility, plaintiffs will have to plead, if not the evidentiary facts, at least a detailed rendition of the ultimate facts and a factual theory that would support an actual malice finding -- to the extent they can do so consistent with Rule 11.

Samuel Fifer is a partner and Gregory R. Naron counsel at Sonnenschein Nath & Rosenthal LLP in Chicago.

Twombly and Iqbal: New Tools For Early Disposition of Defamation Claims In Federal Court

1. S.1504, introduced July 22, 2009. The courts have already begun applying the new rule. *See, e.g., Sinaltrainal v. The Coca-Cola, Company*, No. 06-15851 (11th Cir., August 11, 2009) (applying new “plausibility” rule in affirming 12(b)(6) dismissal).
2. *Twombly*, 550 U.S. at 555 (citing *Conley v. Gibson*, 355 U.S. at 47).
3. *Id.* at 555 and n. 3 (citations omitted).
4. *Id.* at 553-54.
5. *Id.* at 556-57.
6. *Id.* at 560-61 (quoting *Conley v. Gibson*, 355 U.S. at 45-46).
7. *Id.* at 561 (citations omitted).
8. *Iqbal*, 129 S.Ct. at 1949-50.
9. *Id.* at 1951.
10. *See Walker v. Armco Steel Corp.*, 446 U.S. 740, 745 (1980).
11. *Hanna v. Plumer*, 380 U.S. 460, 470 (1965).
12. Fairman, *The Myth of Notice Pleading*, 45 *Ariz. L. Rev.* 987, 1044 (Winter 2003) (quoting *Geisler v. Petrocelli*, 616 F.2d 636, 640 (2d Cir. 1980)).
13. *Twombly*, 550 U.S. at 557 (citations omitted).
14. *Iqbal*, 129 S.Ct. at 1953.
15. *Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers*, 542 F.2d 1076, 1082-83 (9th Cir. 1976); *see also Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1108 (N.D. Cal. 1999) (“actual malice must be pled with specificity”; citing *Franchise Realty*). *See generally*, Fairman, 45 *Ariz. L. Rev.* at 1044-47.
16. 2008 WL 4833012, at *6-7 (S.D.N.Y., Nov. 6, 2008). Notably, in addition to applying the *Twombly/Iqbal* standard, *Diario El Pais*’ holding rested on the notion that “[a]ctual malice must be pled with specificity” -- citing a pre-*Twombly* New York state court decision, *Themed Restaurants, Inc. v. Zagat Survey, LLC*, 4 Misc.3d 974, 981-82, 781 N.Y.S.2d 441, 449 (N.Y. Sup. Ct. 2004). Other state cases, in traditional “fact pleading” jurisdictions, have held dismissal is proper for failure to specifically plead the facts supporting actual malice. Even some pre-*Twombly* federal courts have required specificity, or have held that “bald or bare allegations of malice” were “insufficient” to sustain a complaint. *E.g., Silk v. City of Chicago*, 1996 WL 312074 (N.D. Ill., June 7, 1996) (even through Illinois fact pleading not applicable to defamation claim filed in Federal Court, complaint must contain “some factual allegations from which malice can be inferred”; granting motion to dismiss); *Nicosia v. De Rooy, supra*, 72 F. Supp. 2d at 1109 (“conclusory statements that De Rooy should have known the truth does not satisfy the heightened pleading standard”; granting motion to dismiss).
17. *Iqbal*, 129 S.Ct. at 1954.
18. *Id.*
19. *Twombly*, 550 U.S. at 569 n. 14. *See, e.g., Nelson v. DeVry, Inc.*, 2008 WL 2845300, at *2 (E.D. Pa., July 22, 2008) (negligence claims dismissed pursuant to official immunity statute where “plaintiffs have failed to allege facts that plausibly suggest that the act of filing a false report [by defendant officer] was the result of actual malice or willful misconduct” and “have not alleged facts that suggest that discovery will reveal evidence of willful misconduct or actual malice”).
20. The holding in *Diario El Pais, supra*, rested at least in part on this ground.
21. *Iqbal*, 129 S.Ct. at 1951.

SIDEBAR: Supreme Court Decision in Ashcroft v. Iqbal

The Supreme Court’s most significant decision for media litigation this year may actually have come in a non-First Amendment case. At issue in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (U.S. 2009) (No. 07-1592), rev’g, 490 F.3d 143 (2d Cir. 2007) was the extent to which a plaintiff must plead specific facts to overcome a defense of qualified immunity at the motion to dismiss stage.

In a 5-4 decision written by Justice Kennedy, the Court held that to survive a motion to dismiss a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” Legal conclusions unsupported by factual allegations are “not entitled to the assumption of truth,” the Court cautioned. How this standard will apply to pleading of fault in libel cases, for instance, remains to be seen, but the impact could be significant.

(Continued on page 6)

Twombly and Iqbal: New Tools For Early Disposition of Defamation Claims In Federal Court**Second Circuit Decision**

The Second Circuit held that a post-9/11 detainee had stated a claim for deprivation of constitutional rights against former Attorney General John Ashcroft and FBI Director Robert Mueller, by alleging that they and other FBI and Bureau of Prison defendants conspired to subject plaintiff to excessive detention and harsh conditions, including solitary confinement and beatings by jail guards. The Second Circuit focused on the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) where the Court applied a heightened "plausibility standard" to an antitrust claim. The Second Circuit noted that while *Twombly* and other recent cases "point toward a new and heightened pleading standard" the Supreme Court did not require a universal standard of heightened fact pleading. One judge on the panel, though, urged the Supreme Court to address the appropriate pleading standard "at the earliest opportunity."

Supreme Court Decision

In a 5-4 decision written by Justice Kennedy, and joined by Chief Justice Roberts and Justices Scalia, Thomas and Alito, the Court reversed and dismissed the case holding that *Twombly's* heightened standard applied and that plaintiff failed to state a claim against the petitioners. To survive a motion to dismiss a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." Legal conclusions unsupported by factual allegations are "not entitled to the assumption of truth," the Court cautioned.

Specifically, the Court first held Ashcroft and Mueller could not be held liable for the unconstitutional acts of their inferiors under any theory of "supervisory liability." The term was a "misnomer" in *Bivens* or other civil rights actions, where "each Government official ... is only liable for his or her own misconduct." In determining whether Iqbal had pled a case against the two agency heads, the Court stated that legal conclusions would not be given the assumption of truth. Once the conclusory language had been stripped away, the Court would then determine whether the remaining factual allegations plausibly entitled Iqbal to relief. Assessing plausibility in the shadow of *Twombly* required a fact-finder "to draw on its judicial experience and common sense." The Court went on to confirm that *Twombly* applied to all actions governed by Rule 8 of the Federal Rules of Civil Procedure, not just antitrust disputes. It also rejected the argument that *Twombly* should be minimized when discovery is a simple or easily-managed matter, especially when any measure of undue burden would prevent officials from the "vigorous performance of their duties."

The Court then held Iqbal's complaint did not contain a plausible claim. Iqbal pled that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him]" to repressive treatment "as a matter of policy, solely on account of [his] religion, race, and/or national origin." Iqbal also claimed that Ashcroft was the "principal architect" of the policy and that Mueller was "instrumental" in creating it. The Court called those "bare assertions ... conclusory and not entitled to be assumed true." It then looked to the remaining factual assertion that the duo created a policy of "holding post-September 11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI." This fact did not create a plausible inference of discrimination, the Court held, because the policy was more likely motivated by a desire to detain those who might have potential connections to the attack, regardless of race or other considerations.

Justice Souter, the author of *Twombly*, wrote the main dissent. He first argued the majority had improperly conflated the many species of supervisory liability (which could attach in *Bivens* actions) with vicarious liability. Ashcroft and Mueller had conceded that they would be liable if they had actual knowledge of or were recklessly indifferent to their inferiors' actions, and Souter would have let that stand. He then claimed the majority's plausibility standard revealed "a fundamental misunderstanding of the enquiry that *Twombly* demands." Courts should not decide at the pleading stage whether the allegations are more likely than not true, but should only discard "allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto." Iqbal's complaint, in contrast, provided claims that anti-terrorism officials created a specific policy for discriminatory reasons. "Viewed in the light of these subsidiary allegations, the allegations singled out by the majority as 'conclusory' are no such thing." Moreover, Souter found "no principled basis" for discarding those statements and letting others stand, including the claim about FBI pre-clearance.

Hello Iqbal, Goodbye Lawsuit

West Virginia Federal Court Dismisses Defamation Action Against Author and Publisher Filed by a Convicted Felon

By Mark R. Hornak and Kathleen Jones Goldman

On July 23, 2009, Chief Judge Irene M. Keeley of the U.S. District Court for the Northern District of West Virginia granted the defendants' Motion to Dismiss for failure to state a claim in a defamation action brought by convicted felon Joseph Serian attacking the content of the book, *America at Night: The True Story of Two Rogue CIA Operatives, Homeland Security Failures, Dirty Money, and a Plot to Steal the 2004 U.S. Presidential Election – by the Former Intelligence Agent Who Foiled the Plan (America at Night.) Serian v. Penguin Group (USA), Inc. et al*, 1:08-cv.-74, 2009 WL 2225412 (N.D.W.Va. July 23, 2009).

Background

America at Night was written by Larry Jackson Kolb (Kolb) and was published by Penguin Group (USA) Inc. (Penguin Group.) In *America at Night*, Kolb recounts that he was recruited by the Department of Homeland Security, to help investigate two convicted white collar criminals, Robert Sensi (Sensi) and Richard Hirschfeld (Hirschfeld), each with connections to the CIA, and that his investigation led him to discover and foil a conspiracy to defeat and smear the John Kerry 2004 presidential campaign by charging the campaign with false links to Al Qaeda. (Kolb is also the author of *Overworld: The Life and Times of a Reluctant Spy* (New York: Riverhead Books, 2004). Prior to his career as an author, Kolb had worked closely with Muhammad Ali and Adnan Khashoggi and as an intelligence operative along side Miles Copeland, who was involved in the formation of the OSS, the precursor to the CIA.)

Serian, like a number of individuals acquainted with Sensi and Hirschfeld, is mentioned several times throughout *America at Night*. At various points in the book, Serian is described by certain other persons as "very crazy", "a glib liar", "a bad businessman," and "a crook."

America at Night describes an incident, ultimately resulting in a federal criminal conviction, in which Serian posed as an "official" of Habitat for Humanity, and sent

letters to two United States District Court judges and one United States Attorney requesting that Hirschfeld be released from prison to work in a Habitat for Humanity work release program. The book recounted that, in reality, Serian held no position with Habitat for Humanity which could authorize him to write a letter of this kind; nor was there any work release program affiliated with Habitat for Humanity. In the context of this incident, the book references a description of Serian by a former employee of Hirschfeld as "very bright, very crazy, and a glib liar." Another excerpt of the book recounts a description of Serian by the man who Serian maintains stole his mail order contact lens business. This individual describes Serian as a "bad businessman" and a "crook."

The Civil Action

On January 31, 2008, Serian filed a *pro se* lawsuit against Kolb and Penguin in the United States District Court for the Northern District of West Virginia on behalf of himself and purportedly on behalf of Sensi and General Wayne Jackson (Jackson). Based on the Court's own close examination of the Complaint, it identified as the only potentially defamatory statements references to Serian as "crazy," "a liar," "a bad businessman" and "a crook." In addition to the defamation claims asserted by Serian, the Complaint also alleged that the Kolb and Penguin invaded Sensi's privacy, defamed Sensi, violated 50 U.S.C. §§ 421-426 (prohibiting the disclosure of the identity of covert agents and national security information) as to Sensi, and also asserted a defamation claim on behalf of Jackson. The court, after noting that the Complaint was signed only by Serian, dismissed all counts pertaining to Sensi and Jackson *sua sponte* because Serian, who was appearing *pro se*, could only bring claims on his own behalf and was prohibited from bringing claims on behalf of Sensi or Jackson. (On January 23, 2009, Serian and Sensi filed another action in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. A motion to dismiss is currently pending in the Palm Beach County Florida action.)

(Continued on page 8)

Hello Iqbal, Goodbye Lawsuit

(Continued from page 7)

Motion to Dismiss

Penguin Group and Kolb filed a Motion to Dismiss, asserting that no relief could be granted on Serian's defamation claims because all of the allegedly defamatory statements were conclusively true, or were non actionable opinions under the law. The Defendants' argument was premised principally on Serian's multiple, affirmed federal convictions for mail fraud and other crimes involving his dishonesty.

Decision of the Court

The court recognized that while Serian's *pro se* filings were to be "liberally construed" and that a *pro se* complaint, however inartfully pled, must be held to a less stringent standard than formal pleadings drafted by lawyers, the court nevertheless retains its authority to dismiss an action that is demonstrably frivolous. Specifically, the court held that a claim must be dismissed if it fails to cross the line from "merely conceivable" to "plausible on its face." *Serian v. Penguin Group (USA), Inc. et al*, 1:08-cv.-74, 2009 WL 2225412 (N.D.W.Va. July 23, 2009), quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1037, 1955 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In reference to Serian's claims of defamation, the court noted that a plaintiff seeking to bring a defamation action under the applicable state law must establish the following elements: (1) defamatory statements; (2) a non-privileged communication to a third party [the publication requirement]; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury. *Crumpp v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70, 77 (1983). In addressing these elements, the court found that the noted descriptions of Serian in *America at Night* could be considered to be defamatory in that the statements were capable of lessening Serian's esteem in the community and that the statements constituted non privileged communications to a third party. However, the court then held that there were no facts which could allow for any reasonable inference that these statements about Serian in *America at Night* were false and, as a result,

Serian's claims of defamation were deemed to be implausible as a matter of law, and not actionable.

Taking judicial notice of serial federal judgments of conviction, the court specifically found that Serian's federal conviction on three counts of obstruction of justice and one count of conspiracy for attempting to obtain the premature release of federal prisoners by sending false letters to two United States District Judges and one United States Attorney demonstrated that he was, in fact, "a liar." The court also noted that Serian's other federal convictions for mail fraud, wire fraud, fraud of financial institutions, and delivery of misbranded devices established that he also lied in his business dealings with customers noting that these convictions were specifically based on lies Serian told when he took money from customers for contact lens products that he never delivered.

Moreover, Chief Judge Keeley also took judicial notice of the findings of the Circuit Court of Harrison County, West Virginia in which the Harrison County Circuit Court, in the matter captioned *Joseph Serian d/b/a/ Med-Care America Co. v. Diane Urchak, et. al.*, Civil Action No. 08-C-15-3 "determined as a matter of fact and law that Joseph Serian a/k/a Joseph Seriani, had LIED TO THE COURT" (emphasis in the original). Accordingly, the statement that Serian was a "glib liar" was deemed by the court as not a false statement and therefore, not actionable as a matter of law.

For similar reasons, the court found that Serian's conviction resulting from his sending false letters to obtain the release of federal prisoners in the name of Habitat for Humanity, as well as his convictions resulting from his fraudulent scheme to scam customers who purchased contacts from his mail order contact business conclusively established the statement that Serian "is a crook" as a true statement and, consequently, the statement that Serian was "a crook" was not actionable. The court then found that the remaining characterizations of Serian as "very crazy" and as "a bad businessman" were subjective opinions which were entitled to full Constitutional protection.

Notably, the court's opinion specifically explained that, while several individuals were identified in *America at Night* as having taken part in the alleged plot to ensure the reelection of George W. Bush by implying that the Kerry

(Continued on page 9)

Hello Iqbal, Goodbye Lawsuit

(Continued from page 8)

2004 presidential campaign had links to Al Qaeda, no reasonable inferences supported a claim that *America at Night* associated Serian with any such plot.

In sum, the court granted the Defendants' motion to dismiss on all grounds. The value of this decision is the court's willingness to take judicial notice of facts bearing directly on the allegedly defamatory statements, yet not pled in the Complaint, leading to its analysis of Serian's extensive criminal history which established that Serian could be deemed to be "a liar" and "a crook" in the context of the Defendants' motion to dismiss. The court took judicial notice of Serian's federal felony convictions pursuant to Federal Rule of Evidence 201(c) and, in doing so, that history served as a basis for the court to find that Serian could assert no plausible claim for defamation and, in par-

ticular, could not fulfill his obligation to prove falsity. In this case, the Court vigorously applied the *Iqbal* test by engaging in a searching examination of the allegations of the Complaint as measured against the challenged publication, and then determining whether the plaintiff could prevail in the first instance, as a matter of law. Having failed the *Iqbal* test, the Complaint was appropriately dismissed.

Mark R. Hornak and Kathleen Jones Goldman of Buchanan Ingersoll & Rooney LLP and Frank E. Simmerman, Jr., Simmerman Law Office, PLLC represented Larry Jackson Kolb and Penguin Group USA, Inc. Plaintiff Joseph Serian appeared pro se in this litigation with the exception of a limited appearance by attorney Greg Bowling, who filed a Response in Opposition to Defendants' Motion to Dismiss on Serian's behalf.

MEDIA LAW RESOURCE CENTER CALENDER 2009-10

MLRC Dinner 2009

November 11, 2009

Grand Hyatt NYC

Reception : 6:00pm-7:15pm

Dinner: 7:15pm-11:00pm

MLRC Annual Meeting

November 11, 2009

Grand Hyatt NYC

2:30pm-3:30pm

MLRC Forum

November 11, 2009

Grand Hyatt NYC

4:00pm-6:00pm

2009 DCS Annual Lunch

November 12, 2009

Proskauer Rose LLP

1585 Broadway

New York, NY 10036-8299

Noon-2:00pm

2010 NAA/NAB/MLRC Conference Planning Meeting

November 12, 2009

Sonnenschein Nath & Roth

1221 Avenue of the Americas

New York, NY 10020-1089

8:00am-9:00am

[MLRC London Conference](#)

October 1-2, 2009

International Developments in Libel,
Privacy Newsgathering and New Media Law

MLRC Southwestern Conference

January 14, 2010

Southwestern Law School, Los Angeles, Cal.

[MLRC/Stanford Digital Media Conference](#)

Legal Frontiers in Digital Media

May 13-14, 2010

Stanford University, Palo Alto, CA

Save the Date!

MLRC London Conference 2009

October 1-2, 2009

Stationers' Hall, London

International Developments in Libel, Privacy Newsgathering and New Media IP Law



Keynote Address: Lord Hoffmann, House of Lords

Speech by Justice Ruth McColl, Supreme Court New South Wales Australia

In-House Counsel Breakfast on practice and management issues

Delegates receptions on September 30th and October 1st

Discussion topics include:

- Liability for third-party content posted online in the UK and Europe
- Libel Terrorism Protection Acts and enforcement of judgments
- The right to be left alone in public – the continuing evolution of the Princess Caroline privacy decision
- Reporting on terrorism: How has the fight against terrorism impacted reporting?
- Fair use and fair dealing in the digital media environment

For information contact Dave Heller at dheller@medialaw.org

Sponsored by:

Hiscox, Bloomberg, Chubb Insurance, Covington & Burling LLP,
Davis Wright Tremaine LLP, Dow Lohnes PLLC,
Jackson Walker L.L.P., Leopold Petrich & Smith LLP,
Miller Korzenik & Sommers LLP, Prince Lobel Glovsky & Tye LLP,
SDD Global Solutions Pvt. Ltd.



MLRC London Conference 2009 Program

Current as of August 2009; subject to change

Wednesday September 30, 2009

Delegates Reception

6:00 – 8:00 pm
Bloomberg News, Finsbury Square London
Sponsored by Bloomberg News

Thursday October 1, 2009

Morning Sessions

9:00 Registration Welcome and Opening

Keynote Address: Lord Hoffmann, House of Lords

10:30 – 12:00 **Libel Law Developments:** Liability for third-party content and archived content on media web sites; reporting defamatory statements by sources; republishing defamatory allegations and the press's duty to investigate; Libel Terrorism Protection Acts in the U.S. and federal bills to make foreign libel judgments unenforceable.
Discussion Leaders: Stephen Collins, Channel 4; Lynn Oberlander, The New Yorker

Lunch at Stationers' Hall

Afternoon Sessions 1:15 – 5:00 p.m.

1:15 – 2:45 **Newsgathering Challenges:** Reporting on terrorism – how the fight against terrorism has affected news reporting; limits on access to court proceedings and judicial information. Reporting on the courts – access to judicial proceedings and information, contempt of court and reporting restrictions, limits on Internet archives, updates on cameras in courts. Reporting on sports – combating restrictions on coverage of sports leagues.
Discussion Leaders: Valerie Nazareth, BBC; Charles Tobin, Holland & Knight LLP

Break

3:00 **Speech by Justice Ruth McColl, New South Wales Supreme Court.** An Australian Perspective on Privacy Law Developments

3:30 – 5:00 **Privacy Law Developments:** Developments in the UK and Europe and echoes around the world. The Max Moseley case – sex, lies and public interest. Damages and injunctions in privacy cases, and forum shopping in Europe. Photographs and privacy – the right to be left alone in public.
Discussion Leaders: Gary Bostwick, Bostwick & Jassy LLP; Liz Hartley, Associated Newspapers

6:30 **Reception Sponsored by Hiscox
The Wallace Collection
Manchester Square, London W1**

Friday October 2, 2009

Morning Sessions

In-house Counsel Breakfast

8:00 – 10:00 a.m.
Discussion of in-house practice and management issues.

9:00 – 10:00 a.m.
Breakfast at Stationers' Hall.

10:15 – 11:30 **The Future of Free Expression: A discussion on the impact of the Internet and new technologies on the protection for free expression.** Moderated by David Schulz, Levine Sullivan Koch & Schulz LLP and Mark Stephens, Finers Stephens Innocent LLP
With comments from Justice McColl; Mr. Justice Tugendhat, Mrs. Justice Sharp, High Court of England & Wales (subject to their court schedules).

11:30 – 12:30 **Reinventing Media for the Digital Age** Panel discussion with Alan Rusbridger, Guardian News & Media; Srinandan Kasi, General Counsel, The Associated Press. Moderated by Kenneth Richieri, The New York Times Company

Lunch at Stationers' Hall

Afternoon Sessions 1:30 – 5:00 pm

1:30 – 3:00 **New Media IP Law Developments:** Copyright and trademark challenges in a new digital environment. Copyright climate change, including user generated content challenges, regulatory regimes, the application of extraterritorial law and damages, and more. Trademark evolution, including keyword advertising, secondary liability.
Discussion Leaders: James Chadwick, Sheppard Mullin Richter & Hampton LLP; Niri Shan, Taylor Wessing

Closing Session

3:00 – 5:00 **Mock Parliamentary Hearing: Proposals for Libel and Privacy Law Reform:** A panel of UK legislators will preside over a hearing on proposals to reform libel and privacy law in the UK.

John Whittingdale MP (Chair of the Culture, Media & Sport Committee); Paul Farrelly MP; Edward Garnier MP; others tbd.

Divided Texas Appellate Court Denies Summary Judgment to Newspaper Over Political Ad

Ad Not Protected by Fair Report Privilege; Not Substantially True

A divided Texas appellate court panel affirmed denial of summary judgment to a newspaper over publication of an allegedly false campaign advertisement. [*Freedom Communications Inc. d/b/a the Brownsville Herald and the Valley Morning Star v. Coronado, et al.*](#), No. 13-08-00628-CV, 2009 WL 2462887 (Tex. App. Aug. 14, 2009) (Garza, Valdez, Vela, JJ.).

At issue was an attack ad by a candidate for district attorney condemning the incumbent for being lax in prosecuting crimes against children. The advertisement was based on an internal report prepared by the District Attorney's office, and it reprinted in part a chart listing the names of men accused of sexual or physical abuse of children.

The newspaper was not sued by the incumbent district attorney, but by four men listed in the chart. They sued for libel and disclosure of private facts. The appellate court held that the advertisement was not a fair summary of the official report or substantially true as a matter of law; and that the privacy claim could go forward because it is not clear that the mere accusation of a crime constitutes a legitimate matter of public concern.

Background

At issue was a full page newspaper advertisement published in the *Brownsville Herald* and *Valley Morning Star* newspapers (both owned by Freedom Communications) in the days leading up to the Texas Democratic primary election in March 2008. The challenger for district attorney, Peter Zavaletta, condemned the incumbent stating "Armando Villalobos Is Against Our Children.... He stood against children ... and stood with those who would commit such heinous acts." The advertisement included a chart entitled "Cases Involving Children 2007" with 103 entries, including the charge, name of the accused and disposition of the case. The ad concluded that in all these cases the incumbent "couldn't even send one defendant to prison." (The ad was later reprinted using just the initials of the accused.)

Four of the men listed on the chart sued the newspaper, the candidate and the candidate's source for the report. Last year the trial court denied summary judgment and the publisher appealed under the Texas interlocutory appeals statute. See [Tex. Civ. Sec. 51.014\(a\)\(6\)](#).

Appeals Court Decision

Affirming denial of summary judgment, the majority first addressed the fair report defense. The court found that while the chart was drawn from an official document "there were key omissions made that obscured the full meaning of the report." Specifically, the chart as presented failed to include the reasons why the cases against the plaintiffs were dropped, such as lack of evidence. In addition, the candidate's statements in the ad about his opponent "embellished" the chart by suggesting that plaintiffs would commit crimes against children.

The majority also rejected the substantial truth defense, stating "one could reasonably infer from the advertisement that the appellees committed crimes against children." This was so because of the juxtaposition of the chart and the candidate's harsh statements about his opponent which created the "strong impression" that the people listed in the chart had victimized children and escaped prosecution.

Finally, the court allowed plaintiffs disclosure of private facts claim to go forward. The court noted that the ad contained only accusations of crime without any underlying facts. The majority concluded that: "While underlying facts reflecting criminal activity can certainly be of legitimate public interest, Freedom points to no authority, and we find none, holding that the public has a legitimate interest in the mere fact that an individual has been accused of a crime."

Dissent

In a long and forceful dissent, Justice Vela stated that she would have granted summary judgment on substantial truth. "With respect to the appellees, the advertisements were true. They stated that appellees were accused of crimes concerning children. They were. The advertisements also stated that appellees' cases were declined at intake. They were." Justice Vela would also have dismissed the privacy claim, stating "Criminal allegations related to misconduct against children are of legitimate public concern."

Freedom Communications is represented by John Bussian, The Bussian Law Firm PLLC, Raleigh, NC. Plaintiffs are represented by Marc G. Rosenthal and Charles L. Levy, Rosenthal & Watson, PC, Austin.

Sufficient Evidence of Actual Malice to Send Libel Case Against Author to Trial

But Summary Judgment Granted for Publisher; No Duty to Fact Check Book

A New York federal district court this month held that there is sufficient evidence of actual malice for a libel case to go forward against television journalist and author Rita Cosby over statements in her recent best-selling book “Blonde Ambition: The Untold Story Behind Anna Nicole Smith’s Death” [*Stern v. Cosby*](#), No. 07-8536, 2009 WL 2460609 (S.D.N.Y. Aug. 12, 2009) (Chin, J.).

At issue are explosive allegations in the book about Smith’s former lawyer and companion Howard K. Stern involving sex, sex tapes, pimping and suggestions that Stern played a role in Smith’s death. The court found sufficient evidence of actual malice against Cosby, based on Cosby’s post-complaint contact with representatives of potential witnesses; her reliance on sources that appeared to be biased against Stern; her reliance on sources who now deny making the statements attributed to them; and, according to the court, the inherent improbability of some of the allegations republished in the book.

The court, however, granted summary judgment to the book publisher, holding that the publisher had no duty to fact-check the book given the author’s reputation and experience.

The decision is also significant for holding that allegations of homosexuality are no longer defamatory *per se* under New York law.

Background

Rita Cosby, a former MSNBC, CBS and Fox News reporter, wrote the book in 2007, following Smith’s death that year of a drug overdose and the ensuing tabloid drama about the paternity of Smith’s infant daughter. For the unfamiliar, Smith became a tabloid celebrity as a Playboy model, B movie actress, reality TV star and potential heiress to a half billion dollar fortune as the result of a short marriage to an 89 year old Texas oil baron. Howard K. Stern was her lawyer and later became her companion. After Smith’s death several men claimed paternity of the child, although Stern was listed as the father on the girl’s birth certificate. Tests ultimately showed that photographer Larry Birkhead was the father and he obtained custody of his daughter.

Cosby’s book pitch described the drama as a “tale of sex, drugs, and unbridled personal ambition” that would contain “explosive news items.” Hachette agreed to publish the book on a crash schedule to capitalize on the public’s interest.

The book was published in September 2007 and Stern filed suit in October 2007. Among the allegations in the book that Stern sued over are the following: 1) That Smith discovered Stern and Larry Birkhead engaging in oral sex at a party in Los Angeles. 2) That Smith regularly watched in front of her nannies a video of Stern and Birkhead having sex. 3) That Stern “pimped” Smith out by arranging for her to have sex with men for money. 4) That Stern had a financial motive to kill Smith and was involved in her death.

Shortly after filing suit, Stern’s lawyers successfully moved for a preliminary injunction and expedited discovery schedule based on recorded conversations between Cosby and representatives of Smith’s former nannies that appeared to show Cosby offering to pay the nannies’ lawyers for affidavits supporting the claim that Smith watched a sex video of Stern and Birkhead in front of them. *See Stern v. Cosby*, 246 F.R.D. 453, 455 (S.D.N.Y. 2007).

This proved highly damaging to Cosby in the subsequent actual malice analysis where the court found it suggested “she was attempting to obstruct justice by tampering with witnesses.”

Libel Proof Plaintiff / Defamatory Meaning

The court first rejected defendants’ argument that Stern’s claim was barred by the libel proof plaintiff doctrine. Among other things, Stern was the subject of numerous tabloid reports questioning his role in Smith’s death and discussing his part in Smith’s bizarre inner circle. Moreover, as his libel suit was pending Stern was indicted in California for conspiring to provide Smith with prescription drugs.

The court questioned the viability of the doctrine in light of *Masson v. New Yorker*, 501 U.S. 496, 523 (1991) (incremental harm doctrine -the “cousin” of the libel proof

(Continued on page 14)

Sufficient Evidence of Actual Malice to Send Libel Case Against Author to Trial

(Continued from page 13)

plaintiff doctrine- is not grounded in the First Amendment). But the court concluded that regardless of its viability in federal court, it did not apply to the facts of the case.

there is a qualitative difference between comments made on a tabloid television show and written statements in a book purporting to be the product of legitimate “investigative journalism,” written by - as appears on the cover of the Book - an “Emmy-Award Winning Journalist.” The libel-proof plaintiff doctrine is to be sparingly applied (if at all), and surely it is not to be applied in a situation such as this.

The court also rejected the incremental harm defense given the nature of some of the allegations against Stern in the book.

The court, though, notably held that allegations of homosexuality can no longer be considered defamatory *per se*. Surveying recent case law on the question, the court held that an imputation of homosexuality is not defamatory *per se* in light of the “sea change in attitudes about

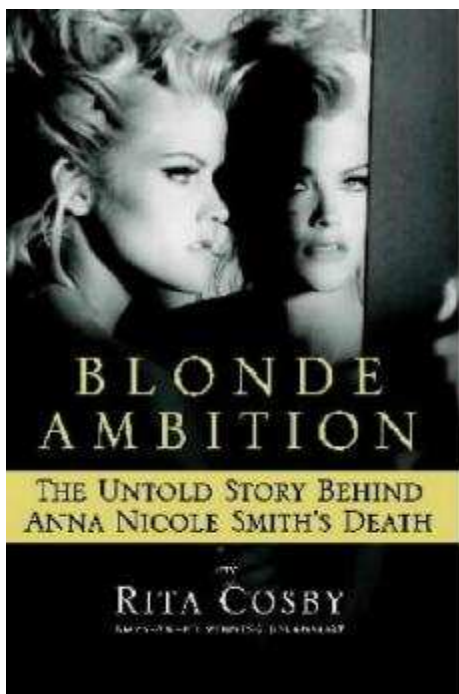
homosexuality.” This part of the holding provided little help to Cosby, though, since the court concluded that allegations that Stern had a homosexual relationship could still be defamatory as implying infidelity. The court also dis-

missed as “absurd” Cosby’s argument that the participation in a sex tape is not defamatory because “sex tapes are commonly made by celebrities.”

Actual Malice

The court found substantial evidence to support a finding of actual malice on many of the complained of statements. Among the sources for the book was Virgie Arthur, Smith’s mother, who had sought custody of Smith’s daughter, private investigators who worked for Arthur, and the wife of a man convicted of stalking Smith. A jury could find that Cosby was reckless by relying on these biased sources. Moreover, a jury could find that Cosby fabricated some of the allegations which the court found to be inherently improbable. For example, the allegation that Stern “pimped” Smith out to men in exchange for money was deemed inherently improbable given Smith’s wealth. Some sources denied making the statements attributed to them in the book, creating issues of credibility for the jury to decide. And the court was obviously troubled by Cosby’s meetings with representatives of Smith’s former nannies and her offer to pay the nannies’ attorneys for affidavits supporting the book’s claim that the nannies witnessed Smith watching the purported Stern-Birkhead sex tape. ‘

As for the publisher, Hachette, the court found no evidence of fault. “The law is clear, however, that a book publisher has no independent duty to investigate an author’s story unless the publisher has actual, subjective doubts as to the accuracy of the story.” Here there was no basis for the publisher to question the reliability of Cosby’s sources or her methods, based on her established reputation as a journalist.



Plaintiff is represented by L. Lin Wood, Bryan Cave LLP, Atlanta. Rita Cosby is represented by Elizabeth McNamara, Davis Wright Tremaine LLP, New York. Hachette Book Group USA, Inc. is represented by Douglass Maynard, Akin Gump Strauss Hauer & Feld, LLP, New York.

District of Columbia Applies First Amendment Protections to Anonymous Internet Communications

By Leo G. Rydzewski and Charles D. Tobin

Appeals Court Decision

In a case of first impression, the District of Columbia Court of Appeals — Washington D.C.'s equivalent of a state supreme court — has held that a plaintiff must overcome a high threshold before obtaining the identity of an anonymous individual who sent allegedly injurious information over the Internet. *Solers, Inc. v. John Doe*, slip op., No. 07- CV-159 (D.C. August 13, 2009).

With this decision, D.C. has joined a growing number of states that recognize First Amendment protections for anonymous Internet speech. The ruling is even more unique in that, while most of the other precedent arose out of classroom environments, this matter involved a direct one-on-one communication.

Background

The dispute began when an anonymous tipster in 2005 used an online form to submit a communication to the Software & Information Industry Association (“SIIA”) alleging that Solers, Inc., an Arlington, Virginia-based defense contractor, was pirating software. SIIA is the trade association for software and digital-content businesses. Among its other services, SIIA runs an anti-piracy program that encourages people to report incidents of suspected software piracy. SIIA investigates the reports and decides on behalf of its members whether to pursue an action against a company it determines to have engaged in piracy. In this instance, Solers denied the report and SIIA notified Solers that it would not pursue a claim.

Citing its long-standing policy of keeping the identity of sources anonymous, SIIA declined Solers’ pre-litigation request for the informant’s identity. Solers then filed a “John Doe” defamation claim against the informant, alleging that the report to SIIA was false and harmed Solers’ reputation and business. Solers immediately issued a subpoena to SIIA seeking documents that would reveal the informant’s name. The trial court, in 2006, quashed the subpoena, finding that Solers had not demonstrated a legal right to discover the person’s identity. The court later dismissed the complaint for failure to state a claim. Solers appealed.

The District of Columbia Court of Appeals noted that the case “presents us with issues of first impression - whether the First Amendment protects the anonymity of someone such as Doe, and, if so, under what circumstances a plaintiff such as Solers may invoke court processes to learn Doe’s identity and have its day in court.” The court discussed the various tests that various state and federal courts have adopted for plaintiffs seeking to compel a third party to turn over the identity of an anonymous speaker. The court specifically turned aside Solers’ argument that no First Amendment protections applied to this communication, holding that all manner of anonymous speech, and specifically to direct communications between people over the Internet.

Surveying the range of potential standards, the court rejected the low threshold adopted by the neighboring state of Virginia, which allows a plaintiff to obtain an anonymous speaker’s identity if it has a “good faith basis” for bringing a claim. In light of the First Amendment interests at stake, the D.C. Court of Appeals ruled that before trial judges order disclosure of an anonymous speaker’s identity, they must conduct a five-part analysis to:

- (1) “ensure that the plaintiff has adequately pleaded the elements of the defamation claim;”
- (2) “require reasonable efforts to notify the anonymous defendant;”
- (3) “delay further action for a reasonable time” to allow the defendant to come forward with a motion to quash;
- (4) require plaintiff to “proffer evidence creating a genuine issue of material fact on each element of the claim that is *within its control* (emphasis is the court’s);
- (5) “determine that the information sought is important to enable the plaintiff to proceed with his lawsuit.”

Unfortunately, unlike other jurisdictions adopting similar tests, the D.C. Court of Appeals did not also adopt a fi-

(Continued on page 16)

District of Columbia Applies First Amendment Protections to Anonymous Internet Communications

(Continued from page 15)

nal First Amendment balancing of interests, which typically requires the plaintiff to show that it has exhausted all alternative sources for the information. The court held that the additional balancing “is not necessary” as it believed the remainder of the test adequately protected the anonymous speaker’s First Amendment rights. In a footnote, the court distinguished this type of subpoena from discovery aimed at disclosure of a non-party journalist’s confidential sources: “Additional First Amendment interests are involved in such cases, and it may be appropriate there to require the exhaustion of alternative sources.”

Under the facts, the court found that Solers had not demonstrated evidence to satisfy the new test. However, the court held that Solers made a “fair point” (notwithstanding SIIA’s arguments to the contrary)

that it did not understand, during the litigation in the trial court, that it would be held to a higher standard than an examination of the sufficiency of its complaint against John Doe. The Court of Appeals therefore remanded the case to the trial court “to give Solers an opportunity to present *evidence* supporting its claim of defamation.” (emphasis is the court’s).

Charles D. Tobin and Leo G. Rydzewski, with Holland & Knight LLP in Washington, D.C., represent the Software & Information Industry Association in this matter. Daniel J. Tobin, of Ballard Spahr Andrews & Ingersoll, LLP, in Bethesda, Maryland, represents plaintiff Solers, Inc. Robert A. Long, Jr., Martin F. Hansen, and Mark W. Moser, of Covington & Burling LLP, in Washington, D.C., represent amicus curiae the Business Software Alliance.

JUST PUBLISHED

[MLRC Bulletin 2009:2, The First Amendment Online & MLRC’s Annual Supreme Court Report](#)

The latest issue of the Bulletin contains a series of articles on the challenges of applying First Amendment doctrine in the new media environment.

In “Public Figures And The Internet,” Michael Kovaka discusses how the public figure doctrine can be expected to apply to Internet cases.

In “Fringe Publishers Test The Limits of Prior Restraints,” Katherine Vogele Griffin examines recent online prior restraint cases that are testing courts’ commitment to traditional prior restraint principles.

In “When Anonymity Is Denied: What Defending A (Formerly) Anonymous Blogger Teaches About The Standards For Protecting Anonymous Speech,” Henry R. Kaufman and Michael K. Cantwell discuss how standards for protecting anonymous speech online can be most effectively applied and improved to maximize protection for the First Amendment interests at stake.

The Bulletin also surveys the case law protecting anonymous speech online and contains a report on MLRC’s data on claims against bloggers to offer a sense of the types of legal proceedings being brought against bloggers, and the fate of these proceedings.

Google Ordered to Identify Anonymous Blogger

No Anonymity for Creator of Website Called “Skanks of NYC”

In a decision that made headlines around the world, a New York state trial court ordered Google to disclose the identity of an anonymous blogger who described a fashion model as a “skank” and a “ho.” [*Cohen v. Google, Inc.*](#), No. 10012/09 (N.Y. Sup. Ct. Aug. 17, 2009) (Madden, J.).

The trial court acknowledged in a footnote that First Amendment protections apply to anonymous speech online, but had little patience to analyze or apply that body of case law to a blog entitled “Skanks of NYC” which contained nothing more than photographs of Liskula Cohen with sexually suggestive and insulting captions. Instead, the court concluded that in context the descriptions of Cohen as a “skank” and a “ho” (and variations on the theme) were susceptible of a defamatory meaning and that she had sufficiently stated a defamation claim to be entitled to pre-action disclosure under New York law.



Cohen apparently discovered the blog in October 2008 when she Googled her name. In January 2009, she filed a [petition](#) under

New York CPLR 3102(c) to compel Google to disclose the identity of the blogger because the site was created and hosted with the “Blogger” software platform owned by Google. The blogger received notice of the action from Google and she moved through counsel to [oppose](#).

In opposing the motion, the blogger’s lawyer argued that Cohen did not have a valid cause of action for libel because the statements at issue were opinion or rhetorical hyperbole. According to the blogger’s lawyer, the words ‘skank’ and ‘ho’ “have become a popular form of ‘trash talk’ ubiquitous across the Internet and network television and should be treated no differently than ‘jerk’ or any other form of loose and vague insults that the Constitution protects.” Moreover, even if the words could be considered defamatory no reasonable reader would have interpreted them as factual since they understand that blogs are the “modern day soap box for personal opinions.”

The blogger’s lawyer also cited the New Jersey appellate court’s influential decision in *Dendrite v. Doe*, 775 A. 2d 756 (N.J. Super. 2001) protecting anonymous online speech. In *Dendrite*, the court held that the historical right to anonymous speech applies to the Internet and the court imposed a heightened standard on libel plaintiffs seeking to identify anonymous online speakers. See [MLRC Bulletin 2009:2](#), “The First Amendment Online” for a detailed discussion of this issue.

The New York trial, however, merely addressed *Dendrite* in a footnote and stated that the constitutional concerns “appear to be” addressed in the standard to obtain pre-action disclosure, namely a strong showing that a cause of action exists and the materiality and necessity of the requested information. The court then held that Cohen sufficiently established a cause of action because the vulgar captions on the blog (e.g. “a skank bitch,” “acting like ho’s,” “psychotic, lying, whoring ... skank”) implied that Cohen was promiscuous and thus conveyed “facts” capable of being proven true or false.

Notably, in the context of this specific blog, such words cannot be reasonably viewed as comparable in meaning and usage to the word “jerk” or any other loose and vague insult, as the Anonymous Blogger urges. The court also rejects the Anonymous Blogger’s argument that this court should find as a matter of law that Internet blogs serve as a modern day forum for conveying personal opinions, including invective and ranting “Those who suffer damages as a result of tortious or other actionable communications on the Internet should be able to seek appropriate redress by preventing the wrongdoers from hiding behind an illusory shield of purported First Amendment rights.” (quoting *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372 (Va. Cir. Ct.), *rev’d on other gds*, 542 S.E.2d 377 (Va. Sup. Ct. 2001).

The blogger was revealed to be 29 year old Rosemary Port who reportedly created the website after Cohen insulted her. Cohen chose not to continue with her libel suit. However, the case made headlines again when the outed blogger announced she was filing a \$15 million lawsuit against Google for revealing her identity in response to the court order.

Liskula Cohen was represented by Daniel J. Schnieder, Wagner Davis P.C. in New York. The blogger, Rosemary Port was represented by Matthew A. Pek, Guzov & Ofsink LLC.

Three Bloggers Face Trials: One Win, One Loss, One Draw

Bloggers in Georgia, New York, and Virginia received mixed results recently in court in libel suits against them: a Georgia jury held that a blogger was not responsible for defamatory comments posted to her site; a Virginia court affirmed a judgment against a blogger, but remitted a \$236,000 damage award to \$53,000; and a New York blogger settled a case for no damages after a jury found him liable for his comments and awarded \$2,900.

The Win: Hammit v. Busbin (Ga. Super. Ct.)

The Georgia case was against the proprietor of the “Rome News by Watson” blog, in which defendant Teresa Watson reports and comments on news in Rome, Ga. *Hammit v. Busbin*, Civil No. 07-13353 (Ga. Super., Chattooga County jury verdict Aug. 4, 2009).

Ed and Brenda Hammitt sued Watson over comments posted to her blog in December 2007 by a user with the pseudonym “dirtyboy,” stating that marijuana plants had been found on their property, and that Ed Hammit had gotten an employee of the local power utility to work on the couple’s new house while the employee was on company time.

The Hammitts initially filed suit against Watson and her company in Floyd County, *Hammitt v. Watson*, Civil No. 07-4954 (Ga. Super., Floyd County filed Dec. 2, 2007), and filed a separate suit against the anonymous poster in Chattooga County. They then dropped both these cases, and refiled a few days later in Chattooga County against all three defendants.

The poster was eventually identified as Ken Busbin, Sr., who was then added to the suit. Busbin eventually filed a counterclaim for abusive litigation under Ga. Code Ann. § 9-15-14, which allows for awards of attorney fees and litigation costs.

It is unclear why Watson was not removed from the case under the terms of section 230 of the Communications Decency Act (47 U.S.C. § 230). She had two different attorneys during the course of the litigation, and ended up representing herself at trial. She claims that she raised section 230, as well as the terms of Georgia’s retraction statute (Ga. Code Ann. § 51-5-11), which she says the plaintiffs did not follow, both to no avail.

Judge Jon Wood allowed three days for trial, saying that he would declare a mistrial if the case went any longer. At the time, he was due to preside over a high-profile murder trial that was due to begin shortly afterwards.

The testimony at trial established that marijuana plants had been found on the Hammitt’s property, but the local sheriff determined that they were growing wild and the plants were destroyed. And the utility employee testified that while he used a Georgia Power truck because he was on call, he used his own material and time to work on the Hammitt’s home.

Although the jury charge was apparently not transcribed, it appears that the judge instructed the jurors that Watson could be held liable if she encouraged the comments and actively edited them.

After less than an hour of deliberation, the jury found that while Busbin’s comments were libelous, they did not cause any damages to the Hammitts; thus the jury awarded no damages.

The jury also held that Watson could not be held liable for the comments that Busbin posted to her blog. The jury forewoman, who runs an Internet business, told the *Rome News-Tribune* after trial that website operators should not be held liable for postings by users.

The jury also found for the Hammitts on Busbin’s counterclaim.

Watson represented herself at trial, while Busbin was represented by W. Benjamin Ballenger of Summerville, Ga. The plaintiffs were represented by Jackson B. Harris of McRae, Stegall, Peek, Harman, Smith & Manning LLP in Rome, Ga.

Watson is also named in another defamation suit over other comments posted to her blog. The judge in that case entered a default judgment in February 2009, although a motion to disqualify the judge is pending before the Georgia Court of Appeals, and is due to be argued in late 2009. *Watson v. Dennis*, No. A09A1603 (Ga. App. appeal filed April 21, 2009).

The Loss: Cretella v. Kuzminski (E.D. Va.)

The Virginia case was brought against the proprietor of the Preditors & Editors website (www.anotherealm.com/)

(Continued on page 19)

Three Bloggers Face Trials: One Win, One Loss, One Draw

(Continued from page 18)

[prededitors](#)), which offers links of interest to authors. A federal jury awarded \$236,000 (\$120,000 compensatory and \$116,000 punitive) after trial in February 2009, which the magistrate recommended be remitted to \$53,000 (\$30,000 compensatory, \$23,000 punitive) in a July 31, 2009 ruling. *Cretella v. Kuzminski*, Civil No. 08-109 (E.D. Va. remittitur granted July 31, 2009).

In February 2007, plaintiff Victor Cretella, who was then outside counsel for the on-demand publishing firm PublishAmerica, sent a cease-and-desist letter to Christine Norris, who had referred to the company as "a scam" in comments she posted to the forum section of the Absolute Write website (<http://www.absolutewrite.com>). Norris reacted to the letter by posting additional comments to the forum, restating her complaints against PublishAmerica and inviting the company to "Bring. It. On." Many other commenters in the Absolute Write forum posted comments expressing support for Norris.

One of these was defendant David Kuzminski, who also posted comments about the controversy and other writers' disputes with PublishAmerica on his own Preditors and Editors site. The commentary by Kuzminski and others on the Absolute Write site and other sites, and by Kuzminski on his own site, continued when Cretella accepted the position as general counsel of PublishAmerica.

These comments included statements that Kuzminski had filed an ethics complaint against Cretella with the Maryland bar, and encouraged others to do the same;

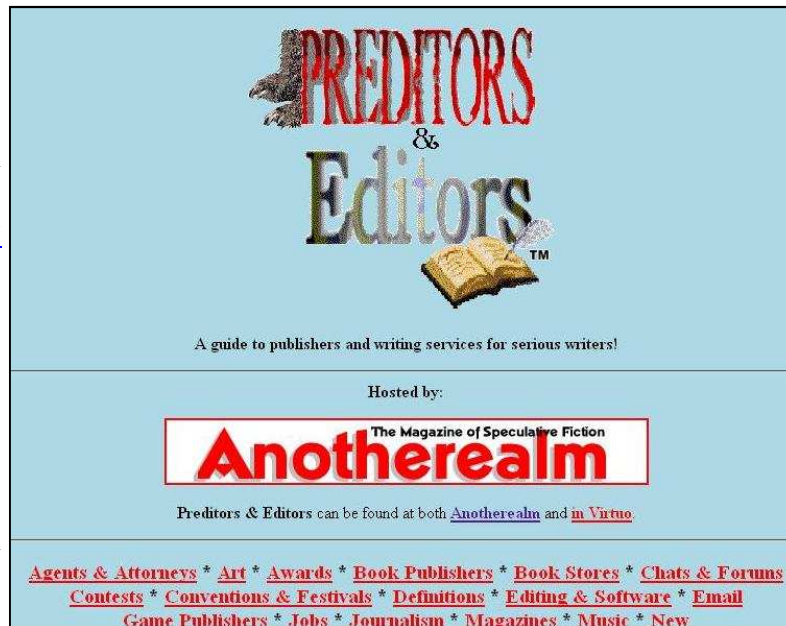
Cretella sued Kuzminski over several of his comments. After pre-trial motions, defamation claims remained against nine comments by Kuzminski: seven on the Absolute Write site, one on his own site, and one on "The Guild," (edandsootwritersguild.yuku.com), a message board for writers. See *Cretella v. Kuzminski*, 2008 WL

2227605 (E.D.Va. 2008) (partially granting motion to dismiss)

Jury trial was held on February 3 and 4, 2009, with Magistrate Judge Dennis W. Dohnal presiding. Besides testimony from the parties, Cretella presented an expert witness on his future employment opportunities in light of the defendant's comments. (In its remittitur decision, the court expressed doubts that the expert met the *Daubert* standards.)

After a two-day trial, the jury awarded a total of \$236,000 in damages (\$120,000 compensatory, \$116,000 punitive).

The defendant filed a post-trial motion for judgment as a matter of law or remittitur, arguing misconduct by the plaintiff and procedural errors by the court. In a written decision, after considering the jury's findings on liability and the amount awarded for



each statement at issue, the court found that some of the awards were so excessive as to "shock the conscious," the standard for remittitur in Virginia.

The court found that the statements were not as available through general Internet searches as the plaintiff's evidence claimed, and that compensatory damages for the statements were thus excessive. It also found that the nature and content of most of the statements showed that they were made with actual malice, justifying the punitive damage awards for all but one. In the end, it offered a remittitur to \$53,000 (\$30,000 compensatory, \$23,000 punitive), or a new trial. *Cretella v. Kuzminski*, 2009 WL 2423368 (E.D. Va. July 31, 2009). The plaintiff accepted the remittitur on Aug. 14.

Cretella was represented by Douglass Hayden Fisher of Richmond, Va. Defendant Kuzminski represented himself.

(Continued on page 20)

Three Bloggers Face Trials: One Win, One Loss, One Draw

(Continued from page 19)

The Draw: Sollami v. Shepard (N.Y. Sup. Ct.)

In New York, a former town supervisor and a blogger reached a no-damages settlement after a jury awarded \$2,900 in damages. *Sollami v. Sheppard*, No. 007550/2003 (N.Y. Sup. Ct., Orange County settled after jury verdict Aug. 17, 2009). The settlement vacated the damages award, as well as two awards for attorney fees that the blogger had won in previous stages in the case, including a 2007 mistrial.

The case stemmed from postings in 2003 on the “Cornball Local” blog, www.cornball-local.com, which focused on local news and politics in the town of Cornwall, N.Y. (The blog’s web page still exists, but has not been updated since 2007.) The blog, which had a name similar to the local *Cornwall Local* weekly newspaper, was written by Tom Sheppard under various pseudonyms, including “Archibald Cornballis” and “Blithesome Spirit.”

The 27 postings at issue in the suit accused then-Town Supervisor Jim Sollami of various improprieties, including maintaining a “hit list” of town employees that he intended to fire after his re-election in 2003 (which he lost).

Supreme Court Justice Lawrence Horowitz dismissed the entire suit on April 28, 2004, holding that the statements at issue were opinion. But Sollami appealed, and an Appellate Division panel reversed the dismissal on eight of the blog statements. *Sollami v. Sheppard*, 21 A.D.3d 408, 799 N.Y.S.2d 427, 2005 N.Y. Slip Op. 06311 (Aug. 8, 2005). Sollami was later awarded \$650 in costs for the appeal.

The case proceeded to trial in May 2007, but ended in a mistrial after four days, when Sollami’s attorney became ill and he could not find a replacement. *Sollami v. Sheppard*, No. 007550/2003 (N.Y. Sup. Ct., Orange County mistrial declared May 21, 2007). In declaring the mistrial, Judge

Horowitz ordered Sollami to pay Sheppard’s attorney fees for the proceeding, later determined to be \$4,500.

Retrial was held in August 2009 before Justice Lewis J. Lubell. Throughout the seven-day trial, the plaintiff emphasized that the statements on the blog were purportedly true facts, pointing to the blog’s motto, “All the truth they won’t print.” The defense argued that the entire blog was meant to be satire, along the lines of “The Daily Show” and Stephen Colbert.

Among the witnesses was former *Cornwall Local* editor Dave Gordon, who testified that he stopped publishing

Sheppard’s letters about Sollami, which he said were repetitive. Afterwards, Sheppard began his blog.

After two hours of deliberation, the jury found that two of the statements at issue were defamatory, and awarded \$1,400 in compensatory damages for one, and \$1,000 for the other. Through an oversight, the

verdict sheet for one of the statements for which the jury awarded compensatory damages also included a line for punitive damages, even though the parties had agreed to bifurcate that issue and the jury was not instructed on punitive damages. Nevertheless, the jury awarded \$500 in punitive damages for the statement with the incorrect verdict form.

Instead of addressing this error, the parties agreed to a settlement of the case in which all judgments, including the \$2,900 jury award, the \$4,500 in attorney fees that Sollami owed Sheppard for the mistrial, and the \$650 that Sheppard owed Sollami for the costs of the appeal would all be vacated, and all rights to appeal waived.

Defendant Sheppard was represented by Michael P. O’Connor of New City, N.Y. Sollami was represented by Bruce Barket of Garden City, N.Y.



Sweet Victory For Nestlé In Misappropriation Case

By Kelli L. Sager and Rochelle Wilcox

In a unanimous decision, the California Supreme Court has held that the single publication rule applies to claims for misappropriation and right of publicity, just as it does for defamation and other content-based tort claims. The Court also rejected the argument that the “discovery rule” should apply to misappropriation claims arising from publications that are widely distributed, even when the claim involves the alleged use of the plaintiff’s image in an advertisement or on a product label. [*Christoff v. Nestle*](#), S155242 (Cal. Aug. 17, 2009).

Background

Plaintiff Russell Christoff was a professional model who claimed that he was unaware that his image was being used by defendant Nestlé USA on millions of labels for Taster’s Choice instant coffee, with the use continuing for more than five years before Christoff purportedly “recognized” his photograph on a jar of coffee on a store shelf.

Christoff sued Nestlé for statutory and common law misappropriation, among other claims. The trial court rejected Nestlé’s motion for summary judgment based on the statute of limitations, holding that California’s Uniform Single Publication Act (Cal. Civil Code § 3425.3) did not apply to claims for the alleged unauthorized use of the plaintiff’s likeness. Although a two-year statute of limitations applied to Christoff’s claims, the trial court further held that the “rule of delayed discovery” applied, such that Christoff could seek damages extending back to Nestlé’s first use of his image if he could prove that he had not previously known or suspected that his photograph was being used.

After a jury trial, at which the proper means of evaluating damages was hotly contested, the jury ruled in favor of Christoff and awarded him more than \$15 million in damages.

The Court of Appeal reversed, finding that the trial court should have applied the single publication rule, and remanded the case for further proceedings in the trial court on the issues of whether the plaintiff’s failure to “discover” the use was caused in any way by Nestlé, and whether there had been any “republishing” of Christoff’s image within the two-year statute of limitations period for which he could recover damages.

The Court of Appeal also held that the jury’s award of more than \$15 million in profits attributable to the use of Christoff’s

image was not supported by substantial evidence, and reversed the jury’s quantum meruit award. The California Supreme Court granted review on four issues related to the single publication rule.

California Supreme Court Ruling

Although the Supreme Court granted Christoff’s petition for review, its unanimous decision largely rejected his legal arguments in favor of the positions presented by Nestlé and by its *amici*. First, the Court rejected Christoff’s argument that the Uniform Single Publication Act only applies to “defamation-like” claims, not to misappropriation claims. The Court pointed to the broad language of the statute, which it held covers claims for “any tort” arising from a “single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine ... or any one broadcast over radio or television” Opinion at 8-9.

Second, the Supreme Court held that the discovery rule – which essentially tolls the statute of limitations for certain claims until the plaintiff “discovers” the facts that give rise to the claim – does not apply to misappropriation claims that arise from widespread publications, including advertisements in the mass media and labels on products that are widely distributed. This ruling also is important for publishers, because it prevents a plaintiff from avoiding the limitations period by claiming – years after a book was published or a movie was released – that he or she “didn’t know” about the publication. Instead, the limitations period for the claim will begin to run on the date of first publication.

The Court remanded the case on the issue of whether the various uses by Nestlé of Christoff’s image over a period of six years were a “single” publication within the meaning of the USPA, or whether some of the uses were “republishings” that would restart the statute of limitations. Because the trial court erroneously held that the USPA did not apply at all, the record was not developed on whether the uses were a “single” publication or involved multiple publications; consequently, the Supreme Court remanded for further proceedings on this issue.

In a concurring opinion, Justice Werdegar addressed the question of “whether *all* distribution of labels employing the original misappropriated image, whenever they occurred, should be deemed to constitute a single publication for purposes

(Continued on page 22)

Sweet Victory For Nestlé In Misappropriation Case

(Continued from page 21)

of section 3425.3.” While “California courts have not spoken” on this question, she noted the “diverse results” from other jurisdictions, with some courts treating multiple uses of identical material as a single publication and others treating each separate use as a separate publication.

In her concurrence, Justice Werdeger indicated that she would favor the latter approach, because of the repeated use in the California statute of the phrase “any one” in describing the publications affected. She recognized the difficulties that might be presented, particularly as the rule is applied to the Internet. Thus, she noted that although a “reissue, rebroadcast or reexhibition” might be deemed to be a new publication, that did not mean that any separate printing of a book should constitute a new publication, or that any download of material from the Internet would be a new publication. She suggested that, at minimum, the trial court should consider whether Nestlé’s uses included labels with different content from the original label, that were “aimed at different audiences.” Justice Werdeger also suggested that trial courts consider whether there was a “conscious and independent” or “conscious and deliberate” decision to reissue or republish, such that the statute of limitations might be restarted for the reissued or republished material. No other member of the Court joined in Justice Werdeger’s concurrence.



On August 21, 2009, Mr. Christoff filed a petition for rehearing on an issue outside of the scope of the questions accepted by the Supreme Court for review: whether California’s misappropriation statute, Civil Code § 3344, is limited to “celebrity plaintiffs.” The petition argued that the issue had been briefed by both parties, and that while the issues accepted by the Court for review “‘included’ four issues related to the single publication rule, [they] made no reference to this issue.” The petition further claimed that “the Court of Appeal effectively rewrote Section 3344 by holding that while Christoff is not required to be a celebrity, in order to recover profits he is required to demonstrate that the profits were attributable to the use of his *identity or persona*.” On August 25, 2009, the Supreme Court extended its time for granting or denying rehearing until November 17, 2009. Nestle anticipates filing a short answer to the petition for rehearing on August 28, 2009.

Kelli Sager is a partner in the Los Angeles office of Davis Wright Tremaine LLP, and Rochelle Wilcox is a partner based in Sacramento, California. They represented a group of media, entertainment, and publishing organizations that filed an amici brief in support of Nestlé. Ms. Sager also participated in the oral argument before the California Supreme Court on behalf of the media amici.

MLRC
50-State Survey

Employment Libel and Privacy Law 2009

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

Edited by the Media Law Resource Center, Inc.

MLRC 50-STATE SURVEY: EMPLOYMENT LIBEL AND PRIVACY LAW 2009

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

For access to an order form please click this ad.

Second Circuit Affirms Dismissal of Putative Class Action Libel Suit Against “American Gangster” Movie

Relying on the group libel doctrine, the Second Circuit Court of Appeals affirmed dismissal of a defamation claim brought by three U.S. Drug Enforcement Administration agents against the makers of the movie “American Gangster.” *Diaz v. NBC Universal, Inc.*, No. 08-1190, 2009 WL 2143216 (2d Cir. July 16, 2009) (McLaughlin, Pooler, Wesley, JJ.).

The movie “American Gangster” is a dramatization of the life of Frank Lucas, a notorious New York drug dealer, who was convicted but later cooperated with federal authorities. The movie depicted corrupt federal agents and New York city police officers. A post script, or legend, at the end of the movie stated that Lucas’ cooperation with authorities “led to the conviction of three quarters of New York City’s Drug Enforcement Agency.”

The plaintiffs sued the makers of the movie as a putative class of 400 current and former federal DEA agents. Last year the district court dismissed, holding that the claim was barred by the group libel doctrine. *See* 536 F. Supp. 2d 337, 343 (S.D.N.Y. 2008) (“when a reference is made to a large group of people, no individual within that group can fairly say that the statement is about him, nor can the ‘group’ as a whole state a claim for defamation”).

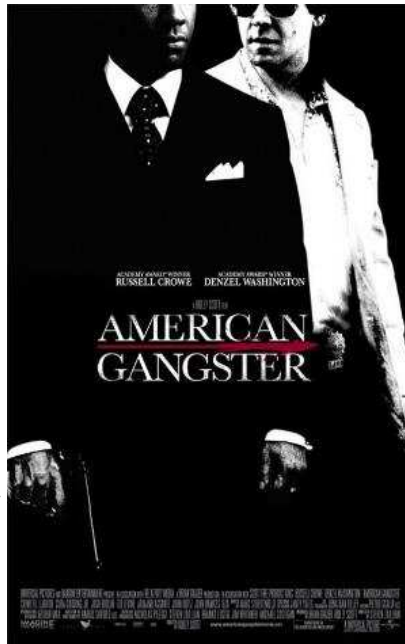
The plaintiffs had relied on a New York appellate court decision which allowed a group of 53 police officers to bring a libel claim over a newspaper article stating that their “entire [police] department was under a cloud” because of criminal

indictments against some members of the department. *Brady v. Ottaway Newspapers, Inc.*, 84 A.D.2d 226, 445 N.Y.S.2d 786 (2d Dep’t 1981). The district court, however, noted the important distinction between referring to “all” members of a group or only “some” members of the group. And here the legend only referred to a fraction of the group’s members (albeit a substantial fraction).

The district court also rejected plaintiffs’ alternative argument to allow a libel claim for a group of nine DEA officers over a particular scene in the movie depicting agents searching Frank Lucas’s home. The plaintiffs tried to argue that this scene was defamatory when taken together with a prior news article that served as source material for the movie. That article included allegations by Lucas that federal agents stole millions of dollars in drug money from him. The court dismissed the attempt to link the article to the movie as improper “bootstrapping.”

The Second Circuit affirmed dismissal, holding that under the group libel doctrine the reference to “some” members of the DEA rendered plaintiff’s claim “incapable of supporting a jury’s finding that the allegedly libelous statements refer to them as individuals.” Moreover, the court noted that the movie depicted corrupt New York City police officers making it impossible to interpret the statements in the movie to be solely about federal officials.

The media defendants were represented by Kelli L. Sager, Andrew J. Thomas, Kevin L. Vick, Robert D. Balin, and Deborah Adler, Davis Wright Tremaine LLP. Plaintiffs were represented by Dominic F. Amorosa, New York, NY.



ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

CALL US, OR SEND US A NOTE.

MEDIA LAW RESOURCE CENTER, INC.
520 EIGHTH AVE., NORTH TOWER 20TH FLOOR
NEW YORK, NY 10018

PH: 212.337.0200,
MEDIALAW@MEDIALAW.ORG

New York Court Dismisses Alleged Breach of Oral News Embargo Claim by Disgruntled Source

Court Reluctant to Enforce Vague, Oral Contract Where First Amendment Rights May Be Affected

By Jonathan Donnellan and Eva Saketkoo

Earlier this month, the New York County Supreme Court granted summary judgment dismissing a claim for breach of an alleged oral news embargo agreement (styled as a breach of contract claim) in an action brought against Hearst by John Aretakis, a New York attorney who appeared *pro se* in this matter. *Aretakis v. Hearst*, No. 101982/05 (Aug. 5, 2009) (Edmead, J.).

Aretakis had filed the action in February 2005 asserting five claims based upon articles published in the *Albany Times Union* (a Hearst newspaper). As was reported in the February 2006 MLRC MediaLawLetter, in January 2006 the court granted Hearst's motion to dismiss four of the claims asserted by Aretakis (two for negligence and two for defamation relating to other articles published in the *Times Union*) but allowed the breach of embargo claim to proceed to discovery on: (1) the terms of the purported embargo; and (2) whether the *Times Union's* article was based on independent reporting. *Aretakis v. Hearst*, Index No. 101982/05 (N.Y. Sup. Ct. January 18, 2006) (Edmead, J.).

Background

The breach of contract claim arose out of a purported oral news embargo agreement between Aretakis and a *Times Union* reporter. According to Aretakis, he had given the reporter tape recordings he had made of his conversations with former Court of Appeals Judge Howard Levine, who developed and oversaw an Albany Diocese mediation program created to resolve clergy abuse claims. Aretakis, who had represented numerous clergy abuse victims in claims against the Diocese, stated that he placed an embargo on the information in the tapes so that he could share the tapes with other reporters. Aretakis claimed that the tapes contained information regarding five settlements reached through the mediation program, none of which related to Aretakis' clients. The *Times Union* subsequently published

an article based on the reporter's independent interview with Judge Levine about the settlements. The article contained no reference to the tapes provided by Aretakis.

Aretakis claimed that the publication of the article resulted in fourteen of his clients firing him as their lawyer and caused him to lose future business. During the course of discovery, Aretakis had disobeyed numerous court orders requiring him to produce information relating to his damages claims. As a result, the court issued two separate preclusion orders prohibiting Aretakis from introducing any evidence relating to six of the alleged fourteen clients who allegedly fired Aretakis as a result of the article.

Trial Court's Decision

The court noted at the outset of its decision that it was "unwilling to create a new cause of action based on the breach of news embargo" and instead analyzed the claim as one for

breach of contract. The court granted Hearst's summary judgment motion and dismissed the claim on two separate

grounds: (1) plaintiff's failure to provide evidence of an enforceable agreement; and (2) his failure to demonstrate any damages stemming from the alleged breach.

the court was "reluctant to enforce vague, oral contracts where Defendant's First Amendment rights might be affected."

No Enforceable Agreement

First, the court found that there was insufficient evidence of an enforceable agreement between the parties. Specifically, the court noted that the alleged oral contract was missing a key material term regarding the duration of the alleged embargo. Aretakis claimed that the reporter agreed that the embargo would last at least a week but "maybe 10 days or two weeks at the outside." The court concluded that the agreement as alleged by Aretakis was too vague and uncertain to be enforceable, stating that the court was "reluctant to enforce vague, oral contracts where Defendant's First Amendment rights might be af-

(Continued on page 25)

New York Court Dismisses Alleged Breach of Oral News Embargo Claim by Disgruntled Source*(Continued from page 24)*

fect.” Slip Opinion at 7-8 (quoting *Kusek v. The Family Circle, Inc.*, 894 F. Supp. 522, 528 (D. Mass. 1995)).

The court further held that uncontroverted affidavits submitted with the motion indicated that “even embargoed information may be published if obtained from a non-embargoed source.” As part of its motion, Hearst submitted affidavits from the reporter and Judge Levine stating that the reported information on the mediation program settlements was not confidential and that Judge Levine had freely provided the information to the reporter. Hearst also submitted evidence indicating that news embargoes between reporters and sources are considered “gentlemen’s agreements” based on an honor system, not legally enforceable contracts. And, that even where there is an agreement to an embargo on news information, it is a common journalistic practice and understanding that if the embargoed information is obtained from an independent source, the news entity may publish the information obtained from that independent source without breaching the embargo.

Lack of Evidence of Recoverable Damages

The court also granted summary judgment on the second, independent ground that “even if the Court were to find that a contract did exist between the parties, plaintiff is unable to demonstrate any damages resulting from its alleged breach.” *Id.* at 8. Hearst submitted affidavits from several individuals listed by Aretakis as former clients and damages witnesses establishing that none had actually fired Aretakis as a result of reading the article at issue. (In fact, one of the supposed clients stated that he had never hired Aretakis as his lawyer in the first place and others stated they never even read the article.) Hearst also deposed other former clients whose testimony confirmed that Aretakis had not suffered any economic damages relating to the publication of the article. Based on the court’s prior preclusion orders against Aretakis and the lack of any evidence of any economic damages stemming from the alleged breach (including no evidence of any lost future business), the court held that summary judgment was further warranted.

Hearst is represented by in-house counsel Jonathan Donnellan and Eva Saketkoo. Plaintiff John Aretakis appeared pro se.

©2009

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

BOARD OF DIRECTORS

Kenneth A. Richieri (Chair)

Marc Lawrence-Apfelbaum

Dale Cohen

Stephen Fuzesi, Jr.

Henry S. Hoberman

Ralph P. Huber

Karole Morgan-Prager

Elisa Rivlin

Kelli Sager

Susan E. Weiner

Kurt Wimmer

STAFF

Executive Director: Sandra Baron

Staff Attorney: David Heller

Staff Attorney: Eric Robinson

Staff Attorney: Maherin Gangat

Staff Attorney: Katherine Vogelesse Griffin

MLRC Fellow: Stephanie Shaffer

MLRC Administrator: Debra Danis Seiden

MLRC Publications Assistant: Philip J. Heijmans

Voluntary Dismissal And Fee Awards In Copyright Cases

Ninth Circuit Reverses Course

By Lincoln D. Bandlow

Under Section 505 of the Copyright Act, a “prevailing party” in a copyright infringement action is entitled to an award of attorney’s fees. 17 U.S.C. § 505. What about the defendant, faced with a copyright infringement action, who employs counsel to work up and fire off a motion that ultimately persuades the plaintiff to voluntarily dismiss the action. Can that defendant be deemed a “prevailing party” entitled to recover the attorney’s fees incurred in having to prepare that motion? Over sixty years ago, the Ninth Circuit held in *Corcoran v. Columbia Broadcasting System, Inc.*, 121 F.2d 575 (9th Cir. 1941) that the answer to that question was “yes.”

This past June, in *Cadkin v. Loose*, 569 F.3d 1142 (9th Cir. 2009), the Ninth Circuit reversed course and held, based on the U.S. Supreme Court ruling in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598 (2001), that when a plaintiff voluntarily dismisses without prejudice a lawsuit containing copyright claims, the defendant cannot be deemed the “prevailing party” and thus *Corcoran* is “no longer good law.”

In *Cadkin*, plaintiff Emil Cadkin, sometimes solely and sometimes with defendant William Loose, had created and recorded thousands of music cues for television and movies. These cues were administered by a partnership owned by Cadkin and Loose. In 2003, Cadkin filed a complaint against Loose, alleging that Loose had removed Cadkin’s name as author from cues that Cadkin had composed, incorporated those cues into Loose’s own music library with Loose being credited as the sole author and then registered those cues with the U.S. Copyright Office, allowing Loose to collect full royalties from any uses of the cues. The complaint, filed in federal court, contained claims for copyright infringement, false designation of origin and various California state law claims.

After a successful motion to dismiss by defendants, plaintiff filed a first amended complaint which was also dismissed, again with leave to amend, on defendants’ motion. Plaintiff then moved to “remand” to state court and attached a second amended complaint to the motion which contained only state law claims for declaratory judgment, unjust enrichment and accounting for profits. The court denied the motion because the action had been initiated in federal court, but treated the second amended complaint attached to the motion as the operative complaint. Defendants again moved to dismiss, arguing that the claims were preempted by the Copy-

right Act, the factual allegations lacked specificity and any federal claims had been waived by being omitted from the amended complaint. Plaintiff opposed the motion but also lodged a notice of voluntary dismissal, without prejudice, under Federal Rule of Civil Procedure 41(a). The district court ultimately entered the voluntary dismissal without comment.

Defendants then brought motions to recover their attorney’s fees and costs, contending that defendants were the “prevailing parties” in the action. The District Court granted defendants’ motions and entered judgment in favor of defendants in the amount of almost \$300,000. Plaintiff appealed.

The Ninth Circuit reversed the judgment, holding that defendants were not the prevailing party for purposes of a fee award under Section 505. The Court first noted that, in applying Section 505, a district court has two tasks: (1) decide whether an award of attorney’s fees is appropriate; and (2) calculate the amount of the award. Although district courts have broad discretion in making fee awards, “that discretion is triggered only if the party in fact prevailed on the copyright claim.” *Cadkin*, 569 F.3d at 1147. The district court had found that defendants were the prevailing parties based on *Corcoran*. The Ninth Circuit noted that the district court was “correct to follow controlling circuit precedent” set by *Corcoran*, but that *Corcoran* is now “clearly irreconcilable” with the U.S. Supreme Court’s decision in *Buckhannon*.

In *Corcoran*, the district court had denied defendants’ motion to dismiss but granted a motion for a more definite statement on plaintiff’s copyright claim. Rather than amend, plaintiff voluntarily dismissed without prejudice and the district court then awarded defendants their attorneys’ fees. On appeal, the Ninth Circuit rejected the contention that a voluntary dismissal without prejudice was insufficient to confer prevailing party status, holding that where “a defendant has been put to the expense of making an appearance and of obtaining an order for the clarification of the complaint” which then prompts a voluntary dismissal “the party sued is the prevailing party within the spirit and intent of the statute even though he may, at the whim of the plaintiff, again be sued on the same cause of action.” *Corcoran*, 121 F.2d at 576. The court in *Cadkin* noted that it had not cited *Corcoran* in subsequent decisions applying Section 505, but the Ninth Circuit had never overruled *Corcoran* “or questioned its continuing viability.” *Cadkin*, 569 F.3d at 1148.

(Continued on page 27)

Voluntary Dismissal And Fee Awards In Copyright Cases

(Continued from page 26)

That viability, however, was undermined by the U.S. Supreme Court in *Buckhannon*, where the Court held that a plaintiff was not a prevailing party under the FHAA when the “lawsuit brought about a voluntary change in the defendant’s conduct” without a “judgment on the merits or a court-ordered consent decree.” In making that ruling, the Court had relied on the definition of “prevailing party” in Black’s Law Dictionary and concluded that a “prevailing party” is one who has been awarded some relief by the court. *Buckhannon*, 532 U.S. at 600, 603. Thus, in determining whether a party is a “prevailing party” in an action, the “key inquiry is whether some court action has created a ‘material alteration of the legal relationship of the parties.’” *Cadkin*, 569 F.3d at 1148 (quoting *Buckhannon*, 532 U.S. at 604).

In *Oscar v. Alaska Dep’t of Educ. & Early Dev.*, 541 F.3d 978 (9th Cir. 2008), which involved an analysis of a fee shifting statute under the Individuals with Disabilities Education Act that is comparable to the fee shifting provisions of the Copyright Act, the Ninth Circuit followed *Buckhannon* and held that an involuntary dismissal without prejudice did not confer prevailing party status on a defendant because it was “‘not a decision on the merits’ and plaintiff was free to re-file his complaint in federal court” and thus “‘dismissal without prejudice does not alter the legal relationship of the parties because the defendant remains subject to the risk of re-filing.” *Cadkin*, 569 F.3d at 1148 (quoting *Oscar*, 541 F.3d at 981).

Oscar distinguished *Miles v. California*, 320 F.3d 986 (9th Cir. 2003), where the court applied *Buckhannon* and concluded that a voluntary dismissal of a claim under the Americans with Disabilities Act without prejudice to plaintiff seeking relief in a state court was sufficient to confer prevailing party status because the dismissal had eliminated the federal ADA claim from further proceedings in federal court and thus the voluntary dismissal had changed the legal relationship between plaintiff and defendant. *Miles*, 320 F.3d at 989; see *Oscar*, 541 F.3d at 982.

The Ninth Circuit concluded that “*Corcoran* cannot be reconciled with *Buckhannon*’s material alteration test.” *Cadkin*, 569 F.3d at 1148. *Corcoran* had incorrectly “focused on the expense the defendant incurred and expressly disregarded that the parties’ legal relationship had not changed as a result of the voluntary dismissal.” *Id.* Moreover, the court had construed “prevailing party” in light of the policies of the Copyright Act while ignoring “the plain meaning of the phrase” as the Supreme Court had done in *Buckhannon*. *Id.*; see *Buckhannon*, 532 U.S. at 607 (suggesting that legislative history would not overcome plain meaning of “prevailing party”).

Although *Buckhannon* was not a copyright case, the Ninth Circuit held that “the distinction is immaterial” because the Ninth Circuit had already determined that *Buckhannon*’s construction of prevailing party “applies to federal fee shifting statutes other than the FHAA that contain that phrase, which is appropriate given the Court’s reliance on a dictionary definition for its holding.” *Cadkin*, 569 F.3d at 1149. Thus, “the material alteration test the Supreme Court articulated in *Buckhannon* governs the prevailing party inquiry under § 505 of the Copyright Act” and therefore *Corcoran* is no longer controlling “to the extent it is inconsistent with *Buckhannon*.” *Id.* The Ninth Circuit noted that its holding was consistent with every circuit that had considered the issue.

The court then analyzed whether there had been a material alteration in the legal relationship of the parties. Although *Cadkin*’s voluntary dismissal had not stated whether it was with or without prejudice, under Federal Rule of Civil Procedure 41(a)(1)(B), such a dismissal is automatically “without prejudice.” Thus, this did not alter the legal relationship between the parties because defendant remained subject to the risk of refiling. Accordingly, defendants were not the prevailing party. The court rejected defendants’ argument that the legal relationship had changed because plaintiff waived the copyright claim by omitting it from the second amended complaint.

Although claims alleged in an original complaint which are not alleged in an amended complaint may be waived, that waiver does not apply to a new lawsuit filed after a voluntary dismissal without prejudice. *Cadkin*, 569 F.3d at 1149. Moreover, the court rejected defendants’ argument that the district court’s two prior dismissals of the copyright claims conferred prevailing party status, again pointing out that defendants remained subject to the risk that plaintiff would refile the copyright claims.

Thus, defendants in a copyright infringement action who have undergone the time and expense of preparing and filing a motion that causes the plaintiff to voluntarily dismiss the action without prejudice should feel happy that they will most likely never see that lawsuit again. Unfortunately, under *Cadkin*, the other thing these defendants will never see again is the money they spent convincing the plaintiff that the claim should never have been brought in the first place.

Lincoln D. Bandlow is a partner in the Los Angeles office of Lathrop & Gage and an Adjunct Professor at USC where he teaches media and communications law. Plaintiffs were represented by Marty O’Toole, Law Offices of Marty O’Toole, Los Angeles. Defendant was represented by

Court Reject's Copyright Plaintiff's New Trial Motion in Infringement Suit Over Movie

Defense Verdict Not Against Weight of Evidence

By Louis P. Petrich

On December 9, 2008, after a trial in which each side was allowed only 12 hours for direct and cross-examination, a jury rejected a \$40 million copyright infringement claim and rendered a defense verdict in favor of Tyler Perry, his production company and Lions Gate Entertainment, Inc., the distributor of his motion picture "Diary of a Mad Black Woman." Plaintiff claimed that the movie copied her obscure play. See [MediaLawLetter Jan. 2009](#), "Jury Finds No Copyright Infringement By Tyler Perry."

Six months after the submission of plaintiff's motion for new trial, U.S. District Judge Leonard Davis of the United States District Court, for the "plaintiff friendly" Eastern District of Texas, issued a 25-page Order denying plaintiff's motion. *West v. Perry*, No. 2:07CV200 (E.D. Tex. July 23, 2009).

The motion raised a number of procedural and substantive issues.

The Golden Rule Argument

Plaintiff challenged an opening statement made by Perry's counsel that the jury members should "imagine yourself" being accused of stealing plaintiff's play -- a variation of the so-called "Golden Rule" argument. The court held that there is no prohibition against the statement when it is used regarding liability issues although its use is a ground for objection and possibly a new trial when raised on the question of damages, citing *Stokes v. Decambre*, 710 F.2d 1120, 1128 (5th Cir. 1983).

Expert's Qualifications

The court rejected plaintiff's challenge to the qualifications of defendants' *scenes a' faire* and probative similarity expert, writer, producer, director Bob Gale, co-author of,

and an Academy Award nominee for, the "Back To The Future" screenplays. Gale testified about his familiarity with thousands of films, his prior expert testimony in infringement cases, his experience as a judge of screenwriter contests, and as an arbitrator of WGA screen writer credit arbitrations.

Registration and Protectability

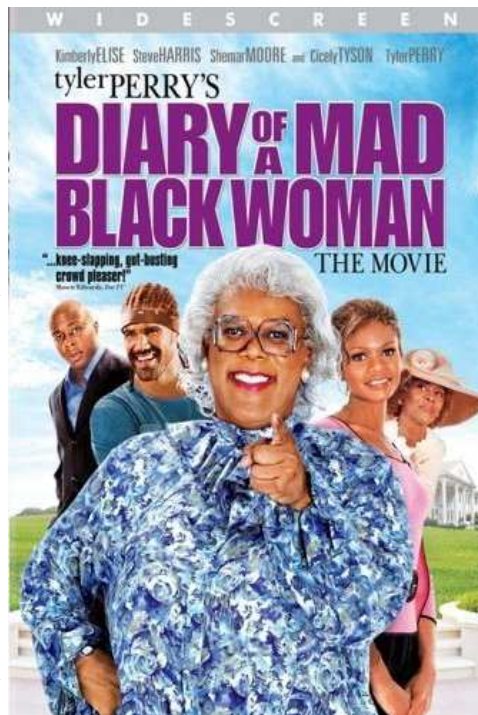
Plaintiff challenged the verdict form, which asked "Do you find that the movie of *Diary of a Mad Black Woman* infringed Plaintiff's copyright, if any, in *Fantasy of a Black Woman?*," arguing that the phrase "any of the protectable elements" should have been added. The court rejected the argument, holding that the jury instructions sufficiently explained that only original forms of expression are protected

by plaintiff's copyright. The court also noted that modifying the phrase "protectable elements" with the word "any" would undercut the "substantial similarity" requirement.

Plaintiff did not register the alleged 1991 version of her play with the Copyright Office until 2006, one year after defendants' highly popular movie was released for public exhibition. Plaintiff obtained a pretrial Order barring defendants from mentioning either the late registration or the late deposit – because those facts might unduly prejudice plaintiff's case. However, the court's Order also provided that if plaintiff mentioned registration, defendants would be free to do so. The court rejected the argument that the phrase "if

any" required the jury to make a finding regarding registration. Nothing in the verdict form or jury instructions mentioned registration. When a juror's note asked "is a work considered to have been copyrighted, *i.e.*, are there any procedures that must take place to copyright a work?," the

(Continued on page 29)



Court Reject's Copyright Plaintiff's New Trial Motion in Infringement Suit Over Movie*(Continued from page 28)*

court answered: "the Court's charge contains all of the instructions regarding the law." Plaintiff did not object to the court's answer when given.

Scenes a Faire

Plaintiff challenged the jury instruction that "copyright protection is denied to those expressions that are standard, stock, or common to a particular topic or that flow necessarily or naturally from a common theme or setting." Plaintiff contended that the instruction placed undue emphasis on defendants' arguments about stock characters and situations in two works that dealt with philandering husbands and abused wives. The court held that because plaintiff's play included both copyrightable expression and non-copyrightable *scenes a' faire*, an instruction differentiating the two was not only proper, but necessary.

Weight of the Evidence

The court held the jury could reasonably conclude there was no access by Perry to plaintiff's play or probative similarity. Additionally, the jury could find that the works were not strikingly similar – based on the admission by plaintiff's expert that she could not opine that Perry must have copied, and the testimony of defendants' expert that Perry could have and probably did create his work independently of plaintiff's play. (Defendants were able to show the jury both works during cross-examination of plaintiff, crucially before plaintiff's similarity expert testified). Finally, the jury could reasonably have determined there was no substantial similarity, as the jury saw the movie and heard the plaintiff read her play from the witness stand. The defense verdict thus was not against the great weight of the evidence.

Lou Petrich, Abigail Jones and Jamie Lynn Frieden of Leopold, Petrich & Smith of Los Angeles and Rick Faulkner of Longview, Texas represented defendant Lions Gate Entertainment, Inc. Defendant Tyler Perry was represented by Veronica Lewis and Dimitri Dube of Vinson and Elkins of Dallas, Texas. Plaintiff was represented by Aubrey "Nick" Pittman and Willie Briscoe of Dallas, Texas.

MLRC MediaLawLetter Committee

Thomas M. Clyde (Chair)

David Tomlin (Chair)

Dave Heller (Editor)

Robert D. Balin

Michael Berry

Katherine M. Bolger

Jay Ward Brown

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

Russell T. Hickey

David Hooper

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

Fair Use Stake Driven Through The Heart Of Monster Copyright Claim

By M. Kelly Tillery, Cara M. Kearney,
and Christopher D. Olszyk, Jr.

The right to Fair Use of copyrighted works has been vindicated for a one-man publishing house known for his biographical artist career retrospectives. In *Warren Publishing Company and James Warren v. J. David Spurlock d/b/a Vanguard Productions*, No. Civ. 08-3399, 2009 WL 2412542 (E.D.Pa. Aug. 4, 2009), United States District Judge Michael M. Baylson, by his Summary Judgment ruling in favor of Defendant on all counts, reiterated the importance of the Fair Use exception to the Copyright Act: Fair Use is a fundamental policy of the Copyright Laws which is equally as important as a copyright owner's property right.

Background

Famous Monsters of Filmland is a magazine of yesterday, originally published by Plaintiff James Warren and his original Warren Publishing Company from 1958 to 1983. The magazine was geared toward fans of monster movies and movie monsters. It contained articles about popular and classic monster movies, photos and stills from favorite monster movies, editorials, and mail order advertisements for the company's latest and greatest monster paraphernalia. The covers of the magazines were often adorned with colorful reproductions of paintings of movie monsters created by various artists. The original magazine folded in 1983, and much of the "monster" artwork that appeared on the covers lay hidden in storage for decades.

One of the most prolific and well-known artists whose work appeared on the covers of *Famous Monsters* was Basil Gogos. Mr. Gogos was a freelance artist who produced cover art for 51 of the 191 issues of *Famous Monsters*, as well as numerous other magazines and publications. Although he is best known for his monster-movie art, Mr. Gogos also has had a decades-long career producing Old West images, work for various men's magazines, and a wide variety of other types of commercial and fine artwork.

Defendant J. David Spurlock, an author, editor and publisher of Vanguard Productions, a small but distinguished publishing company, sought and was granted Mr. Gogos'

permission to publish a retrospective of Mr. Gogos' career as an artist, featuring 160 of Mr. Gogos' works. A number of the works Mr. Spurlock used in the Gogos retrospective were (1) reproductions of paintings that were featured on covers of *Famous Monsters* magazine and, where the original painting was not available, (2) reproductions of actual *Famous Monsters* magazine covers.

In 2004, Mr. Spurlock approached Mr. Warren about collaborating on a retrospective book on Gogos' monster-art career, but after the two debated multiple options, including a Gogos-focused book and a Warren Publishing-focused book, an agreement was never reached. Relying on his conviction that he was entitled to use the works pursuant to the Copyright Act's Fair Use exception, 17 U.S.C. §107, Mr. Spurlock went ahead and published the book, entitled *Famous Monster Movie Art of Basil Gogos* (the "Gogos Book"), without Mr. Warren's blessing.

The Gogos Book, originally published in March 2006, was a critically acclaimed success in the science fiction/comic/monster genres, quickly earning praise and awards within the industry. However, believing he was owed a slice of the book's acclaim and profits, Mr. Warren filed suit on July 21, 2008, seeking (1) injunctive relief and \$3.6 million in Statutory Damages for infringement of 36 copyrights (later reduced to 24) in various Warren Publishing Company magazines (most notably *Famous Monsters of Filmland*), and (2) damages under Pennsylvania Common Law for Unfair Competition. Mr. Warren's copyright claims stemmed from his asserted ownership in the magazine covers reproduced in the book and in the Gogos artwork itself, which Mr. Warren claimed he owned as works-for-hire under the Copyright Act of 1909.

Copyright Fair Use

In granting Summary Judgment to Mr. Spurlock on all counts, the Court dismissed Plaintiffs' claims for Copyright Infringement and found that Mr. Spurlock's use of the magazine covers and artwork was fair. In so ruling, the Court considered each of the statutory factors: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the por-

(Continued on page 31)

Fair Use Stake Driven Through The Heart Of Monster Copyright Claim

(Continued from page 30)

tion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work. 17 U.S.C. § 107.

The Court found that the first factor, the purpose and character of the use, weighs heavily in favor of Mr. Spurlock. The Court was guided by the examples of Fair Use set forth in the preamble of §107 (works reproduced “for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research”), and found that the Gogos Book, as a biography or career retrospective, fits “comfortably within” the statutory categories, which reinforced the Court’s conclusion that Mr. Spurlock’s use was highly transformative.

Whether or not a work is transformative is a key consideration in the factor one “purpose and character” analysis. In other words, is the allegedly infringing use of a work for purposes different from the use of the original work, or does it merely repackage, republish, and supersede the original? In this case, the Court found the Gogos Book to be highly transformative, as it takes the reader through the history of Mr. Gogos’ work and career, whereas the works as used on the *Famous Monsters* magazines were used to help sell magazines, to describe the latest in monster movies through an eye-catching display, and to convey to the reader or potential reader what topics the magazine discussed in that issue.

Another consideration in the factor one “purpose and character” analysis is whether the defendant acted in bad faith. The Court summarily dismissed Plaintiffs’ assertion that Mr. Spurlock’s use of the works after being denied permission from Plaintiffs amounted to bad faith. Citing to the seminal Supreme Court decision on fair use, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Court reiterated “the important lesson on bad faith to be taken from Campbell [] that a defendant’s ‘request for permission to use the original’ and ‘being denied permission to use a work do[] not weigh against a finding of fair use.’ Where the defendant requested permission, ‘the offer may simply have been made in a good-faith effort to avoid [] litigation.’” *Opinion* at 22-23 citing *Campbell*, 510 U.S. at 585 n. 18.

The second factor in the Fair Use analysis requires the Court to consider the “nature of the copyrighted work.” 17 U.S.C. §107(2). This factor calls for recognition that some

works are closer to the core of intended copyright protection than others. The Court found that this factor weighed slightly in favor of Plaintiffs, but is of limited relevance because the Gogos Book is transformative.

The third factor involves a consideration of “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3). This factor contains a quantitative (how much was taken) and qualitative (what was taken) analysis. Quantitatively, Mr. Spurlock argued, and the Court agreed, that he copied the cover (one page) of certain issues of *Famous Monsters* magazines, which range in length from 68 to 100 pages. In other words, Mr. Spurlock copied 1 – 1.5% of each work. Plaintiffs relied on *Schiffer Publ’g, Ltd. v. Chronicle Books, LLC*, 2004 WL 2583817 (E.D. Pa. Nov. 12, 2004) in arguing that even though the copyright registrations cover the magazine as a whole, each cover is its own individually copyrighted work. In other words, Mr. Spurlock copied 100% of each work.

The Court rejected Plaintiffs’ argument as contrary to binding precedent and the statute itself, which calls for an analysis of the “amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 U.S.C. § 107(3) (emphasis added). The Court found, as the Third Circuit did in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 342 F.3d 191 (3d Cir. 2003), that the portion taken is quite small. *Id.* at 201 (finding that 1.7% to 2.2 % copying to be quantitatively small). The Court found that Mr. Spurlock’s use was also qualitatively reasonable, that is, the magazine covers did not appropriate “the heart” of the magazine’s content, as the magazine was devoted to updating its readers on recent developments in the monster movie industry and not discussing the cover art or artists.

Finally, factor four, “the effect of the use upon the potential market for or value of the copyrighted work,” weighed slightly in favor of Plaintiffs. In making all factual inferences in favor of Plaintiffs as the Court must on summary judgment, and despite weighing the fact that Plaintiffs had done nothing to exploit their copyrights in over twenty years and had neglected their copyrights entirely for over twenty years against the testimony of Mr. Warren and his

(Continued on page 32)

Fair Use Stake Driven Through The Heart Of Monster Copyright Claim

(Continued from page 31)

experts, the Court found this factor slightly favored Plaintiffs.

The Court concluded that the Fair Use factors, considered as a whole, weighed in favor of Mr. Spurlock: “The fact that the Gogos Book is inherently biographical render it so fundamentally transformative in nature, coupled with the fact that Spurlock utilized such a quantitatively and qualitatively minor portion of the magazines, requires this Court to conclude that Spurlock’s use is fair use and to grant Spurlock’s motion for Summary Judgment on the copyright claims.”

Common Law Unfair Competition

Defendant also prevailed at Summary Judgment on his defense of Plaintiffs’ Common Law Unfair Competition claim, a late-added claim attempting to parlay the nostalgia associated with James Warren as the founder of *Famous Monsters of Filmland* into an actionable claim. Plaintiffs argued that the title of Spurlock’s book *Famous Monster Movie Art of Basil Gogos*, created a false association with Plaintiffs’ purported common law “Famous Monsters” trademark.

The Court, applying the Lanham Act’s test for Unfair Competition (15 U.S.C. §1125(a)), found the title of the book did not falsely link defendant to any “name, title, or ‘mark’ that is associated with the plaintiff” for the mere fact that Plaintiffs held no trademark or protectable interest in the mark “Famous Monsters.”

Most notably, the Court, relying on *Kusek v. Family Circle, Inc.*, 894 F.Supp. 522 (D.Mass. 1995), found any inconsequential use of the mark by Plaintiffs (attendance at tradeshow, selling back issues of the magazine and memorabilia from his personal collection), after ceasing publication of the magazine 26 years ago cannot forestall abandonment. Following the Lanham Act’s statutory framework under 15 U.S.C. §1127, the Court found Plaintiffs’ non-use for a period of three consecutive years, *prima facie* (and un rebutted) evidence of abandonment. Thus, not only had Plaintiffs’ Federal Registration expired decades earlier, but

the evidence of record established abandonment of any purported Common Law rights to the mark “Famous Monsters” without any intent to resume use.

Finally, the Court also rejected Plaintiffs’ residual goodwill argument, dismissing the limited authority raised by Plaintiffs that even despite abandonment, the “Famous Monsters” mark, the public association with the name created a protectable interest. Having no trademark (either Federal or at Common Law), and no protectable interest in the terms “Famous Monsters”, no cause of action for Unfair Competition existed, and appropriately the Court granted Defendant’s Summary Judgment motion with respect to unfair competition as well.

Conclusion

The Court’s decision as a whole is not groundbreaking. It does not make new law, but merely applies old, well-established Copyright Fair Use principles to a particular set of unique facts. As the Supreme Court has observed, defenses such as Fair Use should be encouraged as much as legitimate infringement claims so that “the boundaries of copyright law” are “demarcated as clearly as possible.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). The Court here has done a great service to the artists, authors, publishers and the Copyright Bar by reinforcing the boundaries of copyright law. This decision will serve as very real and practical guidepost to a myriad of players in the copyright field.

Final Judgment was entered August 5, 2009 in favor of Defendant on all claims. A motion for over \$300,000 in attorneys fees and costs, pursuant to 17 U.S.C. §505 is currently pending with the Court.

M. Kelly Tillery, Cara M. Kearney, and Christopher D. Olczyk, Jr. in the Philadelphia office of Pepper Hamilton LLP represented the Defendant in this case. Manny D. Pokotilow, Salvatore Guerriero, and Douglas Panzer of the Philadelphia law firm of Caesar, Revise, Bernstein, Cohen & Pokotilow, Ltd. represented the Plaintiffs.

Copyright Claim Against Blogger Dismissed

Use of Plaintiff's Photos on Gripe Site Deemed a Fair Use

One decision raising eyebrows is the recent decision from the Northern District of California, holding that a blogger's use of copyrighted images was fair use. [Sedgwick Claims Management Services, Inc. v. Delsman](#), No. 09-1468, 2009 WL 2157573 (N.D. Cal. July 17, 2009) (Armstrong, J.).

Background

The plaintiff, an insurance claim management services company, was representing the defendant in his claim for disability benefits. At some point the defendant became dissatisfied with Sedgwick's handling of the claim, and, as a way to retaliate, he began a blog, accusing Sedgwick and its employees ("Sedgthugs") of having committed various "Sedgcrimes." (The blog was maintained at various URLs, including

www.sedgwickcms.blogspot.com,
www.gesupplydiscrimination.com,
<http://gesupplyrexeldiscrimination.blogspot.com>. (All websites were still up and running as of August 24, 2009.)

In February 2009, he also began a postcard mailing campaign, taking two copyrighted photographs – headshots of the CEO and the COO – and superimposed them on fugitive style WANTED postcards, which he sent to Sedgwick employees, consumers, and potential consumers. Postcards were captioned with various text; for example, one postcard had large text "WANTED FOR HUMAN RIGHTS VIOLATIONS" across the CEO's photograph, as well as the text "Have you been threatened by this man or his minions? The time for change is at hand!" alongside the photograph. The defendant obtained the photos from a company press release and other websites; the plaintiff registered them with the Copyright Office on March 19.

On April 3, Sedgwick brought suit for trespass to chattels, copyright infringement, interference with prospective economic advantage, trade libel, defamation and libel, and unfair competition. Acting pro se, the defendant motioned for summary judgment. The court "liberally construed" this as a motion to dismiss the only federal claim, copyright infringement, and a special motion to strike the remaining state law causes of action and, on July 17, dismissed the case.



Regarding the copyright infringement claim, the court considered whether the use qualified for fair use. In keeping with Ninth Circuit precedent, it focused on the first factor (purpose and character of the use) and applied the functionality-based inquiry espoused in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003). The *Sedgwick* court emphasized that the question is not whether the "photographs themselves were unaltered," but rather if the use of the photos, "in the specific context used, was transformative. . . . In that regard, the Ninth Circuit has consistently held that 'making an exact copy of a work may be transformative so long as the copy serves a different function than the original work.'" *Id.* (quoting *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1164 (9th Cir. 2007) and *Kelly*, 336 F.3d at 816)).

The court held that "[h]ere, there can be no legitimate dispute that Defendant's use of [the photographs] was transformative. Both images originally were used by Defendant for promotional reasons. Defendant, however, used the photographs as a vehicle for criticizing the Company." The court found no claim that the defendant had used the photographs for commercial gain, but noted that "given the transformative nature . . . the matter of whether the use was commercial is less significant."

The court then found that the second factor (nature of the plaintiff's work) was neutral given the transformative nature, and that the third factor (amount of the work used) was neutral, as well, because



the use of an entire image "may be reasonable if it serves the *defendant's* intended purpose." The court briefly discussed the fourth factor (effect of the use on the potential market), finding that even if there were a commercial market for the photographs, the use was transformative enough to be a substitute for the original.

The court next considered the remaining state claims in light of California's anti-SLAPP statute, Cal. Code. Civ. Proc. § 425.16(e)(4), which will dismiss claims arising from speech or conduct 1) made in a public forum and 2) involving a matter of public interest. Summarily, the court found both factors met, finding that the second prong was met because the defendant's purpose in making the statements was "to enlighten potential consumers of Sedgwick's allegedly questionable claims practices and to avoid using the company's services." The court then found that Sedgwick could not overcome the anti-SLAPP motion by showing a probability of prevailing on the merits.

Plaintiff has filed a notice of appeal to the Ninth Circuit.

Plaintiffs are represented by Ian K. Boyd and Seth I. Appel, Harvey Siskind LLP, San Francisco. Defendant is acting pro se.

Update: Complaint Against Google for Ringtone Advertisements Dismissed

Plaintiff Failed to Plead “Plausible” Facts to Avoid Section 230

A federal district court in California dismissed a complaint against Google seeking to hold it responsible for allegedly fraudulent third party ring tone advertisements that appear on the web as part of Google’s AdWords program. [*Goddard v. Google, Inc.*](#), No. 08-2738, 2008 WL 5245490 (N.D.Cal. July 30, 2009) (Fogel, J.).

Last year the court [dismissed](#) the complaint under Section 230 of the Communications Decency Act. But the court allowed the plaintiff to amend her complaint and potentially plead around Section 230 by fleshing out her allegations that Google helped create the advertisements.

At issue in the case are advertisements by mobile service subscription providers (“MSSPs”) who sell ringtones which are charged directly to the buyer’s cell phone bill. Plaintiff alleged she clicked on a MSSP ad created as part of Google’s AdWords advertising program and that the MSSP made fraudulent charges to her cell phone bill. The plaintiff brought a variety of claims against Google, including violation of California’s unfair competition law, breach of contract, negligence and aiding and abetting liability.

In her amended complaint, plaintiff alleged that Google’s involvement in creating the ads “was so pervasive that the company controlled much of the underlying commercial activity

engaged in by the third-party advertisers.” And that Google “not only encourages illegal conduct, [but] collaborates in the development of the illegal content and, effectively, requires its advertiser customers to engage in it.”

The court noted that these allegations supported by specific allegations of fact “would remove Plaintiff’s action from the scope of CDA immunity.” However, plaintiff’s attempt to plead around Section 230 failed because her allegations were “labels and conclusions.” The “formulaic recitation of the elements” of CDA developer liability ... will not do.” *Quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Under the *Twombly* standard the plaintiff would have to allege facts “that plausibly suggest the collaboration, control, or compulsion that she ascribes to Google’s role in the creation of the offending AdWords.” However, plaintiff “did not come close to substantiating the ‘labels and conclusions’ by which she attempts to evade the reach of the CDA.”

Google was represented by Karen Johnson-McKewan, Kikka N. Rapkin, Nancy E. Harris, and Nikka Noel Rapkin of Orrick Herrington & Sutcliffe LLP in San Francisco. Plaintiff was represented by Alan Himmelfarb of Kamberedelson LLC in Vernon, CA and Michael James McMorrow of Kamberedelson LLC in Chicago.

Shooting Victim’s Complaint Against Craigslist for Sale of Gun Dismissed

In a recent decision, a federal court in New York dismissed a complaint against Craigslist, the online classified advertising site, seeking to hold it responsible for injuries caused by a handgun purchased through the site. [*Gibson v. Craigslist, Inc.*](#), No. 08 Civ. 7735 (S.D.N.Y. June 15, 2009) (Berman, J.). The court held that the complaint was barred by Section 230 of the Communications Decency Act.

The plaintiff alleged he was shot by an assailant who bought a handgun through the website. He claimed that Craigslist breached a duty of care to ensure that hazardous objects such as handguns are not sold through the site. The district court held that Section 230 could be raised on a 12(b)(6) motion to dismiss and that Craigslist was entitled to dismissal under Section 230. The court notably cited both *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) to emphasize that plaintiffs must plead more than “labels and conclusions” to state a cause of action.

Second Circuit Denies Public Access To Wiretap Material In Spitzer Case

Rejects Common Law and First Amendment Claims for Access

By Itai Maytal

The news media and the public do not have a right to obtain federal wiretap application and orders under either the First Amendment or the common law, the Second Circuit Court of Appeals ruled this month in a case brought by The New York Times to obtain materials related to the Eliot Spitzer prostitution investigation.

In a unanimous decision, the Second Circuit overturned a lower court ruling that gave *The Times* access to wiretap applications, interim reports and orders in the Spitzer case. *In the Matter of the Application of the New York Times Co. to Unseal Wiretap & Search Warrant Materials*, Nos. 09-0854-cv (L), 09-1164 (con), 2009 U.S. App. LEXIS 17642 (2nd Cir. August 7, 2009). Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.S. § 2518(8) (b), allows such materials to be released only upon a showing of “good cause.”

Holding that the statute pre-empted the common law right of access that normally applies to judicial documents, the court said that *The Times* was required under Title III to show that it was an “aggrieved party” in order to gain access to the material it sought from the government. The court concluded that *The Times* did not meet this burden when it asserted it was pursuing a matter of public interest. The term “aggrieved party” typically refers to those who were caught on the wiretaps or whose phones were tapped.

The court also rejected *The Times*’s argument that *The Times* had a First Amendment right to gain access to them, finding that the First Amendment did not apply because, under the *Press-Enterprise* test, the materials had historically been closed and that access would not advance a public interest.

Background

The case arose out of the March 2008 resignation of Gov. Eliot Spitzer of New York, following his acknowledgment that he had been a client of a prostitution ring known as The Emperor’s Club. For more than a year, federal authorities had investigated the Emperor’s Club, using court-authorized wiretaps and a search warrant, among other tech-

niques. Shortly after the government arrested four people in the ring and charged them with conspiracy to violate prostitution laws and money laundering, media reports identified Gov. Spitzer as one of the ring’s clients. A few days later, Gov. Spitzer resigned his office. By July 2008, the four defendants had pleaded guilty, the government announced it would not pursue charges against Gov. Spitzer, and prosecutors indicated that the case was over.

Questions remained about the genesis and conduct of a federal prostitution investigation that involved such a prominent public figure. While federal officials said that the investigation into Spitzer’s activities arose from routine examinations of suspicious financial transactions by Gov. Spitzer reported to the federal government by participating banks, there were growing public concerns that the former governor had been targeted for political purposes.

The Times filed its motion in December 2008 in the Southern District of New York seeking the unsealing of materials related to the wiretap authorization and a search warrant used in the Emperor’s Club investigation. In support of its motion, *The Times* invoked rights of access under both the common law and the First Amendment, analogizing to prior judicial decision granting media access to search warrant applications and orders. The Government released in redacted form the warrant application and related materials, but disputed the public’s right to the disclosure of the materials from the wiretap authorizations.

In February 2009, after briefing and oral argument, Judge Jed Rakoff of the Southern District of New York agreed with *The Times*’s request to unseal the wiretap materials, finding that the materials – with the names of all customers but Spitzer redacted – should be released under both the First Amendment and federal common law. *In re New York Times Co.*, 600 F. Supp. 2d 504 (S.D.N.Y. 2009).

Rakoff concluded that wiretap applications and orders are “judicial documents” because they “are plainly ‘relevant to the performance of the judicial function,’ and therefore ‘presumptively subject to public access’ under both the common law and the First Amendment. While the presumption in favor of access had to be balanced against factors favoring confidentiality, “such as the government’s law en-

(Continued on page 36)

Second Circuit Denies Public Access To Wiretap Material In Spitzer Case

(Continued from page 35)

forcement interests and the privacy interests of affected parties,” Rakoff ruled that in this case the redaction of names sufficiently addressed the countervailing interest.

In looking at Title III’s “good cause” standard, he held that “there’s no reason to believe that Congress intended ‘good cause’ to be anything other than a synonym for the balancing dictated by the aforementioned constitutional and common law principles.” At the Government’s request, Judge Rakoff stayed his order to permit the appeal.

In its brief to the Second Circuit the Government argued that under Title III there is a strong presumption against disclosure of wiretap applications and orders, and that the “good cause” requirement of Title III should not be conflated with the common law or First Amendment right of access. In response, *The Times* argued that the statutory requirement of Title III should be read as compatible with the balancing test required under the common law, or in the alternative, that a qualified First Amendment right of access applies to wiretap applications and orders. *The Times* also argued that the “good cause” standard itself permitted access applications in the public interest, irrespective of the common law or the Constitution.

The Second Circuit Opinion

Writing for a three-judge panel, Circuit Judge Jose Cabranes rejected in large part the lower court’s analysis by holding that Title III superceded, rather than accommodated any common law right of access. While the Circuit agreed with Judge Rakoff that the wiretap applications and orders were indeed judicial records, the panel held that the common law right of access did not apply to them given the preemption of Title III. In the court’s view, the case therefore turned on a statutory interpretation of the meaning of “good cause.”

Judge Cabranes noted that while neither Congress nor the Supreme Court had defined the meaning of “good cause” in Title III, the Second Circuit had already concluded in *In re National Broadcasting Co. v. U.S. Dept. of Justice*, 735 F.2d 51 (2d Cir. 1984) (“*NBC*”) that “good cause” could be found where the applicant seeking to unseal wiretap applications was ‘an aggrieved person,’ but not upon any lesser showing.”

In *NBC*, the Circuit had denied the defendant access to wiretap applications and orders in a libel case, noting that

the defendant was not an aggrieved party,” which the statute defined as “a party to any intercepted wire or oral communication or a person against whom the interception was directed.” In reading *NBC* to require that the access motion be brought by an aggrieved person, the court rejected *The Times*’s argument that the case said only that an aggrieved person was an example of the type of party who could seek access. *The Times* cited two cases from other circuits where parties other than aggrieved persons had won access to wiretap applications and orders.

Turning to the instant case, Judge Cabranes wrote there was no reason why the Circuit’s “good cause” analysis in *NBC* should not apply to a newspaper litigant acting as a surrogate for the public. “It is irrelevant for the purposes of Title III that *The Times* is a newspaper investigating a matter of public importance,” the court said.

Finally, the Circuit rejected the lower court’s conclusion that the First Amendment right of access required unsealing of the wiretap applications. In deciding that the First Amendment did not apply, the court employed the standard test of whether the materials had been historically open and whether openness would logically serve the public interest. Neither prong of the test was met by the historically secret Title III materials, which were made confidential by Congress to protect personal privacy, the court said. The panel was not convinced that “monitoring the government’s use of wiretaps and potential prosecutions of public officials is more compelling than Congress’s apparent concern for confidentiality and privacy.”

The Times had also sought access to interim reports filed by the Government with the courts while the wiretaps were ongoing. Such reports are not mentioned in the “good cause” provision. The District Court had held that common law and First Amendment right applied to the interim reports as well. The Circuit did not specifically address them in its opinion.

The Times has decided not to seek further review of the decision by the Second Circuit.

Itai Maytal is the First Amendment Fellow at The New York Times Company. The Times was represented in this matter by David E. McCraw, Assistant General Counsel to the newspaper, and Mr. Maytal. The Government was represented by Assistant U.S. Attorneys Daniel L. Stein and Jesse M. Furman.