



LIBELLETTER

December 1995

RULE 26 (C) PROTECTIVE ORDERS

- Modifications Proposed by Rules Advisory Committee
- Hearings Scheduled for January/February
- Written Comments Due By March 1

The Advisory Committee on Federal Rules of Civil Procedure is holding hearings on a significant set of changes to the Federal Rules, Rule 26(c) regarding protective orders. The proposed changes would, in the view of the Advisory Committee, codify the current practice of "so ordered" protective orders for discovery materials, authorizing the entering of protective orders on the stipulation of the parties. The rules, as modified, would allow for modification or dissolution of a protective order on motion made by a party, a person bound by the order, or a third party who has been allowed to intervene for the purpose of seeking modification or dissolution of the order.

The Advisory Committee Notes state that the stipulated protective order deals only with discovery protective orders and does not address any other form of order that would limit access to court proceedings or materials submitted

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Tortious Interference With Contract: A paper on this topical issue is underway, and will be sent to you under separate cover. Thank you to those who have sent in ideas and materials on the tort and its defenses. Please continue to do so.

COURT DISMISSES CLAIMS IN SCIENTOLOGY SUIT AGAINST THE WASHINGTON POST

By Charles S. Sims, Leonard A. Feiwus and Debra Kessler

In a case involving novel copyright, trade secret and First Amendment issues arising in the context of the Internet, the District Court for the Eastern District of Virginia granted summary judgment in favor of defendant *The Washington Post* and two of its news reporters (the "Post") against the Religious Technology Center (the "RTC"), the parent entity to the Church of Scientology (the "Church"). *Religious Technology Center v. Lerma, Digital Gateway Systems and The Washington Post, et al.*, Civ. A. No. 95-1107-A, 1995 WL 710244 (E.D.Va. Nov. 28, 1995).

This is one of many copyright infringement, trade secret misappropriation and other cases recently brought by the RTC and the Church against its former members. (See LDRCLibelLetter, *infra* at p. 13.)

The Church maintained that some of its core "religious" documents, authored by the Church's controversial founder and prolific writer, L. Ron Hubbard, were subject to copyright and trade secret protection and had been "stolen" and distributed by former Scientologists. These documents, sometimes called the "Advanced Technology" or "Operating Thetans" ("ATs" or "OTs" for short), are used as allegedly confidential materials in Scientology courses which adherents pay

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Summary Judgment Denied in Scientology Case to On-line Service and Bulletin Board in California, at page 16.

PRODIGY/STRATTON- OAKMONT RECONFIRMED

Justice Stuart Ainsworth refused to reconsider his March ruling that Prodigy could be held responsible for an alleged defamation posted on one of its bulletin boards. Judge Ainsworth had noted in his original decision that Prodigy had failed to produce evidence to support its description of its bulletin board. Consequently, he accepted the plaintiff's contention that Prodigy's description of its first bulletin boards in 1990 should be relied upon the Court.

(Continued on page 2)

BUSINESS WEEK PRIOR RESTRAINT: The Sixth Circuit Argument

On December 6, a panel of the Sixth Circuit heard argument on the prior restraint issued September 13 against McGraw-Hill, publishers of *Business Week*. The prior restraint barred it from publishing attachments to a motion, the attachments having been filed under seal pursuant to a protective order governing discovery in civil litigation between Bankers Trust and Proctor & Gamble. The motion was filed by Proctor & Gamble seeking to amend its complaint in the suit and the copy in the possession of *Business Week* was obtained by a then-confidential source (now known to be a partner with Sullivan & Cromwell, counsel to Bankers Trust). See, LDRCLibelLetter, September 1995 at p. 1.

After its initial attempt to obtain a stay and expedited review of the prior restraint from the Sixth Circuit and then from Justice Stevens, McGraw-Hill participated

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PRODIGY/STRATTON-OAKMONT RECONFIRMED

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Following the initial decision, Prodigy retained new counsel which immediately moved for a re-argument and/or renewal of the motion in order to provide the Court with evidence of the nature of bulletin boards in 1994, at the time of the allegedly defamatory posting. Judge Ain recognized that "an examination of the original papers in comparison with the renewal papers reveals a number of drastic differences." He noted that the affidavits from the two prodigy employees whose depositions he had relied upon demonstrated that the operative facts in the original decision are very much in dispute.

Judge Ain held that the offer of additional evidence made clear that renewal, rather than the re-argument on the original record, was the important issue.

Thus, he ignored the motion for reargument, but then went on to deny renewal. Although the plaintiff acknowledged that the actual facts were not known to them at the time of making their motion and that, based on the facts now known, plaintiff did not oppose Prodigy's motion for renewal and granting summary judgment to Prodigy, Judge Ain refused to admit the additional

evidence into the record to permit a ruling based on the actual facts. He held that these facts were available to Prodigy, and its prior counsel's failure to present these facts, for which he found no justification, was not a sufficient basis to permit renewal of the motion.

He also noted that he would not vacate the decision despite the request of the parties on the ground that it is the only legal precedent in New York on the very important issues addressed.

The new decision from Justice Ain does establish that there are "drastic differences" between the facts in the court's March decision and the facts which were presented on the motion. Thus, it should be possible to convince any court looking to Justice Ain's decision that it should not rely upon his factual findings. Justice Ain's analysis can thus be limited to a hypothetical situation of an on-line provider who edits and assumes responsibility for all of the content on a particular site. This analysis is not applicable to virtually any bulletin board today.

Prodigy was represented on this motion by the firm Frankfurt, Garbus, Klein & Selz.

THANK YOU...

LDRC wants to thank Media/Professional Insurance, Inc. and Scottsdale Insurance Company for sponsoring the cocktail party that preceded the LDRC Annual Dinner in November. This annual event is both eagerly anticipated and deeply appreciated.

LDRC also wants to thank Rogers & Wells for preparing a transcript of the evening's proceedings.

LDRC is attempting to close its books for 1995. If you still have not sent in your payments for the 50-State Surveys, NY State Sales Tax, Bulletins or Membership Contributions we ask that you do so as soon as possible.

Thank you for your cooperation.

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NEW YORK COURT OF APPEALS REFINES OPINION PRIVILEGE

Despite the United States Supreme Court's denial of blanket protection for opinion in libel actions in *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), the New York State Court of Appeals continues to foster and refine the opinion privilege created under New York's state constitution, first recognized in *Immuno AG. v Moor-Jankowski*, 77 N.Y.2d 235.

In *Brian v. Richardson*, 1995 WL 700373 (N.Y. Ct. App. Nov. 29, 1995), the Court of Appeals, addressing the opinion privilege for the fourth time since *Milkovich*, held that courts must look to the immediate context as well as the broader context of the allegedly defamatory communication in order to determine whether the statement is one conveying opinion or fact. In addition, the court pointed out that "the identity, role and reputation of the author" may also factor into the determination of whether article should be protected as opinion. *Id.*, at *4.

The case arose out of an Op Ed piece published four years ago in *The New York Times* which alleged a Department of Justice orchestrated conspiracy that resulted in, among other things, the bankruptcy of Inslaw, a computer software company which the defendant, former U.S. Attorney General Elliot L Richardson, represented. The plaintiff, Dr. Earl W. Brian, a Republican businessman and former aide to Ronald Reagan, argued the piece asserted that "(1) he was part of a scheme to steal Inslaw's software to gain an unfair business advantage, (2) he was the beneficiary of politically motivated favoritism, (3) he had participated in a morally reprehensible scheme to delay the safe return of American hostages, (4) he had sold stolen software to foreign governments to advance illegal covert activities and (5) he had some how been involved in the murder of an investigative journalist." *Id.*, at *2.

In affirming the trial court's dismissal of the complaint the Court of Appeals restated the principle that "a libel action cannot be maintained unless it is premised on published assertions of fact." *Id.*, at *3, citing *Gross v. New York Times Co.*, 82 N.Y.2d 146,152-53, *Immuno AG. v Moor-Jankowski*, 77 N.Y.2d 235. In order to distinguish between assertions of fact and non-actionable expressions of opinion, the Court stated that courts must consider: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to "signal" . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." 1995 WL, at *3, citing, *Gross v. New York Times Co.*, 82 N.Y.2d at 153, quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292, and *Immuno AG.*, 77 N.Y.2d 235.

Focusing upon the third of these factors the Court explained that "[r]ather than sifting through a communication for the purpose of isolating and identifying assertions of fact, the court should look to the overall context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.'" 1995 WL, at *3, citing *Immuno AG.*, at 254.

In addressing the broader context at issue in the case at hand, the Court acknowledged that while "an editorial page or a newspaper column [never] confers a license to make false factual accusations . . . the Op Ed page is a forum traditionally reserved for the airing of ideas on matters of public concern." 1995 WL, at *4. In this light, the Court continued, "the common expectation is that the

columns and articles published on a newspaper's Op Ed sections will represent the viewpoints of their authors and, as such, contain considerable hyperbole, speculation, diversified forms of expression and opinion." *Id.*, at *4.

Turning to the immediate context of the challenged statements, the Court also concluded "that the specific accusations of which plaintiff complains could not have been understood by a reasonable reader as assertions of fact that were proffered for their accuracy." *Id.*, at *4. To support its holding, the Court pointed out that Richardson stated at the outset of the article that he had been Inslaw's attorney, "thereby signalling that he was not a disinterested observer." *Id.*, at 4. Further, the Court continued, "the predominant tone of the article, which was rife with rumor, speculation and seemingly tenuous inferences, furnished clues to the reasonable reader that [the article] was something less than serious, objective reportage." *Id.*, at 4.

In addition, since the thrust of the article was to argue for an investigation into the alleged conspiracy, the Court noted that "without a recitation of the existing unresolved charges, defendant's call for a full-scale investigation would have made no sense." *Id.*, at *5. In this regard, the Court went on, "the repeated charges were included in the article not necessarily to convince the reader of plaintiff's dishonesty but rather to demonstrate the need for an investigation that would establish the truth or falsity of the charges." *Id.*, at *5.

According to counsel for Richardson, the unanimous opinion authored by Judge Vito J. Titone was the first in the Court of Appeals to apply the opinion privilege on a motion to dismiss. Indeed, with only the complaint and the motion to dismiss filed during the litigation, the Court's decision clearly signals to potential media litigants the continuing vitality of the opinion privilege under New York

THE SUPREME COURT: HELPFUL BY ANALOGY

By JOHN P. BORGER

Journalists for various reasons sometimes take "undercover" positions with private companies in the course of their investigations. Companies upset with the eventual report in turn sometimes sue, not just for defamation, but for allegedly improper newsgathering techniques. A recent decision of the United States Supreme Court may help journalists deflect those legal challenges, although the decision could be overlooked because at first glance it appears far afield from "media law."

The decision, *National Labor Relations Board v. Town & Country Electric, Inc.*, 64 U.S.L.W. 4022 (November 28, 1995), arises from an interpretation of the word "employee" as defined in the National Labor Relations Act. The NLRB had held that Town & Country committed unfair labor practices when it refused to interview or retain job applicants because of their union membership and because the union would have paid the applicants to organize the company once they started work for the company. The company had argued that a true employee could not be paid simultaneously by it and by the union.

The Supreme Court (in a unanimous opinion by Justice Breyer) found that an employee could serve two masters simultaneously, so long as service to one does not involve abandonment of service to the other. It upheld the NLRB's conclusion that service to the union for pay does not involve abandonment of service to the company. The language is worth setting forth at some length:

"Common sense suggests that as a worker goes about his *ordinary* tasks during a working day, say, wiring sockets or laying cable, he or she *is* subject to the control of the company employer, whether or not the union also pays the worker. The company, the worker, the union, all would expect that to be so. And, that being so, that union and company interests or control might *sometimes* differ should make no difference. As Prof. Seavey pointed out many years ago, '[o]ne can be a servant of one person for some acts and the servant of another person for other acts, even when done at the same time,' for example, where 'a city detective, in search of clues, finds employment as a

waiter and, while serving the meals, searches the customer's pockets.' W. Seavey, *Handbook of the Law of Agency* § 85, p. 146 (1964). The detective is the servant both 'of the restaurateur' (as to the table waiting) and 'of the city' (as to the pocketing searching). How does it differ from Prof. Seavey's example for the company to pay the worker for electrical work, and the union to pay him for organizing? Moreover, union organizers may limit their organizing to nonwork hours. See, e.g. *Republic Aviation Corp. v. NLRB, supra; Beth Israel Hospital v. NLRB*, 437 U.S. 483, 492-493 (1978). If so, union organizing, when done for pay but during *nonwork* hours, would seem equivalent to simple moonlighting, a practice wholly consistent with a company's control over its workers as to their assigned duties.

"Town & Country's 'abandonment' argument is yet weaker insofar as the activity that constitutes an 'abandonment,' *i.e.* ordinary union organizing activity, is itself specifically protected by the Act. See, e.g., *Beth Israel Hospital v. NLRB, supra*, at 492-493 (employer restrictions on union solicitation during nonworking time in nonworking areas are presumptively invalid under the Act). This is true even if a company perceives those protected activities as disloyal. After all, the employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity."

The logic of this passage would seem to apply just as well to an undercover reporter as to a union organizer. It is significant that the Court did not simply render a narrow reading of the labor statute, but expressly held that the NLRB's "interpretation of the term 'employee' is consistent with the common law." That underpinning should assist in applying the logic of the decision to newsgathering situations.

Different issues may arise, of course, if the reporter misrepresents personal information on an employment application or signs a confidentiality agreement.

John P. Borger is a member of DCS member firm Faegre & Benson in Minneapolis, Minnesota

SANCTIONS GRANTED AS LIBEL SUIT IS DISMISSED AGAINST AP

*Reverse Wire Service Defense Applied

In a recent decision from the Southern District of New York, Judge Sprizzo applied the wire defense in reverse in dismissing a suit against the Associated Press and its president, and entered monetary sanctions against the plaintiff and her attorney for willful obstruction of discovery. See *Winn v. Associated Press*, 92 Civ. 6535 (S.D.N.Y. 1995).

The suit arose from an AP report based on an article first published in the *Virginian Pilot*, a long-time AP member, concerning problems and controversies surrounding the Miss Black Virginia Pageant ("MBVP"). The MBVP and its president, Gale Winn, then sued the AP for libel, misrepresentation, and tortious interference with contract.

In dismissing the libel claim, Judge Sprizzo applied the wire service defense in reverse, finding no evidence that the AP had been negligent in relying upon the original article. *Slip op.* at 10. According to the AP reporter who prepared the rewrite, the *Virginian Pilot's* coverage in the past had always accurately reflected his understanding of events he had personally covered. Both he and the AP editor that reviewed his report concluded that the *Pilot's* story on the MBVP was "thoroughly researched, fairly presented, neither improbable nor implausible and suggested no factual errors warranting further investigation." *Id.*

Judge Sprizzo then dismissed the claim that the AP had interfered with the MBVP's contracts with sponsors and winners of the pageant on the grounds that the plaintiff had provided no evidence that defendants either were aware of or intended to interfere with these contracts, nor could the transmission of information not otherwise improper afford a basis for any alleged interference with contractual relationships. *Id.* at 11.

The sanctions were assessed under Rule 37 based on Judge Sprizzo's finding that the plaintiff had deliberately impeded the discovery process. *Id.* at 12. Specifically, she had unilaterally terminated one deposition, insisted during another deposition upon writing out each question and answer before responding, claimed ignorance of basic facts within her knowledge, and repeatedly failed to comply with document requests, all of which necessitated numerous pretrial conferences. *Id.* at 13-16. In addition, on several occasions both plaintiff and her attorney made statements to the court that were clearly contradicted by deposition transcripts. *Id.*

Judge Sprizzo indicated that these discovery abuses were serious enough to have warranted dismissal of the case with prejudice under Rule 37 had he not already dismissed it on substantive grounds. *Id.* at 17. He then awarded defendants \$2000 in attorneys' fees incurred in the numerous pretrial conferences, \$10,000 in attorneys' fees and costs in connection with plaintiff's deposition, and costs in connection with defendants' motion for summary judgment and sanctions in an amount to be determined. *Id.* at 18.

The Associated Press was represented by Blair Soyster and Deborah Schwartz, of DCS member firm Rogers & Wells.

MEDIA SEEKS ACCESS TO EX-TOBACCO EXEC DEPOSITION CBS Source Deposited in Mississippi Suit

Seven national media companies have moved to intervene in a suit brought by the Attorney General of Mississippi against tobacco companies for the limited purpose of gaining access to the deposition begun mid-December of Jeffrey S. Wigand, the CBS news source of recent controversy and the former Brown & Williamson executive. *Mike Moore, Attorney General Ex Rel The State of Mississippi v. American Tobacco Company, et al.*, Cause No. 94-1429 (Chancery Ct. Jackson County, Miss.) The underlying suit to recover millions of dollars in cost to the state for health care costs for its citizens necessitated by their tobacco use.

Dr. Wigand's deposition is being videotaped, as well as transcribed. He was subpoenaed by the Attorney General. Brown & Williamson sought a protective order to prevent the taking of Dr. Wigand's deposition. That was denied, but the judge, without articulating a finding of good cause, entered an order that the deposition be filed with the court under seal. While Brown & Williamson had asserted in its motion that Dr. Wigand might testify as to trade secrets or material subject to the attorney-client privilege, the media argued that such conclusory allegations were insufficient to overcome the First Amendment and common law rights of openness and access to court proceedings and records.

In the brief in support of their motion the media note that the subpoena to Dr. Wigand seeks, among other things, documents regarding alteration or falsification of business records, past product research, misleading testimony by executives -- materials that suggests not so much trade secrets as the potential for reputational harm, an insufficient

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2ND CIRCUIT GRANTS STAY OF SANCTIONS IN THIRD-PARTY SUBPOENA

In a late November ruling from the bench, the Second Circuit (McLaughlin, J., Oakes, J., Leval, J.) granted a stay of sanctions set at \$5,000 a day imposed by a federal district court against NBC when it declined pending an appeal to produce video out-takes sought by a third-party subpoena. The subpoena was issued by the defendant in a products liability case reported on by NBC's prime time news magazine, *Dateline*. *In re Application to Quash Subpoena to National Broadcasting Company, Inc.* (2nd Cir. No. 95-9118 Nov 28, 1995)

Dateline aired a story last May about the deaths of infants in "Converta-Cradles" and the parents who were pursuing products liability claims in Massachusetts and Texas against Graco Childrens Products, the manufacturer of the swinging cradle. Graco served third-party subpoenas on NBC seeking, among other materials, out-takes from the interviews with plaintiffs and plaintiffs' attorneys. Graco claimed that the plaintiffs' statements as broadcast by *Dateline* were inconsistent with plaintiffs' deposition statements, and argued that other inconsistent statements might lie within the out-takes. Graco also claimed that the out-takes might

provide Graco with answers to questions that the Plaintiffs were unable to remember during their depositions.

During oral argument, plaintiffs agreed to limit the scope of the subpoena to the out-takes.

NBC's Motion to Quash was based on the New York State Shield Law and state and federal case law protecting newsgathering material. The New York Shield Law (Civil Rights Law §79-h) expressly protects both non-confidential and confidential newsgathering material from compelled disclosure. Non-confidential, newsgathering materials, cannot be subject to compelled disclosure unless there is a "clear and specific showing that it: (1) is highly material and relevant; (2) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (3) is not obtainable from any other source."

In his October 5th Order denying the Motion to Quash, Federal District Court Judge Duffy adopted Graco's arguments that the statements made by the Plaintiffs in the *Dateline* interview were inconsistent with their deposition testimony, and that the out-takes might reveal other inconsistent statements which Graco could use at trial either as party admissions or as impeachment evidence.

Judge Duffy found that the out-takes related directly to plaintiffs' testimony; were critical and necessary to the defense, because they could be used for impeachment; and solely within NBC's control, and non-cumulative. From this, and without further analysis, Judge Duffy concluded that the out-takes met the three-part test.

Judge Duffy also stated that NBC "has no interest in the outtakes" and characterized NBC's efforts to quash the subpoena as "an academic pursuit." Because an order denying a motion to quash is not a final (and subsequently appealable) order absent a contempt order, NBC did not oppose the entry of the contempt order and instead appealed the imposition of sanctions to the Second

Circuit. A temporary stay was granted on November 14 by Judge Cabranes.

The appeal from the denial of the Motion to Quash is slated to be heard by the Second Circuit as early as the second week of January 1996. The litigation has been led by NBC Senior General Attorney Susan E. Weiner. The Brief of Appellant, on which Floyd Abrams and Susan Buckley of Cahill Gordon & Reindel were "Of Counsel," and the Brief of *Amici Curiae* (ABC, CBS, Daily News, Dow Jones and Fox News), represented by Robert LoBue of Patterson Belknap Webb & Tyler, submitted to the Second Circuit are now currently on file at the LDRC Brief Bank.

—Charles Glasser (NYU '96) is a former LDRC intern.

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MEDIA SEEKS ACCESS TO EX-TOBACCO EXEC DEPOSITION

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basis for protecting information from public disclosure, citing *Brown & Williamson Tobacco Corp v. F.T.C.*, 710 F.2d 1165 (6th Cir. 1983).

A hearing on the media motion has been scheduled for December 28. The media moving to intervene are Gannett Co., Inc.; New York Times Company; National Broadcasting Company, Inc.; Cable News Network, Inc.; American Broadcasting Companies, Inc.; CBS Inc.; and Newsday, Inc.

**LDRC WISHES TO
ACKNOWLEDGE INTERN
JOHN MALTBIE'S
CONTRIBUTION TO THIS
MONTH'S LIBELLETTTER**

CASES WORTH A NOTE:

1. *Triplex Communications, Inc. v. Riley*, 900 S.W.2d 716 (Tex. 1995).

Radio Station Not Liable for Injury Caused by Patron at Promotional Event

The Texas Supreme Court held that a radio station, which broadcast out of a nightclub one night a week, collaborating for seven years on the weekly "Ladies Night at the Palace," promoted the event, and even announced to those gathered inside the bar the availability of drink specials at the bar, was not liable for the injury caused by a patron who became intoxicated during the event. Plaintiffs, injured by an automobile driven by a patron at the bar, asserted theories of joint enterprise, civil conspiracy, and negligent promotion for personal injuries resulting from the nightclub's violations of the Texas' Dram Shop Act. The Texas Supreme Court held that the radio station could not be held liable under any of the theories.

Of particular interest is the negligent promotion claim. The Court refused to accept the plaintiffs' reliance upon the California decision of *Weirum v. RKO General, Inc.*, 15 Cal.3d 40, 123 Cal.Rptr. 468, 539 P.2d 36 (1975). In *Weirum* the California court held a station liable for the injuries caused as a result of its promotion urging drivers to be the first to arrive at a particular location. Unlike the speech in *Weirum*, the station's promotions here did not "incite and encourage imminent reckless behavior that exposed the plaintiffs...to an unreasonable risk of injury." 900 S.W.2d at 720.

2. *Phelps v. Hamilton*, 59 F.3d 1058, 23 Media L. Rep. 1058 (10th Cir. 1995).

Criminal Libel Statute Upheld on Constitutional Challenge

In a suit brought by two anti-homosexual rights activists, one of

whom was subject to six pending prosecutions, the Tenth Circuit upheld the Kansas criminal libel statute against charges of facial overbreadth. The court also refused to enjoin the prosecutions based upon plaintiffs' claim that the statute was unconstitutional as applied. In so doing, the court reversed the district court, which had found the statute to be unconstitutional because of its failure to specifically require proof of actual malice, and enjoined the prosecutions.

As to plaintiff-Phelps, subject to the multiple prosecutions for having defamed various individuals in his statements on homosexual rights, the court concluded that the district court should have abstained from enjoining the state criminal prosecutions because of the absence of proof by Phelps that the prosecutions were instituted in bad faith or to harass him, nor was the statute at issue patently or obviously unconstitutional. The court engages in a lengthy discussion on the issue of abstention which may be of interest to members.

As to the constitutionality of the statute, the court found that the requirement of actual malice can and should be read into its provisions under Kansas law.

3. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, Civil Action No. 95-4516 (GEB) (D.N.J.)

A Florida state agency, engaged in offering and administering a tuition prepayment program, has counterclaimed against a private competitor for libel, product disparagement and trade libel. Plaintiff-College Savings Bank, a privately held financial institution in New Jersey, was created to market college savings vehicles. Both it and the defendant offer college savings plans nationwide.

College Savings Bank ("CSB") brought suit against Florida Prepaid Post-Secondary Education Expense

Board in the Federal District Court in New Jersey in August of this year asserting claims of false advertising and unfair competition under the Lanham Act and New Jersey common law. CSB Chairman, Peter Roberts, when asked about the litigation for an article on the suit in Miami Daily Business Review, was quoted as saying that various of the claims made by defendant were "at best...half-truths, and at worst...outright lies." This statement is the basis for Florida Prepaid's counterclaims.

This month CSB moved to dismiss the counterclaims, asserting that Florida Prepaid, as an agency of the State of Florida, could not bring libel and disparagement claims. CSB also argues that its statements were fair reports and fair comments about their litigation and privileged under New Jersey law.

In its answer to the original complaint, Florida Prepaid agreed with plaintiff that it is a government agency, and it asserts that The Florida Prepaid College Program, which it administers and promotes, is "one which the State of Florida considers to be an *essential government operation* to assist its citizens to access higher education." (emphasis added)

4. Cert Denied: *National Enquirer, Inc. v. Hood*, B082611 (Cal. Ap. 2d Dist. March 10, 1995)(unpublished)

The Supreme Court of the United States, following a similar denial by the California Supreme Court, refused to hear a privacy claim coming out of the California state courts. The unpublished appellate decision reversed an unpublished Superior Court decision dismissing all of the claims, including the privacy claims, and entering judgment for the defendants.

The suit arose from an article about the performer, Eddie Murphy. Mr. Murphy had, in a different publication and for an article prior to the one at

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CASES WORTH NOTING

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issue, denied having any but one illegitimate child, referring to the children mentioned in articles and rumors as "[National] Enquirer babies." Three months later, the Enquirer took up the challenge and reported that Murphy had, in fact, fathered an additional child. The Enquirer reported the name of the child, his mother, the cost and location of the home Murphy had purchased for them, the amount in a trust fund established for the child and the amount of the initial child support payments he had made for the benefit of the child.

Murphy did not challenge the article. The child's mother, Tamara Hood, brought suit for invasion of privacy on behalf of herself and the child. Also alleged were intrusion (based upon a photograph) and misappropriation claims. The complaint did not assert that the facts as reported were false.

The Court of Appeals found that under California law, both common law and Constitutional, even when the subject of the article is newsworthy, the publication of certain details may not be newsworthy, and that a jury may, consistent with the First Amendment and California law, find that the details invade privacy. The court seems to find, at least with respect to the California Constitutional invasion of privacy claim, that Murphy and the existence of his illegitimate child or his support of him were newsworthy. Only the specific details of the plaintiffs' financial affairs were at issue.

The Court upheld dismissal of intrusion and misappropriation claims.

APPELLATE COURT UPHOLDS \$750,000 VERDICT IN PENNSYLVANIA LIBEL CASE *BROWN V. PHILADELPHIA TRIBUNE CO.*

A Pennsylvania State Superior Court panel has affirmed a verdict and the denial of defendant's post-trial motions, letting stand a verdict to a Philadelphia dentist of \$750,000 compensatory damages. No punitive damages were awarded. *Brown v. Philadelphia Tribune Co.*, No. 00873 PHL 95 (November 20, 1995).

The defendant newspaper article, according to the opinion, had led with a headline stating that the plaintiff had been charged with fraud. The lead sentence of the article stated that he faced criminal charges of welfare fraud. The plaintiff was investigated, but never charged. And a quotation from the Auditor General's Communications director calling appellee's conduct "unscrupulous at best" was denied by the source.

The appellate court found that a number of issues raised on appeal, such as faulty jury instructions and the admission of expert testimony, had been waived at the trial court level.

But of the issues that the court did review, one of some interest was the court's finding that the dentist, who had received no publicity prior to the defendant's article, was, as the trial court held, a private figure. The court refused to accept defendants' arguments that the dentist, because he received some reimbursement for work on low income individuals could be deemed a limited purpose public figure; nor could defendants' own publicity about the plaintiff thrust him into limited public figure status.

ILLINOIS MAY BAR JURY CONSULTANTS

Legislators in Illinois have introduced legislation entitled the "False Jury Consultation Penalty" Law (1995 IL D.B. 1225 (SN)) which criminalizes the use of jury consultants in a number of capacities.

Currently before the Illinois Senate Rules Committee, the text of the bill makes it a Class A misdemeanor in Illinois, punishable by a \$1,000 a day fine, to use someone other than an attorney to aid an attorney with respect to voir dire, impaneling of jurors, or to assist in making determinations about whether potential jurors "would be sympathetic, favorable or hostile jurors."

The law also criminalizes the use of non-attorneys in areas central to litigation planning, such as background investigations, assistance in mock trials, focus groups, shadow juries, "and other efforts to gauge or reflect juror opinion in a real and identified jury, or pool of prospective jurors, with the intent to aid or assist an attorney in judging the strength or weakness of his or her case or the progress of evidence being presented in a case." While the impact of such a law would affect almost every area of litigation practice, it may be particularly dangerous in jury trials where a popular local figure brings a libel claim against an unpopular or out-of-town media defendant.

The bill was introduced by James "Pate" Philip, who as President of the Republican-controlled Senate wields considerable influence over the passage of legislation, has openly attributed the O.J. Simpson trial as the motivating force behind the bill, which controls both criminal and civil trials. Both the legal and mainstream press have criticized the proposed legislation, pointing out that such restrictions on the right to pursue a fair trial by jury and right to effective counsel would most likely give rise to constitutional challenges, should the bill pass into law.

All DCS Members . . .

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BUSINESS WEEK PRIOR RESTRAINT: The Sixth Circuit Argument

(Continued from page 1)

in a hearing before Federal District Court Judge Feikens, who had issued the prior restraint. The hearing resulted in a permanent injunction issued on October 3 by Judge Feikens, barring McGraw-Hill from use of the copy of attachments that it had received from its source. In a separate opinion issued the same day, however, Judge Feikens granted McGraw-Hill's motion to unseal the documents, thus freeing *Business Week* and others to obtain and publish the documents. See *LDRC LibelLetter*, October 1995 at p. 1.

McGraw-Hill obtained an expedited appeal from the Sixth Circuit.

The panel consisted of Chief Judge Merritt, Judge Martin, author of the opinion on prior restraints in *In re King World Productions, Inc.*, 898 F.2d 56 (6th Cir. 1990), and Senior Circuit Judge Brown.

In the week prior to the oral argument, counsel for the parties had received a letter from the panel asking them to address the issue of the validity of the underlying protective order. But when oral argument began, it became clear that the first issue on the panel's agenda was that of mootness. Had not the judge's order freeing McGraw-Hill to publish the documents at issue in the injunction rendered the entire matter moot? Victor Kovner, counsel for appellant McGraw-Hill, was told by one member of the panel that McGraw-Hill had an easier issue on the merits of the case than on the mootness question.

MOOTNESS

Kovner argued that the order below fell into a traditional exception to the mootness doctrine: that it was capable of repetition and likely to evade review. That the order was capable of repetition seemed to come easily to the court, but they struggled with the issue of what question was raised by the order that was likely to evade review. Judge Merritt seemed

to conclude that the issue was the quick action that was needed in connection with a request for a TRO against publication -- "how quickly must you review a issue of prior restraint," as Judge Merritt framed it.

Kovner also urged that there were collateral consequences from the order that survived the unsealing and subsequent publication of the documents, among them issues related to the validity of the original order, the ex parte nature of the proceeding in which it was rendered, the absence of a finding of harm, and whether there was any basis for a finding of unlawfulness in the actions of the reporter. Kovner noted that the underlying protective order in the case was still in place, that *Business Week* and others might well wish to report on other aspects of the case, and that Judge Feikens believes that publication of any documents subject to the protective order would be punishable by contempt.

At the argument the panel was speculating as to whether a finding that the case was moot, yet setting aside the orders in the case and leaving no precedent, would be sufficient to remedy the concerns expressed under the collateral consequences doctrine. Moreover, Judge Martin appeared to be of the view that the Sixth Circuit in *King World* had already dealt with the substantive standards of a prior restraint -- requiring Kovner to note on more than one occasion during the argument that First Amendment issues sometimes need to be fought and fought again.

Robert Sack, representing amici, had been afforded five minutes of appellant's time and he dealt first with the issue of mootness. He told the court that his clients were deeply concerned that at any time, without warning, they could receive a prior restraint by facsimile from a United States Federal Judge in some jurisdiction somewhere in the country. A finding of mootness, he noted, would not do much to allay those

concerns.

Sack also argued that the district court's order was not consistent with the Federal Rules of Civil Procedure because McGraw-Hill was not a party to the proceeding. Judge Martin noted that the failure of notice, service and party status for McGraw-Hill might raise due process problems as well.

VALIDITY OF THE UNDERLYING PROTECTIVE ORDER

Chief Judge Merritt questioned the validity of the underlying protective order during Kovner's argument, but made it a centerpiece of his questioning of the lawyer for Bankers Trust, Tom Ridgely. The judge noted that the protective order covered seemingly everything in the case and that it allowed the parties to designate what would be held under seal, without any intervention by the court. Judge Merritt stated that such an order was "just unlawful in the Sixth Circuit," that the Circuit's decision in *Brown & Williamson v. FTC* said "flatly" that parties could not do just that. He stated that such an order violated the Federal Rules of Civil Procedure which the Sixth Circuit has held requires a federal judge to determine whether the public interest requires documents to be filed under seal, which, because of the First Amendment and the common law tradition of public access to court proceedings, is to be construed narrowly.

Bankers Trust counsel's arguments that judicial economy required such orders, that it was sufficient that review of the public interest take place at a point in time when someone sought to unseal certain documents, did not seem to convince the panel. Moreover, when Proctor & Gamble counsel, who had taken just five minutes of the argument (and noting the thrashing that his colleague from Bankers Trust was taking, was undoubtedly glad that

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BUSINESS WEEK PRIOR RESTRAINT

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he had not taken more) cited an article by Professor Miller in the Harvard Law Review arguing in favor of protective orders determined upon by the parties, the panel made it clear that they did not intend to follow Professor Miller, that "[h]e's just dead wrong on that."

The court seemed unreceptive to appellee's argument on *Seattle Times*. As one judge noted, what appellees were arguing for was a prior restraint doctrine that allowed such injunctions in cases of imminent harm or threat to the national security of a kind that is sufficiently clear and harmful and in cases of material filed in civil litigation under protective order.

And the panel was unpersuaded that Justice Stevens' opinion (denying McGraw-Hill's emergency petition for a stay of the original prior restraint order and sending McGraw-Hill back to Judge Feikens for a hearing) stood for much of anything in this case. Ridgely tried to argue that Justice Stevens concluded that it would be appropriate for the trial judge to hold a hearing in which an issue was how the press obtained the materials in question. Judge Merritt said flatly that "you can't take his ruling as any precedent about anything. He didn't even have the records and said I don't know anything about this case...I'm not ready to rule on this at the present time. That is all he did." One member of the panel noted that all Justice Stevens did was affirm the Sixth Circuit panel's action in its mistaken assumption that in the Sixth Circuit the order had to be a final one before it was subject to review.

The panel is clearly concerned about many issues raised by the case. Mootness is certainly one. But they are distressed that the district court judge ignored the *King World* decision. They are troubled that this order was issued *ex parte*, that McGraw-Hill was not a party to the proceeding, that it was without notice,

without service, without a hearing or even the setting of a hearing on the issues at the very time of the order.

They are downright agitated by the disregard of the Federal Rules and their decision in *Brown & Williamson v. FTC* on the scope of protective orders.

The tone of the argument was informal and free-wheeling. There was a plethora of dog metaphors: whether the appellees had a dog in the fight, whether Proctor & Gamble's dog was not smaller than Bankers Trust's dog, etc. The informal tenor was evident, among other times, at the very end of the argument. P&G counsel had indicated that in the telephone call conference in which Judge Feikens issued the prior restraint he had also indicated his availability that evening in Detroit if needed. Kovner, on rebuttal, noted that there was no transcript of the telephone call, McGraw-Hill, of course, was not a party, and that Judge Feiken's availability and whereabouts that evening had not been communicated to McGraw-Hill.

One Sixth Circuit judge asked Kovner whether counsel for Bankers Trust had told McGraw-Hill of Feiken's availability. To respond, Kovner turned to Ken Vittor, General Counsel of McGraw-Hill and recipient of the faxed order that evening, who told the court that, indeed, all he had been told was that McGraw-Hill would be in contempt if they published, nothing more. On that, the argument ended.

RULE 26 (C) PROTECTIVE ORDERS

(Continued from page 1)

to a court. However, among the criteria the court is to take into account in its determination as to whether to modify or dissolve an existing protective order is "the extent of reliance on the order." Commentators on an earlier version of the proposed rule change asked that this criteria be dropped, a criticism that the Advisory Committee chose to reject.

Other criteria to be considered in a request to modify or dissolve an order include:

- (1) the public and private interests affected by the order, including any risk to public health or safety;
- (2) the movant's consent to submit to the terms of the order;
- (3) reasons for entering the order and any new information bearing on the order;
- (4) the burden that the order imposes on persons seeking information relevant to other litigation.

A number of these criteria are designed to meet the concerns of certain Congressmen and Senators who, in 1994, introduced "sunshine in litigation" bills in both houses of Congress seeking to prevent discovery and other litigation materials from being protected when in doing so the public was prevented from knowing information that bore on public health, welfare and safety, and when the protection of litigation materials resulted in multiple, duplicative discovery proceedings in other litigation.

In its comments, the Advisory Committee reasserts that the proposed rule "does not govern orders that control access to material submitted to the court by motion, at a hearing, at trial, or otherwise." The Bankers Trust/Proctor & Gamble/Business Week litigation discussed starting on page 1 belies the notion that these issues are completely distinct, however.

If, indeed, any and all discovery materials can be placed under a protective order simply by agreement of the parties, those same documents will

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RULE 26 (C) PROTECTIVE ORDERS

(Continued from page 10)

require some form of disposition as to their confidentiality if and when they are used in motion practice or trial of the case. Will it become the practice that in order to obtain such filing, the press will be required to intervene in the litigation, and engage in motion practice? In addition to the cost of such a procedure, will one practical effect of this be to reverse the presumption from one of openness of court records to one where the public interest in openness needs to be proven, and a presumption of reliance on confidentiality on the part of the parties overcome. This was not the case in the Bankers Trust/Proctor & Gamble case, where the trial judge did, after all, unseal the document attachments to the motion papers despite their having originally been produced in the litigation subject to the protective order in place for discovery.

LDRC has requested copies of the "Request for Comment" and other documents that relate to these proposed changes. We strongly recommend that the LDRC membership look at the proposed rule modifications and consider the submission of comments to the Advisory Committee.

The hearings are scheduled for:
 Atlanta January 26, 1996
 New Orleans February 9,
 1996

Written Comments are due March 1, 1996.

The individual to contact in order to request the opportunity to testify and/or to whom to submit written comments is:

Peter G. McCabe
 Secretary
 Judicial Conference Committee on
 Rules of Practice & Procedure
 One Columbus Circle, N.W.
 Washington, D.C. 20544

For more information on the proposed rule changes, you can contact:
 John Robiej or Mark Shapiro
 Rules Committee Support Office
 202-273-1820

Hearings were held on December 15, 1995 in Oakland, California. All who signed up to testify were interested in voir dire rule changes. As of December 15, only two individuals had submitted written comments on the proposed changes to Rule 26, and no one had signed up to testify on the subject.

The Advisory Committee will meet again in April 1996 to review the comments and testimony and determine whether or not modifications to their proposals are warranted. They will submit their end product to the Judicial Conference Committee on Rules of Practice and Procedure. If the changes made by the Advisory Committee are insignificant, or none at all, they will submit it for Judicial Conference approval. If the changes are significant, then the proposal will need to be republished again for public comment, if the Judicial Conference still views the issue as worthy.

The Judicial Conference, if it approves rule changes, sends them on to the Supreme Court (generally in October) for its approval. If approved (and the Court has until May 1 of the following year to act upon them), they are sent to Congress and go into effect unless Congress passes legislation preventing that from happening, either by modifying, rejecting or deferring them for further study.

The modifications to Rule 26 were previously proposed in 1994. Comments were obtained. The Advisory Committee then added to its previous proposal the language allowing the protective orders to be entered on stipulation of the parties. While believing that this change only adopted current practice and was not significant, comments to the Judicial Conference on this proposal suggested that others felt it was, indeed, significant. As a result, the proposal has been re-published and new hearings and comment deadlines set for 1996. The other change from the 1994 proposal that the Advisory Committee made was in the Notes, in which it made the comment, noted above, that the rule was not intended to cover materials submitted to the court.

Also outstanding, but only in the barest of draft forms, is a proposal to add a Rule 77.1 on the sealing of court records. It is, at best, an outline of a possible rule. We are told that the proposal is not active at this time, the Advisory Committee having focussed all of its current attentions on the class action provisions of Rule 23.

The members of the Advisory Committee on the Civil Rules are:

Chair

Honorable Patrick E. Higginbotham
 United States Circuit Judge

Members

Honorable Anthony J. Scirica-
 United States Circuit Judge
 Honorable Paul V. Niemeyer-
 United States Circuit Judge
 Honorable David S. Doty-United
 States District Judge
 Honorable C. Roger Vinson-United
 States District Judge
 Honorable David F. Levi-United
 States District Judge
 Honorable Christine M. Durham-
 Justice of the Utah Supreme Court
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 Duke University School of Law
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 McCutchen, Doyle, Brown & Enersen
 Francis H. Fox, Esq.-Bingham,
 Dana & Gould
 Phillip A. Wittman, Esq.-Stone
 Pigman, Walther, Wittman &
 Hutchinson
 Honorable Frank W. Hunger-
 Assistant Attorney General for the
 Civil Division (ex officio), U.S.
 Department of Justice

The Reporter for the Committee is
 Professor Edward H. Cooper of the
 University of Michigan Law School.

COURT DISMISSES CLAIMS IN SCIENTOLOGY SUIT AGAINST THE WASHINGTON POST

(Continued from page 1)

substantial sums to take as they escalate through the Scientology ranks. Although most, if not all, of these materials have become widely disseminated on the Internet, in open court records and elsewhere, the Church had made it a point to sue whoever obtains or distributes a copy of any Advanced Technology materials.

The Washington Post obtained portions of the "secret" Advanced Technology materials from a declaration lodged for two years in the open court file in a case pending in the United States District Court in Los Angeles against a former Scientologist named Steven Fishman. The *Post* used three short quotes from alleged Advanced Technology materials found in the "Fishman Declaration" in a news story about another former Scientologist named Arnaldo Lerma. Lerma, who lives in Virginia, had been similarly sued by the Church for posting a copy of the Fishman Declaration on the Internet.

After the *Post's* article was published, the Church sued the *Post*, joining it in the case against Lerma alleging copyright infringement and trade secrets misappropriation. The Church initially sought a temporary restraining order, seeking *inter alia* the confiscation of the *Post's* copy of the Fishman Declaration, but the Court denied that requested relief, and a preliminary injunction as well. *RTC v. Lerma, Digital Gateway Systems and The Washington Post, et al.*, Civ. A. No. 95-1107-A, 1995 WL 518740 (E.D.Va. Aug. 30, 1995).

After virtually no discovery, the *Post* moved for summary judgment on the grounds that the wide dissemination of the "religious scripture" on the Internet and in court files prevented it from being a trade secret, and that any copying fell within the "fair use" exception. On November 28, 1995, Judge Leonie Brinkema granted summary judgment in favor of the *Post*, dismissing the copyright and trade secret claims against them and awarding them attorney's fees.

Judge Brinkema noted that the apparent purpose of the RTC was to stifle media criticism against the Church. *Slip* op at 11.

Copyright Claims. Although skeptical that the AT documents at issue in the case were properly copyrighted, Judge Brinkema ruled that the *Post's* use of the Church's documents was within the "fair use" exception. The Court found that each of the four factors governing fair use favored *The Washington Post*. The purpose of the use (newsgathering and newsreporting), the nature of the copied materials (informational), the amount of copying (*de minimis*), and particularly the market effect on the plaintiff (nonexistent), all mandated a finding of fair use. *Id.* at 7-10.

The Church argued that the *Post* made several copies of the Fishman Declaration which were not initially disclosed to the Court. Based on the existence of those copies, the Church argued that the *Post* should not be allowed to assert a fair use defense on the basis of "unclean hands." The Court rejected that argument, and found no unethical behavior on the part of the *Post*. The Court stressed "that the issue of unclean hands [was] a weak attempt by RTC to avoid the real issue of fair use." *Id.* at 6.

Trade Secret Claims. The Church argued that because it implemented elaborate security measures to protect the secrecy of the materials, the materials gained trade secret status. Further, the Church contended that the presence of the materials in an open court filed did not remove trade secret protection because members of the Church kept a daily vigil, signing out all copies of the materials and hoping to prevent members of the public from accessing them.

The Court disagreed, holding that the documents at issue could no longer be trade secrets by the time the *Post* acquired its copy. Judge Brinkema ruled that the presence of the materials in an open court file for 28 months removed trade secret protection despite the Church's extensive efforts to maintain their secrecy. *Id.* at 12.

Additionally, the Court found that the

availability of the materials on the Internet prior to the *Post's* use removed any doubt that the materials were no longer protected by trade secret law. *Id.* at 12-13. Judge Brinkema held that once a document is posted to the Internet, "[a]lthough the person who originally posted [the materials] may be liable for trade secret misappropriation, the party who merely downloads Internet information cannot be liable for misappropriation because there is no misconduct involved in interacting with the Internet." *Id.* at 13.

Finally, the Court held that a person cannot be liable for misappropriation of a trade secret unless that person used unlawful means or breached a duty owed to another. Absent an abuse of confidence or other impropriety, no violation has occurred. Merely being put on notice that a document constitutes a trade secret is not sufficient to impose such a duty on a party. Finding no evidence of impropriety on the part of the *Post*, Judge Brinkema held that there could be no liability for misappropriation. *Id.* at 13-15.

Attorney's Fees. In deciding to award attorney's fees to the *Post* under the Copyright Act, Judge Brinkema remarked that the motivation of the Church in filing this lawsuit— "the stifling of criticism and dissent of the religious practices of Scientology" — was, in her words, "reprehensible" and that "no reasonable copyright holder could have in good faith brought a copyright infringement action." *Id.* at 11.

The RTC has not yet indicated if it will appeal the grant of summary judgment to the Fourth Circuit. Still pending is their appeal from Judge Brinkema's August 30th decision denying injunctive relief.

Charles S. Sims is a member of, and Leonard A. Feiwus and Debra Kessler are associates with, the DCS member firm of Proskauer Rose Goetz & Mendelsohn LLP, and were involved in the representation of The Washington Post in this matter.

SCIENTOLOGY UPDATE: SUMMARY JUDGMENT GRANTED IN VIRGINIA, DENIED IN CALIFORNIA

In the latest rulings in the Scientology suit against Arnaldo Lerma and the *Washington Post*, Judge Brinkema has granted summary judgment and awarded attorneys' fees to the *Washington Post* and its reporters. *Religious Technology Center v. Lerma et al.* Civ. Action No. 95-1107-A (E.D. Va., Nov. 28, 1995). On November 29, Judge Brinkema also denied the RTC's motion for reconsideration of her prior rulings in this case, including her decision issued the previous day in favor of the *Post*, which the RTC claimed were in conflict with the Free Exercise Clause. Finally, ruling from the bench on December 1, 1995, Judge Brinkema also granted summary judgment to Lerma on the RTC's trade secrets claim.

Meanwhile, in the related action in Colorado against the operators of the bulletin board onto which Lerma posted the allegedly infringing material, Judge Kane, relying in part upon Judge's Brinkema's Religion Clause analysis, directed the return of all previously seized hard copies and all computer media not containing the AT materials.

Finally, in California, Judge Whyte partially denied motions for summary judgment made by the bulletin board operator and service provider used by Dennis Erlich to gain access to the Internet, but denied the RTC's motion for a preliminary injunction against both. *Religious Technology Center v. Netcom et al.*, No. C-95-20091 (N.D. Cal., Nov. 21, 1995). Judge Whyte had previously denied Erlich's motion for summary judgment and entered a preliminary injunction against Erlich. See *LDRC LibelLetter*, October 1995, at p. 5.

Judge Brinkema's decision with respect to the *Washington Post* is reported at page 1 of this *LDRC LibelLetter*. The other decisions are discussed below.

Religious Technology Center v. Lerma et al., Civ. Action No. 95-1107-A (E.D. Va.)

As reported previously, in September Judge Brinkema denied the

RTC's motion for preliminary injunctions against all defendants and ordered the return of all material taken from Mr. Lerma under the court's prior seizure order. See *LDRC LibelLetter*, September 1995, at p. 1. The principal basis for the RTC's motion for reconsideration was its contention that by permitting the *Post* to quote from and Lerma to possess the Advanced Technology ("AT") documents, the court violated the First Amendment's Free Exercise Clause because maintaining the secrecy of such documents was a central tenet of the Scientology religion. *Slip op.* at 2. This argument was soundly rejected by Judge Brinkema in an authoritative and thorough opinion.

Judge Brinkema began by observing that in essence she was being asked not only to ignore such countervailing constitutional considerations as the First Amendment's guarantee of freedom of the press but also to excise the fair use doctrine from the Copyright Act under which the RTC had brought suit. *Id.* at 3-4. While admitting that "a religious council placed within a theocratic government" might credit these arguments, she reminded the RTC that "this Court is a secular branch of secular government." *Id.* at 4.

Pointing to well-settled precedent, under which the Free Exercise Clause has been held to operate only as a limitation on government action and not as a guarantee of government assistance, she explained that the RTC had no right "to employ the machinery of this Court to enforce its religious prescriptions against the *Post* by enjoining otherwise permissible activity." *Id.* Nor does the Free Exercise Clause interfere with the state's ability to enforce otherwise "neutral" laws of "general applicability." *Id.* at 5. In permitting the *Post* to make fair use of the AT documents, the court would thus not be violating the Clause but merely "allow[ing] the continued operation of established secular law in the neutral fashion for which it was intended." *Id.* at 6.

In an eloquent exposition on the

meaning of the First Amendment, Judge Brinkema dismissed as meritless the RTC's related argument that the release of the AT documents threatened "spiritual harm" to both Scientologists and non-Scientologists: "We reside in a country which allows individuals and organizations to confront the risk of harm, spiritual or otherwise, in the face of protected speech. The First Amendment represents a conscious and explicit trade-off which the Founding Fathers made between paternalistic protection from 'harmful' thought and free access to information. Where statutorily and constitutionally protected speech is concerned, our system permits an individual's fate to be sealed by the individual's choices rather than governmental monitoring." *Id.* at 7.

Finally, Judge Brinkema rejected the RTC's claim that economic harm would result from publication of the AT documents, either through competition from rival churches or the "loss of new parishioners through ridicule." *Id.* at 9. As to the former ground, she held it unreasonable to suppose that the brief quotations from the AT documents could provide sufficient material to establish a competing religion, and noted that the *Post* "is clearly not in the business of setting up religions."

And in another ringing affirmation of First Amendment principles, Judge Brinkema dismissed the RTC's claim of the potential loss of new parishioners: "[T]his is the price paid in a free society which encourages an open marketplace for ideas. Free speech protections and the fair use exemption to the copyright statute exist to permit open and educated debate on matters of public importance. The RTC must accept the fact that a frank criticism of Scientology religious tenets may deter some potential parishioners. Harm from legitimate criticism is not actionable under either the First Amendment or the copyright laws." *Id.*

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SCIENTOLOGY UPDATE: SUMMARY JUDGMENT DENIED TO INTERNET PROVIDER AND BULLETIN BOARD OPERATOR IN CALIFORNIA

(Continued from page 13)

Preliminary Injunction Denied, Lerma's Motion to Vacate Granted

In balancing the harm to Lerma if the preliminary injunction was granted against the harm to the RTC if it was denied, the court found that many of the conclusions it had previously reached with respect to the *Post* applied equally to Lerma.

First, Judge Brinkema found that RTC had failed to make a strong showing of irreparable harm absent an injunction, given Lerma's willingness not to transfer the AT files to anyone or to make any use of them beyond the fair use provisions of the Copyright Act. She went on to note that Lerma, no less than the *Post*, would suffer irreparable harm from the prior restraint that would result from an injunction: "[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." *Id.* at 11 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972)).

Judge Brinkema also found that Lerma's use of a nontraditional medium did not strip him of constitutional protection. Despite a paucity of law on communications on the Internet, which she characterized as "rapidly evolving into both a universal newspaper and public forum," she concluded that it was "certain that this form of communication will retain First Amendment protections." *Id.* Accordingly, she held that neither the size of his audience nor his method of communication warranted different treatment than had been afforded the *Post*.

Only on the issue of a likelihood of success on the merits did the court identify any grounds for distinguishing among the different defendants, observing that because Lerma's copying was more extensive than the *Post*'s the RTC had a "somewhat higher" likelihood of success on its infringement claim against Lerma than against the *Post*. *Id.* Standing alone, Judge

Brinkema ultimately concluded that this would have been insufficient to tip the balance in favor of an injunction. *Id.* at 17. However, Judge Brinkema also agreed with Lerma that the RTC had acted with unclean hands and should thus be precluded from availing itself of the equitable powers of the court. *Id.* at 12-13.

Specifically, she held that the RTC had misled the court as to its motives in bringing the suit: "When the RTC first approached the Court with its *ex parte* request for the seizure warrant and Temporary Restraining Order, the dispute was presented as a straight-forward one under copyright and trade secrets law. However, the Court is now convinced that the primary motivation of RTC in suing Lerma, DGS and the *Post* is to stifle criticism of Scientology in general and to harass its critics" *Id.* (emphasis added). She concluded that had she been aware of the RTC's motives she might have refused to issue the seizure order in the first instance.

Judge Brinkema was also "greatly disturbed" that the RTC had "clearly exceeded" her intentions for the search. *Id.* Although her order had provided for Lerma's property to be transferred to an independent party and for computer searches to be based on a limited set of search criteria, not only did counsel for the RTC determine *ex parte* the materials that would be impounded but it "acquired confidential information of great import to them and of secondary (at best) relevance to this litigation." *Id.* at 16. Although she ultimately concluded that these acts fell short of "fraud on the court," she held that the "RTC violated the spirit if not the letter of the seizure writ, and misled the Court as to the way in which the [seized] materials were maintained," mandating denial of its application for equitable relief. *Id.* at 17.

Summary Judgment Granted to Lerma on Trade Secrets Claim

In a separate order, issued orally from the bench on December 1, Judge Brinkema granted Lerma's motion for summary

judgment on the trade secrets claim.

Faced with the court's prior grant of summary judgment to the *Post*, the RTC advanced three grounds for reaching a different result with respect to Lerma: (1) unlike the *Post*, Lerma was bound by confidentiality agreements (albeit signed while he was employed by the Church some 20 years earlier); (2) unlike the *Post*, which had copied the AT documents from unsealed court files, Lerma had received his copies in the mail; and (3) in granting summary judgment to the *Post*, the court had relied in part on their availability on the Internet as a result of Lerma's posting, whereas Lerma was not entitled to rely on his own posting to defeat the secrecy claim, and, the RTC argued, the materials not previously been widely available on the Internet. *Id.* at 12-13.

Judge Brinkema found that these distinctions could not alter the essential reality of the case, namely that the "Fishman affidavit [with the AT materials attached] was in a public, unsealed court file, effectively in the public domain." *Id.* at 16. Rejecting the RTC's citation to Judge Whyte's treatment of the trade secrets claim in the Netcom suit, *see LDRC LibelLetter*, October 1995, at p. 5, she concluded: "With all due respect to my California brethren on the Bench, I am satisfied that you can't have something be a secret if it has been sitting in a public court file for 28 months." *Id.* at 25.

With Judge Brinkema's dismissal of the trade secrets claim, and with Lerma's Internet access provider, DGS, having settled out of the case, only the copyright infringement claim against Lerma remains to be litigated.

Religious Technology Center v. F.A.C.T.Net, Inc., et al., Civ. Action No. 95-K-3143 (D. Colo. 1995)

As additional support for her determination that an injunction against

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SCIENTOLOGY UPDATE: SUMMARY JUDGMENT GRANTED IN VIRGINIA, DENIED IN CALIFORNIA

(Continued from page 14)

Lerma would have been unwarranted even absent the Scientologists' unclean hands, Judge Brinkema pointed to Judge Kane's refusal to enter a preliminary injunction in the RTC's companion suit against the operators of the electronic bulletin board onto which Lerma had "posted" the allegedly copyrighted documents.

Although Judge Kane had initially also vacated the seizure order and directed the return of all seized materials to the defendants, he subsequently modified this order and directed the RTC to deliver all relevant material to the court rather than the defendants, based in part on his concern for the potential for future Free Exercise Clause challenges. See *LDRC LibelLetter*, October 1995, at p. 10.

In the most recent ruling in this case, relying in part upon Judge Brinkema's Religion Clause analysis in the Lerma case, see *supra*, Judge Kane has now granted defendants' motion requesting the return of all hard copies of the seized materials, as well as all computer media not containing the AT materials. *Religious Technology Center v. F.A.C.T. Net, Inc., et al.*, Civ. Action No. 95-K-3143 (D. Colo., Dec. 11, 1995). He made the return of these materials subject to the terms of his order of September 15, which restricted defendants to the fair use of the materials and directed them neither to make additional copies of the materials nor publicize them in any manner inconsistent with fair use.

Religious Technology Center v. Netcom et al., No. C-95-20091 (N.D. Cal.)

In the most recent development in this suit, which arose from Dennis Erlich's postings of L. Ron Hubbard's allegedly copyrighted works on the Internet, see *LDRC LibelLetter*, March 1995, at p. 1, on November 21 Judge Whyte denied motions for summary judgment brought by the bulletin board operator (Thomas Klemesrud) and the on-line service provider (Netcom On-Line

Communications) through which Erlich gained access to the Internet. Judge Whyte also denied the RTC's motion for a preliminary injunction. As reported previously, Judge Whyte had earlier entered a preliminary injunction against Erlich on the copyright claim. See *LDRC LibelLetter* October 1995, at p. 5.

The RTC's copyright claim against Netcom and Klemesrud was premised upon their failure to take action when notified by the RTC that Erlich's postings were in violation of the RTC's copyrights. In a somewhat fulsome opinion, Judge Whyte analyzed the defendants' liability under theories of direct infringement, contributory infringement, and vicarious liability.

Judge Whyte concluded that neither defendant could be held liable for direct infringement as they had not initiated or taken any affirmative action that directly resulted in the copying, and the incidental and temporary storage of messages that are subsequently forwarded onto the Internet does not give rise to liability for direct infringement. *Id.* at 7-9. He either distinguished or refused to follow a number of cases in which bulletin board operators had been held directly liable as a result of the infringing activities of their subscribers, concluding that in instances in which the subscriber is clearly directly liable, "it does not make sense to adopt a rule that could lead to the liability of countless parties whose role in the infringement is nothing more than setting up and operating a system that is necessary for the functioning of the Internet." *Id.* at 14.

He also rejected the RTC's claim that by maintaining Erlich's allegedly infringing copies on its system for between 7 and 11 days, Netcom had infringed plaintiffs' right of distribution and display. *Id.* at 13. Given the variety of servers involved in distribution around the Internet, and the fact that their actions in forwarding messages are "automatic and indiscriminate," a finding that the temporary storage and retransmission of messages involves a

public display of the work "would create unreasonable liability." *Id.*

On the theory of vicarious liability, Judge Whyte granted summary judgment to Netcom, holding that while there existed a fact issue as to Netcom's ability to control Erlich's actions, the RTC had failed to establish that Netcom derived any direct financial benefit from Erlich's allegedly infringing activities. *Id.* at 21. (With respect to the claim against Klemesrud, Judge Whyte gave the RTC 30 days to amend its pleadings to indicate how Klemesrud had profited from Erlich's activities. *Id.* at 30.)

Judge Whyte denied summary judgment on the question of contributory infringement, however, finding issues of fact with respect to the defendants' knowledge of and contribution to the infringing activity. Thus, although it was undisputed that Netcom was unaware of Erlich's postings at the time they were made, Judge Whyte identified a fact issue as to whether Netcom could have prevented the further distribution of Erlich's postings after receiving notice from the RTC. *Id.* at 16. If Netcom could have cancelled Erlich's postings and thereby prevented the further distribution of these postings, its failure to do so would constitute "substantial participation" and subject it to liability for contributory infringement. *Id.*

Judge Whyte rejected Netcom's argument that its knowledge of the infringing nature of Erlich's activities was "too equivocal given the difficulty in assessing whether registrations are valid and whether use is fair," holding that where works carry copyright notices, owners need not provide proof of registration. *Id.* at 16-17. He did suggest, however, that Netcom may ultimately be able to prevail on the issue of contributory infringement: "Given the context of a dispute between a former minister and a church he is criticizing, Netcom may be able to show that 'its lack of knowledge that Erlich was infringing was reasonable.'" *Id.*

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He also rejected the analogy of an online service provider to a landlord who rents premises to an infringer: "Providing a service that allows for the automatic distribution of all Usenet postings, infringing and noninfringing, goes well beyond renting a premises to an infringer." *Id.* at 18.

Finally, Netcom's fair use and First Amendment defenses were equally unavailing. On the question of fair use, Judge Whyte held that fact issues, specifically with respect to the effect of Erlich's postings on the market for the Church's work, precluded its resolution on summary judgment. *Id.* at 27. As to the First Amendment defense, he stated that his opinion was sufficiently limited to avoid chilling speech on the Internet: "the court is not convinced that Usenet servers are directly liable for causing a copy to be made, and absent evidence of knowledge and participation or control and direct profit, they will not be contributorily or vicariously liable."

Preliminary Injunction Denied

Despite having identified issues of fact that prevented

a grant of summary judgment, Judge Whyte denied the RTC's motion for a preliminary injunction, holding that it had failed to show a likelihood of success on the merits against either of the defendants.

Thus, although he had earlier identified fact issues as to the defendants' knowledge of and participation in the infringing activities, Judge Whyte ultimately concluded that "there is little evidence that Netcom or Klemesrud knew or should have known that Erlich was engaged in copyright infringement of plaintiffs' works and was not entitled to a fair use defense, especially as they did not receive notice of the alleged information until after all but one of the postings were completed. Further, their participation in the infringement was not substantial."

Arnaldo Lerma was represented by Lee Levine, Michael Sullivan, Elizabeth Koch, Jay Brown, and Merril Hirsh, of DCS member firm Ross, Dixon & Masback, and Tom Kelley, of DCS member firm Faegre & Benson, who is also representing F.A.C.T.Net. Netcom is being represented by Randy Rice, of DCS member firm Pillsbury, Madison & Sutro.

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