



LIBELLETTER

December 1997

In this Issue . . .

INTERNATIONAL

Washington Post and Russian Settle UK Suit
With Money to Post, p. 4

UK Court Orders Publisher to Disclose
Source, p. 5

ITN Sues Marxist Magazine Over Attacks on
Bosnia Coverage, p. 6

LIBEL

Defense Verdict in Phoenix, p. 7

Rhode Island SLAPPs Libel Plaintiffs, p. 8

Arkansas Supreme Court Affirms \$50,000
Award, p. 9

NEWS & UPDATES

N.Y. Mayor Loses Bid to Keep Ad Off City
Buses, p. 11

"Ugliest Bride" Contest Claim Allowed to
Proceed, p. 12

Second Circuit Protects Depictions of
Violence in Trading Cards, p. 14

Alleged Trademark Infringement on Web
Site Not Enough for Jurisdiction, p. 16

Hit Man Update, p. 17

Editor's Note:

We found this month that some of the most interesting media law news came out of England. Two cases – both against Forbes magazine – were stayed or dismissed based upon forum non conveniens grounds, an extraordinary two-fisted win against a system that has tended to welcome libel litigation from all comers worldwide. The Washington Post settled a suit, and the newspaper got the money! And, on the other hand, the English courts proved insensitive, yet again, in the application of reporters privilege principles. LDRC is in the process of planning a conference in London – March 26-27, 1998 – for the purpose of discussing whether and how English media law might be reformed, and how to operate under that system as it exists today. A notice on the conference is on page 5. That we are doing so reflects the global nature of so many of your client's operations and the magnet-like effect that British law and procedure has had for global media litigation.

A TOWN CALLED SUE-NO LONGER?

By C. David Hooper

Forum shoppers in England suffered two major setbacks recently when English judges in two separate cases ruled that English courts were inappropriate forums for non-English libel plaintiffs against an American publication distributed in England.

It may not be immediately apparent what a Texas billionaire, Oscar Wyatt, with a striking resemblance, to English eyes, to Larry Hagman of "Dallas" fame and the no less billionaire deputy secretary of the Russian Security Council, Boris Berezovsky, had in common. The answer for future trivial pursuit quizzes is that they were both featured in the December 30, 1996 *Forbes Magazine*, and despite their thousands of miles apart they both beat a path to a firm of London lawyers whose telegraphic answerback is Libel and whose senior partner was bought, by his partners, a personalised numberplate for his Rolls Royce spelling out LIBEL on the occasion of his 80th birthday.

Berezovsky complained of an article entitled "Is he the Godfather of the Kremlin? Power, Politics, Murder. Boris Berezovsky could teach the guys in Sicily a thing or two." Wyatt complained of an article entitled "Saddam's Pal Oscar" which commenced "Oscar Wyatt would sup with the Devil if he could make money from it." By English perspective, these were highly defamatory articles, which would need to be defended by assuming the burden of proving

(Continued on page 2)

PUBLISHED BY THE

LDRC

LIBEL DEFENSE RESOURCE CENTER

404 Park Avenue South
16th Floor
New York, NY 10016
(212) 889-2306

(Continued from page 1)

that what was written was true.

The Russian and the Texan

Berezovsky's English Counsel spelt out nine distinct defamatory meanings ranging from an assertion that the article meant that he was a murderous, violent and corrupt criminal and gangland leader to a further meaning that he intimidated, controlled and extracted protection money from his business and political rivals by threats and acts of murder and violence.

Wyatt's approach was a little different. He did not complain about the allegations in the *Forbes* article which did name him and accused him in characteristically unequivocal terms of cozying up to Gaddafi and Hussein. He sued instead on a passage which did not name him and described an arson attack at his company's headquarters in Texas in 1993, alleging that the article meant that there were very strong grounds to suspect that he, through his company Coastal Corporation, had been responsible for the destruction of incriminating documents in order to thwart a federal enquiry into Coastal's links with Libya by an act of arson. *Forbes* denied the article had this meaning, but by English standards these were forceful attacks on both men.

Berezovsky's action was supported by another brought by Nicolai Glouchkov, first Deputy General Manager of Aeroflot, which concerned a disputed 1982 conviction and his links with Berezovsky's ruthless business methods.

In both actions the plaintiffs obtained *ex parte* leave to serve *Forbes* in the United States. But *Forbes* sought either to set aside the order for service outside of the jurisdiction or, alternatively, to have the actions stayed on the grounds that England is not the appropriate forum for trial.

A Setback for Forum Shoppers

On October 22, 1997, Mr. Justice Popplewell stayed the Russians' actions on the basis that they could more appropriately be heard in Russia or, failing that, the U.S.A. On December 2, 1997 Mr. Justice Morland dismissed Wyatt's action on the basis that it could be more appropriately heard in Texas, where the *Houston Chronicle* was already being sued by Coastal Corporation in respect of its story about the arson at Coastal's offices. In both cases, leave to appeal has

been given, but very reluctantly by the second judge in Wyatt's case and seemingly only because leave had been granted in the Berezovsky suit. Wyatt was ordered to pay *Forbes*'s costs.

These cases represent a very real setback for forum shoppers and offer a real prospect to non-European Union media defendants to challenge the jurisdiction claimed by aspiring plaintiffs in England. Neither *Forbes* article had any English content, one described events in Russia and the other in Texas. All witnesses and documents would come from abroad. As such they could not be subpoenaed in this country. *Forbes*'s circulation in England is 1900 copies and that largely to the American community over here, in Russia 13 and in the U.S.A. and Canada 785,000.

The plaintiffs were at pains to establish their links with England such as trips and relatives over here and even acquaintance with minor members of the Royal Family including bizarrely, in Wyatt's case, his stepson's notorious friendship with the Duchess of York. Significantly, the English courts accepted the proposition that such visits established insufficient nexus with England and that the connections they could establish with England were tenuous and simply the product of a foreign international businessman's reputation. Their reputations in this country were essentially Russian or American and not English.

An Analytical Approach to Forum

The significance of these cases is that the English courts have now spelt out how they will deal with these conflict of laws or forum shopping cases and have applied the principles laid down by Lord Goff in *Spiliada v. Cansulex* (1987) 1 A.C.460 to libel actions as discussed below. Libel cases raise particular difficulties under English law as there can be separate torts in different jurisdictions arising out of a particular publication. The plaintiffs sought, they claimed, to vindicate their English reputations based upon publication in England as a separate tort.

A U.S. defendant can be sued in England in one of two ways, either as of right or by leave being given to serve the writ out of the jurisdiction. It may be possible to serve a foreign-based defendant as of right if it has a place of business under Section 691 Companies Act 1985. Unhelpfully,

(Continued on page 3)

(Continued from page 2)

the term place of business is not defined, but the case law shows that the threshold is a very low one. (See, *Cleveland Museum* (1990)).

If a defendant is sued as of right, the burden is on the defendant to persuade a court that there is "a clearly or distinctly appropriate jurisdiction other than the English forum." The burden then shifts to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country.

Where the writ has to be served on the defendant out of the jurisdiction, leave has to be obtained under order 11, Rules of the Supreme Court. Here, unlike the *forum non conveniens* cases, the burden rests on the plaintiff. The practice of the English courts is that they should be "exceedingly careful before putting a foreigner to the expense and inconvenience of being brought to this country." The plaintiff must prove that England is "clearly the most appropriate forum" for the trial. The fundamental principle is where can the case be tried "suitably for the interests of all the parties and for the ends of justice?"

The Most Real and Substantial Connection

The English Court will seek to discover with which forum the action has the most real and substantial connection. The determining factors will include convenience, expense, availability of witnesses, the subject matter of the dispute and where the parties reside and then whether substantial justice can be achieved in another jurisdiction. If there is already litigation abroad, that will militate against the case being heard in England (*Oraro v. Observer*, 10 April 1992, unreported, and the *Wyatt* case). If, however, the plaintiff lives in England, that will militate against the case being sent abroad (*Schapiro v. Ahronson*, Court of Appeal, 21 March 1997; where an Israeli newspaper selling 147 copies in England could be sued by an English citizen). If there is no significant connection with this country, leave to serve out of the jurisdiction is likely to be refused [*Kroch v. Russell* (1937) 1 All ER 721]. The jurisdiction in which the tort

occurred is prima facie the natural forum [*The Albuforth* (1984) 2 Lloyds Reports 91] - but that initial presumption may be readily displaced. A particularly helpful case for defendants is *Oraro v. Observer*, 10 April 1992. There, an English Sunday paper published serious allegations against a Kenya minister. The case was stayed on the *Spiliada* principles, namely that Kenya was the forum with which the action had the most real and substantial connection, even though only a handful of copies were sold in Kenya.

Juridical Advantage Ruled Not Conclusive

English courts are unlikely to be sympathetic to the likes of Berezovsky or Wyatt complaining that the courts of their own country would perpetrate injustice (*Jeyaretnam v. Mahmood* 21 May 1992, *The Times*). An English court will want to know that substantial justice can be done in the forum with which the case has its most natural connection. The mere fact that Wyatt might lose a juridical advantage of not being able to sue in England, namely the burden of proof being on the Defendant to prove the truth of what was written and the absence of a public figure defence, was held, applying the *Spiliada* principles, not to be conclusive factors in determining the appropriate forum.

The *Wyatt* and *Berezovsky* cases are very important decisions for media defendants. They apply the *Spiliada* principles to libel cases. They are an amber if not red light to forum shoppers. They are symptomatic of the increasing desire of the judges to protect freedom of speech even on these plaintiff-friendly shores. The decisions will mean fairer trials of libel cases in countries where the action should be heard and will prevent plaintiffs securing what may for economic reasons prove to be undeserved whitewashing of their reputation.

C. David Hooper of Biddle & Co, Geoffrey Robertson, Q.C., of Doughty Street Chambers, and Heather Rogers, all in London, and Tennyson Schad of Norwick and Schad in New York, represented Forbes in this matter.

RUSSIAN PLAINTIFF AND WASHINGTON POST RESOLVE LIBEL SUIT IN LONDON

By David J. Bodney

After four years of litigating in London against a Russian business and political figure, *The Washington Post* favorably settled a libel lawsuit last October in England's High Court of Justice. (The High Court of Justice is the trial court with original jurisdiction to hear defamation actions over statements published in England). By consent order, plaintiff Artyom Tarasov paid the newspaper defendants £20,000 in "costs" (that is, attorneys' fees) in exchange for a brief clarification. The lawsuit involved Tarasov's claims against the *Post*, *The International Herald-Tribune* and reporter Steve Coll over a 1993 story tracing the problems of capital flight from the former Soviet Union. *Tarasov v. Coll, et al.*, 1993 Q.B. T. Nos. 231, 232 and 2250 (Consent Order, 20 October 1997).

Sanctions Awarded *Post*

A month before the settlement was reached, the High Court had already imposed a £7,500 costs award against Tarasov after he had commenced concurrent libel actions against the *Post's* witnesses in Moscow. Specifically, in March 1997, Tarasov had filed claims in Moscow City Court against four Russian officials over testimony contained in their written statements for the *Post* in the London lawsuit. In September 1997, the High Court sanctioned Tarasov £7,500 in costs after defendants had argued that the concurrent actions in Moscow constituted a discovery abuse, and might exert undue influence on their witnesses, whose cooperation in the British case was paramount.

In addition to paying the £7,500 award, Tarasov agreed to withdraw his actions in Moscow, and to pay the newspaper defendants a further £20,000 in costs to settle the London case. (By consent order, the settlement funds were distributed from £50,000 paid into court by the plaintiff in 1995 as security for defendants' costs.) Plaintiff also agreed not to "bring any proceedings in any jurisdiction" against defendants for republishing the article in a library, archive or electronic data

base.

For their part, the *Post*, its *National Weekly Edition* and *The International Herald-Tribune* published a two-sentence clarification of the story. Appearing in the October 23, 1997 edition of the *Post*, the clarification referred to the 1993 article's statement that Tarasov was under investigation in Russia in connection with the export of oil. The clarification distinguished between the paper's earlier reference to Tarasov being under investigation, and any implication that he "would be found to have committed" a crime. In addition to disclaiming any prediction that Tarasov would be convicted, the clarification also explained that the article "did not state, and did not intend to imply, that he . . . was connected with the Russian Mafia, or that his business activities were a major cause of the collapse of the Russian economy." The *Post* gave Tarasov a letter to the same effect.

Russian Discovery a Challenge

The original article — published by the *Post* on January 31, 1993 — was co-written by Pulitzer Prize-winner Steve Coll and Moscow Bureau Chief Michael Dobbs. The first of a three-part series, the article detailed the diversion of capital from Russia into Western bank accounts, and profiled Tarasov as a "self-exiled Russian millionaire and former politician" whom Coll interviewed regarding the problem of capital flight. The profile reflected the two disparate views of Tarasov — to his foes, an entrepreneur who fled Russia while under criminal investigation, but to his friends, "a historic figure of Russia's embryonic capitalism." The article relied on documents and scores of interviews — including a number with Tarasov himself — concerning Tarasov's role in the so-called "Harvest 90" program. The article quoted Tarasov extensively, including his denial of any wrongdoing. He nevertheless broadly challenged the "meanings" he attributed to the story.

Defending a case that involved a Russian investiga-

(Continued on page 5)

(Continued from page 4)

tion of a British resident required considerable discovery in Russia. Not only does the British system require proof of the statement's truth, but it also limits a defendant's discovery rights -- notably, no deposition of the plaintiff. Here, defendants' discovery initiatives in Russia produced the witness statements of two colonels in the Ministry of Internal Affairs ("MIA"), one former MIA department head and a Chief of the Russian Central Bureau of Interpol. These were the four witnesses whose sworn statements in the British proceeding prompted Tarasov to file claims in Moscow against them in 1997 to protect his "honor and dignity" -- the same claims he later withdrew following the September 1997 costs award.

Securing the cooperation of Russian law enforcement officials was not made any easier by Tarasov's political position. Although Tarasov fled Russia in 1991 and again in 1996, he returned and won election to the new Russian Parliament (or "Duma") in 1993, and mounted an unsuccessful bid in 1996 for the Russian presidency. Throughout these campaigns, however, he maintained a residence and conducted business affairs in London.

To be sure, the British judicial system generally, and its libel laws in particular, made the defense of Tarasov's lawsuit substantially more difficult than if the case had been filed in America. With liberal discovery rules and the "actual malice" privilege, Tarasov's suit would probably have met its fate on motion, and on a far faster track, in an American courtroom. But not all aspects of the British system work to a media defendant's detriment: after all, how often do libel plaintiffs in America agree to a settlement that compels them to pay any fees to a media defendant?

David J. Bodney is a partner in the Phoenix office of Steptoe & Johnson LLP, where he practices media and constitutional law. Working with his firm's Moscow office, Mr. Bodney assisted the Post and its London solicitors, Stephens Innocent, in defending the Tarasov lawsuit.

UK Court Ignores European Court Orders Publisher To Disclose Source

The hazards of England's press laws were again highlighted in a recent appellate court decision holding that a company's interest in punishing an employee who leaks information to the press outweighs the press' interest in protecting the confidential identity of the leaker. *Camelot*

MARK YOUR CALENDARS: LDRC PLANNING MEDIA LAW CONFERENCE IN LONDON IN MARCH

As many of you are already aware, LDRC is in the process of planning a conference on media law to be held in London on March 26 and 27, 1998. The first day will be devoted to the prospects for media law reform in the United Kingdom and will feature a round table discussion among some of Britain's most eminent lawyers, jurists and academics. The second day will be a practical, defense-oriented seminar for American lawyers on how to defend -- and even win -- a defamation case under the British system as it now exists. While many of the specific details of the conference are still being worked out, we wanted to alert you to this conference as early as possible. If you would like more information, please call Dick Winfield at (212) 878-8233 or Kevin Goering at (212) 626-4400, and watch the *LibelLetter* for further updates.

We are looking into an air and hotel package rate and will notify you as details are finalized.

Group plc v. Centaur Communications Ltd. (Court of Appeal Oct. 21, 1997). The decision raises troubling questions about the obligation of UK courts to follow decisions issued by the European Court of Human Rights ("ECHR"), since a 1996 ECHR decision on similar facts reached an opposite result. *Goodwin v. United Kingdom*, The Times 28 March 1996. In *Goodwin* the ECHR, reversing a House of Lords decision, held that ordering a reporter to disclose a confi-

(Continued on page 6)

(Continued from page 5)

dential source violated the European Convention on Human Rights.

In this case, *Marketing Week*, a Centaur Communications publication, obtained leaked financial statements from an employee at Camelot Group, a company which runs the UK's national lottery, and used the information in an article entitled, in part, "Camelot's leaked year end results showing large payouts for directors will spark 'fat cat' storm." After publication of the article, Camelot obtained a court order restraining Centaur from using or publishing any confidential information and requiring Centaur to return confidential company documents.

Although the order did not expressly require Centaur to identify the Camelot employee who leaked the information, the appellate court acknowledged that might be its effect and therefore the legal restrictions on the compelled disclosure of sources applied. (The Contempt of Court Act 1981 limits the power of UK courts to compel the disclosure of sources). However, the appellate court noted that the important public interest in protecting confidential sources does not apply in all circumstances, and that an employer's interest in punishing a disloyal employee should also be considered. In this regard, the court reasoned that the unidentified leaker at Camelot caused disruptive unease and suspicion within the company and also posed a risk of future disloyal acts against Camelot. The court was also influenced by the fact that the leaked document was Camelot's draft financial statement. These were due to be published in any case about one week after *Marketing Week's* article.

The court rejected the magazine's arguments that the very high increase in payments to company directors was a matter of public concern, that Camelot had suffered no damage (except that its public relations department had to work fast to explain the increases) and that there was no evidence that the leaker would, if undetected, leak private details in which there was no public interest. Instead, the court concluded that there was no public interest in protecting the identity of the leaker. Moreover, the court downplayed the chilling effect of its ruling, reasoning that because there is no absolute protection for confidential sources, a source will always weigh the risks under the particular circumstances that a court will compel the dis-

closure of his or her identity.

With respect to the ECHR's decision in *Goodwin*, the court, without specifically distinguishing or referring to the case, simply stated that its decision was consistent with recent ECHR decisions. The *Goodwin* case, though, involved remarkably similar facts. There, a reporter was telephoned by an anonymous informer and given information about the financial difficulties of a company. After the reporter called the company to confirm aspects of the story, the company obtained orders enjoining publication and requiring the reporter to reveal the identity of the source and to disclose his notes. After losing in the House of Lords, the reporter successfully appealed to the ECHR which held that the order and fines imposed violated the free expression provisions of article 10 of the European Convention on Human Rights.

ITN Sues Over Article Attacking Its Bosnia Coverage

In a libel case that has raised eyebrows in the UK because of the media plaintiffs involved and its David and Goliath aspects, Independent Television News Ltd. ("ITN"), the London-based international news agency, and two of its reporters, are suing *Living Marxism*, a monthly 10,000 circulation magazine published by the British Revolutionary Communist Party. The libel suit centers on a *Living Marxism* cover story published in February, 1997 with the headline "The Picture That Fooled the World." ITN's 1992 coverage of Bosnian Muslim prisoners received worldwide attention and spurred international outrage. The *Living Marxism* article alleges that ITN's coverage of a Bosnia Serb prison camp in Trnopolje was fabricated and distorted. As stated in the article:

The picture, reproduced on these pages is of Fikret Alic, a Bosnia Muslim, emaciated and stripped to the waist, apparently

(Continued on page 7)

(Continued from page 6)

imprisoned behind a barbed wire fence in a Bosnian Serb camp at Trnopolje

The fact is that Fikret Alic and his fellow Bosnian Muslims were not imprisoned behind a barbed wire fence. . . . It was not a prison, and certainly not a 'concentration camp,' but a collection centre for refugees The barbed wire in the picture is not around the Bosnia Muslims; it is around the cameraman and the journalists.

ITN's complaint alleges that the article, as well as a contemporaneous press release with the same charge, are defamatory in that they accuse ITN of wilfully distorting the truth and engaging in unethical journalism.

Defending the decision to sue in an article published in *The Spectator*, May 24, 1997, ITN's editor-in-chief Richard Tait acknowledged journalists' concerns that the lawsuit creates the appearance that ITN is bullying a small publication, but he argued that their sympathy should be with the ITN journalists falsely accused of "fooling the world," particularly in light of more recent evidence presented to the War Crimes Tribunal in the Hague confirming the commission of war crimes in Bosnian Serb run prison camps. In fact, ITN argues in the lawsuit that the *Living Marxism* article was published with improper motive or "malice"; that *Living Marxism* knowingly published false allegations as part of its long-running support of the Marxist Milosevic regime in Serbia.

On the other hand, *Living Marxism*, described even by one critic of ITN's decision to sue as "a slightly lunatic" publication (*S. Glover, Never heard of Living Marxism? Thanks to ITN's writ, you have now, The Spectator*, May 17, 1997), is urging the view that the lawsuit is an issue of press freedom, with attendant demonstrations, public meetings and defense funds. The parties are currently engaged in discovery and no trial date has been set.

DEFENSE VERDICT IN PHOENIX *Apology and Internal Review Turned on Newspaper Defendant*

By James F. Henderson

An Arizona state court jury returned a defense verdict on November 20 for Phoenix Newspapers, Inc., on both libel and false light privacy counts in an action where plaintiff contended she had been called a lady of the night.

The reporter learned of a legend of the naming of Jomax Road from two long-time residents. After contacting local historical societies, the Scottsdale Planning commission and other relevant agencies, and even various history texts, the reporter concluded that efforts to prove or disprove the story were fruitless and it appeared an unverifiable story. The story was then published in a folksy "Around Town" column and entitled "A look back," stating "[i]t's a legend that might not stand up to investigation, but it's too good to disprove. Some folks say Jomax Road took its name from two 'ladies of the night' who worked out of wooden shacks on the remote dirt road. Their names were Josephine and Maxine. Hence Jomax."

A Quick Clarification

Plaintiff's immediate demand for publication of the true story of the naming of the Road drew the following "Update" which stated "It's always about that game. We shudda known it was about golf. When "Around Town" heard a colorful tale about the naming of the Jomax Road we thought it was worth sharing with readers. Turns out, one particular reader not only knew the truth about Jomax Road, but we besmirched her honor. Maxine Durham says her late husband, Fitz, built Jomax Road from Scottsdale Road to 64th Street in the 1950's while developing the Ironwood Golf Course. Maxine, now 85, says her husband named the street "Jomax" for his sister Josephine and wife Maxine."

An Internal Critique

Plaintiff had to prove negligence and attempted to

(Continued on page 8)

(Continued from page 7)

build her case on a bulletin posted in the paper's news-room criticizing the column and a letter of apology which was exaggerated in an attempt to ease the mind of the plaintiff and hopefully bring this matter to a conclusion without litigation. The internal bulletin was written before the newspaper management was aware of the lengths of the reporter's investigation into the "legend" and it stated that there was "no defense" for the error in the column. It was intended as a journalistic judgment, not a legal one, but the conclusion was disproven on all levels by the evidence of the reporter's efforts on the story.

Evidence was introduced that the "legend" had existed for several decades, plaintiff had no evidence of reputational damage, was not identified in the first item and had consented to use of her name in the second item.

James F. Henderson and James W. Howard of Morrison & Hecker, in Phoenix, AZ, tried the case for defendant.

Rhode Island SLAPPS Libel Plaintiffs

By Charles J. Glasser, Jr.

In a late October ruling from the bench, Rhode Island Superior Court Justice Melanie Thunberg applied that state's SLAPP statute and dismissed a real estate developer's slander, libel and false light claims against the South Kingston Neighborhood Congress, a neighborhood group which criticized the developer in public meetings and in a newsletter.

In November of 1995, the real estate developer, South County Sand & Gravel, sought rezoning from the city to open a gravel pit and quarry in a residentially zoned area. Although the South Kingston planning board authorized the rezoning, citizens' groups protested the change in person at City Council meetings and in newsletters. The residents complained that the developer had illegally removed trees from the area, and that the developer had misrepresented facts to the city government in order to get the zoning variance.

The developers brought claims for slander (because of the statements made at the public hearing) and defamation and false light based on the newsletter's statements, which included charges that the developer had used "deceitful" and "treacherous" business practices to obtain the zoning change.

At oral argument Justice Thunberg quickly and unequivocally identified the suit as a SLAPP suit within the ambit of Rhode Island's G.L. 9-33-1, and noted that the statute must protect "the robust discussion of issues of public concern in any public forum." The state's SLAPP statute conditionally immunizes such debate from civil claims. Holding that "any statement made before or submitted to a governmental body" deserves the protection of the statute, the slander claims were dismissed.

Citing *Dun & Bradstreet v. Greenmoss Builders*, the Justice reminded the parties that "speech on matters of public concern is at the heart of First Amendment protection," and that the facts of the case made it "abundantly clear that the defendants were imploring the Town Council to prevent the destruction of the ash trees." As to the language accusing the developers of "treachery" and "deceit" the Justice held that these were, given the context of the debate, expressions of unactionable opinion. The court also noted that as limited-purpose public figures, the Plaintiffs failed to raise sufficient proof of actual malice required to recover on the false light claims. This is the second time that Rhode Island has applied that state's SLAPP statute to dismiss a libel claim since the passage of the law in 1993.

The neighborhood group was represented by Andrew Prescott, a cooperating attorney with the Rhode Island Civil Liberties Union in Providence, Rhode Island.

Charles J. Glasser, Jr. is with the firm Preti, Flaherty, Beliveau and Pachios in Portland, ME.

Arkansas Supreme Court Affirms \$50,000 Libel Verdict Photo Misidentified Arkansas Attorney as Whitewater Defendant

By John E. Tull, III

On November 13, 1997, the Arkansas Supreme Court, in a 4-3 decision, affirmed a jury verdict from the Sebastian County Circuit Court in Fort Smith, Arkansas, awarding \$50,000 to J. Michael Fitzhugh in a libel suit filed against Little Rock Newspapers, Inc. d/b/a Arkansas Democrat-Gazette. The lawsuit stemmed from the newspaper's erroneous publication of Mike Fitzhugh's photograph in connection with a story about Whitewater. *Little Rock Newspapers, Inc. v. Fitzhugh*, 330 Ark. __, __ S.W.2d __ (Ark. Nov. 13, 1997).

In *Fitzhugh*, an article appeared in the Arkansas Democrat-Gazette on June 20, 1994, relating to the beginning of the first Whitewater trial against Charles Matthews and Eugene Fitzhugh. The article identified Eugene Fitzhugh as "little known outside Little Rock" and a "Little Rock lawyer." The article was accompanied by two photographs — one of Charles Matthews, which was identified as "Matthews" and one of Mike Fitzhugh, which was identified as "Fitzhugh." A correction was run on the following day, after Mike Fitzhugh complained to the paper.

Mike Fitzhugh is a former United States Attorney who now practices law in Fort Smith, Arkansas. During his tenure as United States Attorney, Mike Fitzhugh worked on a number of high profile cases in the State of Arkansas, including cases involving the Mena Airport and a plot by a militia group to kill a federal judge. While he was United States Attorney, articles concerning Mike Fitzhugh were published in over fifteen newspapers and he was regularly featured on Fort Smith radio and television. His current law firm annually publicizes an advertisement in the Yellow Pages identifying Mike Fitzhugh as a former United States Attorney. Notwithstanding these facts, the trial court in *Fitzhugh* determined that Mike Fitzhugh was a private figure and, therefore, the actual malice standard did not apply.

Further, at trial, Mike Fitzhugh presented little to no evidence of reputational harm. At trial, Mike Fitzhugh

produced a list of more than thirty individuals with whom he had spoken regarding the mistaken photo. He admitted that not one person held him in lower esteem as a result of the article. He called nine witnesses to testify on his behalf, including personal friends, former classmates and colleagues. Not one person testified that he held Mike Fitzhugh in lower esteem as a result of the article. Further, not one person testified that he believed or knew of anyone who believed that as a result of the article in question, Mike Fitzhugh was guilty of some type of wrongdoing in connection with Whitewater.

No evidence was presented concerning lost income, and Fitzhugh did not seek damages for lost income. Over the newspaper's objections, three individuals, none of whom were lawyers, testified that they "would think" that an article such as the one at issue would harm a lawyer trying to build a new practice.

The trial court denied Little Rock Newspapers' summary judgment and directed verdict motions, and the jury returned a verdict of \$50,000 in favor of Mike Fitzhugh.

On appeal, Little Rock Newspapers argued that the article was not "of and concerning" plaintiff because it referenced Eugene Fitzhugh, referred to him as a Little Rock lawyer and, thus, taken as a whole the article was not "of and concerning" Mike Fitzhugh as a matter of law. The majority opinion held that it is for the jury to decide whether the words, together with a photograph, are of and concerning the plaintiff. The Court noted that this was a matter of first impression and cited Missouri and Florida cases in holding that there was sufficient proof for the trial court to submit to the jury the issue of whether the article could be construed as being a false statement "of and concerning" Fitzhugh.

Little Rock Newspapers also argued that the trial court erred in determining that Fitzhugh was not a public figure and that the actual malice standard did not ap-

(Continued on page 10)

(Continued from page 9)

ply. In addition to the notoriety Mike Fitzhugh achieved as a United State Attorney, Fitzhugh represented two witnesses in the Whitewater matter. The Court, relying on *Spence v. Flynn*, 816 P.2d 771 (Wyo. 1991), *cert. denied*, 503 U.S. 984 (1992), *Ryder v. Time, Inc.*, 557 F.2d 824 (D.C. Cir. 1976) and several other cases from Texas and New Mexico, was unswayed by these facts and determined that Fitzhugh was neither a public figure for all purposes nor was he a limited purpose public figure within the context of the Whitewater investigation.

The main thrust of Little Rock Newspapers' argument before the Supreme Court, however, was whether Fitzhugh had provided sufficient evidence of damage to reputation as required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983). The majority decision held that Mike Fitzhugh had met this burden through proof that several witnesses who read the article initially believed that Mike Fitzhugh was the subject of the Whitewater investigation. In so holding, the majority, which was comprised of two sitting justices and two "special" justices appointed for this case, strongly retreated from the teachings of *Gertz* and *Dodrill* that a libel plaintiff in an action against a media defendant must prove actual injury to reputation; proof of a plaintiff's own "humiliation, wrath or sorrow" is insufficient.

In a strongly worded dissent, Justice David Newbern concluded:

The majority pays lip service to the rule from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), that damages may not be presumed in cases against media defendants absent evidence of malice, and yet it sustains the award of damages in this case based in part on a hunch that readers who did not testify at trial *might* have seen the article and *might* have thought less of Mr. Fitzhugh as a result. The majority presumes damages in direct contravention of the *Gertz* case and

our holding in the *Dodrill* case and bases that presumption upon unknown readers *presumed* reactions to the article.

The evidence at trial was that no one thought less of Mike Fitzhugh as a result of the article, no one shunned or avoided him and, further, Fitzhugh was unable to prove he had lost any clients from his law practice as a result of the article. The dissent chastised the majority opinion for ignoring these facts and essentially presuming that some readers might have thought less of Mike Fitzhugh as a result of the article.

In essence, the Arkansas Supreme Court had held in *Fitzhugh* that if an erroneous photograph is "arguably" harmful to the wrongly identified party, then it is for the jury to determine whether that party was harmed, and if so, to what extent. The Court's decision ignores perhaps the most essential element of libel: the requirement that in order for something to be libelous, it must harm an individual's reputation.

John E. Tull, III, of Williams & Anderson in Little Rock, AR, represented Little Rock Newspapers, Inc. in this matter.

LIBELLETTER COMMITTEE

Peter Canfield (Chair)
 Adam Liptak (Vice-Chair)
 Robert Balin
 Richard Bernstein
 Jim Borelli
 Robert Dreps
 Julie Carter Foth
 Charles Glasser, Jr.
 Richard M. Goehler
 Steven D. Hardin
 Rex S. Heinke
 Nory Miller
 Ken Paulson
 Charles D. Tobin

N.Y. Mayor Giuliani Loses Bid to Keep Ad Off City Buses

New York magazine obtained a preliminary injunction on December 1 in a New York federal court, enjoining the City of New York and the Metropolitan Transit Authority from refusing to allow (or from removing) the magazine's advertisements on the sides of 75 city buses, ads that declare *New York* magazine "Possibly the only good thing in New York Rudy hasn't taken credit for." *New York Magazine v. The Metropolitan Transit Authority*, 97 Civ. 8792 (S.D.N.Y. December 1, 1997). It was a victory for *New York* against New York City Mayor Rudolph Giuliani who had objected to the use of his name and picture in the ads, asserting through the city officials that his "right of privacy" had been violated.

New York magazine filed suit alleging a violation of its civil rights under § 1983, saying that the city and Metropolitan Transit Authority (MTA) had violated its First Amendment right to free speech after the MTA pulled the magazine's controversial ad from buses at the request of the Mayor's office. The city contended that the ads violated New York Civil Rights Law § 50, which bars the use, without consent, of someone's name or picture for commercial purposes. The city also argued that the ads created an impermissible conflict of interest under the City Charter provisions stemming from the use of his name to promote a private business.

Central Hudson Applies

In deciding to grant the preliminary injunction requested by plaintiffs, Judge Scheindlin held that the plaintiff had shown a "clear" or "substantial" likelihood of success on the merits of its First Amendment claim. She found the conflict of interest argument almost frivolous and that the *New York* ad fell within "incidental use" and "public interest" exceptions to the prescription of Section 50. In her analysis, Judge Scheindlin sees the magazine's ad as a hybrid of commercial speech and political satire that is, in the end, "essentially commercial in nature," entitled to constitutional protection under the lesser standard of *Central Hudson Gas & Elec. Corp. v. Public Serv. Commission of New York*, 447 U.S. 557

(1980).

Under the four-part *Central Hudson* test, New York City and the MTA were required to show that the speech had been regulated to further a substantial governmental interest, that the regulation directly advances that interest, and is no more intrusive than necessary to obtain the goal. *New York Magazine v. The Metropolitan Transit Authority*, 97 Civ. 8792, slip op. at 15 (S.D.N.Y. December 1, 1997).

Bus Exterior Found to be Public Forum

Judge Scheindlin rejected defendants' contention that the MTA bus exterior was a nonpublic forum, requiring government to show its regulation to be only reasonable, a standard more permissive than that accorded commercial speech in a public forum. She found instead that MTA's general acceptance of both political and commercial advertising rendered the bus exteriors public fora.

Turning to the substantive reasons given by the defendants for rejecting the ads, Judge Scheindlin quickly rejected the defendants' conflict of interest argument, saying "[i]t is abundantly clear from the text of the Ad that the Mayor is *not* endorsing the product." *Id.* at 19.

On the right to publicity argument under Section 50 of New York Civil Rights Law, Judge Scheindlin found that the right to publicity was crafted to protect privacy interests without preventing the publication of matters of public interest. As Mayor of New York, the court said, Giuliani's right to privacy is very limited. This use, moreover, commented on his professional, not his personal, persona. "One who chooses to be the Mayor of the 'Big Apple' must expect that he will be the subject of all kinds of public comments, even in advertisements." *Id.* at 21. Nor did the judicially articulated purposes of the statute cover the use made in this instance. As mayor, the court found, Giuliani could not have a financial interest in his persona, the ad was not deceptive, it did not constitute unjust enrichment, and, in light of the criticism that every mayor must endure, it could not be the source

"One who chooses to be the Mayor of the 'Big Apple' must expect that he will be the subject of all kinds of public comments, even in advertisements."

(Continued from page 11)
of emotional distress.

Public Interest and Incidental Use Exceptions Apply

In addition, Judge Scheindlin found that the *New York* magazine ads fit the "public interest" and "incidental use" exceptions to Section 50. The "incidental use" exception covers those ads or promotions that "'convey the nature and content'...or 'prove[]the worth and illustrate[]the content' ...of the works being advertised." Slip op. at 22. While generally applied to matter that is just being republished from a given issue of the underlying publication, which this was not, the court said categorically that "republishing is not required." *Id.*

The "public interest/newsworthy exception" is "closely related to the incidental use exception." *Id.* at 23. It applies to the use of an individual where that use illustrates an event or subject of public interest. While the cases the court cites as having applied this exception all relate to photographs accompanying editorial substance, not commercial speech, the court found that one could not mock the mayor's eagerness to take credit for the City's successes without using his name.

Applying these exceptions, the court said "New York City politics in general, and Giuliani in particular, are regular subjects of NY Magazine articles, which are often written in a light-hearted and witty style. Even the very subject matter of the Ad's text — Giuliani's alleged penchant for claiming credit for New York's successes — has been a subject of NY Magazine articles." *Id.* at 25.

Judge Scheindlin concluded by saying "[g]iven the notoriety and position of the person asserting the right of publicity and the content of the Ad in issue — which combines incidental use, public interest, and political satire — I conclude that Section 50 simply does not apply to this Ad." *Id.* at 26.

The Corporation Counsel's office, representing the city, failed in its bid to win an emergency stay in the Second Circuit. The ads can now be seen on city buses, pending resolution of the appeal.

New York Appellate Division Permits "Ugliest Bride" Contest Claim to Proceed

This Radio Format, Once Again, Supports Emotional Distress Claim

While the radio broadcast could not support a defamation claim, New York's Appellate Division, Third Department, affirmed a trial court denial of a motion to dismiss an intentional infliction of emotional distress claim based upon a radio show's "Ugliest Bride" contest. *Esposito-Hilder v. SFX Broadcasting, Inc.*, N.Y.L.J., Dec. 2, 1997 at 25 (N.Y. App. Div. Nov. 26, 1997). The court noted that the tort of intentional infliction "has received very little judicial solicitude," but finding this speech was not about a public person or matter of public concern, the court stated that:

[i]n the quest for proper accommodation between the right of redress for infliction of injury and the freedoms of speech and expression protected by the 1st Amendment, we have determined that the State's relatively strong interest in compensating individuals for harms outweighs the relatively weak 1st Amendment protection to be accorded defendants.

Id.

For good measure, the court also cited *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), stating, "Moreover, among the forms of communication, broadcasting enjoys the most limited 1st Amendment protection." *Esposito-Hilder v. SFX Broadcasting, Inc.*, N.Y.L.J., Dec. 2, 1997 at 25.

The complaint arose out of a June 17, 1996 WPYX-FM morning broadcast, during which DJ's Roy Moon and Bill Sheehan engaged in a regular routine known as the "Ugliest Bride" contest, that involved looking at the wedding announcement photographs published in local papers and inviting listeners to call in their votes for the ugliest bride. On that date, a bridal photograph of the plaintiff,

(Continued on page 13)

(Continued from page 12)

Annette Esposito-Hilder, who worked for a competing radio station in Albany, appeared in the wedding section of the *Daily Gazette*. The defendants subsequently chose the plaintiff as the ugliest bride and allegedly "made derogatory and disparaging comments about the plaintiff's appearance and invited their listening audience to do the same." *Id.* The plaintiff also alleged that the DJ's that morning "deviated from the ordinary routine of this 'contest' by disclosing her full name, place and position of employment, as well as the identity of, and her relations with, her superiors." *Id.*

Libel Dismissal Does Not Preclude Emotional Distress Claim

While the court agreed with the defendants' contention that if the plaintiff's claim was for defamation, "it would fail because under no circumstances would it be reasonable to consider the content of defendants' broadcast as anything but pure, subjective opinion," the court rejected the argument that this determination would foreclose recovery on a claim of intentional infliction of emotion distress. *Id.* Rather, the court cited two New York Appellate Division cases which disposed of defamation and intentional infliction of emotional distress claims on independent grounds, implicitly suggesting, according to the court, "that resolution of the opinion issue is not dispositive of the emotional distress claim." *Id.*

The court also relied on the New York Court of Appeals decision in *Howell v. New York Post Co.*, 81 N.Y.2d 115, 21 Media L. Rep. 1273 (1993), which affirmed the dismissal of claims for invasion of privacy and intentional infliction of emotional distress based upon photographs taken during an alleged trespass on the grounds of a mental hospital. The appellate division noted that in *Howell*, "the court observed that [intentional infliction of emotional distress] is as limitless as the human capacity for cruelty. The price for this flexibility in redressing utterly reprehensible behavior, however, is a tort that, by its terms, may overlap other areas of the law, with potential liability for conduct that is otherwise lawful." *Esposito-Hilder*, N.Y.L.J., Dec. 2, 1997 at 25 (N.Y. App. Div. Nov. 26, 1997), quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122, 21 Media L. Rep. 1273 (1993) [emphasis added by Appellate Division]. The court then stated that the *Howell* court also did not end its analysis once it decided that the defendants' conduct did not support a

claim for invasion of the right to privacy, but rather examined, and eventually dismissed, the intentional infliction of emotional distress claim on independent grounds. *Id.*

"Factors" Support Allowing Claim to Continue

Turning to the specific factual circumstances surrounding the case, the court found that several factors supported allowing the emotional distress claim to continue. "First," the court stated, "plaintiff is a private individual and not a 'public figure.'" Second, the nature of the communications made by the defendants involved a matter of virtually no 'public interest'; there is an inference that defendants' conduct represented a deliberate intent to inflict injury upon plaintiff based upon the claimed unprecedented expansion of its standard 'routine' of the 'Ugliest Bride' contest to include particulars concerning plaintiff's name, employer, supervisors and the like, and the fact that the parties are business competitors in the radio broadcast industry." *Id.*

In closing, the court stated that its decision "does no more than permit plaintiff's lawsuit to proceed. Whether and to what extent the allegations of her complaint ultimately satisfy the stringent requirements for the tort will be determined upon further proceedings." *Id.* This is language far more cautious than the December 1996 order denying the defendants' motion to dismiss written by New York Supreme Court Judge Joseph Harris which likened the defendants to wolves attempting to parade around in the sheep's clothing of the First Amendment, "feasting upon the character, reputation and sensibilities of innocent private persons." *Esposito-Hilder v. SFX Broadcasting, Inc.*, No. 4417-95 (N.Y. Sup. Ct., Dec. 31, 1996), *slip op.* at 9.

This is not the first time a "shock jock" routine, or specifically an "ugliest bride" segment, has resulted in detrimental common law on the intentional infliction of emotional distress tort. In 1990, a Connecticut Superior Court denied the defendants' motion to strike defamation, invasion of privacy and intentional infliction of emotional distress claims filed in response to a radio station's "Berate the Bride" segment. *Murray v. Schlosser*, 41 Conn. Supp. 362, 17 Media L. Rep. 2069 (Conn. Sup. Ct. 1990). The Connecticut "Berate the Bride" case was settled for an undisclosed amount on the eve of trial.

Second Circuit Protects Depictions of Violence in Trading Cards

Earlier this month, the Second Circuit affirmed a lower court finding that the Nassau County Board of Supervisors had violated the First Amendment when it passed a 1992 local law prohibiting the sale to minors of any trading card that depicts a heinous crime, an element of a heinous crime or a heinous criminal, and is harmful to minors. The Second Circuit agreed with the district court's finding that depictions of violence are protected under the First Amendment, and that the prohibition was content-based and neither necessary nor narrowly tailored to meet a compelling state interest. *Eclipse Enterprises, Inc. v. Gulota et al.*, Docket No. 97-7099, 1997 U.S. App. LEXIS 34372 (2nd Cir. December 9, 1997).

Eclipse Enterprises filed suit under 42 U.S.C. Section 1983 seeking a judgment declaring the Nassau County law unconstitutional. Eclipse publishes trading cards that include pictures or drawings of famous criminals as well as information about their lives and the crimes they committed. The cards have been sold throughout the country since 1988. The varying sets of cards cover topics ranging from the Kennedy assassination to "True Crime," a set of cards that presents information about serial killers and gangsters.

In November of 1993, both parties moved for summary judgment. Their motions were denied without prejudice pending an evidentiary hearing. A five-day evidentiary hearing was thereafter held before a magistrate judge who was directed by the court to consider whether the Nassau County Law employed the least restrictive means available to serve the county's compelling interest in providing for the well-being of minors and otherwise serving the legislative intent underlying the statute.

At the conclusion of the evidentiary hearing, the magistrate judge ruled that "no credible or empirical evidence was presented from which the Court could conclude that the trading cards cause juvenile crime or impair moral and ethical development." *Eclipse Enterprises, Inc.*, Docket No. 97-7099, 1997 U.S. App. LEXIS 34372 at *9. The magistrate judge found further that "speech which contains depictions of crime or violence is not considered obscene and thus is accorded the protection of the First Amendment." *Id.* Finally, the magistrate judge found that the Nassau County law is a content-based restriction on speech that fails to survive strict scrutiny analysis and that it is both vague and overbroad. *Id.*

Eclipse renewed its motion for summary judgment and in

September of 1996 the district court adopted the magistrate judge's Report and Recommendation insofar as it determined that the law is a content-based restriction and unconstitutional because it is not narrowly tailored to meet a compelling state interest. The district court awarded Eclipse summary judgment, declaring the law invalid on its face under the First Amendment. The court also permanently enjoined enforcement of the law and awarded fees and costs to Eclipse.

In reviewing the case on appeal, the Second Circuit, in an opinion authored by Judge Roger J. Miner, declined any invitation to expand the narrow categories of speech not protected under the First Amendment, agreeing with the district court's finding that depictions of violence are protected speech. *Id.* at *11. The Second Circuit also agreed that the Nassau County law "specifically targets the description of heinous crimes or heinous criminals in trading cards and, therefore, is content-based." *Id.* at *11-12.

After making these findings, the Second Circuit went on to apply the strict scrutiny test, saying that content-based restrictions on protected speech are "presumptively invalid." *Id.* at *12. The court held that there is no dispute that Nassau County has a compelling interest in protecting the psychological well-being of minors and in combating juvenile crime. Indeed, Eclipse did not challenge the finding of the district court that these are compelling state interests.

The court found, however, that the law was neither narrowly tailored nor necessary to protect Nassau County's young people. In making this ruling, the court rejected the County's assertion that it had the right to pass the law based upon "'experience, knowledge, and common sense' in the absence of any empirical proof that the Law would serve any of the County's articulated interests." *Id.* at *13.

When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply posit the existence of the disease to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

Id. at *14 quoting *Turner Broadcasting Sys., Inc v. FCC*, 512

(Continued on page 15)

(Continued from page 14)

U.S. 622, 644 (1994).

Violence is Not the Same as Obscenity

The circuit court pointed out that Nassau County's effort to pattern the law's definition of "harmful to minors" after the standard for obscenity that the Supreme Court delineated in *Miller v. California*, 413 U.S. 15 (viz., the work appeals to depraved interests, is patently offensive, and lacks serious literary, artistic, political or scientific value), is not sufficient to protect its law from constitutional challenge because depictions of violence are not unprotected speech as obscenity is. *Eclipse*

Enterprises, Inc., Docket No. 97-7099, 1997 U.S. App. LEXIS 34372 at *15. The court did, however, circumscribe its opinion, saying

"[f]or the purposes of this opinion, we do not find it necessary to determine whether carefully delimited and properly tailored restrictions on distribution of non-obscene but otherwise harmful speech to minors, especially younger minors, can ever pass strict scrutiny."

Id.

The court concluded by saying that "we do not find support in the record here for the conclusion that a prohibition on the sale of crime trading cards is a necessary or effective way to serve the compelling state interests articulated by defendants-appellants." *Id.* The court pointed out that the only evidence presented by defendants was contested studies concerning TV violence, along with conclusory and contradictory testimony of its own experts who all admitted that they "knew of no studies or actual occurrences where crime trading cards were determined to be a factor in juvenile violence." *Id.* at *16. Moreover, said the court, "there has been no showing why trading cards should be singled out for regulation in preference to other material that is no less noxious." *Id.* at *17.

Concurrence Concern for the Young

Judge Thomas B. Griesa filed a concurring opinion that evidences the difficulty some judges have when faced with material they find unwholesome for minors. Judge Griesa agrees with the majority's finding but pays closer attention to the actual language of the challenged statute, showing why it is constitutionally deficient. He believed "that the case is closer and less one-sided than is indicated by the majority opinion." *Id.* at *18.

Judge Griesa says that the ultimate problem with the

"we do not find support in the record here for the conclusion that a prohibition on the sale of crime trading cards is a necessary or effective way to serve the compelling state interests articulated by defendants-appellants."

County's statute is in its ban of criminal trading cards that appeal to the "depraved interest of minors in crime." "[W]hile by no means devoid of

meaning," says the judge, it "is not sufficiently precise" to survive strict scrutiny. *Id.* at *28. "Indeed, since the supervisors modeled the Local Law on the obscenity standard, it must be noted that they did not go far enough in embodying that standard." *Id.* Under *Miller v. California, supra*, and *Reno v. American Civil Liberties Union*, 117 S. Ct. 2329, 2332 (1997), the Supreme Court has demanded great specificity in drafting regulations curbing speech, and Nassau County's draft does not meet these standards. *Eclipse Enterprises, Inc.*, Docket No. 97-7099, 1997 U.S. App. LEXIS 34372 at *29. "For one thing," concludes Judge Griesa, "there is no language which attempts to limit the law to the kinds of cards the supervisors were referring to when they enacted the law." *Id.* Indeed, pointing out one of the inherent deficiencies of governmental attempts to regulate depictions of violence, Judge Griesa acknowledged "[w]hether a law dealing with depictions of violence and crime could actually be enacted to meet constitutional standards is surely debatable." *Id.*

Robert Balin of Lankenau Kovner Kurtz & Outten in New York City; Edward Klaris formerly of Lankenau Kovner Kurtz & Outten; and Marjorie Heins of The American Civil Liberties Union Art Censorship Project represented Eclipse Enterprises Inc. in this case.

Alleged Service Mark Infringement on Web Site Not Enough for Jurisdiction in Ninth Circuit

The United States Court of Appeals for the Ninth Circuit has rejected the argument that an allegedly infringing use of a service mark in a Florida company's home page on the World Wide Web suffices for personal jurisdiction in Arizona, the state where the holder of the mark has its principal place of business. In dismissing plaintiff's claim for lack of personal jurisdiction, the Ninth Circuit chose to apply "normal 'minimum contacts' analysis," finding that the defendant's essentially passive web site, which could be contacted by Arizona residents, did not constitute purposeful availment when the defendant "engaged in no commercial activity and had no other contacts via the Internet or otherwise in Arizona." *Cybersell, Inc., an Arizona corporation v. Cybersell, Inc., a Florida corporation*, No. 96-17087, 1997 U.S. App. LEXIS 33871, at *21-22 (9th Cir. December 2, 1997).

The *Cybersell* dispute arose when in 1995 a father and son formed *Cybersell, Inc.*, a Florida corporation ("Cybersell FL"), to provide business consulting services for strategic management and marketing on the web. As part of their marketing, the father and son built a web site; its home page features a logo at the top with "CyberSell" over a depiction of the planet earth, with the caption underneath: "Professional Services for the World Wide Web," and a local phone number. A hypertext link allows visitors to introduce themselves, and invites companies not on the web -- but interested in getting on the web -- to "Email us to find out how!"

The problem with *Cybersell FL's* website was that *Cybersell, Inc.*, an Arizona corporation ("Cybersell AZ"), had already filed to federally register the name "Cybersell" as a service mark (the application had not yet been granted) when the Florida company began using the name. *Cybersell AZ* was not operating a web site when *Cybersell FL* began operation. When *Cybersell AZ* found the *Cybersell FL* site, *Cybersell AZ* filed suit in federal court in Arizona, asserting that Arizona's courts have specific (not general) jurisdiction over *Cybersell FL* "because cyberspace is without borders and a

web site which advertises a product or service is necessarily intended for use on a world wide basis." *Cybersell, Inc.*, No. 96-17087, 1997 U.S. App. LEXIS 33871 at *2.

Both the district court and the circuit court disagreed, applying "normal 'minimum contacts'" analysis and finding that jurisdiction would "not comport with 'traditional notions of fair play and substantial justice.'" *Id.* Under the laws of Arizona, courts are allowed to exercise personal jurisdiction as long as doing so comports with due process. *Id.* at *6. Turning to due process analysis, the court found that *Cybersell FL* had not purposefully availed itself of the privilege of conducting activities within Arizona, thus invoking the

benefits and protections of its laws. *Cybersell AZ* argued that the purposeful availment test is met because trademark infringement occurs when the passing off of the mark occurs, which in this case, it submitted, happened when the name "Cybersell" was used

"no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state Rather, in each, there has been 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state."

on the Internet in connection with advertising.

In making its decision, the Ninth Circuit surveyed a spectrum of cyberspace jurisdiction cases, including the Second Circuit's decision in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (1997) and the Sixth Circuit's *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (1996), and found that "no court has ever held that an Internet advertisement alone is sufficient to subject the advertiser to jurisdiction in the plaintiff's home state Rather, in each, there has been 'something more' to indicate that the defendant purposefully (albeit electronically) directed his activity in a substantial way to the forum state." *Cybersell, Inc.*, No. 96-17087, 1997 U.S. App. LEXIS 33871 at *14. The Ninth Circuit commented that after analyzing the district and circuit decisions on Internet jurisdiction, "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." *Id.* quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

(Continued on page 17)

(Continued from page 16)

Cybersell FL, the Ninth Circuit found, had conducted no commercial activity over the Internet in Arizona. "All that it did was post an essentially passive home page on the web, using the name 'CyberSell,' which Cybersell AZ was in the process of registering as a federal trademark." *Cybersell, Inc.*, No. 96-17087, 1997 U.S. App. LEXIS 33871 at *17. "While there is no question that anyone, anywhere could access that home page and thereby learn about the services offered, we cannot see how from that fact alone it can be inferred that Cybersell FL deliberately directed its merchandising efforts toward Arizona residents." *Id.*

The Ninth Circuit found it significant that Cybersell FL did nothing to encourage people in Arizona to access its site, and that no Arizonan, other than Cybersell AZ, "hit" Cybersell FL's web site. Equally significant was the fact that Cybersell FL had entered into no contracts in Arizona, made no sale in Arizona, received no telephone calls from Arizona, earned no income from Arizona, and sent no messages over the Internet to Arizona. Also, the interactivity of its web site did not allow people to sign up for its service via the Internet. *Id.* at 18-19. "In short, Cybersell FL has done no act and had consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law." *Id.* at 19.

Having found that Cybersell FL's contacts were insufficient to establish purposeful availment, the Ninth Circuit refused to "go further solely on the footing that Cybersell AZ has alleged trademark infringement over the Internet." *Id.* "Otherwise," said the court "every complaint arising out of alleged trademark infringement on the Internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located. That would not comport with traditional notions of what qualifies as purposeful activity invoking the benefits and protections of the forum state." *Id.* at 19.

The Ninth Circuit also rejected Cybersell AZ's invocation of the "effects" test employed in *Calder v. Jones*, 465 U.S. 783 (1984), saying "Cybersell FL's web page simply was not aimed intentionally at Arizona knowing that harm was likely to be caused there to Cybersell AZ." *Cybersell, Inc.*, No. 96-17087, 1997 U.S. App. LEXIS 33871 at *21.

Hit Man Update

As reported in last month's *LDRC LibelLetter*, on November 10, 1997, the United States Court of Appeals for the Fourth Circuit ruled against publisher Paladin Enterprises, Inc. and reversed a lower court order granting summary judgment to Paladin in two wrongful death actions allegedly arising out of Paladin's publication of a book entitled "Hit Man: A Technical Manual for Independent Contractors." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997).

Paladin filed a petition for rehearing and suggestion for rehearing in banc, which was supported by *amici curiae* briefs filed by The Horror Writers Association, the Maryland and District of Columbia chapters of the American Civil Liberties Union and the Thomas Jefferson Center for the Protection of Free Expression.

Two days later, the Court issued two orders: one directing that plaintiff-appellants file a response and a second requesting the Department of Justice to express the "views of the United States with respect to the court's further consideration of this case." On December 12, 1997, although the Department of Justice had yet to file any papers with the Court, the Court denied Paladin's Petition. Paladin plans to file a petition for writ of certiorari in the United States Supreme Court.

©1997

Libel Defense
Resource Center

404 Park Avenue South
16th Floor

New York, New York 10016
(212) 889-2306
www.ldrc.com

Executive Committee:

Robert J. Hawley (Chair);
Robin Bierstedt; Peter Canfield;
Susanna Lowy; Kenneth Vittor;
James Grossberg (ex officio);

Executive Director: Sandra S. Baron
Staff Attorney: David V. Heller
Staff Attorney: John Maltbie
LDRC Fellow: John Margiotta
Staff Assistant: Melinda E. Griggs