

# LDRC

Libel  
Defense  
Resource  
Center

## LIBELLETTER

Reporting Developments Through December 27, 2000

**In this Issue . . .**

NEWS AND UPDATES	PAGE
<i>Bartnicki</i> Argued at the Supreme Court	1
BULLETIN Examines Significant Developments of 2000	2
With Deepest Thanks to Ken Vittor & Tom Kelley	3
Judicial Conference Request for Comments on Potential Scope of Access to Electronic Court Files	25
D.C. Grand Jury Subpoena of Bookseller Quashed	29
D.C. Judicial Watch Qualifies As "News Media Representative," for FOI	30
<b>LIBEL</b>	
Kentucky Upholds Verdict Against Tip Sheet	7
Utah Largest Libel Verdict	7
Va. Paper Settles Suits for \$650,000	8
Pennsylvania Jury Rejects Judge's Libel Claim	9
California Court of Appeals Affirms Dismissal of Suit Under Anti-SLAPP Statute	9
Utah Criminal Libel Charge Against Teenager Withstands Motion to Dismiss	10
First Circuit Holds "Of and Concerning" Requirement Is Not Mandated by the First Amendment	11
PA Federal Judge Embraces Implied Defamation in Non-Media Case	13
Idaho Court Rejects Multiple Libel Claims Brought by Former Executive Director of Housing Authority	17
District of Columbia Court Adopts Neutral Reportage	23
<b>INTERNET</b>	
Va. Doctor Wins Libel Award For Anonymous Posting	19
Anonymity in Pa. for Cybersmear Defendants Who Appeared in Court	20
Libel Suits Based on Internet Postings Settled	21
Ca. Court Dismisses Lanham Act Claim, Allows Misappropriation Argument in <i>Dick Clark v. AOL</i>	23
European Courts Assert Jurisdiction Over Yahoo! and Australian Web Site	31
<b>PRIVACY</b>	
California Court: Soundless Video Monitoring of Office Not Privacy Crime	25
Montana Supreme Court: No Right To Privacy in Settlement Agreement	27

**THE LDRC STAFF  
 WOULD LIKE TO WISH  
 ALL OF OUR MEMBERS  
 A HAPPY HOLIDAY  
 AND THE BEST  
 FOR THE NEW YEAR.**

### ***Bartnicki* Argued at the Supreme Court**

**By Thomas Leatherbury**

In between the two rounds of *Bush v. Gore*, the United States Supreme Court heard oral argument on December 5 in a most significant First Amendment case challenging the constitutionality of the disclosure and use prohibitions in the Federal Wiretap Act. *Bartnicki v. Vopper*, 200 F.3d 109 (3rd Cir. 1999). The Federal Wiretap Act, 18 U.S.C. §§ 2510 *et seq.*, creates criminal penalties and civil damage remedies for the intentional "disclosure" or "use" of the contents of an unlawfully intercepted communication when the person who discloses or uses the communication "knows or has reason to know" that it was intercepted in violation of the statute.

Plaintiffs Gloria Bartnicki and Anthony Kane, two Pennsylvania teachers' union officials, sued two radio stations, talk show host Fred Vopper, and taxpayer organization leader Jack Yocum under the Federal and Pennsylvania Wiretap Acts after Vopper broadcast an illegally recorded cellular telephone call between Bartnicki and Kane. During the telephone call, Bartnicki and Kane discussed diffi-

*(Continued on page 4)*

**PUBLISHED BY THE**

**LIBEL DEFENSE RESOURCE CENTER, INC.**

404 Park Avenue South, NY, NY 10016 212.889.2306 www.ldrc.com

## LDRC Bulletin Examines Significant Developments of the Past Year

### *Major Issues: Validity of Eavesdropping Laws, Libel Reversals*

LDRC's Significant Developments BULLETIN, published this month, contains LDRC's annual review of decisions of interest of the past year in libel, privacy and related areas of law, as reported in LDRC's MEDIA LIBEL and MEDIA PRIVACY AND RELATED LAW 50-STATE SURVEYS, and updated with significant post-publication developments.

The constitutionality of federal and state laws against eavesdropping continued to be an important media law issue this past year, marked most notably by the U.S. Supreme Court's grant of certiorari in *Bartnicki v. Vopper*, 200 F.3d 109, 28 Media L. Rep. 1933 (3d Cir. 1999), *cert. granted*, 120 S. Ct. 4320 (2000). As detailed at greater length in this issue of the *LibelLetter*, oral argument in the case was heard by the Court on December 5th and a decision is expected in Spring 2001.

The central question before the Supreme Court is whether the federal and Pennsylvania wiretapping statutes violate the First Amendment insofar as they prohibit the disclosure of unlawfully intercepted communications by persons who were not involved in the interception itself. The Court's decision will undoubtedly offer significant guidance on the larger question of whether and in what circumstances the disclosure of truthful information about matters of public interest can be punished.

The constitutionality of federal and state eavesdropping statutes was also addressed by the Fifth and D.C. Circuit Courts of Appeal with different analyses and results. *McDermott v. Boehner*, 191 F.3d 463 (D.C. Cir. 1999), *pet. cert. filed*, 68 U.S.L.W. 3693 (U.S. Apr. 25, 2000); *Peavy v. WFFA-TV*, 221 F.3d 158 (5th Cir. 2000), *pet. cert. filed*, (Oct. 30, 2000).

On the libel front, while there were no major doctrinal developments, there were several significant appellate decisions in media libel trials. Four jury verdicts for plaintiffs were overturned on appeal. *Levan v. Capital Cities/ABC*, 190 F.3d 1230 (11th Cir. 1999) (reversing \$10 million jury award), *cert. denied*, 120 S. Ct. 1262 (2000); *Journal Pub. Co. v. McCullough*, 743 So.2d 352 (Miss. 1999) (reversing \$600,000 jury award); *Elder v. Gaffney Ledger*, 341 S.C. 108, 533 S.E.2d 899, 28 Media L. Rep. 2295 (2000) (reversing \$300,010 jury award); and *Veilleux v. National Broadcasting Co.*, 206 F.3d 92 (1st Cir. 2000)

(reversing \$525,000 jury award).

Also of note, the New York Court of Appeals reaffirmed that great deference should be given to the judgment of editors in determining whether stories about private figures involve matter of legitimate public concern. *Huggins v. Moore*, 94 N.Y. 2d 296, 704 N.Y.S.2d 904, 726 N.E.2d 456, 28 Media L. Rep. 1601 (1999). This issue is of particular import in New York law because such a finding triggers a higher fault standard in libel cases. In such cases plaintiffs must prove that defendants acted in a grossly irresponsible (as distinct from negligent) manner.

### SUBSCRIBE TO THE 2001



Did you miss the 2000:2 edition of the LDRC 2000 BULLETIN — **FAIR USE IN THE MEDIA: A DELICATE BALANCE** — a collection of articles taking a practical look at the Fair Use Doctrine in copyright law, investigating what can be used, what cannot, and why.

*Now Available:*

LDRC 2000 REPORT ON SIGNIFICANT DEVELOPMENTS

*Or the other issues in 2000:*

LDRC 2000 REPORT ON TRIALS AND DAMAGES

MEDIA TRIALS AT THE CLOSE OF THE CENTURY:  
CHALLENGE AND CHANGE

LDRC 2000 REPORT ON APPELLATE RESULTS

*Including a Report on Petitions for Certiorari to  
the U.S. Supreme Court in the 1999 term.*

Subscription fee for 2001 is \$100 if received by January 30, 2001 and \$110 thereafter. Subscriptions are included with membership of \$1,000 or more.

To order please send your check, payable to the Libel Defense Resource Center, Inc., to:

404 Park Avenue South, 16th Floor  
New York, NY 10016  
Phone (212)889-2306 Fax (212)689.3315

## With Deepest Thanks, But With No Need to Say Good-Bye...

### ***Ken Vittor, Chair***

#### ***LDRC Board of Directors, 1998-2000***

Ken Vittor, Executive Vice President and General Counsel at The McGraw-Hill Companies, will be ending his tenure as Chair of the LDRC Board of Directors at the end of 2000. Fortunately for LDRC, he will remain on the Board of Directors and on the Board of LDRC Institute. Ken has done a phenomenal job of leading this organization – with original ideas and the commitment to see them through. Under his stewardship LDRC has, among other things, launched a Seminar Bank for the use of its members, an idea that was born of Ken’s understanding of the needs of LDRC members, and launched the High School Education Project under the LDRC Institute. The latter project is one of the most exciting that LDRC has ever initiated, with the goal of bringing First Amendment and press issues to life and to the minds of students through the vehicle of Fred Friendly projects.

But Ken brings more than the ability to promote new projects and services. Ken has the experience, the intellect, and the common sense to guide this organization steadily and effectively. He is remarkably smart, decisive and — and this is critical to leadership for any organization — grounded. His commitment to the First Amendment and press issues is unparalleled. I first met Ken when we were both associates at Cahill Gordon & Reindel. I value his counsel as a Board member, but just as importantly, as a friend. I have drawn on Ken’s wisdom and his energy for the cause of free press since my first days here at LDRC. We all owe a debt of gratitude to Ken for his years of service past and future, not only as Chair, but as a Board member. Thank you, Ken.

### ***Tom Kelley, President***

#### ***Defense Counsel Section 2000***

Tom Kelley, partner in the Denver office of Faegre & Benson, is stepping down from his one-year term as President of the Defense Counsel Section. Let’s face it, Tom is easily one of the most amazing men I (and I bet most of you) have ever met. His Trial Tales session at the Conference never fails to garner a large audience, even late on a Friday afternoon. His knowledge of trial practice is renowned. His willingness and ability to commit to and produce such consistently first-rate projects as Trial Tales, as Trials of a Generation, his wrap-up of a decade of trials in an essay published in the LDRC BULLETIN this

year, is unique. And, in addition to his prodigious and stunning legal and communications skills, Tom is one of the men you would most want to call a friend and colleague. He is a

man of genuine intelligence, to be sure, but also of uncommon decency, kindness, humor, and courage — yes, courage, to take on even unpopular First Amendment projects and cases, to believe in the cause when it may not pay well on any level. Tom’s value to LDRC and I think to the media bar in general goes far beyond the concrete articles he writes and the panels he chairs.

That being so, no one would or could say “good-bye.” And we didn’t. Tom is going to participate in a Jury Debriefing Project, headed by Jim Stewart, but inspired by Tom Kelley. And he will remain on the Executive Committee of the DCS as Chair Emeritus for one more year. Thank you, Tom, so very much for all that you have and continue to contribute to LDRC and to the cause of First Amendment litigation.

### **And Welcome To Robin Bierstedt and Susan Grogan Faller...**

As of January 1, 2001, Robin Bierstedt, Vice President and Deputy General Counsel at Time Inc., will take over from Ken Vittor as Chair of the LDRC Board of Directors for a two-year term. At the DCS, Susan Grogan Faller of Frost Brown Todd LLC will take on the mantle of President of the Defense Counsel Section. Both of these women are dynamite choices for these leadership roles. Our thanks to them both for taking on these responsibilities and we look forward to working with them in these new posts.

## ***Bartnicki* Argued at the Supreme Court**

*(Continued from page 1)*

culties in ongoing contract negotiations between the union and the local school board. Of the school board, Kane said, “If they’re not gonna move for three percent, we’re gonna have to go to their . . . homes . . . to blow off their front porches, we’ll have to do some work on some of those guys. . . .”

The identity of the person who intercepted and taped the call and left a copy of the tape in Yocum’s mailbox was not known. Yocum, in turn, then passed on the tape to Vopper and the radio station.

### ***Third Circuit***

The United States District Court for the Middle District of Pennsylvania denied all parties’ motions for summary judgment after extensive discovery and certified an interlocutory appeal to the Third Circuit under 28 U.S.C. § 1292(b).

A divided panel of the Third Circuit reversed the trial court and ordered that the motions for summary judgment of the media defendants and Yocum be granted. The majority held that the Federal and Pennsylvania Wiretap Acts were unconstitutional as applied to the media defendants and to their source, Yocum, when they had no involvement in the illegal interception.

The majority refused to apply the version of strict scrutiny applied in *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97 (1979), and *The Florida Star v. B. J.F.*, 491 U.S. 524 (1989). Rather, because the Wiretap Acts were content-neutral, the majority held that they were subject only to intermediate scrutiny.

Nonetheless, the majority held that the Wiretap Acts’ disclosure and use provisions were unconstitutional as applied. The Court held that the Wiretap Acts were not sufficiently narrowly tailored and that the Petitioners had not proven the link between the Wiretap Acts’ use and disclosure prohibitions and

the substantial state interest in protecting privacy. District Judge Pollak, sitting by designation, dissented.

### ***Petitioners’ Argument***

In the United States Supreme Court, Jeremiah Collins and Solicitor General Seth Waxman split the time for Petitioners Bartnicki and Kane and the United States of America. Lee Levine of Levine, Sullivan and Koch and Tom Goldstein of Washington, D.C. split the time for Respondents Vopper and the radio stations and Yocum.

The questions revealed a sharply-divided court.

---

### ***Justice Kennedy queried whether the Petitioners were creating a new category of prohibited speech, “intercepted” speech.***

---

Justices O’Connor and Kennedy vigorously questioned Petitioners’ attorneys. Justice Kennedy and Justice O’Connor’s questions to Mr. Collins

first focused on the public significance of the information on the tape. Justice O’Connor commented that, when she was a state trial judge, she had faced the situation where an illegally-made tape contained information about a murder that had been committed. “I had a hard time understanding how the public interest was served by punishing the person who passed on the information,” she said.

Echoing arguments from the Respondents’ briefs, Justice Kennedy queried whether the Petitioners were creating a new category of prohibited speech, “intercepted” speech, and said, “[T]here is no precedent for that.” Justice Kennedy also distinguished between this case and *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), and *United States v. Aguilar*, 515 U.S. 593 (1995), because the restraints in those cases operated on “people who received information under a court order” and reminded counsel that the content-neutrality of a restriction was not determinative.

In later questioning Solicitor General Waxman,

*(Continued on page 5)*

## ***Bartnicki Argued at the Supreme Court***

*(Continued from page 4)*

Justice Kennedy said that it “is not accurate” to say that it is very rare for the Court to strike down content-neutral statutes. “What you’re doing here is you’re suppressing speech that is valuable to the public,” Kennedy stated. Justice Kennedy repeated that the Government was “taking a class of speech and saying this is now tainted speech and it can’t be repeated by anybody. And there is simply no precedent for that in the cases of this Court.”

Justice Stevens also seemed to express some scepticism about the breadth of the federal Wiretap Act’s disclosure provisions in his questions to Petitioners’ counsel. In discussing the Wiretap Acts’ reach to prohibit subsequent disclosures even by those who were not involved in the initial interception, Justice Stevens commented, “Well, the difference is in one case they’re acting unlawfully and in the other case they have information that they just came across because someone else acted unlawfully and that’d be a big difference.” In two exchanges with Lee Levine, Justice Stevens expressed some doubt about the Government’s rationale for the statute, particularly its “tailoring” argument.

### ***Souter’s Concerns on Suppression***

In his questions to Solicitor General Waxman, Justice Souter probed the difference between this case involving “a complete suppression of speech” and other intermediate scrutiny cases, involving time, place, and manner restrictions where “somebody can speak somewhere, sometime.” Justice Souter further commented that

when you do the balancing, whether you call it intermediate scrutiny or you figure out some other level . . . — what you’ve got to

balance is that if this law is good, then the disclosure (which apparently has no other source) of information which is of concern to the public is absolutely forbidden and we’ve got to accept that as one of the prices that will be paid.

### ***Does Law Reduce Illegality Acts***

Several of the Justices, including Justice Scalia, seemed to support the Government’s argument that prohibitions on subsequent uses and disclosures were necessary to dry up the market for illegally intercepted communications, much like the prohibitions on distribution of child pornography and stolen property. Justice Scalia called the subsequent disclosure “an essential instrument for the criminal’s [the interceptor’s] achieving what he wanted to achieve.”

However, even Justice Scalia, in questioning Lee Levine, indicated that the Wiretap Act had to have some limit when he said, “[I]f all you want is a decision that you can disseminate it if it’s a threat to blow off somebody’s porch, I’ll give you that. That’s an easy case.”

### ***Does it Protect Privacy?***

Justice Breyer and Justice Scalia pressed Levine about the importance of privacy and the strength of the interest allegedly served by the Wiretap Acts. Justice Scalia asked,

Why isn’t my ability to speak over the phone with some assurance of confidentiality an interest of the highest order? I mean you have speech involved on both sides of this, bear in mind.”

*(Continued on page 6)*

## ***Bartnicki* Argued at the Supreme Court**

*(Continued from page 5)*

In an extended exchange, Justice Breyer posited a hypothetical in which someone, who was not a reporter, broke into his home, “puts his ear to the bedroom door,” hears a private conversation about a matter of public interest, and then passes on the information to a newspaper which, in turn, republishes it. Answering his own question, Justice Breyer stated, “I’m asking if you can get damages from the newspaper and I think your answer straightforwardly is no.”

When Mr. Levine responded, “That’s correct, Your Honor,” Justice Breyer stated,

Then I don’t see how you’re going to have any privacy left. I mean, what kind of privacy is there if people can break into your house, steal all your information, it can be published in the newspaper that knows it and you can’t get any damages from the newspaper?

Justice Ginsburg honed in on the procedural posture of the case and queried whether the Government and the plaintiffs had had an ample opportunity to make a record supporting the statute under the intermediate scrutiny test.

### ***Respondents***

The questions fielded by Tom Goldstein, Yocum’s counsel, covered many different areas. Chief Justice Rehnquist asked about the availability of less restrictive alternatives. Justice Scalia and the Chief Justice engaged in a colloquy about whether matters of public interest were the same as matters of public significance. Chief Justice Rehnquist tested the meaning of the word “disclosure.”

Justice Breyer again stressed the importance of the interest in privacy that the Congress was trying to protect “in . . . the new world that will come through wireless communication.” Justice Scalia stressed that the Respondents had to know that the tape’s contents were illegally obtained.

### ***Rehnquist on Scierter***

In perhaps the most surprising exchange, Chief Justice Rehnquist asked about the Wiretap Act’s scierter requirement and a media defendant’s investigation of material which it receives anonymously. The Chief Justice asked, “Well wouldn’t a reporter want to check out a story? Are they just going to get the tape and say, ‘Gee, let’s put it on?’” Goldstein answered,

. . . [T]his statute operates only in the circumstance where the newspaper doesn’t know the intercepting party. If the newspaper knows the intercepting party then the statute operates because the newspaper will be subpoenaed and will have to testify about who gave them the interception and that person will be prosecuted.”

Fortunately, there is no shield law issue in the case.

Especially for the day after the Supreme Court issued its first opinion in the presidential fight, the argument was well-attended and well-covered by the media. I would be remiss if I failed to point out that none of the counsel presenting argument called any of the sitting justices Justice Brennan, but many of us in the audience certainly wished he were still sitting for this case.

Petitions for certiorari remain pending in two other constitutional challenges to the Federal Wiretap Act, *Boehner v. McDermott* 191 F.3d 463 (D.C. Cir. 1999), *pet. cert. filed*, 68 U.S.L.W. 3693 (U.S. Apr. 25, 2000) and *Peavy v. WFAA Television, Inc.* 221 F.3d 158 (5th Cir. 2000), *pet. cert. filed*, (Oct. 30, 2000).

*Tom Leatherbury is a partner at Vinson & Elkins, Dallas, Texas, and represented media defendants in Peavy. He attended the oral argument at the Supreme Court in Bartnicki.*

## Kentucky Upholds Verdict Against Tip Sheet

### *Thoroughbred Bloodstock Expert Not a Public Figure*

In an unpublished opinion, two members of a three-judge panel of the Kentucky Court of Appeals upheld a \$75,000 libel verdict against the publisher of a horse racing tip sheet. *Musselman v. Alvey*, No. 1999-CA-001481-MR (decided Dec. 8, 2000).

The appeal was of a jury ruling that Edward Musselman had defamed Donald Alvey in a series of articles in October and November 1997 in *Indian Charlie*, a free tip sheet which Musselman distributes at horse racing tracks in Kentucky and neighboring states, and posts on the Internet. The newsletter's slogan is, "We never let the truth get in the way of a good story."

The articles questioned Alvey's abilities as a bloodstock agent (a consultant on racehorse breeding), handicapper and gambler, and made fun of his personal appearance. Among the statements were

ones saying that Alvey was "widely known for being able to help people who are wealthy to end up on food stamps or worse," and that his Internet column was "a scam that only generates money for its owner, who, as it turns out, is too lazy to get a real job."

In his \$200,000 lawsuit, Alvey claimed that his income as a bloodstock agent declined after the *Indian Charlie* articles were published, and that he had been forced to take Valium to handle the resulting stress and mental anguish.

At trial, the court rejected Musselman's argument that Alvey was a public figure, and that the articles were opinion. And while former Kentucky Governor Bereton Jones — a horse owner and breeder — testified at trial that people within horseracing did not take the contents of *Indian Charlie* seriously,<sup>1</sup> the jury found that Alvey had been libeled and awarded him \$75,000 in compensatory damages. The court did not allow the question of punitive damages to be submitted to the panel.

The appeals court agreed with the trial judge's classification of Alvey as a private figure, saying that he "enjoys only limited recognition in the horse racing industry" and that "his public profile is not particularly outstanding."

The appellate court also agreed with the trial judge's determination that the comments about Alvey were not "pure opinion," writing that "Musselman's comments were mixed expressions and . . . could reasonably be understood to imply the existence of undisclosed facts necessary to justify the expressed opinion."

Musselman was represented by Robert L. Heleringer of Louisville; John Kmetz of Louisville represented Alvey.

<sup>1</sup> Jones was apparently so fond of Musselman and his newsletter that he named one of his horses Indian Charlie in his honor. Although the horse was favored in the 1998 Kentucky Derby, it placed third.

---

## Largest Libel Verdict in Utah

A jury's award on December 1 of \$3 million against KTVX Channel 4 to Utah physician Michael Jensen may well be the largest libel verdict in Utah's history. The suit was based upon three reports on KTVX in 1995 and 1996 regarding Dr. Jensen's practice of prescribing diet pills. The stories reported that Jensen violated Utah law and medical regulations. It involved a hidden camera investigation when then-KTVX reporter, Mary Sawyer, posed as a patient. The jury awarded the doctor \$2.2 million in compensatory damages and \$840,000 in punitive damages.

A more detailed review of this trial will appear in the LDRC *LibelLetter* next month.

---

## Paper Settles Suits for \$650,000

A Virginia circuit court judge and a defense attorney in a wrongful-death case heard by the judge have settled their libel cases against a twice-weekly newspaper in Emporia, Virginia for a total of \$650,000. *O'Hara v. Byerly Publications*, No. CL00-170 (Va. Cir. Ct., Va. Beach, filed Jan. 27, 2000); *Dunkum v. Byerly Publications*, No. CL00-1525 (Va. Cir. Ct., Va. Beach, filed Jan. 2000).

The libel case arose from an article reporting on a wrongful death suit filed by the family of an 85-year-old woman who died in an apartment complex for the elderly. That lawsuit, in which attorney B. Craig Dunkum of Richmond, Virginia represented that the owner of the complex, was heard on November 8, 1999, before Judge Robert G. O'Hara, Chief Judge of the Sixth Circuit Court.

After the trial broke for lunch, O'Hara granted the defendant's motion to strike the plaintiffs' evidence and dismiss the case.

In an phone interview with a reporter for the Emporia, Virginia, *Independent-Messenger*, the daughter-in-law of the deceased woman claimed that O'Hara had received a \$1 million bribe to dismiss the lawsuit, and implied that the bribe had come from Dunkum. The newspaper, one of eight owned by Byerly Publications, published the allegations in a front page article on November 11.

"O'Hara is a millionaire now," the paper quoted the daughter-in-law, Dorothy Garris, as saying. "He was bought off." The article added that Judge O'Hara had not returned the reporter's phone call.

O'Hara sued Byerly Publications for \$5 million in compensatory and \$5 million in punitive damages, and sued Garris and the newspaper reporter and editor for \$350,000 in punitive damages. Dunkum filed his own lawsuit.

On February 11, 2000, the *Independent-Messenger* published a front-page apology to the judge, stating that there was "no factual support" for the allegations. The newspaper explained that it had printed the accusation "to convey the anguish felt by the family at the loss of the case and to convey accurately both the family's reaction and its words." The apology did not

address any allegations against Dunkum.

The plaintiffs questioned the sincerity of the apology for a variety of reasons, including the fact that it was not quickly posted on the newspaper's web site while the original offending article remained on the site for several months.

On Nov. 27, the eve of trial of the libel cases, Byerly Publications agreed to pay \$500,000 to O'Hara and \$150,000 to Dunkum.

The newspaper was represented by Conrad M. Shumadine of Wilcox & Savage in Norfolk, Va.; Thomas E. Albro and R. Lee Livingston of Charlottesville, Va. represented the libel plaintiffs.

### ***Now Available***

## **LDRC 50-STATE SURVEY 2000-01: MEDIA PRIVACY AND RELATED LAW**

*With a Special Report on Privacy and Related Law in the Federal Courts of Appeals.*

**TOPICS INCLUDE: False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes**

**\$150**



---

## Pennsylvania Jury Rejects Judge's Libel Claim

A Common Pleas Court jury found on Nov. 16 that the *Bucks County Courier Times* had not libeled former District Justice Dorothy Vislosky in an article on a district attorney's investigation into her decisions in six criminal cases. *Vislosky v. Courier Times, Inc.*, No. 88-1727 (Pa. C.P. Bucks County, November 16, 2000).

According to testimony at trial, in 1987 Falls Township Police Lt. David Clark expressed concerns about eight cases — six handled by Vislosky and two by fellow District Judge Joseph Basile — to Bucks County Deputy District Attorney Joseph Scafidi. Scafidi took five of the case files to the DA's office, and discussed them with District Attorney Alan Rubenstein and two senior district attorneys.

The cases included the dismissal of two drunken driving cases and that of a man accused of assaulting a police officer.

On March 6, 1987, the *Courier Times* ran an article by reporter Robert Bauers reporting that the DA's office was investigating the dispositions in an unspecified number of cases handled by Justices Vislosky and Basile. After the article appeared, Rubenstein issued a press release stating that neither Justice had acted improperly. This led to a number of other articles and editorials in the newspaper critical both of Vislosky and of the District Attorney.

Vislosky, who was running for re-election in the May 1987 primary, alleged in her suit that the newspaper, the reporter, its editor, Lt. Clark and the local police chief had conspired to undermine her campaign. (Vislosky, who was the only candidate in the race, was easily re-elected to the bench.)

Justice Basile also filed suit, which eventually ended with out-of-court settlements. The newspaper settled for an undisclosed amount, while he settled with the two police officers in 1992 for \$275,000, following a jury verdict for \$300,000.

At trial, Vislosky testified that had been "devastated" by the first article. "It inferred that I was either accused of being corrupt or dishonest and that I was being criminally investigated," she said. District Attorney Rubenstein, now a Common Pleas Judge,

testified that although he had issued the press release clearing Vislosky of any wrongdoing, he also had concluded that she was legally incorrect in five of the six dispositions which he reviewed.

After six hours of deliberation and after being recharged on the meaning of "defamatory," the jury answered the first of sixteen special interrogatories by finding that Vislosky had proven that the articles "meant what she claimed they meant to the average reader," but answered the second interrogatory by finding that she had failed to prove "that the publications were defamatory of her." Accordingly, the jury never reached the interrogatories dealing with proof of factual falsity and with Constitutional "actual malice."

The period for filing post-trial motions has expired, and no appeal is expected.

The media defendants were represented by Gregory M. Harvey of Montgomery, McCracken, Walker & Rhodes in Philadelphia; Vislosky was represented by Richard D. Adamson, of Kutztown, Pennsylvania.

---

## California Court of Appeals Affirms Dismissal of Suit Under Anti-SLAPP Statute

In an unpublished decision on November 28, a California appellate court affirmed a Superior Court Order for media defendants under the state's anti-SLAPP statute. *Foxworth v. KUSI-TV et al.*, D034703 (Cal.Ct.App.). The appeals court affirmed the grant of defendant KUSI-TV's special motion to strike the complaint and dismiss the action of plaintiff Levonne Foxworth, affirming as well a grant of attorney's fees and costs to the defendant. In his complaint, Foxworth alleged defamation, intentional infliction of emotional distress, negligent infliction of emotional distress and invasion of privacy.

(Continued on page 10)

---

## Criminal Libel Charge Against Teenager Withstands Motion to Dismiss

On December 5, a judge for the 5th District Juvenile Court in Utah denied a motion to dismiss brought by attorneys for Ian Lake, a teenager charged with criminal libel after he posted vulgar insults on his personal web site (*State of Utah v. Lake*, No. 968716; see *LibelLetter*, July 2000, at 7). Lake's attorneys have said they will appeal.

The decision makes the Internet criminal libel charge the first of its kind in Utah, where the last time a person faced criminal libel charges was in 1987.

Lake's attorneys premised their motion to dismiss on the argument that Utah's criminal libel law is facially unconstitutional for failing to include the "actual malice" standard required for criminal libel statutes by the Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964). Since the subject in Lake's case was a public figure, his attorneys argued, the *Times v. Sullivan* actual malice standard must be applied. The statute, however, requires only "malicious intent to injure," Utah Code Ann. § 76-9-502, and presumes such intent if "justifiable motive" is absent, Utah Code Ann. § 76-9-503(1). Failure under *Sullivan* to require that statements be made "with knowledge of their falsity or in reckless disregard of whether they are true or false" makes the statute illegal, according to Lake's attorneys.

The court, accepting the argument of the Beaver County Attorney that juvenile court was an inappropriate place to overturn state law, also found that there was enough ambiguity in the statute to warrant further review.

Although the government attorney offered a conditional plea of no contest, which could later be appealed

and would avoid a trial, Lake's attorneys rejected the offer since they seek to determine whether the statute is valid before entering a plea.

Lake, who is 17-years-old, was arrested and briefly jailed in May after he posted a home page containing obscenities and calling female classmates "sluts" and the principal of his high school at the time, Walter Schofield, "the town drunk."

In August, Schofield filed a civil libel suit against Lake.

Lake himself filed notice last month that he will sue Schofield and school district officials for alleged civil rights violations.

## Ca. Ct. of Appeals Affirms Dismissal of Suit

*(Continued from page 9)*

The claims stemmed from an August 1998 KUSI-TV news report about the robbery and murder of a San Diego man. The report said the suspect in the killing was "Levonne Foxworth," who was already in jail on other robbery charges. The following night, KUSI-TV broadcast a clarification stating that the true name of the suspect was Alonza Lathan, although he used the alias of "Levonne Foxworth." The clarification further stated that there really was a Levonne Foxworth living in San Diego, and he was not the man accused of the crimes.

The court noted that contrary to the plaintiff's assertion, the state's anti-SLAPP statute did not apply only when the defendant could show that the plaintiff brought the action to chill First Amendment rights, rather than to vindicate personal wrongs. The court also rejected the plaintiff's argument that the anti-SLAPP statute was aimed at protecting economically weak individuals rather than the media.

The court found that Foxworth could not present evidence of the falsity of the broadcast to show a probability of prevailing based on the alleged defamation. The fact that Foxworth has the same name as the suspect was not enough to show that the broadcast was false or that it was about and concerning the plaintiff.

Defendants were represented by Guylyn Cummins of Gray Cary & Ware, San Diego, California.

**Would you like to receive your  
*LibelLetter* via e-mail?**

***This service is now available to  
all LDRC members***

**If interested, please contact:**

**Kelly Chew  
kchew@ldrc.com  
fax: 212-689-3315**

## First Circuit Holds “Of and Concerning” Requirement Is Not Mandated by the First Amendment

### *Dismisses Case Under Puerto Rico’s Law*

By **Juan R. Marchand, Esq.**

In a November 28, 2000 decision, *Estrada Rivera — Isuzu de Puerto Rico, Inc. v. Consumers Union*, No. 99-2333, 2000 WL 1725376, 2000 U.S. App. LEXIS 29721 (1st Cir.) the U.S. Court of Appeals for the First Circuit refused to apply the First Amendment to the “of and concerning” requirement of identification of the plaintiff, but, relying on a 1994 Puerto Rico Supreme Court interpretation of the requirement under Puerto Rico law, affirmed the dismissal of the case by the U.S. District Court for Puerto Rico.

### *Isuzu Dealer Sues Over Trooper Rating*

The case revolves around publications by Consumers Union regarding testing of Isuzu’s Trooper model. Because of the Trooper’s “tendency to roll over in certain situations,” it earned CU’s judgment of “not acceptable.” Estrada, the Isuzu dealer for Puerto Rico and the U.S. Virgin Islands, filed a claim for defamation and product disparagement, alleging that the articles defamed Isuzu and the plaintiff, that the tests were rigged against the Trooper, and that CU had knowledge of falsity. It also claimed tortious interference with existing contracts, and requested a declaratory judgment on falsity.

Notably, the manufacturer was not a party to the litigation, and it was uncontroverted that Estrada was not mentioned or identified in the publications, directly or indirectly. Defendant based its motion for dismissal squarely on the absence of reference to the plaintiff, arguing that the common law “of and concerning the plaintiff” requirement has been recognized under the First Amendment and is applicable to the states and Puerto Rico.

### *District Court*

Federal District Court Judge Daniel Dominguez, in a 17-page unpublished opinion, granted summary judgment for defendant on the defamation and disparagement claim, holding that the absence of identification of the plaintiff was constitutionally decisive under *New York Times v. Sullivan*, 376

U.S. 254, 288-292 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75, 82-83 (1966). He pointed out that the Puerto Rico Supreme Court has also recognized the constitutional “of and concerning” requirement in *Rodríguez v. El Vocero de Puerto Rico, Inc.*, 135 D.P.R. 122, 129, cert. denied, 512 U.S. 1237 (1994).

The court dismissed the tortious interference claim on state law grounds, because such a cause of action requires specific allegations that were absent in this case. The request for declaratory judgment was also denied, because even if the expressions had identified and referred to Estrada indirectly, the court would not “resolve a scientific dispute” regarding the safety of the Trooper.

### *First Circuit*

***“[T]he question in this case is whether the law will permit recovery by a third party related to the person specifically criticized.”***

On appeal, the First Circuit (Boudin, J.) noted that it was “less certain” of the constitutional dimensions of the “of and concerning” requirement, and

expressed doubts as to whether it should apply to the *Consumer Reports* warnings and articles. Analyzing both *New York Times* and *Baer*, the court held that those cases dealt with generalized and impersonal criticism of government, in which the plaintiff was not “named in the article or even indirectly distinguished from other officials.”

By contrast, in the present matter the allegedly false expressions were directed at a named private target (Isuzu), and damages were claimed by “someone closely connected with the defamed person (Estrada).” Therefore, “the question in this case is whether the law will permit recovery by a third party related to the person specifically criticized.” Having thus distinguished both U.S. Supreme Court decisions on the subject, the court concluded that it was “advisable to decide this appeal on local law grounds, even though Puerto Rico precedents offer uncertainty of their own.”

### *Applies Puerto Rico Law of 3rd Party Actions*

The First Circuit cited as local precedent the *El Vocero* decision, in which the Puerto Rico Supreme Court held that a

*(Continued on page 12)*

## “Of and Concerning” Requirement Is Not Mandated by the First Amendment

(Continued from page 11)

defamation plaintiff must show “not only that certain published information was libelous but must also identify himself as the person libeled.” 135 D.P.R., at 129. In *El Vocero* the principal plaintiff was a police officer, and the publication dealt with his official conduct. However, his wife — who admittedly was not mentioned or referred to even indirectly in the publication — appeared as coplaintiff seeking general damages and mental anguish arising from her husband’s defamation and suffering. The court recognized the wife as a “contingent” or “derivative” plaintiff for mental anguish, and her cause of action would depend on the success of her husband’s libel claim.

*El Vocero* also distinguished the situations faced in *New York Times* and *Baer* as “criticism of government,” pointing out that the principal plaintiff was a fully identified individual, and that if the other essential elements of his defamation claim could be established (including proof of falsity, identification and malice), then his wife could recover damages, although not for defamation, since other family members were not identified or referred to in any way. It should be noted that both husband and wife were plaintiffs, and the latter specifically did not allege damage to her reputation.

The First Circuit was unwilling to treat *El Vocero* as an “open-ended endorsement of third-party libel actions outside the family context.” In a commercial context, “an almost unlimited number of plaintiffs could potentially be injured by defamation of a manufacturer and . . . bring independent suits to recover.” The court proceeded to interpret *El Vocero* as strictly limited to derivative plaintiffs who are close family members of the libel plaintiff, and confirmed the district court’s dismissal.

### **Issues for Further Developments**

Although the decision’s impact is somewhat over the horizon, several of its elements may require further clarification.

First, the court recognizes that the common law requirement of identification is alive and well in those jurisdictions in which the common law rule applies. Puerto

Rico is a civil law jurisdiction, and the requirement would apply only if made obligatory under the First Amendment. Significantly, the First Circuit resorted to a local precedent that “offers uncertainty of its own” to confirm a district court judgment that rested squarely on the identification requirement as one established under the First Amendment. Notably, the Circuit’s analysis and characterization of *New York Times* and *Baer* decisions as dealing with “impersonal criticism of government” is substantially identical to the court’s development of the subject in *El Vocero*.

Secondly, the First Circuit left untouched an element in *El Vocero* that was important in that decision. Isuzu was not a party plaintiff, as was Mr. Rodríguez in *El Vocero*. While the wife’s cause of action — even for mental anguish — depends on her husband’s success in the principal

---

### ***The First Circuit was unwilling to treat El Vocero as an “open-ended endorsement of third-party libel actions outside the family context.”***

---

case, and is therefore contingent on the principal plaintiff’s libel action, Estrada is a “derivative” plaintiff without the presence of a “principal” plaintiff. **Q u e r y**

whether *El Vocero* would have been decided in the same way if only the wife had filed an action for mental anguish, because she still would have to establish an underlying cause of action for defamation of her “principal.” There is little doubt that the wife would have been met with a solid “of and concerning” defense. In *Estrada*, however, the dealer (a corporation) appeared in lieu of the manufacturer, and *claimed to have been defamed because of his recognition as Isuzu dealer*. The First Circuit’s decision seems to hinge on the commercial vs. family relationship of the derivative plaintiff with the identified target of defamation, and not the target’s presence and role as plaintiff in the litigation. It remains to be seen if *El Vocero* could be applied in the absence of the principal plaintiff even if there is a family relationship, or if a situation similar to *Estrada* would reach a different result if the plaintiff were an individual (not a corporation), more closely identified with the targeted and identified person, product or service.

Third, the reasoning for not extending derivative plaintiffs beyond close family members, or in open ended fashion into the commercial context, is solid and should be sufficient to stop further erosion of the “of and concerning”

(Continued on page 13)

## Federal Judge in Pennsylvania Embraces Implied Defamation in Non-Media Case

### *Also Adopts Appropriation Claim for Non-Celebrity*

By Joyce S. Meyers

Illustrating the common adage that hard facts make bad law, Senior U.S. District Judge Lowell A. Reed, Jr. recently addressed several issues in defamation and privacy law and decided all of them in a manner that is adverse to defamation defendants in *Fanelle v. LoJack Corp.*, No. 99-4292 2000 U.S. Dist. LEXIS 17767 (E.D. Pa. Dec. 7, 2000).

The expansive opinion denying summary judgment rejects precedent favorable to defendants from both the Pennsylvania Superior Court and several federal courts of appeals. In doing so, Judge Reed reduced the plaintiffs' burden of proof in implied libel cases and recognized, for the first time in Pennsylvania, an appropriation of name and likeness

***Judge Reed reduced the plaintiffs' burden of proof in implied libel cases and recognized, for the first time in Pennsylvania, an appropriation of name and likeness claim by a non-celebrity.***

claim by a non-celebrity. The only good news in this opinion for media defendants is that, at several points in the opinion, Judge Reed acknowledged that the First Amendment requires recognition of certain defenses and privileges for media defendants that he found not applicable to the corporate defendant in this case.

### ***Bad Facts Make Bad Law***

The facts in the case are admittedly compelling. Plaintiff Peter Fanelle, a self-employed buyer and seller of engine parts and transmission cores, happened to be at the wrong place at the wrong time on July 21, 1997. While he was waiting at a garage, police arrived and arrested him and three others in a raid targeted at a suspected car theft and "chop shop" operation. The police had been led to the site by an anti-theft device manufactured by defendant LoJack Corporation.

Two days later, the *Philadelphia Inquirer* published a report of the investigation and arrests that mentioned the LoJack device and included the names and photographs of the four people arrested and described as suspects, including Fanelle. After criminal trials, the other three were convicted, but Fanelle was acquitted of all charges.

The following year, LoJack began including the newspaper article in a package of promotional materials provided to car dealerships. The package, entitled "LoJack Stolen Vehicle Police Recovery Network," included statistics about car theft, representations about the LoJack system, the article containing full face, close-up photographs of Fanelle and the other suspects, and additional information about car thefts. Although Fanelle had been acquitted in October, 1998, the promotional package continued to be distributed until July 1999, when the action was filed.

### **"Of and Concerning" Requirement Is Not Mandated by the First Amendment**

*(Continued from page 12)*

requirement. In future litigation, it must be stressed that Mrs. Rodríguez did not pursue a libel claim, but only a claim for mental anguish, and that Puerto Rico is a "no impact" jurisdiction, where recognition of damages for mental anguish is well developed.

Michael Pollet of Pollet & Felleman in Yonkers, NY and Ramon Bauza-Higuero of Bauza & Davila in San Juan represented Consumers Union. The plaintiffs were represented by Lisa Fair and Michael Rovell of the Law Offices of Michael J. Rovell in Chicago and Charles Cuprill-Hernandez of Ponce, Puerto Rico.

*Juan Marchand practices in San Juan, Puerto Rico and is the preparer of the LDRC 50-State Survey: Media Libel Law outline for Puerto Rico.*

*(Continued on page 14)*

## PA Federal Judge Embraces Implied Defamation

(Continued from page 13)

### ***District Court on Pennsylvania Law***

Judge Reeds's opinion denying defendant's motion for summary judgment addressed issues relating to defamation by implication, false light, appropriation of publicity, and emotional distress damages.

The court tied its defamation analysis to the Pennsylvania defamation statute, 42 Pa. C.S. §8343, which sets forth seven elements of defamation and three affirmative defenses, including truth, privilege, and public concern. The court rejected defendants' contention that the article was true. Although there was no dispute about its factual accuracy and plaintiff had never sought to sue the newspaper for publishing it, the court found that the use of the article in the promotional package created the defamatory implication that plaintiff was in fact a car thief.

### ***Implication***

Acknowledging that the Supreme Court of Pennsylvania has never directly addressed defamation by implication, the court relied on a Pennsylvania Superior Court opinion and several federal circuit courts that had recognized the viability of an implied defamation claim when the stated facts are true. Accordingly, the court predicted that the Supreme Court of Pennsylvania would recognize the cause of action and went on to conclude that its elements are identical to those of a typical defamation claim.

Moreover, in a lengthy footnote, the court explicitly departed from the recent trend in federal courts of appeals to impose a rigorous burden on plaintiffs in an implied defamation case when the stated facts are true. The court specifically rejected the holding of *Chapin v. Knight-Ridder, Inc.*, 993 F. 2d 1087, 1092-93 (4th Cir. 1993), which required "an especially rigorous showing when the expressed facts are true," such as evidence that the defamatory statement "affirmatively suggests that the author intends or endorses the inference."

The court also rejected the standard adopted in *White v. Fraternal Order of Police*, 909 F.2d 512, 519 (D.C. Cir. 1990), requiring a showing that the recipient "reasonably understood" the communication "to have been intended in the defamatory sense." The court did not even acknowledge the numerous other decisions of both state and federal appellate courts in recent years that have adopted variations on this rigorous standard, explaining its reasoning as follows:

Arguments that even more should be required of a plaintiff in a defamation-by-implication case demand too much, because such additional requirements teeter dangerously close to requiring a showing of the actual intent of the speaker such

---

***[T]he court went on to hold that, because plaintiff was a private figure and there was no public concern defense, plaintiff did not even have to prove falsity.***

---

as "actual malice," the high threshold of proof that the Supreme Court of the United States established to protect the sacred rights of publishers under the First Amend-

ment. I do not believe such a high threshold is required or warranted in defamation-by-implication cases. An implication is no less defamatory when it is cloaked in literal truth; on the contrary, the patina of accuracy may exacerbate the harmfulness of the statement by making it more palatable and believable to the recipient. Thus, I conclude that the elements required to establish a claim for defamation-by-implication in Pennsylvania are no more and no less than those set forth in Pennsylvania's defamation statute.

The court had no difficulty finding that the facts of this case included all the elements required by the Pennsylvania defamation statute.

### ***No Privilege and Shifts Burden on Falsity***

The court also rejected defendant's assertions of privilege as not applicable. First, the court refused to apply the fair report privilege, holding that this privilege

(Continued on page 15)

## PA Federal Judge Embraces Implied Defamation

*(Continued from page 14)*

is limited to the press. The court then rejected LoJack's assertion of the Pennsylvania statutory defense of "public concern" by stating, without analysis, that "the public concern privilege asserted by LoJack appears to be addressed by the fair report privilege."

Having rejected every defense, the court went on to hold that, because plaintiff was a private figure and there was no public concern defense, plaintiff did not even have to prove falsity. The court reasoned that the "public concern" defense was inspired by the United States Supreme Court's First Amendment jurisprudence, which places media reports "at the core of the First Amendment" and thus accords them "substantial protection," citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). Finding that the state-

ment at issue in this case is merely "garden variety commercial speech," the court concluded that "in defamation cases involving commercial speech by non-media defendants about private individuals, even when that speech touches on matters of public concern, the speech is not entitled to elevated levels of First Amendment protection, and therefore proof of falsity is not required."

### ***Ignores Scierer on False Light***

The court was equally hostile to defendant on the false light claim. The court acknowledged that the elements of proof in a false light claim require: (1) a showing that the communication was false; (2) a show-

*(Continued on page 16)*

### ***Now Available***

## **LDRC's 2000 JURY INSTRUCTIONS MANUAL**

Please let us know how you would like to receive the manual: via e-mail, disk or hard copy.  
Contact us by email: [ldrc@ldrc.com](mailto:ldrc@ldrc.com) or phone: (212) 889-2306

### **Updated Manual Includes:**

- Selected jury charges for libel, privacy and related claims
- Editorial commentary by Committee members
- "An Overview of Supreme Court Defamation Opinions: 1985-2000," by Robert Raskopf of White & Case, with assistance by Shannon Jost and James Sullivan of White & Case

### **LDRC wishes to thank the 2000 LDRC Jury Instructions Committee Members**

Daniel C. Barr - Chair and Editor  
David Klaber - Vice Chair  
Duane A. Bosworth  
Johathan E. Buchan  
Dominic P. Gentile  
Thomas R. Julin  
Robert D. Nelon  
Mark Prak  
Robert L. Raskopf  
Dan Sponseller  
Donald C. Templin  
Michelle Tilton

Brown & Bain, P.A.  
Kirkpatrick & Lockhart, LLP  
Davis, Wright, Tremain, LLP  
Smith, Helms, Mulliss & Mooore  
Dominic P. Gentile, Ltd.  
Steel, Hector & Davis, LLP  
Hall, Estill, Hardwick, Gable, Golden & Nelson  
Brooks, Pierce, McLendon, Humphrey & Leonard, LLP  
White & Case  
Kirkpatrick & Lockart  
Haynes & Boone, L.L.P.  
First Media Insurance Specialists, Inc.

**Please continue to send to LDRC any proposed and actual jury instructions, along with any comments and suggestions about drafting jury instructions that you believe would be beneficial to LDRC members.**

## PA Federal Judge Embraces Implied Defamation

(Continued from page 15)

ing that the communication was highly offensive to a reasonable person; (3) “scienter, or at least reckless disregard.” Concluding that Fanelle had produced evidence from which a reasonable jury could find that LoJack’s promotional package communicated a false impression that he was a car thief, which would be highly offensive to a reasonable person, the court denied the summary judgment motion on the false light claim without even addressing the “scienter” requirement.

### Misappropriation

Fanelle also sought recovery for appropriation of publicity, claiming that LoJack appropriated his name and likeness for its own use and benefit. Although the Supreme Court of Pennsylvania had acknowledged this cause of action, it had never addressed whether it required celebrity status or a demonstrated commercial worth of the plaintiff’s name and likeness. Judge Reed found that the majority view among courts is that non-celebrities may bring an appropriation of publicity claim, and that the logic of that position was persuasive. Accordingly, the court predicted that the Supreme Court of Pennsylvania would not require celebrity status to support liability in an appropriation claim and permitted Fanelle to pursue it.

### Rejected Recipient on Emotional Damages

In considering damages, the court rejected a decision of the Superior Court of Pennsylvania in *Wecht v. P.G. Publishing Co.*, 725 A 2d 788 (1999), requiring expert medical testimony to prove mental and emotional distress damages arising out of defamation and invasion of privacy claims. Dismissing the reasoning of that case as “unpersuasive,” Judge Reed predicted that the Supreme Court of Pennsylvania would reject it. Accordingly, the emotional distress claim was permitted to proceed de-

spite the absence of expert medical testimony.

In short, the court ruled against defendant’s positions on each and every point, not only in predicting unsettled areas of the law but also in rejecting defendant-friendly holdings of other state and federal courts. Perhaps most distressing is the treatment of libel by implication in view of what has become, in recent years, a growing consensus among state and federal courts that libel by implication claims should impose a rigorous burden of proof on plaintiffs. See, e.g., *Chaiken V. v. Publishing Corp.*, 907 F Supp. 689 (S.D.N.Y. 1995), *aff’d*, 119 F. 3d 1018 (2d Cir.

---

***Finding that the statement at issue in this case is merely “garden variety commercial speech,” the court concluded that “in defamation cases involving commercial speech by non-media defendants about private individuals, even when that speech touches on matters of public concern, the speech is not entitled to elevated levels of First Amendment protection, and therefore proof of falsity is not required.”***

---

1997), *cert. denied*, 552 U.S. 1149 (1998); *Chapin v. Knight-Ridder, Inc.*, 993 F. 2d 1087 (4th Cir. 1993); *White v. Fraternal Order of Police*, 909 F. 2d 512 (D.C. Cir. 1990); *Woods v.*

*Evansville Press Company Co., Inc.*, 791 F. 2d 480 (7th Cir. 1986); *Sassone v. Elder*, 626 So. 2d 345 (La. 1993); *Locricchio v. Evening News Association*, 438 Mich. 84, 476 N.W. 2d 112 (1991), *cert. denied*, 503 U.S. 907 (1992); *Mucci v. Dayton Newspapers, Inc.* 71 Ohio Misc. 2d 71, 654 N.E. 2d 1668 (1995).

This case, however, is distinguishable from most of the above in that it involved neither a public figure plaintiff nor a media defendant and, while the subject matter is of public concern, the publication can be fairly characterized as commercial speech. These distinguishing features should limit the scope of this opinion and its application to other implied defamation cases involving either public figure plaintiffs or media defendants. We can only hope so.

*Joyce Meyers is a partner with Montgomery, McCracken, Walker & Rhoads in Philadelphia, Pennsylvania.*



## Idaho Court Rejects Multiple Libel Claims Brought by Former Executive Director of Housing Authority

**By Debora K. Kristensen**

In a decision amounting to a veritable hornbook of libel law, Judge Fred Van Sickle, Chief United States District Court Judge for the Eastern District of Washington (sitting by designation in the District of Idaho), granted the *Idaho Statesman's* motion for summary judgment dismissing a lawsuit brought by Judith Worrell-Payne, the former Executive Director of the Boise City/Ada County Housing Authority. *Worrell-Payne v. Gannett Co., Inc.*, No. 98-228 (D. Idaho, November 15, 2000). In so doing, Judge Van Sickle reaffirmed many bedrock principles of libel law, some of which had never been addressed by an Idaho court.

### **Background**

The case arose after the *Statesman* published over 100 articles over a period of two years on Worrell-Payne's performance as executive director of the local housing authority. The majority of the articles occurred within a short period of time in early 1996, and chronicled allegations of mismanagement, nepotism, and frequent absenteeism leveled at Worrell-Payne in her capacity as executive director. Shortly thereafter, the Housing Authority conducted several public meetings and decided to terminate Worrell-Payne. The *Statesman* continued to follow the story, including the impact of Worrell-Payne's departure on the Housing Authority. In so doing, many of its articles summarily referred to Worrell-Payne's termination "amid allegations of mismanagement, nepotism and frequent absenteeism." And, later stories gave updates on similar public housing work that Worrell-Payne was doing for other housing authorities.

By 1998, Worrell-Payne had had enough and sued the *Statesman* for defamation, defamation-by-implication, invasion of privacy, intentional infliction of emotional distress, intentional interference with contract and intentional interference with a prospective economic advantage, citing nearly 100 articles as actionable. But Worrell-Payne failed to allege with specificity any actionable portion of nearly 50 of the articles she cited, allowing the *Statesman* to prevail on its motion to dismiss all claims based on those articles. After protracted and heated litigation, the *Statesman* filed a comprehensive motion for summary judgment on all remaining claims, including many well-accepted areas of libel

law not yet decided upon by Idaho courts.

Eight months later, two judges and one vacated trial date later, Judge Van Sickle issued a detailed order granting the *Statesman's* motion for summary judgment.

### ***Worrell-Payne is a Public Official***

Judge Van Sickle began his analysis with determining what standard should apply: negligence or actual malice. Although Worrell-Payne argued that she was a private figure and, hence, a negligence standard should apply, the Court disagreed. Relying on *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), the Court held that "[g]iven the size of housing authority, given the services it was charged with providing, and given the executive director's role in providing those services," Worrell-Payne was a public official. Moreover, neither Worrell-Payne's "firing nor the passage of two years time altered her status for First Amendment purposes," requiring her to demonstrate that the *Statesman* acted with actual malice in order to prevail on her claims.

### ***"Nepotism," "Absenteeism" and "Mismanagement" Not Defamatory***

The Court then turned to the merits of Worrell-Payne's many claims. Given the sheer volume of articles at issue, the Court grouped the articles, beginning with those that reported Worrell-Payne had been accused of "nepotism," "absenteeism," and "mismanagement." After a lengthy factual analysis, the Court concluded that such articles were protected by the First Amendment on three independent grounds.

First, the Court found that such accusations were nonactionable statements of opinion because they could not be proved false. For example, Worrell-Payne was accused of "mismanagement." Judge Van Sickle found that such an accusation "is not an assertion of fact. . . . Whether any executive's performance is "good or bad" is inherently subjective." Similarly, Judge Van Sickle found that an accusation of "nepotism" is "more than an assertion that a public official conferred a benefit upon a relative. It is also a value judgment about the official's behavior . . . Statements of that sort can never be disproved."

*(Continued on page 18)*

## Idaho Court Rejects Multiple Libel Claims

(Continued from page 17)

Second, the Court found that the *Statesman* disclosed essential facts upon which each of accusations were based. The Court specifically found that “the *Statesman* never implied to its readers that it was privy to additional, undisclosed facts.”

Third, the Court found that the *Statesman* had “no reason to doubt the accuracy of the essential facts upon which the accusation[s]” were based. Accordingly, there could be no showing that the *Statesman* acted with actual malice.

### ***Defamation-by-implication***

Next, the Court turned to Worrell-Payne’s defamation-by-implication claims and began by assuming that such a claim exists in Idaho (although the Idaho Supreme Court has yet to decide the issue).

Applying *Dodds v. American Broadcasting Co.*, 145 F.3d 1053 (9th Cir. 1998), the Court held that in order to prevail on her defamation-by-implication claims, Worrell-Payne must demonstrate that the articles could reasonably be said to carry the implications she alleged, and that she “present clear and convincing evidence from which a jury could find that the *Statesman* actually intended to convey the false implications.”

Once again faced with the daunting task of trying to determine which statements in which articles were at issue, the Court chose to specifically analyze a group of articles which it deemed “representative of the whole.” Having done so, the Court found that Worrell-Payne’s defamation-by-implication claims suffered from three defects: (1) she failed to distinguish between implications that can be disproved and those that cannot (*i.e.*, statements of opinion); (2) many of the articles were incapable of sustaining the factual implications she attributed to them; and (3) there was no evidence that the *Statesman* had any “reason to doubt the veracity of the facts allegedly implied by its articles.”

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

One of the many bases asserted by the *Statesman* in support of its motion for summary judgment was that those articles at issue which concerned meetings held by the Housing Authority were protected by Idaho’s statutory fair

report privilege (*i.e.*, “fair and true” reports of “public official proceedings” are privileged). The Idaho Supreme Court has not yet determined the scope of the fair report privilege as it applies to media defendants. Nonetheless, the Court determined that the Idaho Supreme Court would likely look to the Restatement (Second) of Torts for guidance. And, applying § 611 of the Restatement (Second) of Torts, the Court concluded, “it appears that a number of the *Statesman*’s articles are privileged in whole or in part.”

### ***Miscellaneous Allegations***

Despite his best efforts at grouping articles and claims together, Judge Van Sickle was left with a few miscellaneous allegations by Worrell-Payne, which he rejected in turn. Most notably, Judge Van Sickle found that the newspaper’s reporting that Worrell-Payne had been accused of “corruption” was not actionable since it “reflects an accusation that cannot be proved false, and the *Statesman* disclosed the facts upon which that accusation was based.” And, since the First Amendment shielded the *Statesman* from Worrell-Payne’s defamation based claims, Judge Van Sickle held that her accompanying claims based on the same facts must also be dismissed.

### ***Conclusion***

Having disposed of Worrell-Payne’s many and varied claims against the *Statesman*, Judge Van Sickle expressed sympathy for Worrell-Payne, noting that the First Amendment guarantees that the press is free to discuss the shortcomings of public officials, even if such reporting is not “scrupulously fair.” “Frustrating though it may be to Mrs. Worrell-Payne, the *Statesman* had no legal obligation to present a balanced report of the controversy” (citing *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1243 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 1262 (2000)). Indeed, the Court noted that the United States Supreme Court’s words in *Tornillo* about how editorial choices must be left to the newspaper itself — “whether fair or unfair” — “continue to ring true.”

*Debora K. Kristensen is a partner with Givens Pursley LLP in Boise, Idaho, and represented the Idaho Statesman in this matter.*

## Jury Awards Doctor \$675,000 Libel Award For Anonymous Web Posting

An appeal has been filed in what appears to be the first libel award based on an anonymous Internet posting. *Graham v. Oppenheimer*, No. 00-2550 (4th Cir.), *appealing* No. 3:00-CV-57 (E.D. Va., order entered Dec. 7, 2000).

On December 7, a federal district judge rejected a motion to set aside a \$675,000 jury verdict in favor of a Virginia doctor who sued a Internet poster over statements which alleged that the doctor had been forced from a position at Emory University because of improprieties.

Dr. Sam D. Graham, Jr. resigned after 16 years at Emory in 1998 "on good terms," he said, and planned to move to Richmond, Va. and open his own practice there.

In November 1999, a friend informed him that someone using the name "fbiinformant" had posted messages on a Yahoo! Message board alleging that Graham had been forced to

resign as chairman of the urology department at Emory University after taking kickbacks from Oklahoma-based urology company Urocor in return for the department's pathology business.

"This worked out well until the poor SOB got caught with his hand in the cookie jar," said the message, which was posted on a site devoted to discussions of Urocor. "Poor guy had to resign his prestigious position."

Graham responded on the message board, writing that "I never personally received a dime for (sic) Urocor. What you state in your message is a lie, and I demand that you produce the source of your information."

He then sued "fbiinformant," whose identity was unknown, as "John Doe" in federal court in Richmond, Virginia. He then obtained subpoenas for Yahoo! and various Internet service providers in an attempt to determine the poster's identity, but was unsuccessful because "fbiinformant" had given false information to Yahoo!

After eight months, an attorney for Urocor told Graham's attorneys that former Urocor employee Dr. Jonathan R. Oppenheimer, a pathologist who had been fired from the Oklahoma company, had posted other messages on various web sites accusing the company of criminal activity and had admitted in a deposition to using "fbiinformant" as one of his aliases in making these postings.

Graham then named Oppenheimer and his company, Nashville, Tenn.-based prostate services and laboratory company Prost-Data Inc., as defendants in the suit.

At trial, Oppenheimer admitted that he had posted the message, but argued that his message was

---

***At trial, Oppenheimer admitted that he had posted the message, but argued that his message was typical of the freewheeling discourse on the Internet and that such statements are not taken seriously.***

---

typical of the freewheeling discourse on the Internet and that such statements are not taken seriously. He also argued that Dr. Graham had not shown that the statement had damaged his reputation or business.

Graham responded that the criminal allegations were defamatory per se, and no proof of damage was required.

The jury found that Oppenheimer acted with actual malice, and awarded Graham \$325,000 in compensatory damages and the maximum \$350,000 allowed in punitive damages under Virginia law. The verdict found both Oppenheimer and his company liable for the defamation.

U.S. District Judge Richard J. Williams then rejected Oppenheimer's motions to set aside the jury verdict and to grant a new trial, and entered an order consistent with the jury's findings.

Graham was represented by D. Alan Rudlin and J. Burke McCormick of Hunton and Williams in Richmond; Oppenheimer represented himself pro se, although Earle Duncan Getchell Jr. of McGuire-Woods LLP in Richmond is handling the appeal. Bill Riggenbach of Duane & Shannon, P.C. in Richmond represented Prost-Data.

## Anonymity for Cybersmear Defendants Who Appeared in Court

On November 23, a Superior Court in New Jersey adopted the test for revealing the identity of an anonymous internet defendant outlined in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), refusing to identify two anonymous posters on a Yahoo! bulletin board who appeared in court, while agreeing to reveal the identities of two other posters who did not appear. *Dendrite International Inc. v. John Does*, No. C-129-00. The court's ruling defeated the efforts of a company that claims it was injured by the defendants' postings. In determining whether the First Amendment rights of the two John Does appearing in court should be abridged, the court followed the *Seescandy* requirements for discovering the identity of an anonymous internet defendant:

- Identify the defendant with sufficient specificity so that the court can determine that the defendant is a real person or entity who may be sued in federal or state court;
- Identify all past steps taken to locate the defendant;
- Establish, to the satisfaction of the court, that the plaintiff's suit could withstand a motion to dismiss; and
- File a statement of reasons justifying the specific discovery requested, including the identification of the limited number of people on whom discovery process might be served and for which there is a reasonable likelihood that the discovery process will lead to identifying information about the defendant that would make service of process possible.

The Superior Court noted that in setting forth the *Seescandy* safeguards, the District Court in *Seescandy* meant to “. . . ensure that this unusual procedure will only be employed in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will prevent use of this method to harass or intimidate.” *Seescandy.com*, 185 F.R.D. at 577.

In evaluating the requirements, the Superior Court found that Dendrite's claims (defamation against Doe

No. 3 and misappropriation of trade secrets against Doe No. 3 and Doe No. 4), in fact, could not withstand a motion to dismiss. The defamation claim fell for lack of falsity and/or a showing of harm. The trade secret claims fell when plaintiff failed to prove a trade secret existed.

The court refused to assess the claims against John Does 1 and 2, since “John Does Nos. 1 and 2 have not responded in this case. They must assert a right before the Court will recognize it.” The court accordingly granted Dendrite's expedited discovery request for John Doe Nos. 1 and 2.

The plaintiff alleged defamation, misappropriation of trade secrets, and breach of employment contract against various defendants who posted messages critical of the company and its products on the bulletin board. Yahoo! had refused to release the identities of the John Does without a court order or subpoena, and Dendrite sought a subpoena to be served on Yahoo! to produce documents identifying the John Does.

The unpublished decision comes on the heels of a Pennsylvania court ruling, reported in last month's *LibelLetter*, that before the identity of Internet posters accused of libeling public officials could be uncovered, the defendant must have an opportunity to establish as a matter of law that plaintiff could not prevail on the claim. *Melvin v. Doe*, No. ED 99-10264 (C.P. Allegheny, November 15, 2000). See *LibelLetter*, November 2000, at 21. The court there, in a lengthy analysis of the free speech considerations regarding anonymous criticism of public and political matters, put the burden on the defendant to come forward with a showing that plaintiff could not make out a prima facie case. In *Melvin*, the court in the end, denied defendant's motion for summary judgment, finding plaintiff had produced evidence to support a finding on each element of the libel claim the defendant put in issue. The Pennsylvania court's standard required a similar showing that the plaintiff's claims could withstand summary judgment (in *Seescandy*, it was a motion to dismiss). The Pennsylvania court did not require the plaintiff to show the identification of the defendant with a degree of specificity, past efforts to locate him or her, or the justification for the discovery requested.

## Libel Suits Based on Internet Postings Settled

### *Plaintiff Won Prior Restraint Against Further*

Two lawsuits in which a company and its chief executive obtained court orders barring a New Jersey man from posting comments regarding the company on Internet financial discussion sites were both settled in late October. Under the settlement, Floyd Schneider and three other defendants agreed not to post any more comments regarding ZiaSun Technologies. The suit continues against two other defendants.

The two orders are thought to be the first in the country against a poster on Internet stock discussion sites.

The cases, *ZiaSun Technologies v. Schneider*, No. 99-CV-1025 (W.D. Wash. filed June 24, 1999) and *Cragun v. Does 1 through 50*, No. 730826 (Cal. Super. Ct., San Diego Cty., 1999), both stemmed from comments posted by Schneider and others on the web site siliconinvestor.com, which allows users to post statements regarding publicly-traded technology companies, and on Schneider's own website.

ZiaSun filed a libel lawsuit in U.S. District Court in Seattle against Schneider and seven others who put comments on the siliconinvestor site; three were identified in court papers as John or Jane Doe.

In addition, former ZiaSun President Bryant Cragun filed his own lawsuit in California state court in San Diego against Schneider for statements posted at siliconinvestor.com and on Schneider's own site, which has since been shut down. Among the statements were "press releases" in which Schneider, using the alias "truthseeker," encouraged investors to sell ZiaSun stock.

In both suits, ZiaSun and Cragun alleged that Schneider and others posted false information in order to lower the stock's value, and profit by "short selling," or borrowing stocks from a brokerage with the promise to reimburse the brokerage later, hoping to profit due to a decline in the stock's value.

In early 2000, judges in both cases issued preliminary injunctions barring Schneider from posting further comments about ZiaSun and Cragun. Schneider did not appear in the state case.

### **Federal Case**

The federal judge's order stated that:

This court finds that ZiaSun has demonstrated that, at a minimum, there are serious questions going to the merits of their defamation claims against Schneider. This court is convinced that Schneider has posted false messages about ZiaSun on the Silicon Investor message boards; that such communications may be unprivileged; and that Schneider was negligent in making the postings. Schneider's electronic postings are also causing damage to ZiaSun.

The court recognized the injunction could "unduly burden" Schneider's freedom of speech, but found that the harm to ZiaSun outweighed those concerns. "[A]ccordingly this Court will balance Mr. Schneider's interest in publishing false and defamatory information about ZiaSun against the potential harm to ZiaSun."

While the web site was not named as a defendant in the federal lawsuit, the federal court order led siliconinvestor.com to remove three of Schneider's postings regarding ZiaSun from its site.

In February, the federal court in Seattle dismissed the case for lack of jurisdiction, legally voiding the order that it had issued. But in August, ZiaSun asked a federal court in San Francisco to hold Schneider in contempt for violating the preliminary injunction. *Ziasun Technologies v. Schneider*, No. C 00-1612 (N.D. Cal. 2000).

### **State Case**

In addition to issuing his order barring Schneider from making further postings, state judge Janis Sammartino ordered Schneider to retract his previous statements. The retraction said that his recommendation to sell ZiaSun stock "was not based on an objec-

*(Continued on page 22)*

## Libel Suits Based on Internet Postings Settled

*(Continued from page 21)*

tive analysis of ZiaSun's stock and value," and that "derogatory statements made regarding Bryant Cragun, ZiaSun, and the officers, directors and employees of ZiaSun were false or implied false facts."

Although Schneider issued the retraction, he subsequently stated that his statements were true.

In September, the state court ordered the defendants to pay almost \$19,000 in fines for refusing to comply with discovery regarding the postings.

### **Settlement**

Shortly before hearings on the effort to enforce the federal order and impose the state court fines, the parties entered settlement negotiations and eventually agreed to settle both the federal and state cases.

Under the settlement, the plaintiffs dropped their demands for monetary compensation, and that the named defendants apologize and retract their postings. Cragun agreed to pay one of the defendants, George Joakimidis, \$60,000 stemming from a stock transaction between them, but Cragun said that he would attempt to recover the money in a separate lawsuit against other parties involved in that transaction.

ZiaSun also vowed to pursue the federal lawsuit against two of the remaining defendants. The company is also continuing to pursue a similar case filed against another financial web site, *ZiaSun Technologies v. Financialweb.Com*, No. 99-1136-CA-16-G (Fla.Cir.Ct., Seminole Cty., filed June 16, 1999), over an article written by one of that site's columnists.

Both parties also agreed to not discuss the case or each other, including Internet postings, except for one news release per side. Both of the press releases claimed victory in the case.

### **A Coming Trend?**

While the ZiaWeb case may mark the first time that orders of this type have been issued, it may not be the last.

The ZiaSun release paraphrased a statement by the company's attorney, Christopher Howard of Seattle's

Weiss, Jensen, Ellis & Howard, that the restraint provisions of the agreement are broader than any restraint a court would have the power to order. "The defendants have agreed to waive any First Amendment claims they may have regarding the types of statements covered in the agreement," the release quoted Howard as saying. "That's something you can obtain only through an agreement. No court in the country can order a party to waive First Amendment protection."

In its own press release on the case, Palo Alto-based firm Gray Cary Ware & Freidenrich, which represented Cragun in the state case, said that similar orders may become more common.

"This order should serve as a warning bell to those who would use the Internet for unlawful practices," Gray Cary Ware & Freidenrich attorney Daniel Pascucci said in the release. "These defendants think that because the Internet has outpaced the law, it gives them a blank check, but there are ways to shut down these egregious practices even under the current law. This order was just the beginning."

James Shalvoy of Manhattan Beach, California represented the Schneider and the other defendants.

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

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.  
404 Park Avenue South, 16th Floor  
New York, NY 10016

Ph: 212.889.2306

Fx: 212.689.3315

ldrc@ldrc.com

## California Court Partially Grants AOL's Motion to Dismiss in Dick Clark Case

### *Win on Lanham Act Claim but Loss on Right of Publicity*

On November 30, a district court in California handed America Online ("AOL") a partial win over Dick Clark, in a case arising from AOL's use of the name "Dick Clark" in promotion. *Dick Clark and Olive Enterprises, Inc. v. America Online, Inc.*, 2000 U.S. Dist. LEXIS 17368 (C.D. Cal.). Finding that use of the celebrity's name was protected under the "nominative fair use" doctrine, the court granted AOL's motion for summary judgment regarding the plaintiff's Lanham Act claims. Only the statutory and common law claims for right of publicity remain.

The case stems from a mass mailing in 1997 and 1998 by AOL, in which AOL delivered promotional material to members of the American Association for Retired Persons ("AARP"). Along with a black and white photo of a dancing scene reminiscent of "American Bandstand" and an image of a Ford Thunderbird, AOL and AARP marks appeared with the text, "If you danced to the Beatles, cruised in a Thunderbird, or tuned in to Dick Clark, you have earned . . . 100 hours of free [Internet service on AOL]."

Dick Clark sued based on the advertisement, joined as plaintiff by Olive Enterprises, Inc., which has the exclusive right to exploit Clark's name and identity commercially.

### ***Right of Publicity***

Regarding the right of publicity claim, the court rejected the defendant's "newsworthiness" defense as well as a general First Amendment defense. The court found a material question of fact on the issue of whether there was a "direct connection" between the plaintiff's name being used and the use being a commercial one by the defendant that would require the plaintiff's permission. Although Dick Clark's name was mentioned in the ad, the court said, ". . . there appears to be a material issue of disputed fact as to whether there was a direct connection between Dick Clark, as a central figure in the Mailer, and the AOL-AARP promotion." The court denied the defendant's

motion for summary judgment on both the statutory and common law right of publicity claims.

As the preparers of the California chapter of 2000- 2001 LDRC 50-STATE SURVEY: MEDIA PRIVACY AND RELATED LAW state:

"What constitutes a 'direct connection' is not well-developed in the cases, but plaintiff need not establish that the use conveyed a false endorsement. *Abdul-Jabbar [v. General Motors Corp.]*, 85 F3d 407, 414 (9th Cir. 1996); *Eastwood [v. Superior Court]* 149 Cal. App.3d 409, 419(1983). See *Newcombe v. Adolf Co-*

*(Continued on page 24)*

---

## District of Columbia Court Applies Neutral Reportage

An obscured logo on a plate of chitlins does not make a generic story on the health hazards of chitterlings "of and concerning" plaintiff's market. *JBA Soul Food Delicacies, Inc. v. The Washington Post Company*, No. 00 CA 4351, (DC Super. Dec. 12, 2000). The *Washington Post* has won a motion to dismiss a libel, product disparagement, and negligence case on the basis that an article that does not mention plaintiff's entity by name and that links plaintiff to the story "if at all, only by a questionable graphic does not satisfy the 'of and concerning' test."

The court goes on, however, to not only find that the report is not defamatory, but to specifically apply the neutral reportage privilege, finding that the *Washington Post's* report was a clearly attributed summary of a report in a reputable medical journal. According to the court, the plaintiff did not challenge the privilege of neutral reportage, just its application here where plaintiff alleged that the article at issue left out certain aspects of the medical journal's report.

---

## CA Ct. Partially Grants AOL's Motion to Dismiss

(Continued from page 23)

*ors Co.*, 157 F.3d 686, 694 (9<sup>th</sup> Cir. 1998)(jury could conclude that use of drawing based on a photograph of former major league baseball pitcher placed next to advertisement's text and a picture of advertised product established a direct connection between pitcher and commercial sponsorship of the advertised product)."

At page 302, authored by Sidley & Austin and Steinhart & Falconer.

### ***Lanham Act***

To determine whether defendant's commercial use of plaintiff's trademark constituted "fair use," the court applied the test from *New Kids on the Block v. News America Publishing*, 971 F.2d 302 (9th Cir. 1992), and found that regarding the Lanham Act claims, nothing in the mailer suggested sponsorship or endorsement of the Internet service by Dick Clark. Accordingly, the court granted AOL's motion for summary judgment on the claims of unfair competition, dilution of name and identity, and trademark infringement.

The court also denied the defendant's motion for summary judgment on the issue of lost profits, rejecting the defendant's argument that plaintiffs had suffered no decrease in the licensing and royalty value of the mark. The court found that plaintiffs were entitled to seek lost profits for the fair market value of Dick Clark's name as it was used by the defendant.

On the punitive damages issue, the court ruled that plaintiffs had failed to meet, even by implication, the statutory standard of malice or "callous disregard" necessary to oppose the defendant's partial motion for summary judgment. The plaintiff's request for entitlement to punitive damages failed as a matter of law, the court held.

Daniel Scott Schecter, Stacey Gilman and Belinda Lee of Latham & Watkins in Los Angeles represented America Online; Dick Clark and Olive Enterprises were represented by Steven Huff and Hara Jacobs of Pryor Cashman Sherman & Flynn in New York.

***To be published in  
January 2001***

## **LDRC 50-STATE SURVEY 2001: EMPLOYMENT LIBEL AND PRIVACY LAW**

*An essential reference on critical  
employment issues.*

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

**\$150**

**For Ordering Information and  
to Preview the  
*LDRC 50-State Survey 2001:  
Employment Libel and Privacy Law Outline*  
Visit our Website — [www.ldrc.com](http://www.ldrc.com)**



---

## California Court: Soundless Video Monitoring of Office, No Privacy Crime

By Terry Francke

*This article has been drawn from a report by Terry France in the newsletter of the California First Amendment Coalition, the FLASH.*

A school superintendent was not criminally liable under the California eavesdropping statute for using a hidden video camera to monitor a portion of a principal's office to detect suspected break-ins, since there was no evidence that any "confidential communications" were captured by audio or otherwise. The resulting series of still photographs was not "eavesdropping" barred by law. To breach the law, the defendant must record verbal communications of

some form.

So ruled the California Court of Appeal for the Third District in *People v. Drennan*, No. C033959, (November 27, 2000).

Modoc Unified School District Superintendent Craig Boyd Drennan was convicted of violating California Penal Code Section 632 (a), which makes it a crime to "intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device."

"Confidential communication" is defined as:

any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

What Drennan did, based on concern that someone was breaking into Modoc High School Principal Dewey Pasquini's office and stealing or reading confidential documents, was to have a video camera installed in a smoke detector housing in the ceiling directly over Pasquini's desk, without his knowledge.

The camera had no audio recording capability and caught no motion. It was set to take still photos, in effect — one every three seconds. One eight-hour videotape thus recorded 24 hours of surveillance.

Drennan was fairly scrupulous, checking with county counsel and being told that the process

*(Continued on page 26)*

---

## Judicial Conference Request for Comments on Potential Scope of Access to Electronic Court Files

The Judicial Conference of the United States is seeking comments on the degree to which to allow public access to federal court files if and when these files are maintained electronically and made available through the Internet. In sum, the Judicial Conference is considering whether the greater access effectively afforded the public to court files once those files can be accessed electronically raises such privacy and security concerns as to require different rules with respect to what is and is not made available from those applicable to the paper files currently kept by the courts.

All comments are due by 5:00 p.m. on January 26, 2001. To the extent relevant, media should encourage their respective trade associations to file comments. The Request for Comment can be found at [www.privacy.uscourts.gov/RFC.htm](http://www.privacy.uscourts.gov/RFC.htm).

What is being proposed here is nothing short of extraordinary, but it is consistent with a notion that is taking hold across the country that electronic access to otherwise public information is intrusive simply because of the public's greater ability to actually obtain and review the information. The comments do not seem to suggest that the court files in the courthouse would be made any less available.

## Soundless Video Monitoring, No Privacy Crime

*(Continued from page 25)*

would be lawful if no sound was captured. He had the maintenance supervisor, who installed the camera and changed the tapes, stop down the viewed area from the entire office to a zone confined to the principal's desk, computer, file cabinet, credenza and bookcase, excluding from view the conference table where visitors sat.

The taping ran from December 1998 to March 1999, and never caught any suspect conduct. Drennan finally stopped the monitoring and had all tapes destroyed. When Pasquini learned of the surveillance afterward, he complained, and at trial testified that a number of sensitive conversations had been held in his office, including several interviews by law enforcement officers and an even larger number of parent-teacher conferences.

Drennan testified that he had never seen any two-party conversations, and the maintenance supervisor who changed the tapes in essence agreed.

But in closing argument the prosecutor told the jury that "there's no requirement that anybody other than Mr. Pasquini be videotaped under that statute..." Drennan was found guilty and sentenced to three years felony probation, conditioned on his willingness to serve 10 days in jail and pay \$7,010 in fines and restitution.

The court of appeal disagreed sharply with the prosecutor's broad reading of the statute. Reviewing its language, context and legislative history the court, in an opinion written by Justice Coleman Blease, concluded that to breach Penal Code Section 632 (a), the conduct must record communication reducible to words, and communication between two or more parties at that. Perhaps a continuous video record of action might be prohibited if someone could use lip-reading to decipher the words, but a sequence of still photos would be unlikely to offer that opportunity.

The court noted that prosecutors had relied on a 1989 case, *People v. Gibbons*, holding that a silent video surreptitiously made by the defendant of his sexual encounters with various women was a crime under Section 832 because sex is a species of communication. That case held:

Penal Code section 630 expressly states the intent of the Legislature to protect the right of privacy of the people of this state. Consistent with the express declaration of intent and in the absence of any express statutory limitations, we find that 'communication' as used in the privacy act is not limited to conversations or oral communications but rather encompasses any communication, regardless of its form, where any party to the communication desires it to be confined to the parties thereto.

But Justice Blease took issue with the *Gibbons* court's interpretation of the section and stated:

We conclude, from the repeated use of words associated with sounds, symbols and hearing, that the recordings prohibited by this statute are the recordings of the contents of audible or symbol-based communications.

That the legislature intended to treat covert visual monitoring differently from aural eavesdropping, he noted, was indicated by the existence of another statute, Penal Code Section 647 (k), which covers both unaided peeping and technical surveillance of places like dressing rooms or bathrooms, or other places where privacy can be reasonably expected, if the intent is to invade that privacy.

*Terry Francke is General Counsel of CFAC, the California First Amendment Coalition. We would like to thank Terry Francke and CFAC for permission to republish his report in the LDRC LibelLetter.*

---

***[T]he conduct must record  
communication reducible to words,  
and communication between two or  
more parties at that.***

---

## Montana Supreme Court: No Right To Privacy in Settlement Agreement

### *Press Wins Access to Settlement Terms in Suit Against Government*

A Montana husband cannot keep secret from the public a settlement agreement with the state over the murder of his wife by a prisoner on probation. So held the Supreme Court of Montana in the November 17 decision in *Pengra et al. v. Montana et al.*, 2000 Mont. 291, 2000 Mont. LEXIS 289.

The underlying lawsuit, in which Steve Pengra charged that negligence by the state of Montana led to the brutal rape and murder of his wife Tamara, was settled five days before the jury trial was to begin. Pengra asked the court to seal the settlement agreement, a move opposed by interveners the *Helena Independent Record*, The Associated Press, the *Billings Gazette*, the *Missoulian*, and *Montana Law Week*.

The lower court denied Pengra's request, finding that no privacy right existed in the amount of compensation received under the agreement. However, the court sealed the settlement agreement pending the Supreme Court appeal.

#### ***Argued For Privacy***

In his motion before the District Court to seal the settlement terms, Pengra argued that disclosing the agreement's terms would be harmful to his and his daughter's emotional health, and claimed that the requirement under Montana Code Annotated ("MCA") § 2-9-303 that settlement of claims against the government be made public for inspection was outweighed by his and his daughter's privacy rights. In his appeal before the Supreme Court, he added a claim that the § 2-9-303 requirement was facially unconstitutional because it violated his right to personal privacy.

The media responded that settlement agreements with the government are public records and under § 2-9-303 of the MCA, the public has a constitutional right to know about them.

The Supreme Court first noted that there are no

elevated privacy rights for minors regarding settlement documents for their tort claims against the state under the Montana Constitution. Rather, minors and adults have the same degree of privacy rights in the settlement agreements of such cases.

The majority declined to address Pengra's charge that § 2-9-303 violates the privacy rights of the individual and is facially unconstitutional, since Pengra never raised the issue before the District Court.

#### ***Balanced by FOI Law***

***“Disclosure of such agreements,” the court found, “provides an irreplaceable opportunity for taxpayers to assess the seriousness of unlawful and negligent activities of their public institutions.”***

The court then turned to the heart of the matter, addressing Pengra's charge that his privacy rights outweighed § 2-9-303 right-to-know disclosure requirements. In balancing the two interests, the court noted that Pengra's subjective expectation of privacy in the amount of settlement compensation was “discredited” by the fact that he had taken no steps to keep his suit against the government private. Pengra requested a jury trial and admitted at oral argument that if the settlement amount had not been to his satisfaction, Pengra would have gone forward with the public jury trial. Further, the Supreme Court agreed with the lower court that any damage from publicity to the Pengras had already occurred, and there was no evidence that disclosing the settlement amount would cause any additional harm.

“Disclosure of such agreements,” the court found, “provides an irreplaceable opportunity for taxpayers to assess the seriousness of unlawful and negligent activities of their public institutions. The taxpayers are entitled to know how much they must pay for such actions or inactions.”

Countering Pengra's charge that it is unfair for a person who files suit against the government to lose

*(Continued on page 28)*

## Montana Supreme Court: No Right To Privacy

*(Continued from page 27)*

his privacy rights, the court said that this “loss of the right of privacy” is merely a secondary result of the disclosure provision. “The § 2-9-303, MCA, disclosure requirements,” the court wrote, “are aimed not at what the settling party receives, but instead at what State government expends as a result of a given act or omission to act by agents of the government.”

The court concluded that Pengra had not shown that his and his daughter’s privacy rights clearly outweighed the public’s right to know the costs they would bear in the Pengras’ settlement agreement.

### ***Dissent***

In his dissent, Justice W. William Leaphart argued that although the court declined to reach the issue, § 2-9-303 is unconstitutional on its face, since “[i]t gives an absolute preference to one [state] constitutional guarantee, the right to know, to the exclusion of another, the right of privacy. A legislative enactment which elevates the right to know to an absolute rule without any consideration of the individual’s right of privacy cannot pass constitutional muster.”

### ***Concurrence***

In a special concurrence, Justice James C. Nelson said that he agreed with the court’s use of the balancing test, since that was the way Pengra had argued and presented the issue. However, he also went on to adopt the dissent’s observation that the plain language of § 2-9-303 precludes the type of balancing used by the court in deciding the case. Rather, under the mandatory statutory language, “[a]ll settlements with the State are public documents. End of story.” Justice Nelson added that the question of whether the section was facially unconstitutional would have to await a future challenge or legislative action.

The media interveners were represented by

James P. Reynolds of Reynolds, Motl & Sherwood in Helena and Peter M. Meloy and Morrison in Helena. P. Keith Keller and Michael R. King represented the State of Montana. Richard J. Pyfer of Small, Hatch, Doubek and Pyfer in Helena represented the appellants.

### **LDRC *LibelLetter* Committee**

Adam Liptak (Chair)

Mike Giudicessi (Vice Chair)

Robert Balin

Jim Borelli

Jay Ward Brown

Peter Canfield

Thomas Clyde

Robert Dregs

Jon Epstein

Charles Glasser, Jr.

Richard M. Goehler

Karlene Goller

Steven D. Hardin

Rex S. Heinke

Beth Johnson

Debora Kristensen

Nory Miller

William Robinson

Bruce Rosen

Madeleine Schachter

Charles D. Tobin

Paul Watler

## Grand Jury Subpoena of Bookseller Quashed

By Jerome T. Wolf

For the first time, a court has both accepted and vindicated a bookseller's First Amendment rights by quashing a federal grand jury subpoena. In this case, the Drug Enforcement Agency sought the identity of certain books purchased from a Borders bookstore by an unidentified person. No opinion was issued in the case, only an order. *Borders' Inc., a Colorado Corp. v. U.S. Department of Justice/Drug Enforcement Agency (DEA)*, No. 00-2415-JWL (D.Kan.) (filed under seal). Borders was required to litigate this motion to quash without ever knowing the purpose behind the DEA efforts to obtain the information.

Borders argued that the case most directly on point, *In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc.*, 26 Media L. Rep. (BNA) 1599, 1601 (D.D.C. 1998), held that a bookseller's and its customers' First Amendment rights were directly implicated by such a subpoena. In that case, the U.S. District Court for the District of Columbia, when confronting special prosecutor Kenneth Starr's subpoena relating to books purchased by Monica Lewinsky at Kramerbooks, held that First Amendment rights were implicated, and required that the government show a compelling need for the information, and a strong nexus between the information and the investigation being pursued by the special prosecutor. Ms. Lewinsky, however, before such a showing could be made, voluntarily disclosed the information. As a result, the Court did not address the ultimate issue of whether the subpoena should be quashed.

A recent October 2000 decision in the District Court, City and County of Denver, Colorado, *Tattered Cover, Inc. v. The City of Thornton, et al.*, No. 00CV1761 (Dist. Ct., City and County of Denver, Colo., Oct. 20, 2000), also directly considered this issue, but refused to quash the defendants' subpoena, based on a finding that the city had shown a compelling need for the subpoenaed information. The bookstore plans to appeal this decision.

The problem Borders faced was that, because of the secrecy of the Grand Jury proceedings, we were unable to confront and contest any evidence possessed by the Drug Enforcement Agency showing such a compelling need. In order to highlight this issue, we filed a motion for

leave to confront that evidence, suggesting that Borders could not adequately protect its and its customers' First Amendment rights without the opportunity of confronting and contesting any evidence of a compelling need for this information and a strong nexus between this information and the grand jury investigation. This issue was not only significant at the trial level, but potentially significant if, in fact, the motion to quash was overruled, and the issue went up on appeal.

Fortunately for Borders, the U.S. District Court held an additional secret ex parte hearing with the Drug Enforcement Agency and ruled in favor of Borders, sustaining the motion to quash the subpoena, but denying the motion to confront the evidence of compelling need, indicating in its order that the reasons for quashing the subpoena were set out in the record of the secret ex parte hearing.

The Drug Enforcement Agency has not yet indicated whether it intends to appeal. This case is, to the knowledge of Borders' counsel, the first time a motion to quash a subpoena on a bookseller on First Amendment grounds has been sustained.

*Jerome T. Wolf is with Sonnenschein, Nath & Rosenthal, Kansas City, Missouri and represented Borders in this matter.*

### **NOW AVAILABLE**

## **LDRC 50-STATE SURVEY 2000-01: MEDIA LIBEL LAW**

*With an outline of English Libel Law.*

**MEDIA LIBEL LAW TOPICS INCLUDE:** *Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions*

**\$150**

## Judicial Watch Qualifies As “News Media Representative,” D.C. District Court Rules

On November 16, a United States District Court for the District of Columbia ruled that Judicial Watch, Inc. was a “representative of the news media,” and as such, was entitled under the Freedom of Information Act (“FOIA”), 5 U.S.C. Section 552(a)(4)(A), to ask the Department of Justice to conduct a free search. Judicial Watch sought any materials relating to the “decision(s) by Attorney General Janet Reno, the Department of Justice, the Immigration and Naturalization Service, and/or other persons and entities to return Elian Gonzales to the custody of his biological father in Cuba.” The court also ruled, however, that Judicial Watch was not entitled to receive free copies of the findings by the Department of Justice. *Judicial Watch, Inc. v. U.S. Dept. of Justice*, 2000 U.S. Dist. LEXIS 17051 (Civ. No. 00-1396).

The court’s ruling was in response to Judicial Watch’s request for judicial review of the Justice Department’s denial of its application for a waiver of the fee provisions of FOIA.

### Is it “News Media”?

The court’s decision focused on determining whether or not Judicial Watch qualified as a “representative of the news media,” under 1986 amendments to FOIA. Such groups are entitled to receive a waiver of FOIA search fees. The government argued that although Judicial Watch had publicly distributed information obtained through FOIA in the past, publishing reports based on the information, in this case Judicial Watch did not show the requisite intent to create an original work from the materials requested or to use them for any purpose that could be viewed as the “work of the news media.” In response, Judicial Watch contended that its efforts to distribute the news could be seen in its web site and radio show.

Although the court noted that Judicial Watch’s web site was more a self-serving promotional venture and vehicle for fundraising than a traditional “news medium,” the court cited *National Security Archive v. Dept. of Defense*, 279 US App. D.C. 308, D.C. Cir. 1989, discussing the comment of Senator Leahy in 1986 when the FOIA amendments were enacted that:

any person or organization which regularly publishes or disseminates information to the public . . . should

qualify for waivers as a “representative of the news media.”

Based upon this standard, the court said, “. . . arguably anyone with a web site is entitled to demand free search services under the Freedom of Information Act.”

### An Issue for Congress

The district court stated that neither *National Security Archive* nor the Senator could have foreseen the future role of the Internet or the present form of the “news media,” with the blurring of traditional lines between actor/reporter, objectivity/spin and truth/fiction. “At a time when the news media are frequently their own lead story, a publicity seeker may be a representative of the news media, and vice versa,”

***Based upon this standard, the court said, “. . . arguably anyone with a web site is entitled to demand free search services under the Freedom of Information Act.”***

the court said. However, the court continued, if the fact that anyone who publishes or disseminates information qualifies for a FOIA fee waiver is “intolerable” for the Justice Department, it is for Congress to remedy. Thus, the court denied

summary judgment on the issue to the government, granting it instead for the plaintiff.

Finally, after granting Judicial Watch’s waiver of search fees under 5 U.S.C. Section 552(a)(4)(A)(ii), the court denied Judicial Watch’s request for a “blanket” waiver to avoid duplication costs under 5 U.S.C. Section 552(a)(4)(A)(iii). The court ruled that Judicial Watch had failed to present a “reasonably specific[]” request as required under the public-interest waiver standard, since it merely made the broad claim that a public interest waiver would “promote accountable government . . . by disseminating relevant information” that would purportedly “benefit the public by identifying areas for future reform as well as deterring future abuses that could otherwise proliferate without scrutiny.” The court therefore granted the defendant’s motion for summary judgment on the issue.

The litigious and conservative Judicial Watch, self-described on its web site as “a non-profit, non-partisan public interest organization” created “to serve as an ethical and legal ‘watchdog’ over our government, legal, and judicial systems to promote a return to ethics and morality in our nation’s public life,” is currently involved in over fifty lawsuits.

## European Courts Assert Jurisdiction Over Web Sites Abroad

By John P. Rupp and Kurt A. Wimmer

On November 20, 2000, the Tribunal de Grande Instance de Paris entered a follow-up order in a case brought against Yahoo! Inc. and Yahoo! France to limit access by French residents to Nazi-related messages and memorabilia on Yahoo auction sites. In a decision that has been characterized in the press as representing a victory of “national sovereignty . . . against the worldwide net” (*Washington Post*, November 21, 2000), the Paris court held on November 20 that Yahoo! France had “complied for the most part with the spirit and letter” of the court’s earlier access limitation order but that Yahoo! Inc. had not.

Although the case dealt with mixed issues of speech and commerce — the ability of an online merchant to offer goods that may run afoul of the law of one of the scores of countries in which its content may be accessed — the case has been seen as a harbinger of greater interference with Internet content of all kinds. Whether the case deserves this reputation is questionable, as the facts discussed below indicate. But overall developments in Europe do indicate that Internet content providers may be subjected to greater scrutiny by individual governments. In particular, a more recent German case applying its laws against Nazi speech and Holocaust denial against an Australian website operated by an Australian citizen presents the issue of the application of domestic law against a site with no physical connection to the country attempting to apply its law against, and exercise jurisdiction over, the site on the basis of pure speech.

### ***French Proscriptions on Nazi Messages/ Memorabilia***

The statutory predicate for the decisions rendered in the Yahoo case is Article R. 645-1 of the French Criminal Code. Article R. 645-1 generally prohibits the possession, sale and public display in France — other than in a film, show or exhibit “enjoying historical context” — of uniforms, insignias or emblems worn by Nazi organizations prior to or during World War II. Article R. 645-1 also has been held to prohibit

“revisionist” statements and literature — in particular, those seeking to justify Nazism, disputing the reality of Nazi war crimes or inciting racism or antisemitism.

### ***Initial Decision in Yahoo! Case***

The Union des Etudiants Juifs de France (“UEJF”) and Ligue Contra la Racism et L’Antisémitisme (“LICRA”) claimed that Yahoo! Inc. and Yahoo! France had violated Article 645-1 of the French Criminal Code by making available to French residents, operating from French territory, auction sites displaying and proposing the sale of approximately 1,000 items of Nazi memorabilia (uniforms, flags, insignia, medals, etc.). The UEJF claimed in addition that Yahoo! Inc. and Yahoo! France had violated Article 645-1 by making available to French residents, either directly or through hyperlinks, two “monuments of contemporary anti-Semitic literature” (*Mein Kampf* and *Protocole des Sages de Scion*) as well as photographic depictions purportedly proving that the gas chambers operated by the Nazis never existed.

On May 22, 2000, the Tribunal de Grande Instance de Paris rejected requests that had been made by Yahoo! Inc. and Yahoo! France for summary dismissal of the case on jurisdictional and standing grounds. According to the court, permitting the visualization in France and/or the sale to French residents of Nazi-related messages and memorabilia constitutes “a wrong on the territory of France, a wrong, the unintentional nature of which is

*(Continued on page 32)*

***According to news reports on December 21, Yahoo! Inc. filed for a declaratory judgment in U.S. Federal Court in San Jose, California, seeking a ruling that a French Court cannot adjudicate over the California based entity and thus cannot enforce fines from a French court. Yahoo is not seeking to deny French jurisdiction over Yahoo! France.***

## European Cts. Assert Jurisdiction Over Web Sites

*(Continued from page 31)*

apparent, but which is the cause of harm to the LICRA and UEJF which both have the mission of pursuing in France any and all forms of banalization of Nazism, regardless of the fact that the activity complained of is marginal in relation to the entire business of the auction sales service offered on the Yahoo.com auction site.”

Despite having acknowledged some of the difficulties presented to Yahoo! Inc. of limiting access to the disputed auction sites, the court ordered Yahoo! Inc. “to take any and all measures of such kind as to dissuade and make impossible any consultations by surfers calling from France to its sites and services . . . which infringe upon the internal public order in France, especially the selling of Nazi objects . . .”

The court gave Yahoo! Inc. two months to formulate compliance proposals.

So far as Yahoo! France was concerned, the court fashioned a different and arguably less drastic remedy. After having concluded that Yahoo! France had violated Article 645-1 by offering French residents a link to Yahoo.com without any warning concerning the Nazi-related messages and memorabilia appearing on the Yahoo.com site, the court ordered Yahoo! France “to warn surfers, by a banner, prior to the surfer’s entry into the Yahoo.com site, that should the result of his search on Yahoo.com . . . point toward sites, pages or forums . . . which constitute violations of French law, such as is the case of sites which, whether directly or indirectly, intentionally or unintentionally, seek to excuse or justify Nazism, it must interrupt the consultation of the site in question . . .”

### ***Response of Yahoo! Inc. and Yahoo! France***

Shortly after the May 22 order was entered, Yahoo! Inc. discontinued its link to the *Protocole des Sages de Sion*, acknowledging — as the Tribunal de Grande Instance de Paris stated subsequently — “the

sufficiency of the relationship between that document and France in view of to the language of that piece of work . . .” Yahoo! Inc. resisted the court’s May 22 order in other respects by renewing its jurisdictional and standing arguments and arguing that full compliance with the court’s order was technically impossible. Yahoo! Inc. also emphasized in subsequent proceedings in the case that the Yahoo.com server was located in the United States, the Yahoo.com auction site was addressed primarily to users based in the United States and the messages and memorabilia at issue in the case were protected by the First Amendment to the United States Constitution.

Yahoo! France responded to the court’s May 22 order by adding the following message, in French, to the

conditions of use section of the Yahoo! France website:

Lastly, if in the context of a search made on *www.yahoo.fr* based on a tree structure, key words, the results of this search were to lead to sites,

pages or chats the title and/or the content of which constitute a breach of French law, in particular due to the fact that Yahoo! France cannot control the content of these sites and external sources (including the content referenced on other Yahoo! sites and services around the world), you should cease your consultation of the site concerned on penalty of incurring the sanctions applicable under French law or of having to respond to lawsuits brought against you.

The foregoing message was displayed to visitors only when they clicked on the link “tout savoir sur Yahoo!” appearing at the bottom of each page of the Yahoo! France website. By contrast, if a visitor to the Yahoo! France website initiated a category search having a clear relationship to Nazism (*e.g.*, the “Holocaust”), a Nazi-related warning appeared automatically on the screen. The warning, which was in French, stated as

*(Continued on page 33)*

---

***[T]he decisions in the Yahoo! case suggest that the much-heralded technological convergence that is occurring will be accompanied by convergence in the applicable legal standards applying to the on-line and off-line worlds.***

---



## European Cts. Assert Jurisdiction Over Web Sites

(Continued from page 32)

follows:

Warning: By continuing your search on Yahoo! US you may be led to consult revisionist sites whose content is illegal under French law and whose consultation, if you continue, is punishable.

### ***Second Decision in Yahoo! Case***

After having rejected again the jurisdictional and standing arguments lodged by Yahoo! Inc., the Court de Grande Instance de Paris held on November 20 that Yahoo! Inc. had failed to comply with the core provisions of its earlier order. According to the court

the combination of technical means available to [Yahoo! Inc.] and the initiatives [Yahoo! Inc.] can take in the name of basic public morality enables Yahoo to comply with the injunction contained in the May 22, 2000, order concerning the screening of access to Nazi object auction sites and the site containing *Mein Kampf*, which was included in the injunction . . . under the heading “and of all other sites or services which constitute praise of Nazism . . .”

The court gave Yahoo! Inc. three months to comply with the November 20 order, after which time Yahoo! Inc. was made subject to a penalty of FRF 100,000 (approximately US \$13,400) “for each day of delay until perfect accomplishment.”

### ***Evidence that Blocking Possible***

Notably, the court sought and received evidence that there were technical mechanisms that could be used to block at least some access to the content by French nationals. Vincent Cerf, who is widely acknowledged as one of the major developers of the Internet, was part of a panel of experts that testified to the methods that could be employed. In particular, the panel focused on “Internet protocol addresses,” the unique identifiers used by each computer that accesses the Internet. IP addresses often – but do not always –

reflect the geographic origin of the computer that is attempting to access a website. By blocking access to IP addresses assumed to be of French origin and taking a few other measures, the panel found that some 90 percent of French nationals could, in fact, be blocked from accessing content that violates French law. (IP addresses are not, of course, a perfect mechanism for blocking access; a moderately sophisticated user can easily configure her computer to utilize an IP address that reflects an entirely different geographic area.)

Although finding that Yahoo! France had complied “for the most part with the spirit and letter of the decision of May 22, 2000,” the court ordered Yahoo! France to take certain additional steps to increase display of the warning approved by the court before French residents were given access to the Yahoo.com website through Yahoo! France. Specifically, the court held that Yahoo! France must display automatically the warning the court had approved, even if the visitor failed to consult the conditions of use section of the Yahoo! France website or did not initiate a category search having a clear relationship with Nazism. The court reserved the right to order a per diem fine in the case of Yahoo! France for any failure to comply with the court’s November 22 order.

### ***Revolution or Evolution?***

Despite the controversy generated by the Yahoo! case, the decisions entered by the Tribunal de Grande Instance de Paris on May 22 and November 20 are not, in the most fundamental sense, all that revolutionary. When Yahoo! established Yahoo! France and began shipping goods, illegal under French law, to French nationals on French territory, it was “doing business” in France in much the same way as an off-line merchant would be regarded as “doing business” when providing a physical gateway to goods located in the United States through a bricks-and-mortar facility (e.g., an order placement or order processing center) on French territory. Yahoo! also has taken other positive, volitional steps to exploit the French market, including configuring

(Continued on page 34)

## European Cts. Assert Jurisdiction Over Web Sites

(Continued from page 33)

content for the uniquely French Minitel service. Denying the applicability of national law in on-line context while conceding its applicability off line would seem to require, at the very least, a rethinking of general principles.

The reluctance of courts to view on-line activities as being *sui generis* seems likely to increase substantially as additional filtering technology becomes available. Consultants in the Yahoo! case testified that 70 to 80 percent of visitors to Yahoo.com could be pegged to a geographic location using readily available technology and that that figure could be raised to 90 percent or so if Internet Service Providers asked users to complete nationality questionnaires. Although the required use of filtering technology in circumstances such as those presented by the Yahoo! case may be anathema to some, the decisions in the Yahoo! case suggest that the much-heralded technological convergence that is occurring will be accompanied by convergence in the applicable legal standards applying to the on-line and off-line worlds.

### ***The German Approach to Hate Speech***

On December 12, 2000, Germany's highest court, the Bundesgerichtshof, held that a website based in Australia could be subjected to Germany's laws against pro-Nazi speech and denial of the Holocaust. The case was brought against Frederick Toben, a well-known Holocaust revisionist who was born in Germany but who is now an Australian citizen.

German law contains several provisions that address fascist speech. A section on "Incitement of the People" criminalizes incitement to violence by appeals to racial or ethnic hatred. A section on "Incitement to Racial Hatred" criminalizes the display of "documents which incite racial hatred" or depict violence against humanity in a positive light. A section on "Slander on Confessions, Religious Groups and Association of World Views,"

criminalizes slandering the views of religious groups in an attempt to breach the peace. Yet another provision includes a prohibition against the *Auschwitzlüge*, the denial of the Holocaust. These provisions are invoked relatively rarely, and the standard of proof is high – *mit an Sicherheit grenzender Wahrscheinlichkeit*, or "a probability amounting to certainty."

In the *Toben* case, the trial court found that Toben's Australian website, as well as paper pamphlets distributed in Germany by Toben, violated the German criminal law provision against the denial of the Holocaust. Toben was sentenced to 10 months in prison. He appealed his conviction, arguing that German law could not apply to an Australian website. An intermediate

appellate court agreed with Toben and held that German speech laws could only be applied against German websites. But the highest court in Germany disagreed and reinstated Toben's sentence.

---

***Not surprisingly, Internet companies are deeply involved in advocating the "country of origin" approach taken by the E-Commerce Directive***

---

### ***The Evolving E.U. Approach***

Without question, the Yahoo! and Toben cases are troubling precedents that already have increased Internet companies' sensitivity to foreign countries' attempts to apply their law to websites and e-commerce businesses. It is worth noting that both cases involved issues relating to Nazi speech, which remains one of the most inflammatory topics of discussion in Europe; just as hard cases make bad law, cases dealing with hate speech tend to make precedent that is adverse to free expression.

The overall framework of European policies and rules is not, however, as adverse to Internet companies' interests as these two cases might make it seem. For example, under the European Union's relatively recent E-Commerce Directive, which applies to e-commerce activities within the 15 member states of the European Union, companies are subjected only to the jurisdiction

(Continued on page 35)

## European Cts. Assert Jurisdiction Over Web Sites

*(Continued from page 34)*

and the law of the member state in which they are established.

This is, of course, a sensible rule that will spur the growth of e-commerce in the European market. European companies setting up online sales will have a relatively high degree of certainty regarding the law that will apply to their activities and the forum in which they can reasonably expect that law to be applied. This "country of origin" rule is becoming the dominant rule under both United States and European law, and its adoption in other countries (and in disputes between various countries) would foster the development of online commerce.

These principles are not, however, set in stone. On November 30, 2000, the Justice and Home Affairs Council of the European Union adopted the "Brussels Regulation" on consumer contract jurisdiction. This regulation provides, in short, that the courts of the country where a consumer resides will have jurisdiction over consumer-protection disputes concerning agreements when the merchant "pursues commercial or professional activities in the Member State of the consumer's domicile or by any means directs such activities to that Member State . . . and the contract falls within the scope of such activities."

Not surprisingly, Internet companies are deeply involved in advocating the "country of origin" approach taken by the E-Commerce Directive. These efforts will intensify over the next year, as the European Commission considers under the Rome Convention whether online companies are bound by the trading standards and consumer protection laws of every country in which they do business.

Although these proposals are pointed most directly at e-commerce companies and at electronic contracts rather than content-related torts and criminal prosecutions, these principles concern Internet sites that traffic in ideas as well as in tangible products. Additionally, there is the realistic prospective that other non-European countries choose to follow a similar model. Other arguments may, of course, be raised against the imposition of national law against an international medium such as the Internet, including arguments based on treaties such as the Euro-

pean Convention for Human Rights and other similar documents, as well as public international law principles generally.

Those worried about the European Union actions and about the implications of the Yahoo! decisions for the freedom that has been one of the World Wide Web's primary strengths may want to consider using those decisions to prompt further consideration of self-regulatory measures responding to the concerns summarized by the Tribunal de Grande Instance de Paris. Greater attention to strategic site language, structuring content and choosing carefully the location of servers, employees and assets may be warranted. The Yahoo! decisions would appear to confirm that prophylactic steps by the private sector entities having the greatest stake in on-line commerce should not be delayed.

*John P. Rupp and Kurt A. Wimmer are partners at Covington & Burling in Paris and London respectively. Kurt Wimmer is Chair of the LDRC Cyberspace Committee.*

©2000

LIBEL DEFENSE RESOURCE CENTER, INC.  
404 Park Avenue South, 16th Floor  
New York, NY 10016  
(212)889-2306  
www.ldrc.com

BOARD OF DIRECTORS

Kenneth M. Vittor (Chair)  
Robin Bierstedt  
Dale Cohen  
Anne Egerton  
Harold W. Fuson, Jr.  
Susanna Lowy  
Mary Ann Werner  
Thomas B. Kelley (ex officio)

STAFF:

Executive Director: Sandra Baron  
Staff Attorney: David Heller  
Staff Attorney: Eric Robinson  
LDRC Fellow: Sherilyn Hozman  
Legal Assistant: Kelly Chew