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see page 58 for information



THANK YOU SUSAN GROGAN FALLER
The LDRC expresses its appreciation
for the out-going DCS Executive
Committee President
see page 2

Reporting Developments Through December 18, 2001

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Thank You Susan Grogan Faller...

Thank you for being a terrific president of the Defense Counsel Section. As you all know, the officers of the DCS rotate on an annual basis. What that means is that a brand new officer starts as Treasurer each year — elected by the DCS at their Annual Breakfast and Meeting in November — and moves up the ranks till he/she reaches President of the Executive Committee. What that also means is that each year we are obligated to say good-bye to that year's President as we welcome the next.

Susan Grogan Faller was President of the DCS Executive Committee in 2001, and she has been a wonderful President. She runs a taut meeting — complete with fire horns straight from Cincinnati during each of the Monday noontime Executive Committee meeting sessions. She cares deeply about the progress of the DCS and about the creation of practical, intelligent materials and programs for her colleagues in the media and media bar, with the result that under her watch a number of reports and projects were published and new ones begun. She has helped us all keep our focus, even as the ground, sometimes literally, seemed to shake beneath us.

Indeed, I am deeply grateful to Susan for all that she uniquely brought to the post this past year. It hasn't been an easy year. But her concern for all of us and her patient, intelligent presence made it easier for us to work through the stresses of this year to see through to notable accomplishments. We value her common sense (of course, as a Midwesterner myself, I place high stock in the particular version of common sense Susan brings to the table), her sense of humor, as well as her experience as a media defense counsel.

Fortunately, she will be on the Executive Committee one more year, as President Emeritus. And we welcome Jim Stewart to the DCS Executive Committee as our new Treasurer, starting January 1. David Schulz will take over as president, Lee Levine as Vice-President, and Bruce Johnson as Secretary. We will all look forward to a dazzling 2002...with the caveat that following Susan's example of accomplishments will be no mean feat. Thank you, Susan Grogan Faller.

Three Courts Reject Expansive View of Internet Jurisdiction

By David A. Schulz

The jurisprudence of Internet jurisdiction is still in its infancy and unresolved legal issues abound. [Note the cases discussed in the box below, and on p.5, if you had any doubt about that proposition]. But, three recent rulings firmly reject, in different contexts and on different rationales, the notion that the availability of information on the Internet, alone, is enough to assert jurisdiction anywhere the information can be read. These cases require evidence establishing a deliberate intent to conduct activity in the forum, or evidence showing that injury in the forum was reasonably foreseeable to follow from the defendant's conduct.

No Jurisdiction Over a Trademark Claim

WILDFIRE COMMUNICATIONS V. GRAPEVINE

The first of the recent rulings came in late September, when Judge O'Toole of the U.S. District Court in Massachusetts dismissed a trademark infringement and breach of contract case for lack of personal jurisdiction. See *Wildfire Communications, Inc. v. Grapevine, Inc.*, 2001 U.S. Dist. LEXIS, 18238 (D. Mass., Sept. 28, 2001). Wildfire Communications, the plaintiff, is a Delaware company

[W]ithout evidence showing an "actual purchase" by or "direct solicitation" of customers in Massachusetts, the court found the existence of the web pages insufficient.

that provides Internet and computer services from its headquarters in Massachusetts; the defendant, Grapevine, is an Illinois company that markets and sells its Internet applications over the Web and, under the name Wildfire, provides local ISP services to customers in the (618) telephone area code in southern Illinois.

Plaintiff first became aware of the defendant in 1995, when Grapevine sent an (unsuccessful) e-mail solicitation for plaintiff to advertise on its website. A year later, plaintiff approached Grapevine to purchase the name "wildfire.net;" Grapevine agreed, and this transaction was completed in October 1996. However, Grapevine continued to operate a website at "wildfireinternet.com."

The court's opinion is less than clear about the facts that led to the litigation, but in late 2000 Wildfire Communications sued Grapevine for trademark infringement and unfair competition. A few months later it added a claim for breach of the contract conveying the "wildfire.net" name. Plaintiff argued that personal jurisdiction over Grapevine existed in Massachusetts because Grapevine maintained three websites that were accessible in the State, Grapevine had solicited business from plaintiff in the State, and Grapevine had signed a contract with plaintiff, a Massachusetts company, that contained a Massachusetts choice of law provision. Notwithstanding that Massachusetts is plaintiff's home state, the court rejected its choice of forum.

The court was entirely unpersuaded of the significance of Grapevine's websites, standing alone, to the jurisdictional issue. The court recognized that Massachusetts residents "could theoretically purchase" services from the websites, but without evidence showing an "actual purchase" by or "direct solicitation" of customers in Massachusetts, the court found the existence of the web pages insufficient to establish the necessary "minimum contacts" with the State.

The court did not expressly apply an active/passive analysis, but found the lack of commercial activity with defendant in the state over the Internet to be significant.

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UPDATE: Stanley Young v. New Haven Advocate, Hartford Courant, et al.

In this case involving the key jurisdictional issue — whether personal jurisdiction can be obtained by a hometown plaintiff over a non-resident newspaper premised upon little or nothing more than its availability on the Internet — the Federal Court of Appeals for the Fourth Circuit has accepted an interlocutory appeal from a decision from the Western District of Virginia. Civil No. 2:00CV0086, *LDRC LibelLetter*, September 2001 at 7. Appellants' briefs are due in mid-January.

Three Courts Reject Expansive View of Internet Jurisdiction

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The court found Grapevine's single, unsuccessful attempt to win business from plaintiff by an email message, and its signing of a contract that had been solicited by plaintiff, to be insufficient to establish that Grapevine had "purposefully availed itself of the laws and privileges of the Commonwealth such that it could reasonably foresee being haled into a Massachusetts courtroom."

No Jurisdiction Over NY Publicity Claim

PERRY V. BOSTON CAPITAL VENTURES

In October, Judge Siragusa in the Western District of New York similarly threw out a complaint filed by a home-state plaintiff, this time alleging a violation of Section 51 of the New York Civil Rights Law, which protects against the unauthorized use of a person's name or likeness for purposes of trade. See *Perry v. Boston Capital Ventures*, 2001 U.S. Dist. LEXIS 18789 (October 30, 2001).

Dr. Perry, the plaintiff, is a well-known scientist who developed a device known as an "aerial tram," that allows a person to explore the rainforest canopy without injuring the plant life by using a system of ropes, clamps and pulleys. Dr. Perry was also one of the founders of two companies, defendants in the litigation, which own and promote an ecotourism facility in Costa Rica, known as the Rainforest Aerial Tram, where tourists can experience his device. Plaintiff severed his ties with those companies several years ago and has since begun to develop his own ecotourism businesses in several other locations, including upstate New York.

When the Costa Rican firms continued to use Dr. Perry's name and statements in various brochures and letters, he objected. When they did not heed his objection, Dr. Perry filed suit in New York against the Costa Rican companies, several related individuals and the most significant shareholder in the venture, an investment firm located in Boston. None of the defendants were residents of New York.

Defendants Knew Plaintiff was in New York

Moving to dismiss for lack of jurisdiction, defendants alleged that none of them regularly transact or solicit business in New York, or reasonably expect their acts to have consequences in New York. Defendants operate a website that physically is located on a server in Dallas, and anyone who desires to make a reservation for the Costa Rican facility is directed by the website to addresses and phone numbers in either Costa Rica or Miami. Defendants urged that they could not reasonably have foreseen that their acts would cause injury in New York.

Plaintiff asserted that jurisdiction was proper, largely on the basis of defendants' website promoting the Costa Rican facility. The website included a description of Dr. Perry's role in the project and contained a link to an article he had written about the rainforest canopy. Plaintiff contended that personal jurisdiction existed because defendants' website is accessible in New York and is used to solicit business from New York residents, defendants derive income from tourists who reside in New York, and 7 percent of the shareholders of one defendant reside in New York.

Plaintiff also argued that defendants had reason to know that the injury they inflicted on him would occur in New York, because employees of the defendant companies had visited him in New York to discuss business while he was still affiliated with the companies, and had previously communicated with him in New York by telephone calls, letters and email messages.

Bensusan Controlling

Notwithstanding these allegations, the District Court declined to exercise jurisdiction, finding the Second Circuit's holding in *Bensusan Rest. Corp. v. King*, 126 F. 3d 25 (2d Cir. 1997), to be controlling. In that case, a New York City jazz club had alleged trademark infringement against a music club in Missouri that used the same name, and asserted personal jurisdiction in New York because the defendant maintained an Internet website accessible in New York.

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Three Courts Reject Expansive View of Internet Jurisdiction

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The Second Circuit, however, concluded that the website promoting defendant's business did not provide a sufficient basis to exercise personal jurisdiction, because a New York resident would have to take several affirmative steps to access and use the information on the website, and would still need to travel to Missouri to pick up tickets (defendant did not mail out tickets) and attend a performance. The mere fact that information is posted on a website, the court found, is not the equivalent of targeting advertising to persons in New York.

UPDATE

Australian Highest Court to Hear Internet Publication Jurisdictional Issue in *Gutnick v. Dow Jones*

The High Court of Australia in Sydney has agreed to hear an appeal by Dow Jones of the decision in *Gutnick v. Dow Jones* [2001] VSC 305, ¶ 60 (Aug. 28, 2001) (Hedigan, J.) (available on-line at <www.austlii.edu.au/cases/vic/VIC/2001/305.html>) in which the Victorian Supreme Court ruled that the ability of subscribers to access material from the Dow Jones website was publication in Australia and subjected Dow Jones to Australian court jurisdiction. See, LDRC LibelLetter, September 2001 at p. 11.

At issue were allegedly defamatory statements published in Dow Jones' *Barron's* magazine. Key to jurisdiction were the 1700 subscribers to www.wsj.com who used credit cards issued by Australian and the court's conclusion that 300 of whom were from Victoria. Plaintiff had not initially alleged that any hard copies of the publication were at issue, although he later made efforts to amend his complaint to assert claims based upon the very small number, approximately three copies, which were intended to be sent to subscribers in Victoria. The plaintiff is a resident of Australia, but the article was about several stock frauds in the United States in which religious charities were misused to manipulate stock prices. No schedule for the argument was reported.

Judge Saragusa found this analysis persuasive, concluding that the website promoting the Costa Rican facility was substantially similar in nature and function to the website at issue in *Bensusan*. He therefore declined to exercise for two reasons. First, he found that plaintiff failed to satisfy New York's long-arm statute, which requires an injury within New York to be reasonably foreseeable when jurisdiction is based upon a tort committed outside the State. As in *Bensusan*, the court found that the defendants had not been shown to have made the type of discernible effort to serve a market in the forum state that is needed to satisfy the foreseeability requirement. The court held that web presence, alone, is not sufficient and that plaintiff had not made a *prima facie* showing of such conduct. Even though some tourists may have visited defendants' facility after viewing their website in New York, the court concluded that the "mere foreseeability of an in-state consequence and a failure to avert that consequence is not sufficient to establish personal jurisdiction." Second, for the same reasons the court concluded that the exercise of jurisdiction would also violate due process, because the existence of the website did not establish that the defendants had purposefully availed themselves of the benefits of conducting activities in New York.

No Jurisdiction Over a Libel Claim

NAM TAI ELECTRONICS V. TITZER

The third decision reaching the same outcome was handed down in November, when an intermediate appellate court in California declined to exercise jurisdiction over a libel claim brought by a Hong Kong-based company against a Colorado resident. See *Nam Tai Electronics, Inc. v. Titzer*, 2001 Cal.App. LEXIS 2544 (Cal.App., 2d Dist., Nov. 26, 2001). Plaintiff accused defendant of posting several defamatory messages on a number of Yahoo! bulletin boards, some of which were devoted to discussions of the plaintiff's stock. California was chosen as the forum, apparently, to obtain convenient subpoena power over Yahoo! in order to compel the disclosure of the name of the anonymous person who had posted the de-

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Three Courts Reject Expansive View of Internet Jurisdiction

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famatory messages. Having independently learned the defendant's name, the initial "John Doe" complaint was amended, and plaintiff sought to proceed with the case in California.

After first rejecting an argument that defendant had waived his jurisdictional defense, the court took up the issue of when a jurisdiction over a libel claim can be based on a website posting. It found the "effects test" from *Calder v. Jones* to be appropriate in the Internet context, so that jurisdiction could be based upon intentional actions expressly aimed at the forum state that cause harm within the state, where defendant has reason to know that the brunt of the harm is likely to be suffered in the forum state.

In applying this test to the facts presented, the court again underscored that mere Internet presence is not enough to satisfy the "effects test." Rather, it must have been foreseeable that defendant's Internet posting would create a risk of injury by defamation in the forum state.

The plaintiff argued that this standard was surely met because the defendant posted his messages on websites maintained in California, but the court rejected this simplistic approach entirely:

The issue is not whether the company that makes the Web sites available is incorporated or based in California.... [A]n Internet company of Yahoo!'s type may be based anywhere in the world.

Instead, the court found the dispositive issue is whether the websites where the statements were posted are of particular significance to Californians so that a user "has reason to know the posting of a message will have a significant impact in this state."

Because the plaintiff presented no evidence that either defendant's messages or the websites on which they were posted were directed at Californians or disproportionately likely to be read by Californians, the court declined to exercise jurisdiction over a lawsuit between two out of state parties.

The court also rejected an argument that defendant's agreement to Yahoo!'s terms and conditions subjected him to California jurisdiction, because they amounted to a contract of adhesion that did not unambiguously notify customers that such third party disputes would be litigated in California.

Internet Presence Not Enough

These three cases each firmly reject any notion that Internet presence, without more, is sufficient to establish jurisdiction. Although the Internet analysis of each holding focuses on a slightly different aspect of the jurisdictional equation, each court concluded that the operation of a website does not make it reasonably foreseeable that

a defendant will be pulled into court in any forum from which the website can be accessed.

The Massachusetts court demanded some evidence of actual business conducted via the website

in the forum state; the New York court found evidence of some actual forum-related business referrals generated by the website still insufficient where there was no evidence that the forum was a target of the website or that defendants specifically intended to solicit in the forum; and, the California court, in a libel context, required evidence that specific harm in the forum was reasonably foreseeable because of the nature of the message or the nature of the website.

David A. Schulz is a member of Clifford Chance Rogers & Wells LLP in New York. Counsel in the cases discussed are: Paul J. Hayes, of Weingarten, Schurgin, Gagnebin & Hayes, Boston Mass., for Wildfire Communications, Inc.; Anthony A. Froio of Robins, Kaplan, Miller & Ciresi, Boston, Mass., for Grapevine, Inc.; Carl Jacob Schwartz, Jr., Penn Yan, New York for Donald R. Perry; Keith C. Long of Kirkpatrick & Lockhart, LLP, Boston, Mass., for defendants Boston Capital Ventures, et al.; Robert E. Feyder of Kirkpatrick & Lochart, LLP, for Nam Tai Electronics, Inc.; and, Lee G. Werner of Carroll & Warner, for Joe Titzer.

[T]he court again underscored that mere Internet presence is not enough to satisfy the "effects test."

Internet v. Hard Copy Newsletter: No Added Harm Found

The fact that a newsletter was distributed on the Internet, in addition to its hard-copy form, was not a basis for New York officials to discontinue disclosure of the names, titles and salaries of certain employees working for life insurance companies doing business in New York contained in publicly filed forms. See *Belth v. New York State Dep't. of Ins.*, 2001 N.Y. Misc. LEXIS 490 (N.Y. Sup. Ct., Sept. 28, 2001).

Joseph Belth is the publisher of *The Insurance Forum*, a monthly newsletter that is partially available via its website, www.theinsuranceforum.com. When Belth requested the names, titles and salaries of the highest-paid employees in the insurance community, the Life Insurance Council of New York, Inc., objected. According to the court, the respondents had "routinely disclosed this information since 1986," but began to object in 2000 when various insurance companies learned that Belth was publishing the information on the website, as well as in the printed version of the newsletter. Numerous insurance associations and companies claimed the dissemination of the information would be an "unwarranted invasion of privacy."

The court rejected Belth's argument that because state law requires the insurance companies to file this information, the information was thus available for public dissemination. However, the court did hold that under the state's Public Officers Law § 89(2)(b), disclosure of the information was not an invasion of privacy.

Significantly, the court found no substantiated increase in harm from the dissemination of the information via the Internet. The court said, despite claims by the insurance companies that the availability of the information via the Internet could result in undesired solicitations and "possible criminal wrongdoing," there was

no attempt, however, to show how the data's potential impact had changed during its former availability in printed format as compared with its current availability on the Internet.

The court went on to say that

other than respondent's conclusory and unsupported claim that Internet dissemination can have a deleterious result, respondent has offered nothing

to substantiate this claim. Respondent's conclusory allegations cannot serve as a basis for denial of petitioner's FOIL request."

Thus, the refusal to release the requested data was arbitrary and capricious.

The opinion was written by Judge Nicholas Figueroa. Counsel for Belth was Nina Morrison and Matthew D. Brinckerhoff of Emery, Cuti, Brinckerhoff & Abady in New York, and Justin P. Smith and David C. Viadeck of Public Citizen Litigation Group in Washington, D.C. Counsel for the Life Insurance Council of New York was Elizabeth D. Moore of Nixon Peabody in New York.

Class Action Suit Against Bloomberg and Internet Wire Fails Again

Court Holds Failure to Investigate "Red Flags" Did Not Constitute Securities Fraud

A district court in the Southern District of New York has dismissed, with prejudice, a second amended complaint filed in a class-action lawsuit seeking to hold two financial news services responsible for money lost in a stock hoax. See *Hart v. Internet Wire, Inc. and Bloomberg, LP*, Case No. 00-6571 (S.D.N.Y. Oct. 3, 2001). The defendants claimed Internet Wire and Bloomberg showed a lack of care by distributing a fake press release, and thus should be held liable for damages. The district court, however, held the plaintiffs' allegations failed to meet basic pleading standards.

The case arose when a California man was facing a margin call from his stock broker. Unable to cover his debt, Mark Simeon Jakob decided to try to cause the price of Emulex stock to fall dramatically. Jakob did this by causing Internet Wire and Bloomberg to distribute a phony press release about Emulex.

Internet Wire is a corporation that distributes corporate news, including press releases. Bloomberg is a financial news organization that regularly re-transmits press releases to the general public. Bloomberg typically

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Class Action Suit Against Bloomberg and Internet Wire Fails Again

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receives the press releases from companies such as Internet Wire and re-transmits the press releases without editorial revision. Jakob, a former employee of Internet Wire, was able to take advantage of this system by sending a fictitious press release to Internet Wire.

In his press release, Jakob claimed that Emulex's President and CEO had resigned and that the Securities Exchange Commission was conducting an investigation of the company. After Bloomberg re-transmitted the press release, Emulex's stock fell from an opening price of approximately \$110 per share to approximately \$44 in less than an hour. Later in the day, after a correction had been published, Emulex's stock went as high as \$130 per share, closing at \$105.

The complaint did not charge either defendant of any fraudulent motive or intent to commit fraud, but asserted that Internet Wire and Bloomberg showed a "lack of care and absence of verification of the story."

Quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) and *Novak v. Kasaks*, 216 F.3d, 300 (2d Cir. 2000), the district court stated that no private cause of action will lie under section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 in the absence of "any allegation of 'scienter,'" that is any "intent to deceive, manipulate, or

defraud." The "basic pleading standard" for scienter requires "expression of the facts from which to infer fraud and fraudulent intent." Because the second amended complaint still failed to properly allege scienter, the court held that the suit "should not have been brought."

The plaintiffs had attempted to meet the pleading burden by citing "red flags" that, according to the plaintiffs, should have caused either company to investigate the veracity of the press release. Yet, the court examined them individually and as a whole, and concluded that the red flags were still not sufficient to satisfy the pleading requirements. The court said that "failure to investigate

The court said that "failure to investigate such flags as cited here simply does not amount to securities fraud."

such flags as cited here simply does not amount to securities fraud." None of the red flags, according to the court, "suffice to show a plausible motive or intent to defraud investors."

Counsel for the class was Patrick A. Klingman, Andrew M. Schatz, and Jeffrey S. Nobel of Schatz & Notbel in Hartford, Conn. Counsel for Bloomberg was Richard L. Klein and Thomas H. Golden of Willkie Farr & Gallagher in New York. Counsel for Internet Wire was Kenneth Conboy and Elena C. Norman of Latham & Watkins in New York, and Robert W. Perrin of Latham & Watkins in Los Angeles.

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Colorado Supreme Court Adopts Misappropriation Tort

Applies First Amendment Newsworthiness Privilege

By Thomas B. Kelley and Steven D. Zansberg

In a decision issued November 19, 2001, Colorado's Supreme Court (opinion by Hon. Michael L. Bender, Assoc. Justice) recognized the tort for invasion of privacy by appropriation of another's name or likeness. In doing so, the court rejected the requirement that plaintiff prove a pre-existing commercial value in his/her persona, but held that a newsworthy publication is protected by a First Amendment privilege.

The case, *Joe Dickerson & Assocs. v. Dittmar*, _____ P.3d _____, 2001 WL 1456508 (Case No. 00SC115, Nov. 19, 2001), arose out of an article published in a newsletter called "The Dickerson Report" that private investigator Joe Dickerson distributed free of charge to law enforcement agencies, financial institutions, law firms, and others. In the newsletter, Dickerson described various fraud investigations, tips for avoiding fraud, activities of private investigator boards, information about upcoming conferences, and the like.

In one article entitled "Fraud DuJour — Five Cases, 100%+ Recovery," Dickerson discussed five cases his firm had investigated, one of which involved the plaintiff Roseanne Dittmar, who, while working as a secretary at a brokerage firm, stole a customer's bearer bonds and cashed them for personal use. Dittmar was later charged and convicted of the theft, and, as described in Dickerson's report, was ordered by the court to pay restitution to the theft victim. The article appeared on the front page of "The Dickerson Report," mentioned Dittmar by name, and included her photograph.

Dittmar sued Dickerson alleging numerous tort theories, including invasion of privacy by appropriation of another's name or likeness. The trial court granted Dickerson's motion for summary judgment on all claims. Colorado's Court of Appeals reversed that ruling, holding that there were genuine factual disputes over whether the

purpose of the publication was for Dickerson's personal benefit and whether the article was on a matter of public concern. See *Dittmar v. Dickerson*, 9 P.3d 1145, 1147 (Colo. Ct. App. 1999).

Colorado Adopts Tort of Appropriation

Colorado's Supreme Court began its analysis of the case by surveying case law, academic writings, and the *Restatement of Torts*'s treatment of the cause of action for "invasion of privacy by appropriation of identity." Importantly for its decision, the court recognized that the appropriation tort "subsumed ... two types of injuries — personal and commercial — into one cause of action that existed under the misleading label of 'privacy.'" 2001 WL 1456508 at *4.

With practically no discussion of the policy ramifications for or against the state's adopting this species of the four invasion of privacy torts, Colorado's Supreme Court recognized the misappropriation tort, and noted that "neither the plaintiff nor the de-

fendant in this case disputes that such a tort is cognizable in Colorado." *Id.* at *5. (Curiously, the first issue upon which *certiorari* was granted was the question "whether the tort of invasion of privacy based on appropriation of another's name or likeness is cognizable under Colorado law.") *Id.* at *2.

The court proceeded to identify the elements of the tort. In doing so, it expressly rejected one of the elements that had been identified by Colorado's Civil Jury Instruction Committee, namely that "the defendant sought to take advantage of the plaintiff's reputation, prestige, social or commercial standing, or any other value attached to the plaintiff's name, likeness, or identity." In other words, the court rejected the requirement that to state a claim for misappropriation, "the plaintiff's identity must have had pre-existing commercial value." The court explained its reasoning as follows:

Colorado's Supreme Court recognized the misappropriation tort, and noted that "neither the plaintiff nor the defendant in this case disputes that such a tort is cognizable in Colorado."

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Colorado Supreme Court Adopts Misappropriation Tort

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It appears illogical to require the plaintiff to prove that her identity has value in order for her to recover for her personal damages. The market value of the plaintiff's identity is unrelated to the question of whether she suffered mental anguish as a result of the alleged wrongful appropriation. A plaintiff whose identity had no commercial value might still experience mental anguish based on an unauthorized use of her name and likeness.

Accordingly, the court identified only the following four elements necessary to establish an invasion of privacy by appropriation claim: (1) the defendant used the plaintiff's name or likeness; (2) the use of the plaintiff's name or likeness was for the defendant's own purposes or benefit, commercially or otherwise; (3) the plaintiff suffered damages; and (4) the defendant caused the damages incurred. The court left for another day the question whether a plaintiff who *does* seek to recover commercial damages (unlike Dittmar) must prove the value of her identity or "whether such commercial damages are recoverable under either the rubric of privacy or the right of publicity." *Id.* at *7.

First Amendment Privilege Turns on the Content, Not Motive

Having recognized that Dittmar had sufficiently stated a claim for appropriation of name or likeness, the court proceeded to decide whether Dickerson's publication was nevertheless "constitutionally protected speech as a matter of law." The court held that the article in question related to a matter of legitimate public concern because it described the circumstances surrounding the plaintiff's arrest and conviction, topics that were undisputedly "newsworthy and of legitimate public concern." *Id.*

To determine whether a use of the plaintiff's likeness

was constitutionally privileged, and could not therefore be subject to civil damages liability for invasion of privacy, the court stated that it was required to determine "whether the character of the publication is primarily noncommercial, in which case the privilege will apply, or primarily commercial, in which case the privilege will not apply." *Id.* at *8. The court defined commercial speech as speech that proposes a commercial transaction," citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993), but then diluted that definition with the observation, "in many situations . . . it is not altogether clear whether a particular use of a person's name or likeness is made for the purpose of communication of news or for the

purpose of marketing a product or service." The court held that it was required to determine "which type of speech predominates." *Id.* The court stated that "a profit motive does not transform a publication regarding a legitimate matter of public concern into commercial speech," *id.*

at *9 (citing *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 482 (1989)), and emphasized, "It is the content of the speech, not the motivation of the speaker, which determines whether particular speech is commercial." *Id.* (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993)). Recognizing that "defendant's article has aspects of both commercial and noncommercial speech," the court concluded that Dickerson's publication was "primarily noncommercial because it related to a matter of public concern, namely the facts of the plaintiff's crime and felony conviction." *Id.* The court reiterated that even though Dickerson published the newsletter with a profit motive, that "does not affect the fact that the article relates to the arrest and circumstances of a felony conviction, which are matters of legitimate public concern." Because the court found that Dickerson's publication "was predominantly a noncommercial publication," it held that the First Amendment pro-

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The court reiterated that even though Dickerson published the newsletter with a profit motive, that "does not affect the fact that the article relates to the arrest and circumstances of a felony conviction, which are matters of legitimate public concern."

Colorado Supreme Court Adopts Misappropriation Tort

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vided a privilege for the article and, accordingly, that the plaintiff's claim for invasion of privacy by appropriation of name or likeness must fail.

One Justice Takes Another Approach

Writing separately in concurrence, Justice Nathan B. Coats stated that while he agreed with the majority's conclusion — that summary judgment must be granted in defendant's favor — he did not believe this case was an appropriate one in which to recognize the tort of misappropriation or to reach, unnecessarily, a constitutional question. *Id.* at *10-11. Justice Coats rejected the majority's recognition of actionable appropriation of certain values associated with a person's name or likeness arising from the publication of a person's felony conviction record. For that reason, Justice Coats would find no actionable claim, and would reserve for another day what First Amendment limitations, if any, are applicable to an otherwise actionable appropriation claim.

Questions Answered and Unanswered

The majority opinion laid to rest in Colorado some of the issues in the appropriation/commercial speech conundrum that are fermenting elsewhere. The court recognized that the appropriation tort is subject to a broad First Amendment privilege, and that the privilege presents a question of law that is subject to the court's *de novo* review. The court also declared that the availability of First Amendment protection for information that is newsworthy or has a legitimate relationship to a subject of public or general concern is to be determined by assessing the content of the speech, and not whether the speaker is motivated by a desire to increase its business or commercially promote itself.

The newsletter in question, like many law firm newsletters, was an infomercial (which would not be circulated unless thought to help the firm retain or increase business),

but that is not dispositive and arguably irrelevant if there is a reasonable relationship between the use of the plaintiff's identity and a subject of public or general concern. The "content only" approach suggests that the pitfalls of cases like *Proctor & Gamble Co. v. Amway*, 252 F.3d 539 (5th Cir. 2001), and *U.S. Healthcare v. Blue Cross*, 898 F.2d 914 (3d Cir. 1990), may be avoided in Colorado. Finally, the court also indicated that it will focus on the particular article at issue, and not the whole of the publication, even if it is otherwise chock full of advertising and promotion of the publisher's products or services (after all, the advertising section of every newspaper contains an offer to contact the advertising department to place ads).

The unanswered questions, to use one of the court's

The court holds that there is a First Amendment privilege for any publication that is newsworthy or has reasonable relevance to a subject of public or general concern.

words, predominate. The court holds that there is a First Amendment privilege for any publication that is newsworthy or has reasonable relevance to a subject of public or general concern. However, the privilege applies only if the publication is "primarily noncommercial,"

and does not apply if it is "primarily commercial." This sounds like trouble, and contrary to the approach taken in the better-reasoned cases, such as *Hoffman v. L.A. Magazine*, 255 F.3d 1180, 1185 (9th Cir. 2001) (extending First Amendment protection when the use of plaintiff's likeness is not "pure commercial" speech, and the commercial aspects of the use are "inextricably intertwined" with expressive elements). But then, the court declared that "the defendant's publication was primarily noncommercial because it related to a matter of public concern, namely the facts of the plaintiff's crime and felony conviction." The court seems to be saying that use of plaintiff's likeness that is "relevant to a matter of public or general concern," by definition, is not "primarily commercial."

If the two terms are indeed mutually exclusive, that would more or less banish from Colorado appropriation jurisprudence the pronouncements by other courts that

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“advertising which ‘links a product to a current public debate’ is not thereby entitled to constitutional protection afforded noncommercial speech.” *U.S. Healthcare v. Blue Cross*, 898 F.2d at 936, quoting *Bolger v. Young’s Drug Products Corp.*, 463 U.S. 60 (1983). The court’s circular reasoning (use of likeness relevant to subject of public concern is protected, if not primarily commercial; use is not primarily commercial if it is relevant to a subject of public concern) raises the question why the court introduced the question of commercial speech at all, and then bothered to define it as “speech that proposes a commercial transaction.”

The article in question contained nothing readily identifiable as “propos[ing] a commercial transaction,” and the lack of analysis on this point further suggests that the court’s inquiry was completed as soon as a public interest component was identified. If this court is indeed willing, *sub silentio*, to bypass the commercial speech analysis, this may be a reflection of its unwillingness to limit the appropriation tort only to those uses that are for the publisher’s commercial benefit: Consistent with its recognition of a broadly applicable tort, the court left the way clear for application of the tort to any use of the plaintiff’s name or likeness that is for the defendant’s benefit, “commercial *or otherwise*.” It is hard to predict where this may take us.

In discussing the First Amendment limitations on the tort, the *Dickerson* decision speaks in terms of a “newsworthiness privilege” for content published for the apparent “purposes of communicating news.” The decision suggests that “entertainment” may also be a protected form of noncommercial speech, but leaves unclear whether the privilege adopted in this case would also apply to publications made for the apparent purpose of expression other than communication of news.

In the abstract, a broadly defined tort subject to a broadly defined First Amendment safe harbor sounds okay. However, the uncertainty generated by the *Dittmar* opinion’s explication of the Justices’ reasoning suggests we need to hear more from the court before the harbor is safely navigable.

The plaintiff was represented by Richard J. Lesch of

Denver. Defendants were represented by A. Peter Gregory and Michael Brice Sullivan of Harris, Karstead, Jamison & Powers, P.C. of Denver.

Thomas B. Kelley and Steven D. Zansberg are partners in the Denver office of Faegre & Benson, LLP.

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'Genuine Connection' to Expressive Work Bars Right of Publicity Claim

Kentucky Allows the Unauthorized Use of Images and Song Clips When There is Proper Connection

In a 5-2 decision, the Kentucky Supreme Court denied a right of publicity claim after it found a "genuine connection" between the use of a former country music singer's name and likeness in a music video and the song for which the video was made. See *Montgomery v. Montgomery, et. al.*, 2001 Ky. LEXIS 205 (Ky. 2001).

A Song About this Dad

The defendant, John Michael Montgomery, is a nationally known country music star. His father, Howard Edward Montgomery, was a country musician who never attained national fame, but recorded several songs, performed over a period of years at local-area festivals and once appeared on a Nashville television show.

After the father's death in 1994, the son wrote a song about the father and included it on his album released in 1997. The son later made a video for the song and the father's likeness (including a clip from a song the father recorded) appeared in approximately 30 seconds of the video.

The father's second wife, as personal representative of the estate of Howard Edward, filed suit claiming, among other things, that the use of the father's likeness in the video violated his estate's common-law and statutory right of publicity under Ky. Rev. Stat. § 391.170.

Three Courts/Three Wins

Despite three different approaches taken by the trial court, the court of appeals and the state supreme court, all three courts denied the Barbara Montgomery's claim.

The trial court granted summary judgment for the defendants, holding in pertinent part that the common-law right of publicity is not inheritable and that the father was not a "public figure" within the meaning of Kentucky's right of publicity statute, which provides for descendability up to 50 years after death. The trial court defined a public figure as a "person who has attained

'national celebrity status' within his lifetime."

The court of appeals affirmed the grant of summary judgment, but on different grounds. Instead of finding a common-law right of publicity separate and distinct from the common-law right of privacy, as the trial court did, the court of appeals found publicity was part of the appropriation prong of the right of privacy. The court of appeals still held that the common-law right of privacy was not descendable.

As to the statutory right of publicity, the court of appeals held that the trial court's definition of "public figure" under the Kentucky right of publicity statute was too narrow. Instead, the court of appeals defined a public figure as "a person whose

A right-of-publicity claim is actionable only when the infringing work is "simply disguised commercial advertisement for the sale of goods or services."

name and likeness had a 'significant commercial value.'" The court of appeals affirmed the grant of summary judgment when it determined that the father's name

and likeness did not have "significant commercial value."

On appeal, the step-mother abandoned her common-law claims and focused solely on the statutory right. Thus, the Kentucky Supreme Court did not decide

- (1) whether there exists a common-law right of publicity that is distinct from the common-law right of privacy (though the court, in dicta, quoted a law review article that said the common-law right of publicity is "a distinct cause of action intended to vindicate different interests."),
- (2) whether the common-law right of publicity is inheritable, or
- (3) whether any or all of the rights embraced by the right of privacy are inheritable. The Kentucky Supreme Court did not determine the correct definition of "public figure," either, because it held that the father's likeness was not appropriated for "commercial profit," and thus the step-mother did not have an actionable claim.

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'Genuine Connection' to Expressive Work Bars Right of Publicity Claim

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The Kentucky Supreme Court held that a right-of-publicity claim is actionable only when the infringing work is "simply disguised commercial advertisement for the sale of goods or services." Here, the use of the father's likeness was not a "disguised commercial advertisement," but a legitimate use of the father's likeness in a constitutionally protected form of expression.

The court held that the claim was not actionable because the song and video were protected by the First Amendment and the use of the father's likeness was "intimately related to the underlying work." The court also held that "the commercial nature of music videos does not deprive them of constitutional protection." The court cited *Parks v. LaFace Records*, 76 F.Supp.2d 775 (E.D. Mich 1999), for the proposition that the right of publicity is "inapplicable under the First Amendment if the content of the expressive work bears any relationship to the use of a celebrity's name."

The dissent felt the trial court's summary judgment was premature. The dissenters felt that the step-mother

"has not yet had an opportunity to fully attempt to demonstrate the extent of any commercial value in Harold Montgomery's name and likeness," and thus would have remanded the case to the trial court to reevaluate summary judgment after full discovery. The dissenters also objected to the court deciding the case on an issue never raised by the son (that application of the right of publicity statute could infringe on First Amendment rights). The dissenters also felt that music videos were more commercial than the majority (and thus subject to less First Amendment weight).

The decision was written by Justice Johnstone. He was joined by Chief Justice Lambert and Justices Cooper, Graves and Wintersheimer. Justice Keller dissented. He was joined by Justice Stumbo. Counsel for the step-mother was William M. Thompson and David A. Tapp of Somerset, Kentucky. Counsel for the son (and Atlantic Records Corp.) was Brent L. Caldwell and Jon A. Woodall of McBrayer, McGinnis, Leslie & Kirkland in Lexington, Kentucky.

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Michigan District Court Dismisses Amway's Speech-Based Tortious Interference Claim Against Procter & Gamble

By Victor A. Kovner and Matthew A. Leish

Invoking both First Amendment protections and the fair report privilege, a federal court in Michigan has granted summary judgment dismissing tortious interference claims brought by Amway Corporation against The Procter & Gamble Company and Dinsmore & Shohl LLP, one of Procter & Gamble's law firms. The decision, *Amway Corp. v. The Procter & Gamble Co. et al.*, 2001 U.S. Dist. LEXIS 14455 (W.D.Mich. Sept. 14, 2001), touches on a range of important First Amendment issues, including commercial speech doctrine, the public figure status of Amway, and the question of whether the alleged actual malice of one defendant may be imputed to another, as well as the scope of the fair report privilege.

The Satanism Rumor Abounds

The Michigan case is just the latest chapter in an ongoing series of related legal battles between Amway and Procter & Gamble arising out of the "Satanism rumor"

that has long plagued Procter & Gamble. According to the rumor, which has resurfaced intermittently for nearly twenty years, the president of Procter & Gamble revealed on a television talk show that he worships Satan and that a portion of Procter & Gamble's profits are given to the Church of Satan.

A number of Amway distributors were involved in spreading the initial rumor, often in the form of a flier urging a boycott of Procter & Gamble products. After an Amway distributor named Randy Haugen disseminated the rumor in 1995, Procter & Gamble brought suit against Amway, Haugen, and other Amway distributors in Utah, alleging, among other things, that Amway is an illegal pyramid scheme. Amway has since been dismissed from the Utah action, although Procter & Gamble's Lanham Act and tortious interference claims against the Amway distributors are still being litigated. *Procter & Gamble Co. v. Haugen*, 2001 U.S. Dist. LEXIS 12600, 2001 WL 957683 (D.Utah June 7, 2001).

Procter & Gamble also commenced litigation against Amway in Texas after learning that Amway distributors there had allegedly spread the Satanism rumor as well. The

district court dismissed the case, which included claims for defamation, fraud, Lanham Act and RICO violations, but the Fifth Circuit reinstated the Lanham Act and RICO claims earlier this year. *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001).

In connection with the Utah case, Procter & Gamble's counsel, Dinsmore & Shohl, hired Sidney Schwartz, the creator of an Internet website that is highly critical of Amway, as a non-testifying consultant. Dinsmore allegedly provided Schwartz with copies of pleadings and other publicly available documents from the Utah and Texas cases and from other suits involving Amway, which Schwartz then posted on his website. Amway responded by commencing the Michigan action against Procter & Gamble, Dinsmore, and

Schwartz, alleging that the defendants,

individually and in concert with one another, disseminated malicious attacks against Amway on the internet with the intent and effect of interfering with Amway's contracts and pro-

spective and actual business relationships.

Amway, 2001 U.S. Dist. LEXIS 14455 at *6.

Although Amway, during discovery, identified 99 allegedly defamatory statements from the Schwartz website, only 18 of those statements were from documents provided to Schwartz by Dinsmore — namely, 16 paragraphs from the Texas complaint, and two statements from a separate complaint brought against Amway by a former distributor. Each of the 18 statements involved either allegations that Amway is a pyramid scheme or allegations of RICO violations.

In granting Procter & Gamble and Dinsmore's motions for summary judgment, Judge Robert Holmes Bell began by holding that, since the record did not support allegations of a conspiracy or of non-speech related conduct by Procter & Gamble or Dinsmore, the action against those defendants is "strictly one of speech." *Amway*, 2001 U.S. Dist. LEXIS 14455 at *25. Even though Amway had not raised a direct defamation claim, Judge Holmes correctly held that where "a claim for tortious interference with business relations is

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"[A] claim for tortious interference with business relations is premised on the publication of defamatory statements, First Amendment protections apply."

MI District Court Dismisses Amway's Speech-Based Tortious Interference Claim Against Procter & Gamble

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premised on the publication of defamatory statements, First Amendment protections apply." *Id.*

Amway is Public Figure

Judge Bell next concluded that Amway was a public figure and was therefore required to show actual malice by clear and convincing evidence in order to prevail. To support its finding, the court cited evidence submitted by Procter & Gamble showing that Amway has over 14,000 employees in 45 countries, had estimated retail sales of \$5.7 billion in 1998, has approximately one million independent distributors in the United States, is well known worldwide, advertises extensively, and "has been the subject of public debate since long before the actions at issue in this case took place." *Amway*, 2001 U.S. Dist. LEXIS 14455 at *28. In addition the court noted that the question of whether Amway operated as an illegal pyramid scheme has been a publicly debated issue since the 1970s.

Actual Malice Applies

In an interesting gloss upon commercial speech doctrine, Judge Bell next rejected Amway's argument that Procter & Gamble was judicially estopped from raising the actual malice defense because it had successfully argued in the Texas action that a public figure need not show actual malice where commercial speech is involved. (See *Procter & Gamble v. Amway*, 242 F.3d at 546-47). Judge Bell held that judicial estoppel did not apply because of the "significant" differences between the two cases — namely, that the Texas case arose under the Lanham act, and that, unlike in the Texas case — where the Fifth Circuit held that the Satanism rumor allegedly spread by Amway was commercial speech because it was economically motivated — there was "no support for Amway's argument that litigation documents [at issue] in this case are commercial speech" under the three-factor test set out in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983). *Amway*, 2001 U.S. Dist. LEXIS 14455 at *29-31.

Applying the actual malice test, Judge Bell went on to find that, while there was a factual issue as to whether the pyramid scheme and RICO allegations were true or false, Amway had not set forth sufficient evidence of actual mal-

ice. Specifically, the court found no evidence that Procter & Gamble or Dinsmore knew that their allegations were false or that they acted in reckless disregard of truth or falsity, and the court also held that

the pyramid and RICO allegations are in the marketplace of ideas and are subject to vigorous debate [and] no reasonable juror could find that the claims made by P&G and Dinsmore are so objectively false that actual malice can be inferred.

Amway, 2001 U.S. Dist LEXIS 14455 at *41-42.

The court also noted in passing that, despite the alleged conspiracy, any actual malice by Schwartz could not be attributed to the other defendants; rather, Amway was required to — but did not — show that Procter & Gamble and Dinsmore "individually acted with actual malice." *Amway*, 2001 U.S. Dist LEXIS 14455 at *43.

A Fair Report

Finally, as an independent ground for granting summary judgment to Procter & Gamble and Dinsmore, Judge Bell held that the dissemination of "full and complete" copies of publicly available litigation documents was protected under Michigan's statutory fair reporting privilege, which protects the publication of "a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public...." *Amway*, 2001 U.S. Dist. LEXIS 14455 at *44-49.

Unfortunately for Mr. Schwartz, the court declined to dismiss the claims against him, concluding that, in light of his other conduct and additional material posted on his website, there was a question of fact as to whether he acted with actual malice and whether he tortiously interfered with Amway's business relations.

Amway has made clear that it intends to appeal the dismissal of its claims against Procter & Gamble and Dinsmore & Shohl to the Sixth Circuit.

Victor A. Kovner is a partner and Matthew A. Leish is an associate at Davis Wright Tremaine LLP. Mr. Kovner was retained by Procter & Gamble as an expert witness on First Amendment issues in the Michigan case.

Polo Trademark Dispute Concludes with Court Drafted Disclaimer

By Robert P. Latham

In the latest episode of the long running battle between Westchester Media, the publisher of "POLO" magazine, and PRL USA Holdings, Inc. (Polo Ralph Lauren), the United States District Court for the Southern District of Texas fashioned a very specific disclaimer for the cover of POLO magazine to alleviate consumer confusion. *Westchester Media Co. L.P. v. PRL USA Holdings, Inc.*, 2001 U.S. Dist. LEXIS 17468, Civ. Action No. H-97-3278 (S.D. Tex. October 23, 2001).

Polo Magazines

The dispute between Westchester and PRL is unique and involved, and was chronicled previously in the Libel-Letter of August 2000, at pages 41-43. The trouble began when Westchester relaunched POLO magazine, which historically had been the magazine sent to members of the United States Polo Association. In 1997, Westchester created two new publications, one being "Polo Player's Edition" geared towards the sport of polo, and the new "POLO" magazine which was, in Westchester's own words, "not about the sport, but rather about an adventurous approach to living life." The case presented a classic conflict between the interests of trademark law and the interests of the First Amendment.

The district court previously had found infringement by Westchester of PRL's distinct marks and ordered a permanent injunction that Westchester cease and desist from publishing POLO magazine under the title "POLO." In *Westchester Media Company L.P. v. PRL USA Holdings, Inc.*, 214 F.3d 658 (5th Cir. 2000) the Fifth Circuit affirmed the finding of infringement but remanded the case to the district court to fashion a remedy more sensitive to First Amendment concerns.

The Fifth Circuit stated that even where trademark infringement has been found, "First Amendment interests should influence the choice of remedy." The Fifth Circuit found that a magazine title contains components of

"expressive" speech and is therefore more deserving of First Amendment protection than pure commercial speech or strict commercial use of a distinct mark.

Injunction v. Disclaimer

Upon remand to the district court, PRL continued to assert that the court should reinstate the permanent injunction prohibiting the magazine from being titled "POLO," even after weighing the First Amendment concerns. Westchester, though it had previously opposed the temporary injunction issued by the court requiring a non-specified disclaimer on the cover of "POLO," now argued that such a non-specified disclaimer was sufficient to alleviate confusion. Adding to the mix was the fact that POLO Magazine ceased publication in October

1999. On the latter point, the district court found that Westchester had expressed a desire to resurrect the publication so the issue was not moot.

After the remand, the court was presented with the results of four different surveys, as well as additional expert testimony regarding consumer confusion. The upshot of the court's analysis of this information is that the court found that with the general disclaimer Westchester had been using, there was a 14 percent reduction in consumer confusion as to whether POLO magazine was associated with PRL opposed to when it was not used. But the court also found that there was a 17 percent increase in consumer confusion between Polo Players Edition (the magazine geared towards the sport of polo) and POLO Magazine (the magazine geared towards polo "lifestyle") as to whether each was associated with PRL.

Burden of Proof on Remedy's Efficacy

Perhaps the most significant aspect of the court's analysis concerned the burden of proof on the effectiveness of a disclaimer. Must the infringer demonstrate the effectiveness of the disclaimer or must the senior user of a mark demonstrate the ineffectiveness of such a remedy in order to be entitled to absolute prohibition?

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Fifth Circuit stated that even where trademark infringement has been found, "First Amendment interests should influence the choice of remedy."

Polo Dispute Concludes with Court Drafted Disclaimer

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That issue was one of first impression in the Fifth Circuit and the court looked to trademark law, rather than First Amendment law, to resolve it. The district court noted that Westchester had already been adjudicated to be an infringer, and that finding was affirmed on appeal. The fact that Westchester's compliance with the temporary injunction had been spotty may also have influenced the court's analysis. The court ultimately held that, in the context of this case, the infringer would have to bear the burden to "come forward with evidence sufficient to demonstrate that any proposed materials would significantly reduce the likelihood of consumer confusion," citing *Home Box Office, Inc. v. Showtime, The Movie Channel, Inc.*, 832 F.2d 1311, 1316 (2d Cir. 1987).

Nevertheless, in the same opinion the court relied heavily upon the Second Circuit's opinion in *Consumer's Union of the United States, Inc. v. General Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983), a case which the Fifth Circuit had cited with approval. The Second Circuit in *Consumer's Union* and the Fifth Circuit in *Westchester Media* both opined that absolute prohibition of speech was unconstitutional when there was "any" possibility that a disclaimer would suffice to alleviate consumer confusion.

Thus, the question remains as to whether a party who has been held to infringe must come forward with evidence to show that a disclaimer would significantly reduce consumer confusion or come forward with evidence to demonstrate that there is "any possibility" that a disclaimer would significantly reduce consumer confusion. The court's holding would seem to indicate that it is the latter standard.

A New Disclaimer Required

Due to a number of factors, the court reasoned that it needed to draft a disclaimer that was more specific than the previous court-ordered disclaimer to make clear that POLO magazine was not affiliated in any way with PRL.

The court was persuaded by the testimony of an expert witness that the shorter the text of a disclaimer, the more effective it would be. The specific placement of the disclaimer on the cover would also be important in alleviating consumer confusion. Westchester had put its previous disclaimer in the lower left hand corner of the cover which the expert testified was the least likely place for it to be read.

Accordingly, if Westchester is to resume publication of POLO, a new shorter disclaimer will be required, right under the title of the magazine, and of a specific size and color (black lettering on white background). By consistently placing such a disclaimer in a more prominent position on the cover of the magazine, as well as in any correspondence or documentation in which Westchester referenced the title of the magazine, the court felt that it could accommodate the First Amendment right of Westchester to resurrect the magazine under its preferred title.

The polo saga contains valuable lessons to the parties on either side of such a dispute. The memorandum opinion of the district court is instructive to show factors that go into a court constructed remedy and the burdens each side might face in such a dispute.

Robert P. Latham is a partner with Jackson Walker L.L.P. in Dallas, Texas.

[A]n absolute prohibition of speech was unconstitutional when there was "any" possibility that a disclaimer would suffice to alleviate consumer confusion.

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Eleventh Circuit Finds No Libel by Implication Arising From Accurate Quotes

On November 9, 2001, in *Rubin v. U.S. News & World Report, et al.*, 2001 WL 1397891, applying established state law (Florida), a unanimous panel of the 11th Circuit (Reavely, J., sitting by designation from the 5th Circuit) found that practices which are standard in the magazine industry did not raise defamatory implications. Although only in a brief footnote and dicta at that, the decision also marks the first time a federal appellate court has suggested that a private figure faces additional hurdles imposed by the First Amendment when suing over an implication allegedly arising from true facts.

A Miami gold refiner, Richard Rubin, brought a libel claim arising out of an investigative article entitled “The Golden Age of Crime: Why international drug traffickers are invading the global gold trade.” Rubin, who was interviewed for and quoted in the article, and who willingly posed for a photograph for the article, claimed that the article implied that he was involved in money laundering: namely, that he processed gold that he knew had been smuggled and that he kept two

sets of books. The Eleventh Circuit disagreed, affirming the district court’s dismissal on the grounds that no reasonable person could read the article to be defamatory of the plaintiff. Rather than the implications suggested by plaintiff, the Court held the “reader could only see Rubin as a knowledgeable gold refiner who has cooperated to be interviewed as a source of information about the industry.”

Natural Inference from True Facts Not Actionable

The plaintiff did not challenge the accuracy of his quotes nor the accuracy of the facts in the article until his reply on appeal. When he raised, for the first time, a false fact in his reply, the Circuit Court granted defendants’ motion to strike that portion of the brief. The Court went on to hold: “Because a statement must be false to be libelous, any damage to Rubin flowing from the article’s uncontested statements is not actionable.”

Rubin was quoted — accurately — as saying he “may have handled” smuggled Peruvian gold. Rubin’s use of the

word “may” undercut, in the Court’s view, any accusation of *knowing* handling of illegal gold, as plaintiff had contended. Even if unwitting facilitation of such illegal activities could have been deemed defamatory, it was not actionable because he did not contest the quote.

The fact that there was no allegation of falsity also set the stage for the Circuit’s suggestion that an unintended inference that arises from true facts or true quotes is not actionable without some additional showing.

A growing number of Circuits (D.C., 4th, 7th and 9th) have required an “especially rigorous showing,” as the Fourth Circuit prescribed in *Chapin v. Knight Ridder Inc.*, 993 F.2d 1087, 1092-93 (4th Cir. 1993), that the implication was intended or endorsed rather than inadvertent or unintended. This was the first time the Eleventh Circuit has weighed in on this question

Rubin was the first time a circuit court has suggested, albeit only in dicta in a footnote, that it is necessary in the context of libel-by-implication claim brought by a private figure.

We recognize that a First Amendment problem is encountered where a private figure complains that he has been defamed by implication in a communication containing only true facts

While two federal district courts have in recent years held that private figures had to show the implication was intended or endorsed, *Rubin* was the first time a circuit court has suggested, albeit only in dicta in a footnote, that it is necessary in the context of libel-by-implication claim brought by a private figure. (The court assumed without deciding Rubin’s status as a private figure). The requirement that an implication was intended flows from the actual malice standard — knowledge of the implication — but its application is less obvious for the private figure who does not have to demonstrate such subjective knowledge.

Threshold Inquiry or Part of the Fault Requirement

This case also invited the court to make the requirement of an intended or endorsed implication part of the initial threshold inquiry of defamatory meaning on a motion to dismiss. Citing Fourth Circuit and D.C. Circuit authority, de-

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defendants argued that there must be affirmative evidence on the face of the text that the implication was intended or endorsed, an objective test for which discovery would not be necessary. In this scheme, there would also be a second bite at the apple, should the motion to dismiss not be granted, requiring evidence of subjective intent or endorsement by the reporter or editors as part of the fault inquiry following discovery, an approach the Ninth Circuit has clearly adopted.

The advantage of making this added hurdle part of the threshold inquiry is, of course, it avoids lengthy discovery. But, as Judge Carnes asked at the oral argument in *Rubin*, beyond the theoretical added hurdle, the affirmative evidence of intended or endorsed implication may not, in reality, be that different from what a court examines to determine defamatory meaning in the first place — juxtaposition, omission and tone. The response at oral argument to what would constitute such affirmative evidence was to point to cases where the defendant was too cute by half, all but saying, with a linguistic wink and a nod, the implied accusation. More broadly, there must be some affirmative adoption beyond just the natural implication that arises from the statement of true facts. Another way to frame the threshold inquiry, along the lines of some state courts, is whether the implication is the “principal” inference not just a “plausible” inference, again an objective measurement based on the face of the text.

The Source of the Added Requirement: Common Law or First Amendment

Another question raised: what is the source of this added requirement of an intended or endorsed implication? In *Rubin*, the source of the requirement mattered: Florida common law, while recognizing claims based on implication, has never required this added showing.

In addition to common law roots for intended defamatory meaning, there is the First Amendment, which like the actual malice standard, is a constitutional overlay on state common law. The First Amendment’s “sanctuary for truth” as the Fourth Circuit declared in *Chapin*, is threatened by implica-

tion claims based on true facts where the publication or broadcaster gets everything right and still faces a libel claim.

Additionally, the suggestion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 384 (1974), that the danger to reputation must be “apparent” gives rise to a requirement that the implication must have been foreseeable to be actionable. Otherwise, publishers will be too cautious if they have to guess what readers, juries and judges might find implied from the true facts. The Eleventh Circuit, in dicta, has now in *Rubin* suggested that this especially rigorous showing was required by the First Amendment.

The Standard Magazine Practices Do Not Support Defamatory Implication

Whether part of the inquiry into affirmative evidence of intended or endorsed implication or just the plain vanilla defamatory meaning, magazine practices which are standard in the industry were found not to support Rubin’s claim of implication.

To plaintiff’s claim that the fact that he was the only person pictured in an article about drug dealers and money launderers, the court cited the “common practice of magazines to show photographs of those they quote merely for visual interest.”

The fact that his quote from the text was used in abbreviated form as part of the caption, only reinforced the reader’s understanding that Rubin’s photo was used to “put a face to the text.” The fact that he appeared in an obviously posed photo and quoted in the article could even do more and affirmatively to suggest to the reader that Rubin was a legitimate businessman, since drug traffickers and money launderers do not typically pose for photos and talk about their misdeeds to national magazines. Plaintiff countered that “60 Minutes” and the like have created expectations that miscreants will — albeit foolishly — make embarrassing confessions to a national audience.

Plaintiff cited the use of the word “concedes” instead of “says” in introducing Rubin’s quote in the text about double-bookings: “There’s a dual economic system in the jewelry

The court cited the “common practice of magazines to show photographs of those they quote merely for visual interest.”

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industry,' concedes Richard Rubin, the owner of Republic Metals in Miami, a gold refiner, 'There's on the books and there's off the books.' " Rubin argued that "concedes" suggested grudging acknowledgement of his own culpable involvement. The absence of any more direct accusation against Rubin, in contrast to the article's very direct charges against named drug traffickers and others, led the court to conclude that readers would understand Rubin to be "knowledgeable" of this industry practice rather than culpable.

The abbreviated version of Rubin's quote in the caption omitted Rubin's reference in the text to doublebookkeeping "in the jewelry industry." Rubin cited this omission as evidence that the implication was intended or endorsed, implying by its silence that the doublebookkeeping was at his gold refinery. The omission in the caption was marked by ellipses. As is typical for magazines in general, and *U.S. News* in particular, the caption was a lift from the text, effectively referring the reader back to the text for the full quote.

A Clarification or Not

Rubin also complained that the article omitted either a disclaimer that he was not knowingly involved in the schemes described or an affirmative statement that he was a legitimate businessman. Where, as here, no allegation was made in the first place, a disclaimer might raise a cloud where none had existed. Although, in the legal prepublication review, such disclaimers are sometimes added in the hope of avoiding lawsuits, such an affirmative legal obligation to include a disclaimer would be contrary to First Amendment principles that courts do not dictate what publishers must include, absent an omission so material as to create a defamatory falsehood.

After receiving a retraction demand from Rubin, *U.S. News* did publish a clarification to the effect that *U.S. News* did not suggest or intend to suggest that Rubin was involved in the illegal activities described in the article. The decision whether to publish such a clarification is often faced by pub-

lishers where they do not really think there is a problem but the clarification is accurate — they did not intend the implication — and they hope to avoid a lawsuit. It runs the downside risk of looking like the publisher thought there was an implication that needed clarifying. But, as happened in the oral argument in this case, the Court wonders why plaintiff is not satisfied with the published clarification rather than bringing the lawsuit.

An Affidavit: The Reasonable Reader

Both the Eleventh Circuit and the district court dismissed Rubin's claim based on how the proverbial "reasonable reader" would have understood the article. After dismissal at

the trial level, plaintiff tried to put flesh on the "reasonable reader," producing an affidavit of a would-be customer who had been shown the article by one of plaintiff's competitors and who declined to do business with Rubin because he thought plaintiff was accused in the article of being a crook. But this is

a threshold question of law addressed to the court based on how a reasonable reader, not an actual reader, could understand the article.

Even if such actual readers' views are not theoretically part of the inquiry, such affidavits are an invitation to a court to deny dismissal since the standard is tough — no reasonable reader could possibly understand the defamatory implication, implications are so much in the eye of the beholder and plaintiff is asserting real readers and real damage. In this case, the district court declined the invitation and denied reconsideration without opinion, a ruling the appellate court did not address.

Defendants *U.S. News* and its reporter were represented by Laura R. Handman, along with Rick Cys and Connie Pendleton of Davis Wright Tremaine LLP, Jerry Budney of Greenberg Traurig, as local counsel, Martin Krall, Executive Vice President/Chief Legal Officer, *U.S. News*, and Peter Dvoskin, General Counsel, *U.S. News*. Barry Langberg, Deborah Drooz, Michael Niborski, Richard Simring and Sean Firley of Stroock & Stroock & Lavan LLP represented plaintiff Richard Rubin.

As happened in the oral argument in this case, the Court wonders why plaintiff is not satisfied with the published clarification rather than bringing the lawsuit.

Public Official's Defamation Claim Against Newsletter Funder Fails in Court

By Richard J. O'Brien and Jamie L. Secord

A Chicago alderman's unique theory of defamation liability against a mere funder of a grassroots organization's newsletter failed to survive defendant's summary judgment motion.

An Illinois state court dismissed Crossroads Fund, a not-for-profit foundation, from Alderman Eugene Schulner's defamation and false light invasion of privacy action. Crossroads' only involvement was its grant of \$400 to the community group that published the newsletter. Crossroads did not write, edit, review, publish or disseminate the newsletter.

The challenged newsletter, entitled "Alderpuppet Schulner Purports," criticized Alderman Schulner's decisions about gentrification and commercial development in his 47th ward. The anonymous authors urged political activism to prevent their neighborhood from falling prey to even higher rents and property taxes and the saturation of Starbucks' coffee shops. The last page of the newsletter noted that Crossroads Fund provided the authors with financial assistance.

Plaintiff cited an Illinois Supreme Court case, *Van Horne v. Muller*, 185 Ill. 2d 299 (1999), for the proposition that "all persons who cause or participate in the publication of libelous or slanderous matters are responsible for such publications." Schulner alleged that Crossroads helped cause the publication of a libelous matter by providing financial assistance and, therefore, could be deemed a publisher for liability purposes.

Crossroads argued that it was not a publisher of the newsletter under the traditional common law definition. Crossroads further contended that it could not possess the requisite actual malice for a public official plaintiff because it had no prepublication knowledge of the challenged statements.

Crossroads requested that sanctions be imposed against Schulner because plaintiff's pleading was neither well-grounded in fact nor warranted by existing law and was a classic SLAPP ("Strategic Lawsuit Against Public Participation") suit.

The court granted Crossroads' summary judgment motion but denied its request for sanctions. The suit is

still pending as to the actual authors of the allegedly defamatory material.

Richard J. O'Brien, David TerMolen and Jamie L. Secord of Sidley Austin Brown & Wood represented defendant Crossroads Fund. Robert W. Fioretti and Sara D. Lund of Fioretti & Des Jardins, Ltd. represented plaintiff.

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D.C. Court of Appeals Rejects Discovery Rule for Statute of Limitations in Libel Case

By Robert D. Lystad

In a case of first impression for the District of Columbia Court of Appeals, the District of Columbia's highest court held that the statute of limitations for a libel action against a newspaper begins to run upon publication of the allegedly defamatory remarks, and not when the plaintiff learns of the article. *Mullin v. Washington Free Weekly, Inc.*, Civil No. 00-CV-1199 (D.C. Nov. 8, 2001).

An article published in the Washington City Paper, a free weekly newspaper, described a lengthy landlord-tenant dispute and included comments that the tenant was a "freeloader" who did not pay his rent. The tenant filed a complaint for libel, false light invasion of privacy and intentional infliction of emotional distress in the Superior Court for the District of Columbia against the newspaper, the landlord, and the landlord's attorney. The complaint was filed one year and three days after the article was initially distributed to the public.

In lieu of filing an answer, the Washington City Paper filed a motion to dismiss or for summary judgment and attached affidavits attesting to the date that the article was first distributed. The Superior Court granted the motion, holding that the plaintiff failed to file within the one year statute of limitations for libel. The court further held that the same one-year limit applied to plaintiff's other tort claims because they were intertwined with the defamation claim.

On appeal, the plaintiff urged adoption of the discovery rule for his libel claim, contending that he did not know about the article until the week after it was initially distributed. (The plaintiff did not challenge the lower court's ruling that the one-year statute of limitations for libel applied to his other tort claims.)

The D.C. Court of Appeals, following precedent of other jurisdictions and its own policy rationales regarding the discovery rule, refused to apply the discovery rule to this libel claim. It noted that the discovery rule traditionally is invoked only where "the relationship between the fact of injury and the alleged tortious conduct is obscure," such as in medical malpractice cases. *Mullin* at 4. "In defamation

cases, on the other hand, at least where mass media are involved, 'the fact of . . . injury can be readily determined,' and thus any resulting defamation claims will 'accrue for purposes of the statute of limitations at the time the injury actually occurs,' i.e., publication." *Mullin* at 5 (citations omitted).

The D.C. Court of Appeals decision is consistent with precedent from other jurisdictions. See, e.g., *Schweih's v. Burdick*, 96 F.3d 917, 920-21 (7th Cir. 1996); *Bradford v. American Media Operations, Inc.*, 882 F. Supp. 1508, 1519 (E.D. Pa. 1995); *Russell v. The Standard Corp.*, 898 P.2d 263, 264-65 (Utah 1995); *Flynn v. Associated Press*, 519 N.E.2d 1304, 1307 (Mass. 1988); *Holloway v. Butler*, 662 S.W.2d 688, 693 (Tex. App. 1983); *McGuinness v. Motor Trend Magazine*, 180 Cal. Rptr. 784, 786 (Cal. Ct. App. 1982); see generally Francis M. Dougherty, Annotation, *Limitation of Actions: Time of Discovery of Defamation as Determining Accrual of Action*, 35 A.L.R.4th 1002 (1985 and 2001 Supp.).

Courts that have applied the discovery rule in defamation actions have done so only where the allegedly defamatory publication is secret or confidential, such as a credit report. See, e.g., *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 334 N.E.2d 160, 164 (Ill. 1975).

Dismissal of the claims against the other defendants (the landlord and his attorney) was also affirmed because the plaintiff sued only over the statements published in the article, and thus the one-year statute of limitations barred those claims.

The D.C. Court of Appeals decision is scheduled to be published in the Atlantic Reporter.

Robert D. Lystad, a partner in the Washington, D.C. office of Baker & Hostetler LLP, and David W. Andich, a partner at Andich and Andich in Rock Island, IL, represented Washington Free Weekly, Inc., the publisher of the Washington City Paper. The co-defendants were represented by Roger L. Amole and Associates of Alexandria, Va. Plaintiff appeared pro se. The opinion was written by Associate Judge Steadman and joined by Associate Judges Schwelb and Farrell.

Courts that have applied the discovery rule in defamation actions have done so only where the allegedly defamatory publication is secret or confidential, such as a credit report.

District Court Enforces Defamation Exception in Georgia Long-Arm Statute

By Tom Clyde

For national reporters who do not relish the thought of having to defend their reporting in the deep South, a federal district court has issued a helpful decision on Georgia long-arm jurisdiction. Earlier this year, Atlanta federal district court chief judge Orinda Evans dismissed an Associated Press reporter from a libel action, enforcing Georgia's exception for defamation contained in its long-arm statute. *Weinstock v. Gordon, et al.*, No. 1:00-CV-2935-ODE (N.D. Ga. June 20, 2001).

Under Georgia's long-arm statute, jurisdiction can be established by an allegation that a non-resident committed a tortious act or omission in the state, "except as to a cause of action for defamation of character arising from the act." O.C.G.A. § 9-10-91(3). The exception for defamation in effect requires libel plaintiffs to establish jurisdiction under other subsections of the Georgia statute, which demand that a nonresident have persistent course of conduct in the state.

Georgia is one of four states that contain such carve-outs in their long-arm statutes. Although the wording and effectiveness of the carve-outs vary, other states with similar exceptions include Connecticut, Minnesota and New York. Some District of Columbia courts have also achieved a similar limitation, even in the absence of an express exception, by strictly interpreting the District's long arm statute.

The case against Associated Press reporter Marcy Gordon presented a compelling opportunity to enforce the defamation exception in Georgia's statute. Apart from her reporting, Gordon had no contacts with Georgia other than some occasional telephone calls to the state and the pleasure of making some flight connections through the nation's busiest airport.

Gordon wrote the challenged story from her desk in the Securities and Exchange Commission's pressroom in Washington, D.C. Her story reported on the filing of a SEC action against the operator of an Atlanta-based

Internet ponzi scheme and his counsel, a high-profile attorney in the city's plaintiff's bar. The attorney, Michael Weinstock, admittedly profited handsomely from the his investment in the scheme, but nevertheless fought the SEC's action seeking the return of his "unjust enrichment" and simultaneously launched his defamation suit challenging Gordon's wire story.

In response to the filing of a motion to dismiss Gordon for lack of jurisdiction, the plaintiff insisted a ruling on the motion was premature until he was permitted to take thorough and sifting discovery on Gordon's contacts with Georgia, including the contacts she had by telephone with Georgia residents in preparing the story.

The district court rejected plaintiff's request for discovery and instead entered a dismissal of Gordon, even making the dismissal "with prejudice" for good measure.

The district court rejected plaintiff's request for discovery and instead entered a dismissal of Gordon, even making the dismissal "with prejudice" for good measure. The decision is particularly helpful because it reaffirms that a plaintiff cannot circumvent the exception by claiming that jurisdiction is not premised on the publication in Georgia, but rather on the newsgathering contacts that occurred in preparing the publication, an area that plaintiffs inevitably want to explore through discovery. Citing a Georgia Supreme Court decision, *Bradlee Mgmt. Servs., Inc. v. Cassells*, 249 Ga. 614 (1982), the opinion states:

Any such contacts [from the preparation of the story at issue] would be irrelevant to an evaluation of the propriety of personal jurisdiction under Georgia's long-arm statute. Rather, for the court to authorize discovery on this issue, Plaintiff must allege that Gordon engaged in some course of conduct [in Georgia] unrelated to the news article.

Richard Winfield and Mark Weissman of Clifford, Chance and Peter Canfield and Tom Clyde of Dow Lohnes represented Gordon and Associated Press. Plaintiff Michael Weinstock was represented by himself, Jan Cohen and Adam Gleklen of Weinstock & Scavo.

New York Court, Dismissing Defamation Action, Accords Web Site Full First Amendment Protection

By David Atlas

In an important decision for online news organizations, on December 5, 2001, New York State Supreme Court Justice Paula J. Omansky dismissed defamation and related claims brought by Banco Nacional de Mexico, S.A. against Mexican journalist Mario Renato Menendez Rodriguez, and independent journalist Al Giordano and his web site, The Narco News Bulletin, over statements accusing the bank's Chairman of involvement in drug trafficking. In dismissing the complaint in *Banco Nacional de Mexico, S.A., v. Rodriguez, et al.* against Mr. Menendez, the Court held that Mr. Menendez had insufficient contacts with New York for the Court to exercise long-arm jurisdiction over him.

With respect to Mr. Giordano and The Narco News Bulletin, the Court held that the web site and its reporters were entitled to the full realm of First Amendment protections accorded to traditional news gathering organizations and that the bank could not meet its burden of proving that these defendants acted in a grossly irresponsible manner, the required standard under New York law.

Background of the Case: Initial Article in Mexico

The dispute arose in Mexico in 1997 when Mr. Menendez published a series of articles in his Mexican newspaper, *Por Esto!*, about Roberto Hernandez Ramirez, the Chairman and General Director of Banco Nacional de Mexico, S.A. Responding to complaints by local fisherman about being forced from their land by drug traffickers, *Por Esto!* conducted an investigation and reported that Mr. Hernandez was permitting drug traffickers to operate freely on property that he owned known as Punta Pajaros.

Following the publication of these articles, the bank filed a complaint with the government prosecutor against Mr. Menendez seeking to have him arrested and jailed for defamation (which is both a criminal and civil offense in Mexico). The first Mexican court to hear the case dismissed the charges against Mr. Menendez, ruling that the statements in *Por Esto!* could not be read to communicate

any illegal or immoral activity on the part of the bank, nor could the accusations against Mr. Hernandez be imputed to the bank.

That decision was affirmed on appeal and the bank's subsequent, repeated efforts to hold Mr. Menendez criminally responsible for such statements were all rejected. Thereafter, in several articles on the Narco News Bulletin, Mr. Giordano repeated and expanded upon many of the allegations published by *Por Esto!*

Invitations to Speak in NY

In March 2000, Mr. Menendez was invited by the Latin American Law Students Association to participate in a panel discussion at Columbia Law School in New York on drugs and drug trafficking. Just before coming to New York, Mr. Menendez gave an interview from Mexico to *The Village Voice* in which he asserted that Mr. Hernandez was a narcotics trafficker.

At Columbia Law School, Mr. Menendez recounted the results of his investigation into drug trafficking on Punta Pajaros and pointed out, as he had repeatedly done in *Por Esto!*, that Punta Pajaros was land owned by Hernandez, the Chairman and General Director of the bank. Mr. Giordano, who participated with Mr. Menendez in the panel discussion, also appeared on WBAI 99.5 FM in New York to further discuss the allegations against Mr. Hernandez.

In response, the Bank of Mexico, which has a branch office in New York and is authorized to do business in the state, commenced an action in New York for defamation and tortious interference against Mr. Menendez, Mr. Giordano and the Narco News Bulletin based upon the statements made at Columbia Law School, to *The Village Voice* and WBAI, as well as those appearing on the Narco News Bulletin web site.

Sufficient Contacts to Assert Jurisdiction Only Over Giordano and the Web Site

On the defendants' motions to dismiss, Judge Omansky first ruled that New York's law governed, rejecting defen-

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dants' arguments that she should accord res judicata or collateral estoppel effect to the Mexican courts' dismissals of the bank's criminal claims. Interestingly, the New York court's conclusions rested on finding that the public policy of the state required that she look to New York and not Mexican law. The public policies included protecting companies (presumably ones with economic interests and transactions in the state) from accusations of illegal conduct, and First Amendment and state defamation law and principles which would not allow a New York court to enforce a judgment under Mexican criminal defamation law. New York's substantive, as well as its procedural, laws and rules would govern.

Turning to the question of jurisdiction, the court found that New York's "long-arm" jurisdiction statute does not permit the exercise of jurisdiction over Mr. Menendez. The Court found that Mr. Menendez's statements in New York, standing alone, were insufficient to confer personal jurisdiction where it was clear that he had no other contacts with or business activity within the State. Accordingly, the Court dismissed the bank's complaint against him in its entirety.

Mr. Giordano and Narco News also argued that the court lacked jurisdiction over them. Mr. Giordano lives in Mexico. He argued, and the court agreed, that merely maintaining a website accessible by New York residents was insufficient basis for jurisdiction.

However, the Court found that the bank had alleged facts, including Mr. Giordano's maintenance of a post office box in New York and the web site's retention of a New York based web host, which, if true, would support the exercise of personal jurisdiction over them. The dispute, the court held, could not be decided just on the motion papers. However, the Court found that the bank had failed to adequately plead a defamation claim against Mr. Giordano or the Narco News Bulletin.

Web Site and Its Reporters Entitled to Full First Amendment Protection

In analyzing the bank's defamation claim against Mr. Giordano and Narco News Bulletin, the Court rejected their arguments that the statements at issue were pure opinion and could not be defamatory to the bank. However, it held that the web site is "a media defendant and is entitled to heightened protection under the First Amendment."

The Court based this finding on its review of Mr. Giordano's submissions on the web site, which demonstrated that

The Court found that Mr. Menendez's statements in New York, standing alone, were insufficient to confer personal jurisdiction where it was clear that he had no other contacts with or business activity within the State.

defendants' format is similar to a regularly published public news magazine or a newspaper except for the fact that the periodical is published 'on line' or electronically, instead of being printed on paper. The fact that the Narco News website can accept readers' comments, or letters to the editor, via a separate e-mail address only strengthens the need for First Amendment protections for the medium.

Accordingly, "Narco News, its website, and the writers who post information, are entitled to all the First Amendment protections accorded to a newspaper/magazine or journalist in defamation suits."

No Gross Irresponsibility

Based on the motion papers, the Court could not determine whether the bank is a public figure. But, it nevertheless ruled that the bank had failed to plead any facts to indicate that Mr. Giordano or Narco News acted in "a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties," the re-

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Special Prosecutor for Criminal Libel Case Ordered Against Newspaper

A Kansas judge has ordered county prosecutors not to handle a criminal libel case that was filed against a politically oriented alternative newspaper last March. Judge Tracy Klingensmith instructed District Attorney Nick Tomasic to seek a state-appointed prosecutor if the case is to proceed. If Tomasic does not find a special prosecutor, Judge Klingensmith indicated he will appoint a prosecutor for the case.

In March, Tomasic charged the publisher and editor of *The New Observer* with multiple counts of criminal defamation for articles about the Kansas City, Kan., mayor and her staff. See *Kansas v. Carson*; *Kansas v. Powers* (Kan. Dist. Ct. Wyandotte County 2001). See also *LDRC Libelletter*, March 2001 at 5. The charges were filed after *The New Observer* was critical of Tomasic and Mayor Carol Marinovich during their re-election in 2000. Among the articles that gave rise to the charges was an article that claimed that the mayor and her husband, a county district judge, did not live in Wyandotte County, as required by law.

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required standard under New York law for even private figures when the statements concern matters of public concern.

In this regard, the Court noted that the bank had not alleged that Mr. Giordano or the Narco News Bulletin failed to use "methods of verification which are reasonably calculated to produce accurate copy" or that they "used sources which they knew, or should have known, were unreliable." The Court also held that Mr. Giordano and the Narco News Bulletin were entitled to rely on the accuracy of articles written by reporters from *Por Esto!* Even if these defendants were guilty of unbalanced reporting, the Court found that to be not actionable and strictly a matter of editorial judgment.

The Court dismissed the remaining claim for tortious interference, finding that the bank had failed to allege any specific relationship with which these defendants interfered.

Thomas Lesser of the firm Lesser, Newman, Souweine and Nasser represented defendant The Narco News Bulletin; Al Giordano appeared *pro se*; Michael Madigan, Thomas McLish and Trevor Peterson of the firm Akin Gump Strauss Hauer & Feld, LLP represented plaintiff Banco Nacional de Mexico, S.A.

David Atlas is a partner at Frankfurt Garbus Kurnit Klein & Selz, P.C. in New York and, together with Martin Garbus and Jessica Miller, represented defendant Mario Renato Menendez Rodriguez

Judge Klingensmith did not want Tomasic or his staff handling the case because of the "history of contentiousness" between Tomasic and the defendants, publisher David Carson and editor Edward Powers Jr. The judge also said that "the probity of the D.A.'s decision to file the subject charges at the time they were filed ... is, in the public's mind, questionable at best." The judge even claimed there was "extreme personal animus" between Tomasic and the defendants.

Judge Klingensmith, a Brown County District Judge, was hearing the Wyandotte case because all Wyandotte judges refused to hear it.

The Kansas criminal libel statute, Kan. Stat. Ann. § 21-4004 (1988), prohibits "maliciously communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice." In 1995, the 10th Circuit Court of Appeals upheld the facial constitutionality of the Kansas law in *Phelps v. Hamilton*, 59 F.3d 1058, 23 Media L. Rep. 2121 (10th Cir. 1995).

Carson and Powers are represented by Mark Birmingham of Kansas City, Kan.

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

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Florida Court of Appeals Strikes Down Section of Criminal Libel Statute

Statute Found to be Impermissibly Content-Based, Overbroad and Vague

A Florida Court of Appeals upheld a trial court's dismissal of criminal charges brought under a section of the Florida criminal libel statute. In doing so, the court of appeals held that the section making it unlawful to print or publish something that "tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy" is unconstitutional. See *Florida v. Shank*, 2001 Fla. App. LEXIS 13166 (Fla. Ct. App. Sept. 19, 2001).

Florida's criminal libel statute, Fla. Stat. § 836.01 *et. seq.*, is composed of 11 sections. In August 1999, Lloyd Shank was arrested and charged with violating § 836.11 when he admitted to writing and circulating to the members of the Broward County Board of Commissioners an anonymous letter that included anti-Semitic comments.

Under the heading "Publications which tend to expose persons to hatred, contempt, or ridicule prohibited," § 836.11 provides that it is unlawful to anonymously:

print, publish, distribute or cause to be printed, published or distributed by any means, or in any manner whatsoever, any publication, handbill, dodger, circular, booklet, pamphlet, leaflet, card, sticker, periodical, literature, paper or other printed material which tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy. . .

The trial court concluded that § 836.11 violated the First Amendment because it was "impermissibly content-based, overbroad, and vague." In a short, conclusory, per curiam opinion, the court of appeals affirmed.

Stating simply that § 836.11 is not content-neutral, the court said the statute "criminalizes speech based solely on content, i.e., speech that criticizes or ridicules is targeted, while other 'nice' publications that praise or promote approval, admiration, or commendation are not penalized." Citing cases such as *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992), the court of appeals held that the statute was facially invalid.

The court also held the statute to be overbroad because it "not only impacts proscribable speech, it also profoundly impacts speech that is clearly protected." By

way of example, the court agreed with the trial court that the statute could be construed to "proscribe parodies, anonymous political cartoons, or anonymous 'letters to the editor' of a local newspaper that ridicule or expose to contempt individuals who are not public figures, but are nevertheless 'in the news.'"

Lastly, the court held the statute to be void for vagueness because it "fails to apprise a person of ordinary intelligence what would subject him or her to criminal punishment."

IMPORTANT NOTICE:

PLEASE SEND US YOUR E-MAIL ADDRESS FOR FUTURE NEWSLETTER DELIVERY

The LDRC Board of Directors has voted to distribute the newsletter, the LDRC LIBELLETTER by e-mail only. The directors have taken this position both because "snail mail" is increasingly cumbersome, slow and, in some businesses, virtually undeliverable, and in order to save LDRC the substantial expense of mailing hard copies each month. Certainly, e-mail distribution is faster. LDRC already distributes over 175 copies of the LDRC LIBELLETTER by e-mail each month in a manner that allows recipients to print it out in the same format as the hard copy.

We will continue to distribute the LDRC LIBELLETTER by both e-mail and hard copy for at least a few more months. But please send us your e-mail address as soon as possible. We do not want any of you to miss even one issue. And also, let us know if, for some reason, you cannot receive the LDRC LIBELLETTER by e-mail. Again, we want all of you to receive the publication each month.

PLEASE SEND EMAIL ADDRESSES OF ANYONE IN YOUR ORGANIZATION WHO WOULD LIKE TO RECEIVE THE LDRC *LibelLetter* BY E-MAIL TO:

Kelly Chew (kchew@ldrc.com)

Court Denies Judgment on the Pleadings in *Richard A. Sprague v. American Bar Association, et Al.*

“Lawyer-cum-fixer” May be Defamatory

By Joyce S. Meyers

Judge William H. Yohn, Jr., of the United States District Court for the Eastern District of Pennsylvania, has ruled that Richard A. Sprague, a prominent Philadelphia attorney and perhaps the most famous libel plaintiff in America, will be allowed to proceed with his libel suit against the American Bar Association, the *ABA Journal* and its reporter, Terry Carter. On November 14, 2001, Judge Yohn denied defendants' motion for judgment on the pleadings, finding that the challenged language was sufficiently ambiguous in context to preclude granting defendants' motion, which had argued that the publication was not defamatory. *Sprague v. American Bar Association, et. al.*, 2001 U.S. Dist. LEXIS 18707 (E.D. Pa. Nov. 14, 2001).

An Article on Cops and Race

The article at issue, entitled “Cops in the Cross Fire” and published in the October 2000 issue of the *ABA Journal*, detailed the fatal shooting of a young black man by a white Philadelphia police officer, Christopher DiPasquale. The article reported on the use of a private, criminal-complaint procedure by leaders of the black community to obtain a court order forcing Philadelphia District Attorney Lynne Abraham to pursue murder charges against DiPasquale, and the District Attorney's appeal of that order. The article explored the serious public issues raised in this controversy, relating to the disciplining of police in Pennsylvania, both internally and through the courts, and the policy question of whether the District Attorney should have ultimate control over decisions to prosecute. In addition, because the victim of the shooting was black, the police officer was white, and the sides in the controversy were racially divided, the case carried serious racial and political implications.

Describing the charged atmosphere in which the case was proceeding, the article reported, “Some of the biggest names in the city's legal community have lined up

to battle over the validity and constitutionality of this use of the private criminal complaint.” The challenged language appears in this context in the following paragraph:

The political stakes were raised in May when the DA accepted outside help in the case from her former boss, Richard Sprague, perhaps the most powerful lawyer-cum-fixer in the state. The appearance of the storied Dick Sprague set off alarms in the black precincts. Within a week they brought in their own big guns.

The next paragraph describes the “big guns” brought in on the other side, including a former chancellor of the Philadelphia Bar Association and two highly regarded prominent African-American civil rights lawyers.

Sprague, famous not only for his \$34.5 million libel verdict against *The Philadelphia Inquirer* but also for his prominent role over several decades in many high-profile and politically sensitive legal matters as a district attorney in Philadelphia, a special prosecutor, and counsel to many prominent public officials, claimed that the descriptive phrase “lawyer-cum-fixer” defamed him. His complaint alleged that the description accused him of agreeing to “fix” the DiPasquale case and of having “fixed” other cases, in violation of various criminal statutes and the Rules of Professional Conduct.

Argument It Isn't Defamatory

Defendants filed an answer, denying that the challenged language was defamatory in context and attaching more than 100 examples of the term “fixer” used by reputable publications such as *The New York Times*, *The Washington Post*, *The Philadelphia Inquirer*, *The National Law Journal* and *Associated Press* to describe, in laudatory terms, some of the most distinguished lawyers in the country, including Clark Clifford, former Deputy Attorney General, Richard Kleindienst, presidential advisors Vernon Jordan, Charles Ruff, and Lloyd N. Cutler, and nationally known trial lawyer, Robert Shapiro.

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Defendants simultaneously filed a motion for judgment on the pleadings, arguing that the term “fixer,” as used in the context of the article, was intended as “an accolade, not an insult,” to describe Sprague as a highly effective attorney and formidable adversary, whose involvement in the case raised the political stakes and motivated the other side to bring in its own top lawyers. Defendants argued that the use of the term “fixer” in that manner to describe lawyers in terms of their prominence, effectiveness as advocates and success in solving complex problems was a common and legitimate use of the term that was not defamatory in the context of the article or the broader context of ordinary journalistic usage.

Defendants also argued that the term was protected under the First Amendment as rhetorical hyperbole and figurative language rather than a statement of an objectively verifiable fact, relying on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), *Greenbelt Cooperative Publishing Ass’n, Inc. v. Bresler*, 398 U.S. 6 (1970), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974). Defendants cited numerous cases that relied on *Greenbelt* to hold that challenged language was not defamatory because the context did not explicitly refer to criminal conduct.

Sprague Argues “Fixer” is Crook

In opposing defendants’ motion, plaintiff cited published articles and judicial opinions using the word “fixer” in contexts clearly involving criminal charges and indictments, including specific allegations of bribing judges. Most of Sprague’s examples consisted of articles and judicial decisions relating to “Operation Greylock,” a federal investigation of judicial corruption in Chicago that resulted in numerous convictions for fraud and bribery. Sprague argued that the use of the word “fixer” in these contexts establishes that, in reference to a judicial proceeding, a “fixer” is one who employs unlawful means to procure a desired outcome. Sprague

argued that the term must be read as defamatory because it accuses an individual of illegal activities.

In its opinion denying defendants’ motion for judgment on the pleadings, the court defined the controlling question as “the impression the statement would have made upon the average reader of the *ABA Journal*.” Acknowledging that such readers comprised a sophisticated audience, the court assumed that they would be aware that the term “fixer” has two meanings. One meaning, which defendants assert they intended, is “that Sprague has a reputation as a politically savvy lawyer who can achieve results for his clients that others with fewer skills or connections could not.” The other meaning describes attorneys “who arrange to pay judges or bribe administrative agencies for the outcomes they desire.”

The court’s analysis turned on the lack of explicit language in the context to negate any possible implication of illegal activity.

Court Finds it Ambiguous

The court concluded that the specific description of Sprague in the article was ambiguous because it “contained no additional modifiers” and there was “no direct reference in the article to Sprague’s political skills.” The court concluded,

Without direct modification, the contextual reference to Sprague as a ‘fixer’ could have either connotation: either Sprague’s opponents could be alarmed because he is a challenging adversary on the political and legal playing fields, or they could be alarmed because they believe that he has a reputation for conducting illegal activities for the benefits of his clients.

The court acknowledged that the context arguably tipped in favor of the defendants’ interpretation:

It is arguably less likely that the black community would respond by hiring lawyers of the caliber listed if it believed that Sprague conducted illegal activities — presumably the community would instead seek a law enforcement investigation — but the

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article notes the charged atmosphere in which the black community complained that it had not already received appropriate assistance from law enforcement on issues. The black community's alarm at Sprague's addition could stem then from being forced to fight its political battle on another front as well." The court therefore concluded that this ambiguity in the context of the article meant that "readers of *ABA Journal* could possibly have understood the term 'fixer' to be defamatory.

The court's analysis was based entirely on its interpretation of the words in context and turned on the lack of explicit language in the context to negate any possible implication of illegal activity. The court ignored the clarification published in the November 2000 issue of the *ABA Journal*, which stated that the *Journal* "intended the reference to mean that Sprague is known for his problem-solving skills in politically nuanced cases" and "did not intend to convey that Sprague has engaged in any unethical or illegal activity." Although the court acknowledged the clarification in a footnote, it concluded that it did not bear on the issue before the court but was relevant only to mitigation of damages. The court also ignored First Amendment considerations in its analysis. Although noting in passing defendants' reliance on *Greenbelt* and *Letter Carriers*, the court did not discuss, or apparently consider, their application to this case.

Because the only issue before the court on the motion for judgment on the pleadings was whether the challenged language can be read as defamatory, defendants can assert other appropriate defenses in a motion for summary judgment at a later stage in the proceedings.

Plaintiff Richard A Sprague is represented by James E. Beasley, the same lawyer who represented him in his successful libel suit against *The Philadelphia Inquirer*.

Defendants are represented by Joyce S. Meyers, David H. Marion and Jeanette Melendez Bead of Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia.

UPDATE: Court Dismisses Case Claiming Motion Picture *Hardball* Was Defamatory**By Micheal Doornweerd**

A Chicago federal judge dismissed an \$11 million lawsuit alleging that the motion picture *Hardball*, which stars Keanu Reeves as a youth-league baseball coach managing a team of inner-city children, defamed plaintiffs and portrayed them in a false light before the public. Plaintiffs are Robert Muzikowski, a securities broker active in the community, and a Little League® he founded on the west side of Chicago. Plaintiffs' complaint purported to allege claims under Illinois law of defamation *per se*, defamation *per quod* and false light invasion of privacy. Plaintiffs previously moved for a temporary restraining order and a preliminary injunction, seeking to prevent the nation-wide release of *Hardball*. United States District Court Judge Charles P. Kocoras denied that motion following oral argument on September 6, 2001. See *LDRC Libelletter*, October 2001 at 19. On November 28, 2001, Judge Kocoras dismissed plaintiffs' complaint altogether. *Muzikowski, et al. v. Paramount Pictures Corp., et al.*, No. 01 C 6721 (N.D. Ill. Nov. 28, 2001), available at <http://www.ilnd.uscourts.gov/racer2/>.

Defendants Paramount Pictures Corp., SFX Tolin/Robbins, Inc. (the film's production company), and Fireworks Pictures (the film's international distributor), filed a motion to dismiss the complaint in its entirety on the grounds that (1) the film, a work of fiction, is not defamatory *per se* because plaintiffs cannot allege that the film named or pictured them, and because the film is subject to an innocent construction; (2) plaintiffs failed to plead with specificity the special damages required to state a claim for defamation *per quod*; and (3) plaintiffs failed to plead the elements of a claim for false light invasion of privacy.

In opposition to defendants' motion to dismiss, plaintiffs argued that the fictional character Connor O'Neill, played by Reeves in the film, actually is or could reasonably be considered a depiction of Muzikowski. Plaintiffs further argued that the film was defamatory *per se* because the O'Neill character alleg-

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Court Dismisses Case Claiming Motion Picture *Hardball* Was Defamatory

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edly engages in illegal activities and the depiction of O'Neill's behavior and motivations for coaching children cast aspersions on Muzikowski's professional integrity and ability as a securities broker and insurance agent. With respect to their claim of defamation *per quod*, plaintiffs argued that, as a natural result of the film, corporate sponsors would be reluctant to contribute to the plaintiff Little League®, volunteers would be unlikely to continue to donate their time, Muzikowski's securities and insurance sales and renewals would be harmed because his clients would have reason to believe that he misrepresents himself, and Muzikowski would become a target of street gangs in the areas where he coaches. Muzikowski also argued that he had spent time that would normally be used for sales calls trying to mitigate the harm to his reputation. Finally, plaintiffs asserted that they had adequately plead the elements of a claim for false light invasion of privacy.

The Opinion

In a ten-page written opinion, the court granted defendants' motion to dismiss in its entirety. The court first noted that the complaint contained insufficient allegations on behalf of the plaintiff Little League® to state a claim for defamation of any kind under Illinois law. The court then dismissed plaintiff Muzikowski's defamation claims. As to the defamation *per se* claim, the court first noted first that *Hardball* is a work of fiction and that Muzikowski "is not mentioned by name in the film." The court then concluded that the complaint failed to allege that the O'Neill character is "immediately identifiable as Muzikowski" because the complaint alleged several differences between Muzikowski and O'Neill, as well as some similarities. Applying the innocent construction rule, the court concluded that based on the differences between O'Neill and Muzikowski, the O'Neill character "could reasonable be construed to refer to someone other than Muzikowski or to no actual person at all." The court therefore dismissed

Muzikowski's defamation *per se* claim.

As to Muzikowski's defamation *per quod* claim, the court held that the complaint failed to adequately plead special damages. The court reasoned that the bulk of the damages allegations in the complaint referred to possible future damages and were therefore improperly speculative. The court further concluded that the sole allegation of actual damage, which consisted of Muzikowski's claim that he had spent time mitigating alleged damage to his reputation, was too general to satisfy the requirement that special damages be plead with specificity under Rule 9(g) of the Federal Rules of Civil Procedure.

[B]ecause the film Hardball is a work of fiction, and "it is difficult to imagine how a production company could produce a work of fiction without knowledge of its falsity."

Finally, the court dismissed the false light invasion of privacy claims. The court dismissed the claim of the plaintiff Little League® on the ground that it did not have standing to bring any kind of invasion of privacy claim because it was a corporation and

not a person. The court dismissed Muzikowski's false light invasion of privacy claim because he could not adequately plead that the film put him in a false light before the public in that Muzikowski could not allege "that he and O'Neill are one and the same." Alternatively, the court opined that a false light invasion of privacy claim — with its requirement of actual malice — "seem[s] singularly inapplicable under the circumstances of this case" because the film *Hardball* is a work of fiction, and "it is difficult to imagine how a production company could produce a work of fiction without knowledge of its falsity."

Plaintiffs have vowed to appeal to the United States Court of Appeals for the Seventh Circuit. They are represented by Marian Conroy Haney and Donald William Rupert of Mayer, Brown & Platt in Chicago.

Debbie L. Berman, a partner, and Michael A. Doornweerd, an associate, of Chicago's Jenner & Block, LLC, represent defendants in this matter.

Loutchansky UK Libel Win Against The Times Reversed in Part

Further Explanation of Reynolds Qualified Privilege

Appellate Court Upholds Plaintiff's Judgment on Web Archive Republication

On December 5, the Court of Appeal, led by the Master of the Rolls, hearing an appeal from the Queen's Bench Division (Mr. Justice Gray), reversed a judgment for the plaintiff in *Loutchansky v. The Times Newspapers Ltd & ORS* finding that the trial court had misread the qualified privilege delineated by the House of Lords in *Reynolds v. Times Newspapers Limited* [2001] 2 AC 127.

The appellate panel also found, however, that maintenance of a defamatory article on the newspaper's website archive, where it was conceded to have been read on occasion, constituted re-publication each time the article was accessed, thereby rejecting the "American single publication rule." Moreover, while the initial publication of the article might well be found qualifiedly privileged under the *Reynolds* analysis, maintenance of that article on the website archive, after having been notified of a claim based upon defamation, would not necessarily be privileged as well. The plaintiff was allowed to retain his judgment on the archival claims.

The opinion is lengthy and important. LDRC will publish a more comprehensive analysis of the decision in the January 2002 edition of the *LDRC LibelLetter*.

Reynolds Privilege Argued

Defendants, the publisher and editor of The Times and two of its journalists, did not try to defend the articles at issue — which placed Loutchansky as a boss in a major Russian criminal organization — under "justification," or truth within the strictures of English law. Instead, the defendants sought protection under the "*Reynolds*" qualified privilege to publish because the information was of import once to the public and the defendants had an honest belief in its truth. As to archival retention of the articles, and their availability on the

website archive, the defendants argued in favor of the single publication rule for the internet publication.

The *Reynolds* privilege asks "whether in all the circumstances 'the duty-interest test, or the right to know test'...is satisfied." Para. 22, quoting from *Al-Fagih v. H.H. Saudi Research and Marketing (UK) Limited* (unreported, 5 November 2001). In determining the answer to that question, the *Reynolds* court set out a list of ten factors — one presumes it is not a dispositive or utterly comprehensive list — that the lower courts are to use to evaluate the public interest and the bona fides of

the journalists in publishing the material. The court is forced to analyze whether or not the journalist acted responsibly, that being part and parcel of a determination as to whether the publication itself is qualifiedly privileged.

The requirement built into the Reynolds privilege that the journalist have acted reasonably, "effectively pre-empt[s] a finding of malice."

Defines "Duty" of Publisher

The appellate panel rejected outright the test used by the trial court below to determine the duty element of the *Reynolds* privilege: whether the "publisher would be open to legitimate criticism if he failed to publish the information in question." Para. 44. The appellate court concluded that was both wrongly derived from the precedent cited and was far too narrow a definition of the duty owed. Uniformity amongst the press as to the absolute need to publish the information at issue in the given litigation was not required. The standard is "that of responsible journalism."

Any Role Left for Malice

Among the interesting elements of the appellate court decision in *Loutchansky* is the conclusion that once a finding is made by the court that the published material is privileged under a *Reynolds* analysis, then it

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Loutchansky UK Libel Win Against The Times Reversed on Initial Publication

serves as a complete defense. While as a general proposition, a privilege under English law can be defeated by a showing of malice, this privilege, the court stated, is different as the requirement built into the *Reynolds* privilege that the journalist have acted reasonably, “effectively pre-empt[s] a finding of malice.”

In effect, Reynolds conflates the two more standard prongs of a qualified privilege analysis — arguably, one, whether the material is in the public interest giving rise to the privilege and two, whether the publisher abused the privilege by acting with malice — into one.

Rejects Single Publication Rule

As to the single publication rule, the court felt that the law’s failure to accept it would not inhibit publications’ willingness to maintain archives.

Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.” Para. 74.

But that in any event, while the maintenance of archives has social utility it is “a comparatively insignificant aspect of freedom of expression.”

Moreover, while acknowledging that allowing a libel action on the basis of a new dissemination of a very old article “is at odds with some of the reasons for the introduction of a 12 month limitation period for defamation” Para. 75 — one of the major reasons for American adoption of the single publication rule — the court stated that such republication is likely modest with equally modest damages ensuing.

Need to Put Qualifiers in Archive

Interestingly, the court of appeals rejected the trial court’s conclusion that the defense of qualified privilege must be struck down on the basis that the newspaper was not prepared to defend based upon its honest belief of the truth of the statements. The court of appeals did believe, however, that the qualified privilege was not applicable when the publisher continued to make the arti-

cles available through its web archive recognizing that it was not seeking to justify the truth of the allegations, but “without publishing any qualification to draw to the reader’s attention the fact that the truth of the articles was hotly contested.” Para. 79

The courts language regarding the requirements and values of free press are notable. The *Reynolds* privilege, the opinion states, tolerates factual inaccuracy and, interestingly, in a *New York Times v. Sullivan* -esque analysis, the court states that it does so for two purposes: “first so as not to deter the publication sued upon (which might have been true); and secondly so as not to deter future publications of truthful information.” Para. 41.

More on this post-*Reynolds* decision in the next issue.

Counsel for Loutchansky were Desmond Browne QC and Hugh Tomlinson (instructed by Olswang). Counsel for The Times defendants were Lord Lester of Herne Hill QC, Richard Spearman QC, Richard Parkes, and Brian Kennelly (instructed by Reynolds Porter and Chamberlain).

LDRC is distributing the
***PRACTICE GUIDE: HOW TO
DEFEAT PLAINTIFF’S CLAIMS
OF ACTUAL MALICE***

by e-mail, to allow you not only to read it, but to cut and paste easily from it. To obtain a copy, send an e-mail request to ldrc@ldrc.com.

Second Circuit Grants Media Access to Deposition Transcripts of Top NYSE Officials

By Marc E. Ackerman and Justin M. Brown

The Second Circuit Court of Appeals affirmed the United States District Court for the Southern District Court of New York granting TheStreet.com, an online financial based newspaper, access to deposition transcripts previously sealed by the District Court. *New York Stock Exchange, Inc. v. TheStreet.com*, 2001 WL 1517018 (2d Cir. 2001). The ruling will allow TheStreet.com to gain access to deposition transcripts of two high-ranking NYSE officials, Edward A. Kwalwasser and William R. Johnston. The Court of Appeals found that United States District Court Judge Jed Rakoff did not abuse his discretion in finding that the media interest in obtaining access to documents, which relate to the interaction of government agencies, outweighed the possible reputational harm. In so doing, however, the Second Circuit panel's clarification of the appropriate standard to be applied by a court in deciding whether to modify or vacate a protective order it has entered in a civil suit appears to restrict severely the public's right of access to discovery materials not filed with the district court.

The District Court

TheStreet.com intervened in a civil suit brought by the Securities and Exchange Commission (the "SEC") against broker John D'Alessio and his company D'Alessio Securities Inc. The SEC claimed that from 1993 to 1998 D'Alessio had engaged in illegal trading activities violating federal security laws. As part of D'Alessio's defense, he filed a third-party complaint against the New York Stock Exchange (the "NYSE"), which alleged that the NYSE and top NYSE officers, including NYSE Chairman Richard A. Grasso, were aware of and condoned illegal trading on the exchange floor.

In October 2000, Judge Rakoff entered a protective order (the "October Order") that allowed the parties to designate discovery material "confidential" if the parties believed in good faith that the material was entitled to such a

designation. Confidential material was not to be filed with the court except when required by court rules or in connection with motions or other matters pending before the court. The October Order was stipulated to the NYSE, its pertinent officers and D'Alessio. The SEC, however, did not stipulate to the October Order.

The District Court eventually dismissed D'Alessio's third-party complaint, finding that the NYSE and its officers were absolutely immune from claims arising from their performance of regulatory activities. Nonetheless, by December of 2000 Kwalwasser and NYSE President William Johnston had provided deposition testimony at the request of D'Alessio who claimed their testimony was necessary to his remaining affirmative defenses. The depositions were attended by representatives of the SEC. The NYSE designated certain portions of the testimony confidential ("Confidential Testimony").

In December 2000, the NYSE learned that the press had obtained a portion of the Deposition of NYSE Chairman Grasso, which included references to the Confidential Testimony of Kwalwasser and Johnston. As a result, the NYSE moved for enforcement of the October Order or a new protective order, under Federal Rule of Civil Procedure 26(c).

On January 4, 2001, during a closed proceeding, in which Judge Rakoff excluded members of the press from the courtroom, the District Court concluded that the October Order had not been violated, but that the Confidential Testimony did contain sensitive information. The court then entered a second protective order on January 24, 2001 (the "January Order") which sealed the Confidential Testimony.

In March 2001, TheStreet.com moved to intervene, under Federal Rules of Civil Procedure 24(a) and 24 (b), to modify the January Order and to gain access to the sealed information. TheStreet.com argued that the media and the public had a presumptive right of access to all of the sealed information. The argument was bolstered by the strong public interest in the Confidential Testimony, as it concerned the activities and interaction of a governmental

Documents that play no role in the performance of Article III, such as those passed between the parties in discovery, lie entirely beyond the presumption's [of access] reach.

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Second Circuit Grants Media Access to Deposition Transcripts of Top NYSE Officials

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agency, the SEC, with a quasi-governmental agency, the NYSE. TheStreet.com further argued that complete access would afford it the opportunity to fulfill the press' role of watchdog over governmental affairs.

In April 2001, the District Court granted The Street.com's motion and ordered the Confidential Testimony unsealed. District Court Judge Rakoff, from the bench, ordered that "a new balance must be drawn now that warrants the unsealing of those portions of the depositions that this court previously sealed." Judge Rakoff continued that "I don't think it is accurate to say that the interests of the intervenor were meaningfully represented at the hearing where I made my previous finding of good cause."

Thus, the District Court found a strong public interest in the Confidential Testimony and held that "there is a specific non-conclusory relevant interest that the media might have in those depositions relating to the interaction of the SEC and the [NYSE] that outweigh[ed] possible reputational harm." The Order was stayed pending appeal.

Second Circuit Court of Appeals

The NYSE appealed claiming that the Confidential Testimony was not a "judicial document" and thus not subject to a common law right of access and, even if it were a "judicial document," privacy interests outweighed the public's right of access. On appeal, the Second Circuit considered the appropriate standard to be applied by a district court in deciding whether to modify or vacate a protective order it has entered in a civil suit.

Standard for Modification of Protective Orders

The court determined that the appropriate standard for reviewing Judge Rakoff's modification of the protective order was for abuse of discretion. The court then revisited its holding in *Martindell v. Int'l Tel & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979). There, the court held that a district court should not modify a protective order granted under

Rule 26(c) "absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need." *Id.* at 296.

Thus, the court held that *Martindell* establishes a strong presumption against the modification of a protective order where it is found that the party claiming privacy has reasonably relied on the protective order. The court also noted that some district courts in the Second Circuit have incorrectly found that the *Martindell* rule only applies when the Government is seeking modification of a protective order. The court opined that "its logic is not restricted to Government requests nor did our opinion in *Martindell* suggest otherwise."

The court also stated, however, that "some protective orders may not merit a strong presumption against modification." Protective orders that are temporary, limited or where a litigant or deponent could not reasonably rely on a continuation of a protective order are, according to the court, properly subject to modification.

Martindell establishes a strong presumption against the modification of a protective order where it is found that the party claiming privacy has reasonably relied on the protective order.

Right of Access

Next, the court examined when "judicial documents" deserve a presumption in favor of access. The Second Circuit examined its *Amodeo* line of cases where it recognized the long established, but not absolute common law right of public access to judicial documents. *See United States v. Amodeo*, 44 F.3d 141 (2d Cir. 1995) ("*Amodeo I*"); *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995) ("*Amodeo II*").

In *Amodeo I*, the court held that "judicial documents" are entitled to a presumption of public access when the items are filed with the court and are relevant to the performance of the judicial function and useful in the judicial process. *Amodeo*, 44 F.3d at 145. In *Amodeo II*, the court considered the standards that should be applied by a court in light of objections to disclosure of a "judicial

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Second Circuit Grants Media Access to Deposition Transcripts of Top NYSE Officials

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document.” The court instructed that district courts should first determine the weight of presumption of public access by evaluating “the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.” *Amodeo*, 71 F.3d at 1049. The court confirmed that the “public has an especially strong right of access to evidence introduced in trials.” However, it also stated that

[d]ocuments that play no role in the performance of Article III, such as those passed between the parties in discovery, lie entirely beyond the presumption’s reach and stand on a different footing than a motion filed by a party seeking action by the court, or indeed, than any other document which is presented to the court to invoke its powers or affect its decisions

Id at 1049-1050.

Balancing Interests v. Access

After the district court determines the weight of the presumption of public access, it is then required to balance the competing considerations against that presumption. *Id* at 1050. The court identified at least two “countervailing factors”: (1) the danger of impairing law enforcement or judicial efficiency; and (2) the privacy interests of those who resist disclosure. *Id*.

Applying the Standards

After revisiting *Martindell* and the *Amodeo* cases, the Second Circuit panel decided that the Confidential Testimony did not directly affect an adjudication nor did it significantly determine litigants’ substantive rights, and concluded that the Confidential Testimony did not carry a presumption of public access. By so holding the Second Circuit failed to adopt TheStreet.com’s argument that the Confidential Testimony was a “judicial document” because it was reviewed by the District Court during its decision on whether or not to enter the protective order.

Indeed, the panel took a bleak view regarding the public’s right of access to discovery material. The court went so far as to question the validity of the presumption of access to discovery material created by the *Agent Orange* line of cases, in so much as they rely on Federal Rule of Civil

Procedure 5(d), which was recently amended, to prohibit the filing of discovery material except in certain limited circumstances. See *In re Agent Orange Products Liability Litig.*, 821 F.2d 139 (2d Cir. 1987); *Fed. R. Civ. P. 5(d)*.

The court then concluded, however, that the District Court acted properly in not applying *Martindell*’s strong presumption against access. The panel reasoned that the deponents could not have provided their testimony in reasonable reliance on any of the protective orders at issue.

The Second Circuit did not rule on the District Court’s determination that the deponents could not rely on the October Order because interested third parties, who had not stipulated to that order, were present during the depositions. The Appeals Court, however, did find that the January Order could not be reasonably relied upon because it was entered at least a month after the depositions occurred.

Contrary to Sixth Circuit?

Curiously, in a footnote, the court left open the possibility that parties could enter into a private agreement to keep discovery material confidential before presenting a proposed protective order to a court, and that such an agreement might provide a basis of reliance that discovery material would be kept confidential. This notion seems contrary to the Sixth Circuit’s holding that “Rule 26(c) allows the sealing of court papers only for good cause shown to the court that the particular documents justify court imposed secrecy.” *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) (vacating a protective order which allowed the parties to control public access to court papers).

In *Bankers Trust*, the court stated that a “district court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.” *Id*. Nonetheless, here, the Second Circuit determined that the *Martindell* presumption against public disclosure was never triggered.

Marc E. Ackerman and Justin M. Brown are associates at White & Case LLP. Robert L. Raskopf of White & Case LLP represented the TheStreet.com in the above described matter.

Illinois Court Opens Private Discovery Documents to Media in Police Misconduct Case

By Richard J. O'Brien and Jamie L. Secord

An Illinois federal court enhanced the media's access rights to court-protected documents to aid the fight against the "ugly and expensive" bad-cop syndrome.

The court allowed a weekly newspaper and reporter to intervene in an action that had been settled nine months earlier to obtain access to discovery documents under a protective order. The court based its ruling on the public's need to review police misconduct files. It championed the theory that publicity helps society remedy social ills.

Police Misconduct

In *Doe v. Chicago Police Officer*, 2001 U.S. Dist. LEXIS 11680, No. 97 C 3913 (N.D. Ill. Aug. 6, 2001), the court began its opinion by asking, "Will police misconduct ever end?" It answered that "unless serious efforts are undertaken to review, evaluate and scrutinize prior police misconduct, the answer . . . will invariably be 'absolutely not.'"

The plaintiff in *Doe* alleged that a police officer used his position to commit a sexual crime against her. The parties settled the lawsuit. Subsequently, the *Chicago Reader* and staff writer Tori Marlan filed a petition to intervene to challenge a protective order. The *Reader* sought access to confidential documents produced by defendant City of Chicago. The documents included sealed depositions of Chicago Police personnel, hiring and personnel information for the defendant officer, and investigative complaint register files for the defendant and other police officers, which primarily concerned allegations of official sexual misconduct. The court noted that all personal information had been deleted from most of the documents, including social security numbers, addresses, and telephone numbers.

Granting Intervention

Noting that intervention is "the procedurally appropriate course for third-party challenges to protective orders," the court granted the *Reader's* petition to inter-

vene. The court held that the parties could not suffer "tangible prejudice" as a result of intervention. After all, the *Reader* did not seek any documents from the plaintiff, and all personal information in defendants' documents would be redacted before being handed over to the media.

Defendants had objected to intervention because, in producing various confidential materials, they had relied on the court's protective order. Consequently, they argued that prejudice would result from a non-party's intervention to obtain access to private documents. The court dismissed defendants' argument, finding that it did not sufficiently outweigh the "strong public interest in disclosure."

Redesignating Confidential Materials as Public

The court next granted the *Reader's* motion to obtain access to defendants' "so-called" confidential documents. Balancing the need for public exposure with defendants' privacy interests, the court held that no good cause existed to maintain the protective order. The court chastised those who allow the bad-cop syndrome to perpetuate and undermine the justice system. It commended the *Reader* and Marlan for shining light on incidents of police misconduct. Quoting Justice Brandeis and Martin Luther King, Jr., the court concluded that appropriate media scrutiny is necessary to air police misconduct issues and assist society in searching for a remedy.

Richard J. O'Brien is a partner and Jamie L. Secord is an associate with Sidley Austin Brown & Wood in Chicago. David William Andich of Andich & Andich in Rock Island, Illinois, and Robert Stephen Minetz of Levin, McParland, Phillips & Minetz in Chicago represented plaintiff-intervenors the Chicago Reader and Tori Marlan. John Patrick Goggin, E. Michael Kelly and Steven M. Puiszis of Hinshaw & Culbertson in Chicago represented defendant City of Chicago.

Camera Access Granted Following Unprecedented Application Under Article 10

By Jonathan Donnellan

An English High Court Judge in October granted CNN's application to televise a Public Inquiry into the case of family doctor convicted of killing 15 patients and suspected of murdering hundreds more. CNN sought to broadcast the Inquiry as a matter of right, citing the free speech guarantee in Article 10 of the European Convention of Human Rights (ECHR), adopted into British law in 1998. The Judge, however, based the order on her inherent discretion and granted access only to the second of the inquiry's three phases as a pilot program.

Although short of the mark, the effort does open to broadcasters proceedings that ordinarily remain closed to cameras, and may pave the way for greater access and press rights in the future. The assertion of an affirmative right to televise was, after all, a novel one. And although ultimately rejected, it provoked serious and thoughtful discussion by many, including the Attorney General, who intervened to argue against the application. In contrast, an earlier application by the BBC that did not rely on Article 10 prompted little debate and was summarily denied by the Judge.

Article 10 Guarantees

It is hard for those who live and breathe the First Amendment to imagine, but until recently there existed no legal basis to challenge the UK's long history of banning cameras from courts. Following a photograph being taken of the infamous Victorian poisoner, Dr. Crippen, sitting in the dock at the Old Bailey, a 1925 statute was passed to specifically bar cameras, overriding the common law "open justice" principle, and access to judicial fora not reached by the act — such as public inquiries and the House of Lords — has until now been sought hat-in-hand, not as a matter of right.

Parliament's adoption of the ECHR three years ago changed all that. Article 10(1) provides that "Everyone has the right of freedom of expression," which "shall include freedom to 'receive and impart information and

ideas without interference by public authority.'" Article 10(2) tempers this presumption with a number of exceptions, permitting restrictions "necessary in a democratic society," including national security, public safety, protection of the reputation or rights of others, and maintaining the authority and impartiality of the judiciary.

The same law that adopted the ECHR also requires that opinions of the European Court of Human Rights be heeded in its interpretation. Those opinions hold that the state must establish a "pressing social need" for any restriction, and that it be proportionate to the legitimate aim pursued. *E.g., Nilsen and Johnson v. Norway*, 30 EHRR 878, para. 43 (1999). Sounding very much like a First Amendment analysis, Article 10(2)'s exceptions are to be "construed strictly" and the need for any restriction "established convincingly."

CNN's argument was straightforward. It had a presumptive right to camera access under Article 10(1)

Id. Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. *Jersild v. Denmark*, 19 EHRR 1, para. 31 (1994); *Oberschlick v. Austria*, 15 EHRR 389, para. 67 (1991).

CNN Argues Presumptive Access

CNN's argument was straightforward. It had a presumptive right to camera access under Article 10(1), and any additional distress that broadcasting may cause witnesses (the justification for denying the BBC's earlier application) could not survive strict scrutiny under Article 10(2). Broadcasting also furthered the principle of open justice, the purpose of the public inquiry and the Judge's stated aim to make the proceedings entirely open. Public inquiries — which by law may be established only to address a "definite matter" of "urgent public importance" — are initiated in response to national tragedies and go far beyond the fact-finding and judgments of trial courts, casting a wide net and aiming to propose systematic changes to avert future disasters.

This inquiry, which began in early 2001 and is expected to run at least two years, focuses in the first phase

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on the true scope of Dr. Shipman's homicidal misconduct and next on the failure of public health and other authorities to identify and put a stop to it. Initially convened as a private inquiry, the victims' families waged a successful legal challenge to make it public, and the Judge has since ordered that all evidence and daily transcripts be posted on a website. A closed-circuit camera feed was also set up in a public library in the town where the doctor practiced.

The victims' families and public officials involved in the inquiry did not contest the applicability of Article 10. Their opposition was limited to broadcast of their own respective testimony, arguing it would cause added stress for "some" witnesses. While CNN would not concede that claims of increased anxiety by some witnesses could amount to a "pressing social need" overriding Article 10's free speech guarantee — causing the exception to swallow the rule — it proposed a protocol which would have allowed those witnesses to opt out of television coverage.

The Crown's Opposition

The Attorney General filed a response just before oral argument was held. Stating that it had "no view on the desirability or otherwise of a public broadcast" in "this specific case," the Crown was troubled by the "startling" ramifications of CNN's argument. If CNN is correct, it rightly argued, every type of public event or proceeding from which cameras are prohibited would potentially infringe the human rights of broadcasters, and the 1925 law prohibiting cameras in courts would also be at risk of incompatibility with Article 10.

On the latter point, the Crown reluctantly acknowledged that, because this was not a trial, CNN's application avoided a direct showdown with the 1925 law, as well as the need to take into account Article 6 of ECHR, which permits courts to exclude the press from trials where necessary to avoid prejudice or further the inter-

ests of justice. Either of those laws would have given the Attorney General more to work with in opposing the application.

It argued instead that Article 10 did not give CNN the right to "receive" information others were not willing to impart to it, and that the Inquiry was under no obligation to give CNN access to its camera feed. In the alternative, it argued the Judge was free to exercise her "(considerable) discretion" to bar camera access under Article 10(2). The basis for such discretion, the Crown suggested, was because a contrary finding "would imply that any public authority would be obliged to let the television cameras function at any public event, unless it

could justify their exclusion" under Article 10(2). And this, it stressed, "would be a potentially very burdensome requirement."

The Court Redefines Information

The Judge took a somewhat different tack in finding that Article 10 does not apply, holding that the transient experience of events taking place at the inquiry amounted to "knowledge" — which Article 10 does not protect — and only a permanent record of events qualified as "information" which CNN would have a right to receive and impart under Article 10.

"Information," she wrote, "is the communication of knowledge." And "the difference" between the two "is important when one considers what information is in the public domain." "It is different," she opined, "from what knowledge is available to the public." Because there is no permanent audiovisual record of the inquiry, there exists no "information" for CNN to receive or impart to its viewers. Thus, the Judge concluded, Article 10 is not engaged.

This bit of wordplay finds some support in the Oxford English Dictionary. Information is indeed defined as "Knowledge communicated concerning some particu-

To read the word "information" as narrowly as the Judge suggests would be to exclude from Article 10's protection any speech not already recorded.

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lar fact, subject, or event.” Though far from being limited to preexisting recordings, information is “that of which one is apprised or told.”

To read the word “information” as narrowly as the Judge suggests would be to exclude from Article 10’s protection any speech not already recorded. It would do nothing to protect a dissenter’s voice, political debate and argument, unpopular lectures, and speeches urging social responsibility, much less the live broadcast of any of these events. In a word, it would render Article 10 toothless. Live speech would be chilled — only preexisting recordings would be protected.

The Judge advanced another basis for her conclusion that Article 10 does not apply: “Article 10 does not provide a right to film a public event if the person with lawful control of the event is not willing to allow it.” Only where “no person has lawful control, then there is a right to film, because in practice there is nothing to prevent it.”

This reading excludes from Article 10’s protection coverage of any public event where the government is in control, which would seem to be at odds with the language of Article 10, which requires the government to make a showing that its speech restrictions are “necessary in a democratic society.”

In the end, the Judge exercised her discretion to invite broadcasters to televise the first part of the Inquiry’s second phase to a broader public. It seems this invitation will be viewed as a litmus test by the English Judiciary who are now considering whether to extend coverage by experimenting with it in the UK Appeal Courts.

Jonathan Donnellan is Assistant General Counsel of CNN. Mark Stephens and Amber Melville-Brown of Finers Stephens Innocent, London were CNN’s solicitors in the case; Geoffrey Robertson QC and Anthony Hudson of Doughty Street Chambers, London were CNN’s barristers.

Is There A Treason Statute in Your State?

On November 28, a photographer for the *Brattleboro (Vt.) Reformer* was detained and threatened with arrest for treason after he was seen taking pictures of the Vermont Yankee nuclear power plant. The photographer was attempting to get pictures of the power plant to accompany a story on the security at the plant. Under a little-known Vermont statute it is illegal to take pictures of a nuclear power station during times of war or threat of war.

The Windham County State’s Attorney Dan Davis has indicated that he does not intend to press charges against the photographer. However, the statute and the threat of prosecution is worth taking note of.

Originally passed in 1917, the statute was originally designed to protect railroads after war was declared with Germany. The statute can be found at 13 Vt. Stat. Ann. § 3481, and it reads as follows:

A person who, without permission of lawful authority, while the United States is at war or threatened with war, makes or attempts to make, or has in his possession or attempts to obtain, or aids another to obtain, any map, drawing, plan, model, description, or picture of any military camp, fort, armory, arsenal or building in which munitions of war are stored, or of any bridge, road, canal, dockyard, telephone or telegraph line or equipment, wireless station or equipment, railway or property of any corporation subject to the supervision of the public service board, or of any municipality or part thereof, shall be imprisoned not more than ten years.

The statute was implicated in the case because the Vermont Yankee nuclear power plant is “subject to the supervision of the public service board.”

Congressional Proposals to Limit Access to Information on Critical Infrastructure

By Kevin M. Goldberg

Several bills which are intended to spur private entities to share information with each other and the government in order to protect our nation's critical infrastructure represent a major threat to the Freedom of Information Act.

A FOIA Exemption

H R. 2435 and the similar S. 1456 would give companies which own and operate this infrastructure an antitrust exemption and immunity from civil suits for sharing information. It would also make this information exempt from disclosure under the Freedom of Information Act by creating a new exemption under subsection (b)(4), which exempts information related to trade secrets and commercial or financial information from disclosure under FOIA. The House bill was introduced by Reps. Tom Davis (R-Va.) and James Moran (D-Va.), and is similar to a bill that they introduced last year. The Senate bill was introduced by Senator Robert Bennett (R-Utah).

Broad Definitions

Under both bills, the FOIA exemption would apply to information shared by private entities with the government regarding the critical infrastructure, which is defined as any industry sector that provides a continual flow of goods and services essential to the defense or economic security of the United States, the functioning of government, or the health, welfare or safety of the public.

Critical infrastructure information is defined as any information relating to facilities or services so vital to the nation or its economy that their disruption, incapacity, or destruction would have a debilitating impact on the defense, security, long-term economic prosperity, or health or safety of the United States - although this mainly pertains to computer systems, it can also mean physical infrastructures such as the nation's highways or water reservoirs.

Any entity sharing critical infrastructure information with the government may request that the information be exempt from disclosure.

Delayed to 2002 Session

The House bill has not moved since being referred to the Government Affairs Committee and the Judiciary Committee. Of more concern is the Senate, where S. 1456 may be attached to a bioterrorism prevention bill introduced by Senator William Frist (R-Tenn.). That bill is S. 1765.

The Bennett bill appeared to be on a fast track to the Senate floor, as it was expected to be attached to a bioterrorism bill introduced by Senators Kennedy and Frist. That could have resulted in the bill becoming law without so much as a committee hearing on the matter. However, on December 12, Senator Bennett announced that he would delay consideration of the critical infrastructure bill on the Senate floor until 2002, citing increased opposition from groups interested in public access, especially an outpouring from groups working in the environmental arena. However, it is expected that hearings will be held on this bill in the Senate Governmental Affairs Committee in early 2002.

Kevin M. Goldberg is an associate with Cohn and Marks in Washington, D.C.

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Court Enters a \$200-a-day Fine for Journalist Refusing to Name His Sources

Journalist Was Subpoenaed After Writing Story About the Departure of a Football Coach

By Mark Anfinson

Cases involving subpoenaed journalists may still be rare enough for each to be considered unique. But the one involving reporter Wally Wakefield currently being played out in Minnesota has some features that are unusual by any measure.

Wakefield is a 70-year-old sports reporter for Lillie Suburban Newspapers, a group of weeklies serving suburbs in the northeast Twin Cities metropolitan area. A year and a half ago, Wakefield was served with a subpoena by the plaintiff in a civil lawsuit. Among other things, the subpoena sought the identities of confidential sources Wakefield had used in preparing a story about a school district's decision not to extend the contract of a popular high school football coach.

Eighteen months later, Wakefield's effort to spike the subpoena is still on-going, and appears to be far from over. He has just filed a second appeal in the case, prompted by a contempt ruling from the trial court directing that he be fined \$200/day until he complies with its earlier order requiring him to disclose his sources for each of several statements that appeared in the newspaper article.

Background

Dick Weinberger was a successful and well known football coach at Tartan High School. When he was told in 1997 that his contract would not be renewed, it surprised him and many other people in the suburban St. Paul school district. The decision prompted editors at the *Maplewood Review*, which provides regular coverage of Tartan's athletic teams, to publish an explanation of what had happened.

But when they sought that explanation from school officials, the newspaper's reporters ran head-on into Minnesota's data privacy law, one that (as in many states) allows the district to release very little information about

personnel matters where no actual discipline has been imposed. So Wally Wakefield set out to interview people who might know something about the circumstances of Weinberger's departure. However, he encountered a reluctance to talk — potential sources expressed concern about how Weinberger might react.

Wakefield, who was helping lead reporter Jason Tarasek cover the story, then asked sources if they would provide information contingent on a promise of confidentiality. Some agreed, and Wakefield obtained what appeared to be illuminating information about the Weinberger separation. On January 27, 1997, an article appeared in the *Maplewood Review* under the headline, "Tartan officials say they won't renew coach's contract."

It was a good piece of journalism. The article gave the community its only real insight into what had been a considerable mystery: why a popular and successful high school football coach had been told to hit

the road. But the article was not flattering to Weinberger. Several quotes from confidential sources were highly critical of his behavior and attributed his fall from grace largely to this.

Coach Sued School Board

For some months after the article appeared, little more happened. No retraction or correction demand was served on the *Maplewood Review*, and the article seemed safely consigned to the morgue. But Weinberger's relationship with the school district continued to deteriorate. Eventually he hired well-known Minnesota attorney Steve Cooper (a former state Commissioner of Human Rights, who also spearheaded the drive to raise bail money for Sara Jane Olson). Cooper sued Weinberger's school district on a number of theories, one of which was defamation. To a significant extent, the defamation claim derived from the article that had appeared in the *Maplewood Review*.

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The article gave the community its only real insight into what had been a considerable mystery: why a popular and successful high school football coach had been told to hit the road.

Court Enters a \$200-a-day Fine for Journalist Refusing to Name His Sources

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Weinberger evidently believed that most of the sources quoted in the article were school district employees. But the suit did not include as defendants either the newspaper or the reporters who had prepared the story.

The litigation between Weinberger and the school district ground along for some time without any involvement on the part of the *Maplewood Review*. But in July 2000, Wakefield was suddenly served with a subpoena by Cooper. (The attorney also sought to serve Jason Tarasek, but Tarasek had left the state to attend law school in California.) The subpoena directed Wakefield to appear at a deposition with his notes from the January 1997 article. At that point, Ted H. Lillie, publisher of Lillie Suburban Newspapers, contacted legal counsel. An objection to the subpoena was lodged, citing the reporters' shield law (formally known as the Minnesota Free Flow of Information Act). Thus began a legal campaign that has become far more protracted and complex than anyone envisioned at the outset.

Wally Wakefield in the Courts

Minnesota's shield law provides broad protection for both confidential sources and unpublished information. Procedurally, it requires prior court approval for a subpoena seeking any such information. In response to the newspaper's objections, attorney Cooper therefore scheduled a hearing before Judge Dale B. Lindman of Ramsey County District Court in St. Paul, who was presiding over the Weinberger litigation.

And, although for the most part the state's shield law is robust, it does contain a "defamation exception" (Minn. Stat. §595.025). The exception provides that where a sufficient showing of need is presented by public figure and public official plaintiffs seeking to establish constitutional malice, the protection of the shield law can be defeated. In essence, the exception mirrors similar loopholes carved out by state and federal courts throughout the country interpreting the journalist's privilege derived from the First Amendment. A decision issued a few years ago by the

Minnesota Court of Appeals comprehensively addressed the exception and imposed on the statute's relatively spare language a five-factor test that a plaintiff seeking to defeat the shield law must satisfy. See *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608 (Minn. App. 1997)

When Wakefield appeared before Judge Lindman at the hearing on the subpoena in August 2000, he argued that the *Bauer* test could not be satisfied, and more fundamentally, that the Minnesota Legislature never contemplated extending the defamation exception to *non-party* journalists. Since Wakefield was not a defendant in the underlying defamation claim, Wakefield contended that he could not be subpoenaed at all. But Judge Lindman gave short shrift to these arguments, and in an order dated October 9, 2000, directed Wakefield to provide information to the plaintiff's attorney about what sources he had relied on, and what they had said.

Wakefield promptly appealed this ruling to the Minnesota Court of Appeals, where he amplified the arguments presented to the trial court. In an unpublished decision issued on June 22, 2001 (Case No. C5-00-1830), the Court of Appeals reversed the trial court's order, and remanded the matter for further proceedings.

Unfortunately, the appellate court's decision was not broadly framed. It rejected Wakefield's argument that the Minnesota Legislature had not intended the defamation exception to apply to non-party journalists, predictably relying on canons of statutory construction suggesting that a statute be interpreted to mean what it says. But then the court of appeals examined the five-factor *Bauer* test, and concluded that the trial court had, at minimum, not provided adequate findings to support its determination that the subpoena should be enforced.

A Second Round at Trial Court

Thus the proceeding resumed with Judge Lindman, who in July 2001 conducted another hearing to consider

And, although for the most part the state's shield law is robust, it does contain a "defamation exception"

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Court Enters a \$200-a-day Fine for Journalist Refusing to Name His Sources

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the enforceability of the subpoena in light of the appellate court's opinion. In this round, Wakefield's principal argument was that the plaintiff could not create a sufficient showing under the *Bauer* test to sustain the subpoena. Unsurprisingly, however, Judge Lindman again disagreed, and in an order filed on August 8, 2001, he once more directed Wakefield to identify his sources with respect to the allegedly defamatory quotes found in the article.

An appeal from this order was not immediately pursued: The plaintiff's attorney never served the notice required to trigger the 60-day time period in which appeals may be filed in Minnesota. Also, by this point, the legal costs for Lillie Suburban Newspapers had become considerable — the newspaper company had been paying for all of Wakefield's legal expenses. As Wakefield and the newspaper company mulled their options, Cooper brought a motion in September, 2001 seeking to impose contempt sanctions on both Wakefield and the newspaper for failure to comply with the August 8 order. (Cooper believed Wakefield had turned over his notes or other information about his sources to employees of the newspaper, which turned out to be untrue.)

At a hearing on the contempt motion in early November, Wakefield argued strenuously that Cooper had not made any credible showing that he could satisfy the *Bauer* factors — in particular, evidence of constitutional malice. Wakefield contended that because of this infirmity in the plaintiff's defamation claim, Weinberger would be unable to prevail regardless of whether Wakefield provided the information requested. But, as with other arguments that Wakefield had offered, Judge Lindman rejected this one from the bench (though he did rule that the newspaper company would not be held in contempt).

Judge Lindman then asked Wakefield to approach — the first time the reporter had the opportunity to speak in court himself in 17 months of litigation. When Judge Lindman asked Wakefield if he would comply with the order, Wakefield responded succinctly. He said that while he had the greatest respect for the court, his promises to his sources must take precedence. At this point, Judge Lindman gave him two weeks, until November 24, to comply with the order. If by that date he neither complied with nor appealed it, the \$200-a-day contempt fine would begin accruing.

It should be noted here that, while Judge Lindman has ruled against Wakefield at every stage of the subpoena challenge, he has nonetheless accorded Wakefield and his counsel full opportunity to present their arguments. Lindman has conducted lengthy hearings, listened carefully to the attorneys debate the fine points of the law, and issued what appear to be carefully thought-through decisions. Ultimately, the real problem in the case is with the language of the Minnesota shield law's defamation exception, and probably with the fact that Judge Lindman does not see the First Amendment's protections in quite the same perspective as journalists do.

In Letter to Senator, Justice Department Details Use of Subpoenas Against Journalists

The Letter Raises More Questions Than It Answers, According to the Senator

On November 28, the Justice Department sent U.S. Sen. Charles Grassley (R-Iowa) a letter regarding subpoenas issued to journalists over the last 10 years. Unfortunately for the Justice Department, the letter only raised more questions from Sen. Grassley.

In late August, the Justice Department disclosed that in May it had secretly compelled Verizon to turn over the home telephone records of Associated Press reporter John Solomon. See *LDRC Libelletter*, September 2001 at 4. In the wake of that disclosure, Sen. Grassley, the ranking member of the Subcommittee on Crime and Drugs, demanded an explanation from the Justice Department. In letters dated September 4 and 6, Sen. Grassley informed the Justice Department that he expected an answer by September 24. The events of September 11 intervened and Sen. Grassley gave the DOJ a pass on the initial deadline. The DOJ's response came by letter on November 28. The letter prompted a new request for information.

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In Letter to Senator, Justice Department Details Use of Subpoenas Against Journalists

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By a letter dated December 6, Sen. Grasserly told Deputy Attorney General Larry Thompson that the Justice Department has thus far “failed to demonstrate that it followed its own rules and regulations when it obtained a subpoena for Mr. Solomon’s home telephone records without any notification or negotiation.” In fact, the letter from the Justice Department illustrates that the Solomon subpoena was most likely handled in a way that no other subpoena to journalists has been handled over the last 10 years.

In its November 28 letter to Sen. Grasserly, the Justice Department claimed there have been at least 88 subpoenas since 1991 that were authorized in connection with members of the news media — 12 of which were for telephone records. Of the 12 subpoenas for telephone records, five involved no prior notification or negotiation with the affected new media. (The Justice Department regulations governing the issuance of subpoenas against the news media allow for no prior notification or negotiation where notification poses a threat to the integrity of the investigation. The regulations give the DOJ an initial 45-day delay when this determination is made.) In only one of the five cases where there was no prior notification — presumably the case involving Solomon and his home phone records — the Justice Department requested an additional 45-day delay in notifying the media of the subpoena, resulting in a 90-day delay in notification.

In his December 6 letter to Deputy Attorney General Thompson, Sen. Grasserly asked for a clarification on the statistical data provided by the Justice Department. He specifically asked if the one case of a 90-day delay was in fact the Solomon case. The DOJ provided no information that identified any of the cases.

Sen. Grasserly also requested more specifics on the Solomon case. Sen. Grasserly requested a detailed chronology of the events leading to the subpoena of Solomon’s home telephone records. Sen. Grasserly asked what prompted the investigation, including the first event that “set this situation in motion.” He also asked if, in the investigation into disclosure of grand jury information to Mr. Solomon, the Justice Department attempted to “interview and/or polygraph the limited number of persons who had access to the information in question (contents of a 1996

wiretap of Sen. Robert Torricelli)?”

In addition to those clarifications, the Senator requested clarification in a number of other areas where the Justice Department simply provided raw numbers. For example, the Justice Department claimed that out of the 88 subpoenas of the news media, only 17 involved a situation where a confidential source may have been revealed as a result of the subpoena. Sen. Grasserly asked in how many instances of the 17 authorized subpoena requests was the purpose to discover the reporter’s source.

Sen. Grasserly request that the DOJ answer his additional questions by January 8, 2002.

Leggett Remains in Jail

Vanessa Leggett remains in jail for refusing to turn over her notes to a Texas federal prosecutor. Leggett has been in jail since July 20, 2001. Last month, the 5th Circuit Court of Appeals refused to rehear the case, leaving her with few options other than to seek review from the United States Supreme Court.

Leggett has long surpassed the record for incarceration of a journalist in America. The previous record for incarceration of a journalist is believed to have been set by a Los Angeles reporter almost 30 years ago. William Farr, then with the *Los Angeles Herald Examiner*, was jailed for 46 days in 1972 for refusing to reveal the source of leaked documents in the Charles Manson trial.

Leggett was doing research on the 1997 murder of Houston resident Doris Angleton when a federal grand jury looking into the murder issued a broad subpoena to Leggett. See *LDRC Libelletter*, August 2001 at 7. A district court held Leggett in contempt when she refused to comply with the subpoena.

In August, the 5th Circuit Court of Appeals let stand the decision of a three-judge panel in Houston that held there was no applicable reporter’s privilege that would allow Leggett to refuse to testify and withhold research.

Leggett is represented by Mike DeGeurin of Foreman, DeGeurin, Nugent & Gerger in Houston.

UPDATE: Lawsuit Challenges Presidential Records Order

As promised, a coalition of historians, historical associations, and public interest groups including the Reporters Committee for Freedom of the Press has filed a lawsuit challenging an executive order issued by President Bush under which both current and former presidents are given authority to keep presidential records secret for indeterminate periods. *See American Historical Ass'n v. Nat'l Archives and Records Admin.*, No. 1:01cv02447 (D.D.C. filed Nov. 28, 2001).

The order, Exec. Order 13233, 66 Fed. Reg. 56025 (2001), requires the Archivist to notify the sitting and former presidents of a request for records of the former president, and to provide the sitting and former presidents with copies of the requested records. The sitting and former presidents then have 90 days to review the material, after which either may block disclosure of the documents on the basis of executive privilege. Similar provisions were included to encompass vice-presidential documents not mentioned in the Act itself. President Bush issued the order after requesting that the release of internal communication records from the Reagan Administration, scheduled for last January, be delayed. (For more information on the order and its issuance, *see* "Executive Order Allows Withholding of Presidential Records," *LDRC LibelLetter*, Nov. 2001, at 13.)

The lawsuit, which names the National Archives and Records and Administration and Archivist John W. Carlin as defendants, seeks declaratory judgments that the order is unlawful and that the defendants have unlawfully withheld the Reagan administration records, and an injunction or writ of mandamus ordering the release of the Reagan documents. It alleges that Exec. Order 13233 violates the Presidential Records Act, Pub. L. No. 95-961, 92 Stat. 2523-27, codified as amended at 44 U.S.C. § 2201, *et seq.*, and that the National Archives' refusal to release the Reagan documents is arbitrary, capricious and an abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. § 550, *et seq.* The complaint is available online at www.citizen.org/litigation/briefs/FOIAGovtSec/articles.cfm?ID=6515.

The plaintiffs are represented by Scott L. Nelson, David C. Vladeck, and Michael Tankersley, all of the Public Citizen Litigation Group in Washington, D.C. At

press time, the government defendants had not yet appeared in the suit. The case has been assigned to Judge Colleen Kollar-Kennedy of the Federal District Court for the District of Columbia.

The USA PATRIOT Act: Louis Freeh Gets His Wish

By Jane E. Kirtley

On October 26, 2001, President Bush signed into law the USA PATRIOT Act, a vast and complex statute which grants unprecedented surveillance authority to law enforcement. USA PATRIOT (an acronym for "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) makes significant changes to more than 15 existing federal statutes, expanding the powers of the government to monitor and intercept electronic communications through the use of wiretaps and pen registers, as well as increasing the scope of subpoenas and search warrants while limiting judicial review of them. It also expands surveillance authority under the Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. § 1861 *et seq.*, which regulates the collection of information within the United States for counterintelligence purposes.

Many of these provisions were proposed and rejected by Congress during the Clinton administration, but in the wake of the September 11 attacks, most members of Congress put aside their scruples and voted in favor of the statute. Given the length and complexity of the legislation (342 pages) and the speed with which it was enacted, it is reasonable to ask how many of them actually read it first.

This summary is not a review of the entire USA PATRIOT Act. Its scope is limited to the sections dealing with surveillance and computer trespass, as well as a few provisions potentially affecting the exercise of First Amendment rights. Although nothing in the statute itself

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indicates that existing legislation, such as the federal Privacy Protection Act governing newsroom searches, or the Attorney General's Guidelines on subpoenaing the news media, have been amended or rescinded by enactment of USA PATRIOT, the breadth and sweep of the new law suggests that its impact will be felt throughout American society, especially in the communications industry.

Wiretaps

Wiretap orders can now be issued for the following new crimes: terrorism offenses (§ 201) and felony computer fraud and abuse (which means exceeding the authority of a computer used in interstate commerce and causing more than \$5000 in damages, § 202). Formerly, the Electronic Communications Privacy Act governed law enforcement access to stored electronic communications (such as e-mail), but not stored wire communications (such as voice mail), which were covered by the wiretap statute, requiring an intercept order. Under USA PATRIOT, both are now covered by the same rule, and only a search warrant, not an intercept order, is required to retrieve voice mail and other stored wire communications (§ 209).

Search Warrants

Terrorist investigations are now subject to single-jurisdiction search warrants (§ 219). A warrant may be issued in any district where activities related to terrorism may have occurred, and may be executed to search any person or property regardless of location. This single-jurisdiction provision also applies to warrants to seize unopened e-mail less than 180 days old, which can be served on any ISP/OSP or telecommunications company anywhere, without identifying that company in the warrant itself (§ 220). Notice of a warrant to seize any wire or electronic communication, or for tangible property, may be delayed if a judge finds

“reasonable cause” to believe that immediate notification would endanger life or physical safety, result in evidence tampering, or otherwise seriously jeopardize an investigation. Delay in notification may be extended for good cause. This is the so-called “sneak and peek” provision (§ 213).

Pen/Trap orders

The prior law covered wire communications only, and was limited to phone numbers. USA PATRIOT now expressly includes dialing, routing, signaling and addressing information that identify content (such as what web sites someone visited), although it still excludes the “contents” of communications (not defined in the statute). Grounds for issuance include surveillance that is likely to uncover information “relevant to an ongoing investigation.” These orders, too, authorize installation anywhere within the United States, and may be served on any service provider whose assistance will facilitate execution of the order (§ 216). However, if the provider is not named in the order, the provider may seek certification from a U.S. attorney that the order in fact applies to it. There is no requirement that an ISP install or maintain equipment that would facilitate surveillance (§ 222); the government will presumably use its own technology, such as DSC 1000 (“CARNIVORE”) or Etherpeek, to collect information.

Subpoenas

In order to establish users' identities, the new law amends the Electronic Communications Privacy Act to allow subpoenas for stored information to be issued to ISP and other providers to obtain records of a customer's name, address, session times and durations, temporarily assigned network addresses, means and source of payments (credit card or bank account num-

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bers), local and long distance connection records, length of service (including start date) and types of services utilized (§ 210). Cable service providers are specifically covered by the new law if they provide telephony or Internet access services, but customer cable video viewing records (as long as the content is not streamed over the Internet) are still protected under the Cable Act (§ 211). USA PATRIOT expands ISPs' right to "voluntarily" disclose content or non-content information if they have reason to believe an immediate danger of death or serious injury exists (§ 212). It does not create an affirmative obligation to monitor customer communications. ISPs are also allowed to disclose non-content information such as log-in records to protect their rights and property.

FISA

Foreign intelligence surveillance is subject to different standards than criminal investigations; for example, probable cause is not required. A special FISA

court, consisting of 11 federal district judges (increased from seven by § 208), reviews applications for authorization of surveillance in secret; records and case files are sealed. Although historically FISA investigations have been kept legally distinct from criminal investigations, USA PATRIOT allows greater potential for disclosure and information sharing between investigatory entities (§ 203). Formerly, foreign intelligence gathering had to be the primary purpose for FISA surveillance; now, it need only be a "significant purpose" (§ 218).

Under USA PATRIOT, FISA now has roving wiretap authority to intercept any telephone or computer that a target may use. Previously limited to orders requiring "specified person[s]" to assist with the interception ("specified persons" such as common carriers, landlords, custodians who were required to provide "information, facilities, or technical assistance in such a manner as will protect its [the electronic surveillance's] secrecy and produce a minimum of interference with the services

[provided]"), these intercept orders no longer need to specify the person or entity required to assist. Roving wiretap authority can result in the monitoring of communications by others who use the equipment after the target does so (§ 206).

The new law extends and expands the time period and authority for FISA search warrants (§ 207), pen/trap orders (which may involve a "United States person," as long as the investigation is intended to protect against international terrorism and is not conducted solely upon the basis of First Amendment activities) (§ 214), and subpoenas for computers, business records, or similar items (§ 215). These provisions apply whether or not the entity served with an order to disclose these materials is

the subject of the investigation.

A particularly Draconian aspect of § 215 is that the FISA court effectively has no discretion to deny a request for a subpoena provided he/she finds that the application meets the re-

quirements of § 215, which becomes the new Sections 501-503 of FISA. The order itself must not state that it was issued under § 215, and the person served with the order is forbidden to disclose that it was received. These provisions potentially raise troubling issues in the context of subpoenas and search warrants issued to the news media. It is unclear whether existing privileges and protections would apply, or even be taken into account by a FISA judge, or whether the "gag" imposed would be construed as constituting an unconstitutional prior restraint on a news media recipient of a FISA subpoena.

Computer Trespass

USA PATRIOT contains provisions relating to computer trespassing. "Computer trespassers" are individuals, including U.S. citizens, who gain access to a "protected" computer without authorization. This seems

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to be aimed at hacking and denial of service attacks, and although the term “authorization” is not defined, it apparently does not include individuals, such as subscribers, who have an existing contractual relationship giving them access to all or part of the computer. Surveillance and interception of the content of computer trespassers’ communications by any government employee (not only law enforcement) may be “authorized” by the owner or operator of a computer and provided there are reasonable grounds to believe that the content will be relevant to an investigation. Other persons’ communications may not be accessed (§ 217).

Amendments to Computer Fraud and Abuse Act (18 U.S.C. 1030)

The following is a “terrorist offense” under USA PATRIOT: an act calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, and that involves gaining access to restricted or classified information on protected computers with reason to believe the information could injure the United States, and willful communication of it to one not entitled to it (§§ 808, 814).

Providing Material Support for Terrorism

“Domestic terrorism” as defined in § 802, an amendment to 18 U.S.C. § 2331, includes criminal activities that are dangerous to human life and are intended to intimidate civilians, influence government policy by intimidation or coercion. It has been suggested that this could apply to acts of protest involving civil disobedience. Those who harbor terrorists (§ 803) (“Whoever harbors or conceals any person who he knows or has reasonable grounds to believe, has committed, or is about to commit” any one of the enumerated offenses), or provide them with material support (§ 805) are subject to severe penalties (§§ 809, 810, 813). The existing definition of “material support” in 18 U.S.C. 2332b is amended to now include providing “expert advice or assistance” as well as “training.” Arguably, this could extend to publication of information, as long as the facilitator knew that the information would be used to commit a terrorist offense.

Sunset Provisions

Although some provisions of USA PATRIOT “sunset” on December 31, 2005, others do not. Those that do not expire include §§ 203 (criminal investigative information), 208, 210, 211, 213, 216, 219. Those that do expire include §§ 201, 202, 203 (grand jury information), 206, 209, 212, 213, 214, 215, 217, 218, and 220.

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**The first issue of the 2002 LDRC BULLETIN,
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The Press Goes to War

Suits Filed Over Post-Terror Policies; Pool Activated, But Limited; Reporters Fly Again

A lawsuit has been filed challenging the federal government's refusal to release information on those detained in the wake of the Sept. 11 terrorist attacks, and other suits are being prepared to challenge the planned use of military tribunals to try those suspected of terrorism. Under pressure from Congress, the FAA began allowing newsgathering flights in most American cities. And an Islamic charity sued several new-organizations in what appears to be the first libel case stemming from coverage of the attacks and their aftermath.

In Afghanistan, meanwhile, there was a report of CIA operatives posing as journalists.

Suit Filed Over Detentions, Threatened Over Tribunals

Government policies in the wake of the Sept. 11 terrorist attacks have come under fire, including in the courts.

A coalition of 19 civil liberties groups including the American Civil Liberties Union, the First Amendment Foundation, the *Nation* magazine and the Reporters Committee for Freedom of the Press has filed a lawsuit challenging the withholding of information regarding more than 1,100 people detained in the weeks after the attacks. *See Center for Nat'l Security Studies v. Department of Justice*, No. 1:01cv02500 (D.D.C. filed Dec. 5, 2001).

These individuals were detained under the provisions of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862), which allows lower due process standards and allows "secret evidence" to be used in criminal cases stemming from espionage investigations. Under a temporary provision of the USA PATRIOT Act, passed in response to the attacks, the criminal cases in which the "secret evidence" is used need not involve espionage crimes — any crime discovered in the course of an espionage investigation is

eligible. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56 (signed Oct. 26, 2001), § 224.

For 11 weeks after the attacks, neither their identities of those detained nor the charges against them were disclosed, and court proceedings involving them were subject to gag orders.

But on Nov. 27, Attorney General John Ashcroft responded to the criticism by releasing some information about the detainees. He released the names of 93 people who had been charged with crimes, but did not disclose the names of 11 who have been charged under sealed indictments. He also disclosed the nationalities of 548 people who were being held on immigration and other charges, but not their names.

Ashcroft said that releasing the 548 names would violate the privacy of the detainees. "[I]t's very possible that some individuals that (sic) we think might be terrorists might someday, by further investigation, be shown not to be terrorists," he said at a press confer-

ence. "I think it would be inappropriate for us to either advertise the fact of their detention or to provide the suggestion that they are terrorists in a way which would be prejudicial to their not only privacy interest but personal interest. And for that reason, we are not going to do that."

The New York-based Center for Constitutional Rights and the ACLU have announced that they are preparing to sue the Bush administration over its executive order allowing non-citizens accused of terrorism to be tried by military tribunals. *See* Military Order of November 13, 2001, 66 Fed. Reg. 57831 (2001).

The order requires the Secretary of Defense to draft regulations to implement the order, including public access to such proceedings. *Id.*, § 4(c)(4). These regulations are now being drafted by the Defense and Justice departments, but Defense Secretary Rumsfeld said that

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the procedure used may vary based on the character of the case. For example, White House officials told *The New York Times* that the trials held by military tribunals may generally be open, except when classified or sensitive information is discussed.

Using Journalistic Cover?

A little-noticed report by the *Washington Post*, recently reiterated by *Editor & Publisher*, may show yet another danger for journalists in Afghanistan beyond the threats inherent in reporting from a war zone — CIA operatives posing as journalists.

In a Nov. 30 story, the *Post* reported on an exclusive interview with former Taliban deputy interior minister Mohammed Khaksar, who shifted his alliance when Northern Alliance troops took over Kabul.

Besides detailing some of the internal workings of the Taliban, Khaksar told reporter Peter Baker that he was in frequent contact with American intelligence operatives while he was part of the regime. The article states that these operatives were “disguised as journalists.”

“They came two or three times, and they knew about my policy and about my opinion,” the article quotes Khaksar as saying.

Left unclear in Khaksar’s comments are the true nature of his visitors, and, if they were intelligence operatives as he alleged, how extensive their cover as journalists was.

The *Post* story also quoted a CIA spokesman reiterating the agency’s policy on agents posing as journalists, which is not use American media organizations as cover for clandestine operations.

Two days before the Sept. 11 terrorist attacks, Northern Alliance leader Ahmed Masood was killed by Taliban operatives posing as television journalists.

News Takes Flight

Spurred by Congress, the Federal Aviation Administration has been granting waivers to allow news helicopters and planes to operate in major cities, on a case-by-case basis.

After Sept. 11, the FAA prohibited news flights from operating in airspace around 30 major airports. This restricted airspace originally extended 25 nautical miles,

then was reduced to 18 nautical miles. See FDC 1/1225 (issued Oct. 13, 2001).

While the temporary rule is still in force, the agency has granted 2,000 waivers to individual operators. Even with the waivers, hovering and circling are still restricted, and there are special no-fly zones in some cities.

The waivers were sparked by the passage of the Aviation and Transportation Security Act, which includes a provision which provides plane and helicopter operators an automatic waiver within 30 days unless the FAA acts to keep the restriction in place, and explains its reasoning behind the restriction. See Aviation and Transportation Security Act, Pub. Law No. 107-71 (signed Nov. 19, 2001), § 146.

In the meantime, the FAA continues to investigate four pilots who allegedly violated the temporary rule by operating aircraft to cover news events in Miami, Dallas and Denver.

First Suit Filed

What appears to be the first lawsuit against the media stemming from coverage of the terrorist attacks and their aftermath was filed Nov. 15. *Global Relief v. New York Times Co., et. al.*, No. 1:01-CV-8821 (N.D. Ill. filed Nov. 15, 2001).

The lawsuit was filed by the Global Relief Foundation, a non-profit, humanitarian organization which describes itself as “the second largest United States-based Islamic charitable organization.” The defendants named in the suit are the corporate owners and/or reporters for ABC News, the Associated Press, *The Boston Globe*, the *New York Daily News*, *The New York Times*, and the *San Francisco Chronicle*.

The suit alleges that reports by the various media outlets incorrectly identified the Global Relief Foundation as one of the charitable agencies whose assets had been or may be frozen by the American government. ABC News, whose report ran on “Good Morning America” on Sept. 24, placed a correction on its web site later that day.

The lawsuit seeks a total of \$25 million in compensatory damages and \$100 million in punitive damages.

Second Circuit Upholds Digital Millennium Copyright Act

Napsterization of Motion Picture Industry Averted

By Charles Sims

Resolving the first major test of the constitutionality of the Digital Millennium Copyright Act ("DMCA"), which the hacker community has protested as an incursion on free speech rights, the Second Circuit unanimously affirmed the judgment rendered by District Judge Lewis Kaplan entering declaratory and injunctive relief in favor of the eight leading motion picture studios. *Universal City Studios, Inc. v. Corley*, 2001 U.S. App. Lexis 25330 (2d Cir. November 28, 2001). The Second Circuit's 71-page opinion was written by Senior Circuit Judge Jon O. Newman, a noted First Amendment champion, for a unanimous panel on which he was joined by Circuit Court Judge Cabranes and District Judge Thompson. The court upheld the constitutionality of the trafficking provisions of the DMCA, and rejected each of the arguments that the hackers and their allies had pressed.¹

Congress was persuaded that the owners of copyrighted digital content needed an additional layer of legal protection, in addition to existing protection against infringement.

The DMCA Opens the Way for DVDs

Congress enacted the DMCA in 1998 pursuant to the United States's obligations under the World Intellectual Property Organization ("WIPO") Copyright Treaties, which required signatories to provide additional protection for copyright owners from digital infringement by mandating legal protection for technological measures employed to prevent unauthorized copying and distribution of copyrighted works. Congress heard extensive testimony that digital copying posed dangers that differed in kind from those posed by analog copying on videotape.

Among its various provisions, the DMCA prohibits the public offering or provision of "any technology, product, service, device, component, or part thereof" that "is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access" to a copyrighted work, or that "has only limited commercially significant purpose or use other than to circumvent" such control measures, or that is knowingly marketed for use in circumventing" such measures. Content owners who protect

their works by encryption or other technological means are assured of a right to have those measures respected, and persons providing the public with the means to circumvent them are subjected to civil suits (for injunctive relief and damages) and criminal prosecution.

Congress heard that, in view of the dangers of digital copying, motion picture studios were hesitant to release films in digital form without the technical protection of encryption and the additional legal protection that would prevent hackers from defeating encryption measures; and that similar fears were inhibiting those in other content industries as well from the broader provision of creative works in digital formats.

Supporters of the DMCA used the analogy of locks and keys and the protection afforded those who utilize them to protect property: just as the public provision of burglars tools is illegal, and the public provision of master keys to the automobile fleets of the major auto companies can be criminal-

ized, Congress was persuaded that the owners of copyrighted digital content needed an additional layer of legal protection, in addition to existing protection against infringement.

The protection afforded consisted of a cause of action to prohibit the distribution of devices, however configured, that would defeat technological protection measures implemented by copyright owners. If copyright owners employed technologies such as access-control or copy-control-measures, such as encryption or scrambling, on their creative works (for example, by encrypting films distributed on DVDs or e-books distributed in stores or via the Internet), then circumventing those measures is wrongful under 17 U.S.C. § 1201(a)(1), and trafficking in decryption devices is wrongful under 17 U.S.C. § 1201(a)(2) and 1201(b)(1).

Trial Judge Issues Injunction

Universal City Studios v. Reimerdes was commenced in the United States District Court for the Southern District of New York in January 2000, when the eight major motion

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picture studios filed suit against three hackers operating websites (Shawn Reimerdes, Roman Kazan, and Eric Corley) upon finding that they were providing to the public, on their websites, a software utility for decrypting motion pictures released on DVDs, called DeCSS. (The protection on DVDs, which results from a complex negotiation among motion picture studios, computer manufacturers, and the consumer electronics industry, is known as the “Content Scramble System” (“CSS”), and the hackers had named the software to defeat it “DeCSS”.) The Electronic Frontier Foundation (“EFF”) undertook to supply a defense, and engaged Martin Garbus of Frankfurt Garbus Kurnit Klein & Selz.

Judge Lewis Kaplan granted a preliminary injunction and ultimately, after intensive discovery and a two-week trial, final injunctive and declaratory relief. Judge Kaplan rejected both the statutory and constitutional challenges asserted by the remaining defendants who had not already abandoned the field, and enjoined them from “offering to the public, providing, or otherwise trafficking in DeCSS”, by any means, including the means he had been using during the six months that the preliminary injunction was in effect (*i.e.*, providing hyperlinks to DeCSS) in his finger-flipping challenge to the court’s authority. Adding belt to suspenders, Judge Kaplan added a provision expressly barring Corley from further distributing DeCSS by “knowingly linking any Internet website operated by them to any other website containing DeCSS or knowingly maintaining any such link for the purpose of disseminating DeCSS.”

As testimony elicited by the court showed, the links that Corley set on his 2600.org website did not reach DeCSS by accident or as an unintended byproduct of his journalistic provision of information. In response to the filing of the motion for a preliminary injunction, Corley had issued a world-wide call for “civil disobedience,” pleading for hackers to “mirror” his site and return to him the URL for each such mirrored site. He then patiently reviewed each returned URL, setting links only once he established that the mirrored site in fact contained DeCSS, and then setting only deep links, to the pages actually containing DeCSS.

The Appeal

Shortly before the appeal was argued, the Electronic Frontier Foundation announced that oral argument for appellants Eric Corley, who goes by the *nom de net* “Emmanuel Goldstein” (after a character in Orwell’s novel *1984*), and his company 2600 Enterprises Inc., would be delivered not by Garbus (who was then engaged in the *Wind Done Gone* litigation in Atlanta, but who remained on the briefs of the appeal), but by Kathleen Sullivan, Dean of the Stanford Law School. The United States had intervened to defend the constitutionality of the DMCA, and argued in tandem with the undersigned in support of the judgment below.

The Second Circuit appeared highly interested in the well-publicized case. In addition to hearing oral argument for nearly two hours, the court granted Dean Sullivan’s request to submit a post-argument brief, and then, shortly before those submissions were due, sent the parties a list of questions, on various questions of how First Amendment doctrine applied to DeCSS and the DMCA. (The law-school-exam-gone-mad character of the questions propounded is indicated by the one that asked, “If DeCSS or its dissemination or its use to decrypt has both speech and non-speech elements and is not subject to intermediate level scrutiny simply because of the non-speech elements, is intermediate level scrutiny appropriate because of the close causal link between dissemination of DeCSS and its improper use?”)

Posting and Linking

The Second Circuit’s decision closely tracked both the decision below and the studios’ brief on appeal. Each of appellants’ First Amendment arguments (they had abandoned the statutory arguments raised at trial) was quickly dispatched.

First, the court had to address the standard of scrutiny for Corley’s First Amendment claims. Although Garbus and Dean Sullivan argued that strict scrutiny necessarily applied because computer code is (apparently always) “speech” and therefore, they maintained, always subject to the closest scrutiny, the court rejected that syllogism.

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Agreeing with Judge Kaplan that computer code has both speech and non-speech elements, it also agreed with the court, and the Studios, that the scope of First Amendment protection for code depends not on whether “speech” is involved but on the character of the regulation: on whether the restriction at issue is imposed *because of the content* of the speech elements, or to regulate conduct (regardless of viewpoint or the content of speech).

Accepting the argument that had persuaded Judge Kaplan, the Second Circuit held that the DMCA’s anti-trafficking provisions are content-neutral, and the government’s interest in preventing unauthorized access to encrypted copyrighted works “is unquestionably substantial.”

The court further held that the regulation of DeCSS by the DMCA, and specifically by Judge Kaplan’s posting injunction, served that interest.² Addressing the linking injunction separately, the court reached the same result, holding that Judge Kaplan applied the right test for a content-neutral regulation to Corley’s linking scheme, and agreed that the linking injunction served the same important governmental interest.³

Fair Use

Judge Newman’s opinion for the panel resoundingly rejected Appellants’ “extravagant claim” that the DMCA unconstitutionally eliminated fair use on three grounds:

First, the Court observed that no Supreme Court holding had ever held fair use required.

Second, since appellants were not themselves interested in making any fair use themselves (but only in helping the rest of the world to do so), they had no standing to raise the claim.

And *third*, appellants provided no support for their contention that the fair use of DVD films is constitutionally required to be made by copying the original work in its original format. Cataloging a long list of means by which fair use, even for content available *only* on DVDs, may be un-

dertaken, and observing that in any event fair use has always been dependent on the owner’s provision of access, Judge Newman found insupportable the notion that users have a First Amendment (or fair use) right to sufficient access to make a perfect digital copy of any given work.

Among the decision’s highlights, the court agreed that:

- CSS “is like a lock on a homeowner’s door, a combination of a safe, or a security device attached to a store’s products.” The DMCA bars decryption code “because of its capacity to instruct a computer to decrypt CSS. That functional capability is not speech within the meaning of the First Amendment.”
- The DMCA is not subject to demanding First Amendment review because it is “content-neutral, just as would be a restriction on trafficking in skeleton keys . . . even though some of the keys happened to bear a slogan or other legend that qualified as a speech component.”

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At present there is no indication that the DMCA has been, or would ever likely be, used to “lock-up” protected speech or create a pay-per-view world in which browsing, fair use, and free speech are actually impaired.

But Some Believe This Could Give On-Line Journalists Future Problems...

An issue raised by the *Corley* case has been the potential liability of on-line journalists who may be reporting on Corley and his activities or on DVD or DeCSS or any related topic were they to themselves offer a hyperlink to Corley’s site, knowing he linked to DeCSS, or linking to any of the sites that provide access to DeCSS. The issue, and arguments pro and con regarding the risk to journalists from the Second Circuit opinion were discussed in a recent article online at the New York Times site: “Experts Say Decision Could Undermine Online Journalists,” by Carl S. Kaplan, December 14, 2001 (<http://www.nytimes.com/2001/12/14/technology/circuits/14CYBERLAW>).

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- “The injunction’s linking prohibition . . . validly regulates the Appellants’ opportunity instantly to enable anyone anywhere to gain unauthorized access to copyrighted movies on DVDs.”
- Congress has the authority to craft new laws that respond to new possibilities of harm.

The court’s powerful decision faulted appellants and their *amici* for consistently ignoring “the reality of the functional capacity of decryption computer code and hyperlinks to facilitate instantaneous unauthorized access to copyrighted materials by anyone anywhere in the world.” Also rejected was their “extravagant” claim that the DMCA “eliminates fair use.” The court held that the application of the DMCA to Corley did not violate Corley’s First Amendment or fair use rights, because preventing hackers from making perfect digital copies “provides “no basis for a claim of unconstitutional limitation of fair use.” Corley’s central premise was rebuffed when the court observed that “the Supreme Court has never held that fair use is Constitutionally required.” Behind that conclusion was the knowledge that the First Amendment was not violated during the 1950s, 1960s, and early 1970s when the “right” to make fair use of Disney’s *Snow White* had to accommodate itself to the fact that Disney only released the cartoon every few years, and when would-be fair users had no concomitant “right” to demand access to a print so as to make copies of visual images.

A Thorough Rejection of the EFF’s Arguments

Judge Newman’s decision makes the case seem rather simple; and in the end it was. The arguments against the injunction, and against the DMCA, were overwrought, exaggerated, and depended on a parade of horrors that was not only hypothetical but at worst years away, for at present there is no indication that the DMCA has been, or would ever likely be, used to “lock-up” protected speech or create a

pay-per-view world in which browsing, fair use, and free speech are actually impaired. Fair use has not been eliminated.

Notwithstanding their long list of decisions vindicating free speech claims, Judges Newman and Cabranes, and District Judge Thompson from Connecticut who sat with them, had little trouble rejecting the anti-DMCA arguments that had been clothed in ill-fitting First Amendment garb. The earnestly-pressed arguments that Corley was a journalist, that Judge Kaplan (who had at Paul, Weiss represented media defendants) had enjoined journalism, and that the injunction somehow threatened linking by responsible journalists, were all expressly or implicitly rejected.

Corley was not enjoined from criticizing anyone, or from providing information, or from linking to such speech; he was enjoined only from distributing to the public a “digital crowbar” for breaking into the technological protection measures.

The section of the opinion focusing on the dual nature of computer programs (as speech, but also having functional capabilities), and on the essential purpose of encryption code (to prevent unauthorized access, which is a right of all property owners), explained the basis for rejecting those arguments. As the court observed,

Just as the realities of what any computer code can accomplish must inform the scope of its constitutional protection, so the capacity of a decryption program like DeCSS to accomplish unauthorized — indeed, unlawful — access to materials in which Plaintiffs have intellectual property rights must inform and limit the scope of its First Amendment protection.”

At the bottom of the court’s holding, and the answer to concern about the DMCA, is that Corley was not enjoined from criticizing anyone, or from providing information, or from linking to such speech; he was enjoined only from distributing to the public a “digital crowbar” for breaking into the technological protection measures employed by the studios on their property. Corley’s 2600.com website was for months after the final injunction full of vitriolic criticism of Jack Valenti, Judge Kaplan, and the DMCA, which the injunction had not reached or even sought to reach.

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All that was enjoined was the specific program that broke into the technological protection surrounding films on DVDs and turned an encrypted stream of data into an unencrypted one, making films on DVD available for transmission over the Internet to millions of computers world-wide, each of which could then send the film further in a wholly un-degraded form.

What Corley did, as compared to articles by the New York Times and others on the DeCSS controversy that themselves linked to sites at which DeCSS could be found, is, considering all the relevant facts and circumstances (including the deep linking, the number of links, and the creation of the mirrored sites at Corley's own instigation as detailed above), the difference between writing about gun control and operating a mail order service for guns. The DMCA bars distributing DeCSS to the public, and Corley's conduct demonstrates that he was intentionally and actively engaged in doing just that.

Vindicating the Studio's strategy of avoiding the hypothetical arguments pressed by the EFF and focusing instead on the hacker defendants before the court (precisely the kind of defendants for whom the Act was enacted), the court observed that

Copyright infringers who want to acquire copyright material (for personal use or resale) without paying for it" are properly characterized as "thieves.

Notwithstanding the abstract issues that the EFF seemed determined to emphasize, the fact is that facts matter in First Amendment litigation. And neither thieves, nor those who distribute burglary tools, nor serial violators of federal statutes who thumb their noses at federal court authority, usually prevail in the Second Circuit.

Chuck Sims argued for the eight major motion picture studios on appeal, and, with Leon Gold, Jon A. Baumgarten, Bill Hart, Carla Miller, and Scott Cooper, at Proskauer Rose LLP, represented studios in the Universal City Studios litigation. Briefs for numerous amici curiae supporting the studios and the constitutionality of the DMCA were filed by David Kendall and Paul Gaffney, of Williams & Connolly in Washington D.C, and by Professor Rod Smolla. There were a number of briefs on behalf of law academics amici curiae on both sides of the litigation.

¹ The decision, and the underlying briefs and post-argument letter briefs, are available at <http://www.eff.org/Cases/MPAA-DVD-cases/>.

² “[J]ust as the realities of what any computer code can accomplish must inform the scope of its constitutional protection, so the capacity of a decryption program like DeCSS to accomplish unauthorized — indeed unlawful — access to materials in which plaintiffs have intellectual property rights must inform and limit the scope of its First Amendment protection.”

³ “As they have throughout their arguments, the Appellants ignore the reality of the functional capacity of decryption computer code and hyperlinks to facilitate instantaneous unauthorized access to copyrighted materials by anyone anywhere in the world.”

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