



MEDIA LAW LETTER

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Thank You Robin Bierstedt...

As those of you who attended the LDRC Annual Dinner know, Robin Bierstedt of Time Inc. will be stepping down as Chair of the Board of Directors of LDRC. None of you who know Robin will be surprised to learn that she was a remarkable Chair.

For openers – and this is important – Robin really knows and understands this organization. Time Inc. was there at our founding, and Robin, throughout the time she has been with Time Inc. has been familiar with LDRC, its purposes and its projects. She brings more than a special sensibility to the role of Chair. She brings a special affection and respect for what the organization can and should do. She is able, as few are, to help the organization stay in focus.

But she brings a whole lot more than that. Robin has great depth as a First Amendment lawyer. There are relatively few issues in the media First Amendment field

that she hasn't addressed first hand. She has common sense and an always needed and much valued sense of priorities and perspective. She has been able to help LDRC/MLRC go where the needs are and – and this is a real testament to her skills – not to wander off the important paths.

Under her leadership, LDRC finally evolved into MLRC, the Media Law Resource Center – a singular accomplishment for any Chair. Robin, perhaps more than anyone else, appreciated the need for this organization not merely to continue to reach out to a wide range of First Amendment media law issues, but to signal through our name our commitment to do so.

When we unveil www.medialaw.org next year, it will be a tribute to Robin's vision for this organization.

Fortunately for all of us, she remains on the Board for another year to complete her term. Robin, thank you.

And to David Schulz...

David Schulz has served on the DCS Executive Committee for four years, and is ending his term as president of the august body at the end of this year. And what a year he has presided over...

David Schulz, as anyone who knows him will attest, is one of the smartest, most intellectually active and curious lawyers in this bar. The number of significant articles written by David and published by LDRC alone would attest to his scholarship. So, it would surprise no one to learn that he arrived to his post last January proposing that LDRC sponsor a forum that would bring together academics and litigators in an effort to explore and ultimately bridge the gap between those active in the bar and those active at the academy.

Well, that idea will find its fruition this upcoming year with David's leadership, but in the meantime under his watch, LDRC produced an extraordinary Roundtable on Access – a kissing kin to the initial proposal, and exquisitely well structured by David Schulz and Nathan

Siegel, to focus on the pressing issues of access to governmental proceedings. This pirouette was a sterling example of his appreciation of what was important to the membership and his ability to take ideas, his own and others, and mold them to meet those needs.

Under David's watch, LDRC created the specifications for a new website that will, we believe, bring our materials and services to the membership in a wildly more efficient manner than currently exists.

Under David's watch, the DCS saw two new committees take off: Ethics and Newsgathering and a third International Law Forum in London take shape, as well as the rescheduling of the 2002 NAA/NAB/LDRC Conference to 2003.

He will serve as Chair Emeritus in 2003, continuing to participate in the DCS Executive Committee meetings and projects. And in MLRC matters, well...we would suggest his participation forever and ever....

Thank you David Schulz.

Media Consider Unified Response to Intrusive Credential Applications

By David Tomlin

Journalists who cover the President or take assignments that require them to visit military installations are used to giving Social Security numbers or other personal information in exchange for the credentials that put them in position to get the story. But since 9-11, news organizations have begun to notice that sponsors of sports and entertainment events have begun to present credential applications that demand the same kind of data, or even more. At a time when the risk of identity theft has grown sharply and when personal privacy seems threatened from so many directions, some editors are working to organize resistance.

Their effort began gathering momentum last spring during preparations for the U.S. Open Golf and U.S. Open Tennis tournaments. Sponsors of both events insisted that journalists sign releases that would have cleared the way for essentially unlimited background investigations.

No Exclusions

The releases would have authorized any third party with information about a journalist-applicant to share it with the golf and tennis organizations or their security agents. Health care, tax, legal, business and all other kinds of information were not excluded.

Several news companies organized a hasty campaign to protest these overly intrusive demands. With the help of their media counsel, led by David Schulz of Clifford Chance, they were able to negotiate significant modifications that narrowed the scope of the release and added safeguards for any data collected. Based on this experience, Schulz drafted recommendations to news managers for a consistent strategy for a negotiating response to unreasonable credential terms when they arise.

While in some cases there might be good grounds for a legal challenge, there usually isn't enough time to get to the courthouse.

The Associated Press has circulated the recommendations to directors of the AP Managing Editors, AP Broadcasters, AP Sports Editors and AP Photo Managers and urged that they be adopted as policy.

Five Recommendations

The recommendations are as follows:

1. News managers confronted with intrusive credential demands should immediately seek allies for a unified approach to the event sponsors.
2. Journalists or their counsel should insist that no background check should ever be required in order to obtain a credential where the access provided to a journalist creates no greater security risk than the access provided to the general public.
3. When special access warrants heightened security concerns, the scope of any background check required should be no more intrusive than necessary to satisfy reasonable, legitimate security needs.
4. All information relating to a background check conducted on a journalist, should be treated with appropriate confidence and discretion, and should be disclosed only to those who have a "need to know" in order to implement necessary security measures.
5. All written information relating to a background check should be destroyed promptly once a decision has been made to grant or deny a credential, and may be used for no other purpose.

Experience so far indicates that event sponsors often make the credential demands at the prompting of security managers' or local police and are unaware of the concerns created among journalists. When these are brought to their attention, they are usually willing to discuss changes.

David Tomlin is a former reporter, editor and bureau chief for The Associated Press, where he now works in the president's office as an attorney.

Recommendations to news managers for a consistent strategy for a negotiating response to unreasonable credential terms when they arise.

Jurisdiction From Internet Publishing U.S. v. Australian View

Website Content Must Be Intentionally Directed At Forum To Support Personal Jurisdiction

*Fourth Circuit Panel Unanimously Reverses District
Court in Young v. New Haven Advocate*

By Robert D. Lystad and Stephanie S. Abrutyn

The mere fact that Internet content is accessible in a specific geographic location is not sufficient, in and of itself, to support personal jurisdiction against out-of-state newspapers in a defamation lawsuit filed in the plaintiff's home state, said the U.S. Court of Appeals for the Fourth Circuit in a decision issued December 13, 2002. The appellate court reversed the decision of the U.S. District Court for the Western District of Virginia, which had found jurisdiction appropriate in Virginia over two Connecticut-based newspapers based solely on the newspapers' operation of websites that were accessible in Virginia, in spite of the fact that the newspapers had little or no circulation in Virginia and had virtually no other traditional jurisdictional contacts with the state. According to the Fourth Circuit, jurisdiction would be appropriate only if the newspapers evinced a "manifest intent" to target and focus its content on a Virginia audience. *Young v. New Haven Advocate*, No. 01-2340 (4th Cir. Dec. 13, 2002).

The Fourth Circuit's analysis is the first federal appellate decision resolving this issue. Had the Fourth Circuit adopted the District Court's approach, it could well have created a chilling effect on Internet speech. For some publishers, a chilling effect was felt just three days before the *Young* decision was issued, when the High Court of Australia held that Internet contact with a forum is sufficient to support jurisdiction in Australia over a U.S.-based publisher. *Dow Jones & Co. v. Gutnick*, 2002 HCA 56 (Dec. 10, 2002).

Connecticut Prisoners in Virginia

In late 1999, the State of Connecticut, as a cost-cutting measure and in an effort to reduce overcrowding in its prisons, contracted to transfer approximately 500 of its prisoners

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Australian High Court: Publishers Should Keep Their Assets, If Not Their Articles, In the United States

Dow Jones & Company, Inc. v. Gutnick

By Stuart Karle

To paraphrase W.C. Fields, on the whole we would have rather been in Richmond.

On December 10, the Australian High Court, that country's court of final appeal held that Dow Jones could be sued by a prominent Australian citizen in the Supreme Court of Victoria over an article published on Dow Jones's news website Barron's Online, which is available through WSJ.com. The High Court also held that the libel claim would be governed not by US law, but by Australian law, which would not require any showing of fault by Barron's New York-based reporter and editors. *Dow Jones & Company, Inc. v. Gutnick* [2002] HCA 56.

The unanimous, 7-0 result produced four opinions. In dicta, three of the opinions appear to hold out some hope for publishers wary of being sued half-way around the world for libel based on an article posted on a United States-based website. Unfortunately, for US publishers at least, these dicta are likely to be of little value.

Justice Michael Kirby, while concurring in the result, discussed the impact of the internet on libel law at some length and concluded that the court's finding, while required by precedent, was not "a wholly satisfactory outcome" and was "contrary to intuition." But Justice Kirby said the solution would have to be found not in the courthouse, but in legislation and international treaties.

The Article on Barron's Online

On Saturday, October 28, 2000, Dow Jones loaded onto its web servers in New Jersey an article headlined "Unholy Gains," which reported on the possible role played by religious charities in the United States in questionable trades of publicly-owned securities. (The article also appeared in that

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to a correctional facility in Big Stone Gap, Virginia. Most of the prisoners were minorities, while most of the prison staff were white. The decision to ship the inmates to Virginia ignited a public controversy in Connecticut, as allegations of abuse and poor conditions were leveled by the transferred prisoners. Concerns also arose in Connecticut with regard to the difficulty of visiting relatives detained in a Virginia prison and the widespread presence of Confederate flags in Big Stone Gap. The Connecticut media devoted extensive coverage to the controversy. Some news articles mentioned the prison warden, Stanley Young, by name, along with the presence of the Civil War memorabilia in his office.

Virginia Warden Young Sues

The *New Haven Advocate* and the *Hartford Courant* both wrote articles about the prison controversy. In May 2000, Warden Young filed a defamation action against the two newspapers in the U.S. District Court for the Western District of Virginia. Young alleged that certain articles had defamed him by portraying him as a racist who encouraged the abuse of prisoners.

At the time of publication, the *Courant* had eight subscribers located in Virginia, while the *Advocate* had zero. None of the reporters or editors had set foot in Virginia in the course of preparing the articles. However, the newspapers each have websites that allow anyone with Internet access (including, of course, Virginia residents) to view their editorial content. Having none of the traditional contacts with Virginia that typically are required to support personal jurisdiction, the newspapers filed motions to dismiss for lack of jurisdiction.

The newspapers argued that the mere fact that their articles could be viewed in Virginia over the Internet was not sufficient to support jurisdiction. They said that since they had no traditional contacts with Virginia and had never solicited business or directed any content (Internet or otherwise) at a Virginia audience, dismissal was proper. The newspapers argued that under *Calder v. Jones*, 465 U.S. 783 (1984), and other precedent, jurisdiction in Virginia was improper because they did not “expressly aim” their conduct at Virginia. They pointed out that the articles in

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week’s print edition of Barron’s, which had a circulation of approximately 300,000 copies, 99 percent of which was in the United States.) Barron’s Online is a feature of WSJ.com, the principal news website published by Dow Jones. WSJ.com is available only to paying subscribers or trial subscribers; at the time “Unholy Gains” was placed on the website, WSJ.com had more than 500,000 paying subscribers. Several of the companies whose shares were involved in the questionable trading described by Barron’s were associated with Joseph Gutnick, an Australian-based businessman who was also chairman of a company listed for trading in the United States and who had stated his intention to move a substantial portion of his business interests to the United States.

Shortly after the article appeared, Gutnick filed a claim in the Supreme Court of Victoria in Melbourne alleging that he had been libeled by the publication of the article on Barron’s Online. The Statement of Claim made no mention of, and, indeed deleted from the exhibit attached to the claim, the bulk of the article, which concerned transactions and activities in the United States. The libel claim was based only on a few paragraphs that referred to a man convicted of money-laundering in a widely publicized case in Melbourne.

Dow Jones’ application to dismiss the case, or in the alternative to have the case heard in Melbourne but to have the article judged under United States law, was denied by the trial court in August 2001; that decision was affirmed by the Court of Appeal of Victoria in a matter of weeks. In December 2001, the High Court granted Dow Jones’ application for special leave to have its appeal heard on these two points.

The High Court Decision

Because in Australia “matters of substance are governed by the law of the place of the commission of the tort,” the critical first question for the High Court was whether the libel, if there was one, had occurred in Australia. Libel is largely a strict liability tort in Australia, as it is throughout the Commonwealth, and would occur under traditional Commonwealth rules wherever an article is “published.”

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question focused specifically on the Connecticut policy of the prisoner transfer, and that their websites were directed at Connecticut readers.

Young argued that jurisdiction was proper in Virginia because the alleged damage to his reputation occurred in Virginia—by virtue of the articles being downloaded and read in Virginia, where he lived and worked—and because the articles discussed events occurring in Virginia.

The District Court Decision

Senior U.S. District Court Judge Glenn Williams agreed with Young and held that jurisdiction was proper in his court. In an opinion issued August 10, 2001, Judge Williams held

The newspapers argued in their interlocutory appeal to the Fourth Circuit that an “exodus” of speakers from the Internet would result from the decision.

that “information placed on an Internet website should be subjected to multistate jurisdiction.” Relying chiefly on *Calder*, Williams wrote that constitutional Due Process requirements had been met because the defendants had published statements on a website that could be viewed by Virginia readers. Since the newspapers knew that Warden Young lived and worked in Virginia, they should have been aware that any damage to his reputation would occur there. Williams held that “[w]hen such information is posted on the Internet, the [information] is offered to a worldwide audience,” thus intimating that worldwide jurisdiction would be appropriate.

Since the District Court’s holding supported jurisdiction in virtually any location where Internet material could be viewed, the newspapers argued in their interlocutory appeal to the Fourth Circuit that an “exodus” of speakers from the Internet would result from the decision, “as speakers concerned about lawsuits in far-off jurisdictions” would simply decline to publish on the Internet. The newspapers’ appeal to the Fourth Circuit was supported by a broad coalition of media amici.

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Dow Jones argued in the High Court, as it had below, that the place of publication of Barron’s Online was New Jersey, where the site’s web servers are located. Wherever readers happened physically to be when they logged on to the website, all would have to send a message to New Jersey to retrieve the article. Dow Jones argued that choosing a single location for publication of the article would enable publishers to identify with certainty the legal rules with which their publications would need to comply.

The High Court rejected this argument, finding that it was bound by Commonwealth principles to find that publication occurred only when the text of the article was comprehensible—in this case, when the article appeared in readable form on a computer screen. Publication had therefore occurred in Victoria when a subscriber sitting there saw the article on her screen.

Rejected Simple Publication Rule

Dow Jones’ alternative argument on publication was to urge the court to adopt the single publication rule in recognition of the fact that even if the article had been published when read in Victoria, it simultaneously had been published globally when readers pulled the article onto their computer screens. Because internet publication is global, the real place of the tort, and the jurisdiction in which claims should be litigated, is the country to which the defendant directed the article and where the dominant circulation of the article occurred.

While noting the “obvious force in pointing to the need for the publisher to be able to identify, in advance, by what law of defamation the publication may be judged,” the court rejected adoption of a global tort theory to provide publishers with that certainty. The majority opinion discussed the development of the single publication rule in the United States from its inception through the decision of the New York Court of Appeal in *Firth v State of New York*, 775 N.E.2d 463 (2002) (applying the single publication rule to internet publications). The court was not impressed, stating that the single publication rule had morphed from one designed to limit the multiplicity of lawsuits into a choice of law rule, citing a 1949 note from the Harvard Law Review.

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Fourth Circuit Requires “Manifest Intent” to Reach Forum State’s Audience

In its ruling, a three-judge panel of the Fourth Circuit unanimously reversed the District Court. The court said that under *Calder* and a recent Fourth Circuit case applying *Calder*, Internet content must be “expressly targeted at or directed to the forum state” to support jurisdiction. *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002). Young had argued that *Calder* required a finding of jurisdiction simply because the newspapers posted articles on their websites that discussed the warden, and because the warden would feel the effects of the alleged libel in Virginia. “*Calder* does not sweep that broadly,” the Fourth Circuit

The Court specifically ruled that merely making content available on the Internet is not sufficient to support jurisdiction in any state where that information can be accessed.

replied. Rather, jurisdiction would be proper only if the “newspapers manifested an intent to direct their website content . . . to a Virginia audience.”

The Court specifically ruled that merely making content available on the Internet is *not* sufficient to support jurisdiction in any state where that information can be accessed. Something more is required for a newspaper to be “intentionally directing” website content at a jurisdiction.

(The Fourth Circuit did not discuss whether jurisdiction was appropriate against the *Hartford Courant* based on its eight mail subscribers in Virginia because Young did not rely on those contacts in his argument, and neither did the District Court rely on those traditional contacts in its decision below.)

In the opinion, the Fourth Circuit examined the newspapers’ activities with respect to Virginia in order to determine whether they had “manifested an intent” to focus on a Virginia audience. The Court first studied the general content of the newspapers’ websites that Warden Young had placed in the record, and concluded that since the “overall content of both websites is decidedly local,” the newspapers had aimed their articles and websites only at a Connecticut audience.

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Instead, the court said it was bound by the traditional Commonwealth notion that each publication of a defamatory article is a separate tort that can be sued on separately. This multiple publication principle arises from a mid-19th century case in which the Duke of Brunswick sued on an article from a newspaper that his servant had retrieved from a newspaper archive at the Duke’s request more than a decade after the newspaper was first published. Justice Kirby, the High Court judge whose opinion seemed most sympathetic to Dow Jones’s arguments, noted rather dryly that

“[t]he idea that this Court should solve the present problem by reference to judicial remarks in England in a case, decided more than a hundred and fifty years ago, involving the conduct of the manservant of a Duke, dispatched to procure a back issue of a newspaper of minuscule circulation, is not immediately appealing to me.”

The Internet Does Not Require New Rules

The majority opinion of the court also dismissed the notion that the “considerable technological advance of the world wide web” raised particularly new issues. “The law has had to grapple with such cases ever since newspapers and magazines came to be distributed to large numbers of people over wide geographic areas.” Justice Kirby was again far more sympathetic, noting that

“[i]ntuition suggests that the remarkable features of the Internet (which is still changing and expanding) make it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals.”

But the majority said it would be wrong to focus on the scope of publication because

“those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.”

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The Court noted that the websites and the newspapers themselves were focused on local, Connecticut-related matters, such as providing local weather and traffic news, feature stories about Connecticut attractions, and links to websites for the University of Connecticut and the state government.

The Court also examined the allegedly defamatory articles themselves in order to determine whether they were “posted on the Internet with the intent to target a Virginia audience.” Although the articles alleged that Warden Young’s prison had sub-standard conditions (and once mentioned the presence of Civil War memorabilia in his office), the newspapers’ mere knowledge that Young worked and lived in Virginia did not constitute a “targeting” of Virginia as the focus of the articles. The Court held that “Connecticut, not Virginia, was the focal point of the articles,” because the articles concentrated on the impact of the Connecticut prisoner transfer policy in Connecticut. The news stories “reported on and encouraged a public debate in Connecticut about whether the transfer policy was sound or practical for that state and its citizens,” and therefore the newspapers had no “manifest intent” to target Virginia readers when they posted the articles online.

Fortunately, the Fourth Circuit engaged in careful scrutiny of the two newspapers’ websites rather than following the “Internet-has-changed-everything” mantra that has greeted so many other defendants in Internet jurisdiction cases. Following on the heels of the High Court of Australia’s decision in *Dow Jones & Co. v. Gutnick*, the opinion in *Young* hopefully demonstrates that well-established personal jurisdiction principles can – and must – govern this new medium in order to avoid a chilling effect on the flow of Internet speech.

Robert D. Lystad, a partner in the Washington office of Baker & Hostetler LLP, argued the case before the Fourth Circuit on behalf of the New Haven Advocate and the Hartford Courant. Stephanie S. Abrutyn serves as Counsel/East Coast Media, for the Tribune Company, and as in-house counsel for the Advocate and Courant. Robert Stuart Collins of Fleming & Collins, Norton, VA, represented Young. The Fourth Circuit’s decision was written by Judge M. Blane Michael and joined by Judges Roger Gregory and Bobby Baldock, a senior judge of the Tenth Circuit sitting by designation.

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In accepting this point, the High Court ignored the trial court’s key finding that WSJ.com is a subscription website. The trial court emphasized that because Dow Jones could reject subscribers who said they were Australian, Dow Jones could have kept, or at least made some effort to keep, the Barron’s article out of the antipodes. But none of the High Court opinions devoted any analysis to WSJ.com’s paid subscriber base.

Once the court arrived at the determination that publication is local, not global, there was little work left for the court. The focus of Australian defamation law is damage to the plaintiff’s reputation - the conduct of the reporter and publisher is irrelevant except in a very limited class of cases -

A plaintiff may sue a publisher in each and every jurisdiction in which he can allege he has a reputation.

and so a plaintiff may sue a publisher in each and every jurisdiction in which he can allege he has a reputation. Here, by seeking damages only for the hits registered by subscribers sitting in front of computer screens located in Victoria, Gutnick ensured that the tort occurred, and could only have occurred, in Victoria, according to the High Court. “It is his reputation in that State, and only that State, which he seeks to vindicate,” said the court. The court never explains precisely how this “vindication” would work in the vast regions of the world, like the United States, where the article went unchallenged.

Some modest comfort to foreign publishers may be found in dicta discussing what would happen if a plaintiff sought to recover damages in “a case in which it is alleged that the publisher’s conduct has all occurred outside the jurisdiction of the forum.” The court appears to be holding that if a plaintiff were to sue a United States-based publisher for libel for an article prepared entirely outside of Australia and for damages suffered outside of Australia, then it might be necessary to actually consider whether the publisher acted “reasonably before publishing” the article. One justice took this point further, positing that an action brought in Australia that also sought damages for publication in other jurisdic-

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tions might well be sent to one of those jurisdictions on a forum non conveniens application.

Of course, it is far from obvious that an Australian plaintiff's libel counsel, faced with the application of U.S. libel law to a case brought in Australia, would choose to sue in Australia at all. Top libel awards there are far less than the occasional multi-million dollar jackpots at the top of the U.S. libel heap. Rather than take on the burdens imposed by First Amendment jurisprudence and the limited damages available in Australia, many lawyers pressing claims to be governed by United States law would roll the dice and sue in the States.

The Court Discounts a Global Threat to Publishers

The court identified several principles that it said limited "the spectre which Dow Jones sought to conjure up . . . of a publisher forced to consider every article it publishes on the World Wide Web against the defamation laws of every country from Afghanistan to Zimbabwe"

First, the Court assumed that an internet publisher could "readily identify the defamation law" to which a person mentioned in an article may resort. With a little old man who never leaves his home in Sydney, this may be true. The point seems far weaker when General Electric, Microsoft, Sun, Cable & Wireless, Deutschebank, and any other member of the 1,000 or so largest companies in the world may claim reputations in literally dozens of countries. So, too, could individuals with homes in multiple countries, or business interests with which they are closely identified. A separate problem would seem to arise in preparing articles in which a number of different people or companies, with reputations in different countries, are mentioned only briefly. The law of many far-flung jurisdictions might apply to each of these articles.

Second, the court also said that defendants shouldn't be particularly concerned about getting dragged into remote jurisdictions because damages would only be substantial "if the plaintiff has a reputation in the place where publication is made." But in practice, this logic provides little comfort to a publisher. Australian libel damages are quite low - hundreds of thousands of dollars at the most, and hardly the millions potentially at risk in a United States courtroom - so the real economic driver is the recovery of costs by the prevail-

ing party. Those costs, which include a substantial percentage of the prevailing party's legal fees, will typically far exceed any damage award, and can be in the millions. Thus the potential to recover fees provides a strong incentive for plaintiffs and an equally strong deterrent to U.S. publishers.

Third, the majority also reasons that plaintiffs are unlikely to sue if their damage award would be unrecoverable in the jurisdiction in which the publisher's assets can be attached. Under this logic, an Australian plaintiff simply wouldn't sue an American publisher whose assets are all in America because it is likely that the judgment wouldn't be collectible in the States. This theory is belied by this case, where the publisher of Barron's Online, Dow Jones & Company, Inc., is a United States corporation with no assets or employees in Australia. This plainly has not deterred Gutnick, or his solicitors and counsel. More importantly, it is generally not an option for a major publisher to allow its credibility or its reporters' reliability to be damned without a fight, at least not in what appears to be a responsible forum. Responsible publishers must take very seriously the specter of a libel plaintiff touting a default judgment as false vindication.

The Justice most hostile to Dow Jones' arguments stated that he saw this case as an attempt by an American publisher "to impose upon Australian residents for the purposes of this and many other cases, an American legal hegemony in relation to Internet publications" and to confer upon the United States "an effective domain over the law of defamation, to the financial advantage of publishers in the United States . . ." But the hegemony permitted by this decision is that of Victorian libel law over a communication that beyond dispute was by and large published in America by an American magazine that is directed at Americans and that is concerned exclusively with issues of concern to American investors. Publication may for the Australian High Court be a local issue, but the problems left by this decision are global.

Dow Jones is represented by barristers Geoffrey Robertson, QC, of Doughty Street Chambers in London and Tim Robertson of Frederick Jordan Chambers in Sydney; solicitors Gilbert & Tobin in Sydney, and Stuart Karle of Dow Jones. Joseph Gutnick is represented by barristers Jeffrey L. Sher, QC, and Michael Wheelahan and solicitors Schetzer Brott & Appel, Melbourne. Intervenor represented by barristers Bret Walker and Sarah Pritchard, St. James Hall, and solicitors Blake, Dawson, Waldren of Sidney, and David Schulz of Clifford Chance, New York.

Landmark Decision by War Crimes Tribunal on Reporters Privilege

By Eric Lieberman

In a landmark decision, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) held that war correspondents have a qualified privilege not to testify before a war crimes tribunal about their newsgathering from conflict zones, and set aside a subpoena issued to former Washington Post war correspondent Jonathan Randal. From now on, journalists will only be compelled to give evidence before the ICTY in exceptional cases where the court is satisfied that “the evidence sought is of direct and important value in determining a core issue in the case,” and “cannot reasonably be obtained elsewhere.”

Background

In early 1993, Randal and another journalist conducted an interview with Radoslav Brdjanin in Banja Luka. Excerpts from the interview were subsequently published in The Washington Post on February 11, 1993, in an article entitled “Preserving the Fruits of Ethnic Cleansing; Bosnian Serbs, Expulsion Victims See Campaign as Beyond Reversal.”

Brdjanin was later charged with various war crimes. The prosecutors sought to have Randal’s article admitted into evidence, claiming that it was relevant to establishing Brdjanin’s criminal intent. Defense counsel objected to admitting the article unless he could cross-examine Randal about the article and its context.

On January 29, 2002, the Trial Chamber issued a subpoena to Randal. Randal refused to comply with the subpoena, and filed a motion to have it set aside. He argued that the ICTY should recognize a qualified privilege for conflict zone reporters not to testify about their newsgathering, and that the subpoena should be quashed because the prosecution failed to demonstrate why the claimed privilege should be overcome on the facts of his case. Randal contended that war correspondents who take the witness stand risk being perceived by potential sources as an investigative arm of a judicial system, and that subpoenas to reporters therefore threaten the free flow of informa-

tion from conflict zones. Randal also argued that if reporters become identified as would-be witnesses, their personal safety within conflict zones would be further compromised.

On June 7, 2002, the Trial Chamber upheld the subpoena, and refused to recognize a qualified privilege for journalists when no issue of protecting confidential sources was involved. The Trial Chamber concluded that when testimony from a journalist relates to published information from identified sources, compelling the journalist’s testimony poses only a minimal threat to newsgathering. The Trial Chamber thus held it sufficient that Randal’s was “pertinent” to the case.

The Trial Chamber granted leave to appeal, which Randal subsequently filed in late June. An Appeals Chamber was constituted consisting of Presiding Judge

Claude Jorda (France), Judge Mohammed Shahabuddin (Guyana), Judge Mehmet Guney (Turkey), Judge Asoka de Zoysa Gunawardana (Sri Lanka), and Judge Theodor Meron (U.S.). A worldwide coalition of 34 media entities and organizations filed an amicus brief in support of

Randal’s appeal. The five-judge court heard argument from the parties and the amici on October 3, 2002.

The Appeals Chamber’s Decision

The Appeals Chamber broke down the issue of whether war correspondents should be afforded a qualified privilege into three subsidiary questions: “Is there a public interest in the work of war correspondents? If yes, would compelling war correspondents to testify before a tribunal adversely affect their ability to carry out their work? If yes, what test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court and, where it is implicated, the right of the defendant to challenge the evidence against him?”

1. *Is there a public interest in the work of war correspondents?*

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The court specifically cited the European Court of Human Rights’ seminal decision in Goodwin v. United Kingdom, which recognized the “vital public watchdog role” played by the press in democratic societies, as well as U.S. law.

Landmark Decision by War Crimes Tribunal

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The Appeals Chamber answered “yes” to the first question. The court explained that

“international and national authorities support the related propositions that a vigorous press is essential to the functioning of open societies and that a too frequent and easy resort to compelled production of evidence by journalists may, in certain circumstances, hinder their ability to gather and report the news.”

The court specifically cited the European Court of Human Rights’ seminal decision in *Goodwin v. United Kingdom*, which recognized the “vital public watchdog role” played by the press in democratic societies, as well as U.S. law.

The Appeals Chamber further explained that the work of war correspondents in particular serves the public interest, as evidenced by the crucial role that war correspondents played in uncovering evidence of human rights violations in the former Yugoslavia:

The transmission of [accurate] information [from war zones] is essential to keeping the international public informed about matters of life and death. It may also be vital to assisting those who would prevent or punish the crimes under international humanitarian law that fall within the jurisdiction of this Tribunal. In this regard, it may be recalled that the images of the terrible suffering of the detainees at the Omarska Camp that played such an important role in awakening the international community to the seriousness of the human rights situation during the conflict in Bosnia Herzegovina were broadcast by war correspondents.

The court found additional support for the public interest in the work of war correspondents in the “right to receive information” contained in Article 19 of the Universal Declaration of Human Rights. Article 19 provides in pertinent part that “[e]veryone has the right . . . to seek, receive and impart information and ideas through any media and regardless of frontiers.”

2. *Would compelling war correspondents to testify in a war crimes tribunal adversely affect their ability to carry out their work?*

On this question, the Trial Chamber below concluded that compelling war correspondents to testify where the testimony sought relates to published information and does not involve confidential sources would not “hamper[]” or “endanger[]” their “objectivity and independence.” The Trial Chamber faulted Randal for failing “to distinguish between those cases where something fundamental like being forced to reveal confidential sources and unpublished information or cases where newspapers are subjected to search of their offices or archives, from cases like his, where he had no problem with revealing to the entire world Brdjanin’s alleged declarations in a publication but now seeks to avoid having to confirm it.”

The Appeals Chamber viewed the issue differently. Even when the testimony of war correspondents does not relate to confidential sources, the court concluded “compelling war correspondents to testify before the International Tribunal on a routine basis may have a significant impact upon their ability to obtain information and thus their ability to inform the public on issues of general concern.” In a critical paragraph of the opinion, the Appeals Chamber reasoned as follows:

What really matters is the perception that war correspondents can be forced to become witnesses against their interviewees. Indeed, the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. To publish the information obtained from an interviewee is one thing – it is often the very purpose for which the interviewee gave the interview – but to testify against the interviewed person on the basis of that interview is quite another. The consequences for the interviewed persons are much worse in the latter

War correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

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Landmark Decision by War Crimes Tribunal

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case, as they may be found guilty in a war crimes trial and deprived of their liberty. If war correspondents were to be perceived as potential witnesses for the prosecution, two consequences may follow. First, they may have difficulties in gathering significant information because the interviewed persons, particularly those committing human rights violations, may talk less freely with them and may deny access to conflict zones. Second, war correspondents may shift from being observers of those committing human rights violations to being their targets, thereby putting their own lives at risk.

Having reached the conclusion that routine compellability of journalists would not serve the public interest, the Appeals Chamber next addressed “how the course of justice can be adequately assured without unnecessarily hampering the newsgathering function of war correspondents.”

3. *What test is appropriate to balance the public interest in accommodating the work of war correspondents with the public interest in having all relevant evidence available to the court?*

The Trial Chamber justified issuing a subpoena to Randal because the evidence sought was “pertinent” to the case. The Appeals Chamber rejected that standard, concluding that

“the word ‘pertinent’ is so general that it would not appear to grant war correspondents any more protection than that enjoyed by other witnesses.”

Instead, the court established a two-pronged test that must be satisfied in order for a Trial Chamber to issue a subpoena to a war correspondent:

“First, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence cannot reasonably be obtained elsewhere.”

Since the Trial Chamber failed to apply the correct legal standard before issuing Randal’s subpoena, the Appeals Chamber set the subpoena aside.

The Appeals Chamber chose not to decide the facts of Randal’s case, but offered some “observations” if the prose-

cution or defense decides to submit a new application in the Trial Chamber for Randal’s testimony. Principally, the Appeals Chamber noted that because Randal speaks no Serbo-Croatian and relied on his fellow journalist for interpretation, it is “difficult to imagine how [Randal’s] testimony could be of direct and important value to determining a core issue in the case.”

Judge Shahabudden filed a separate concurring opinion. The full text of both opinions is available on-line at www.un.org/icty

Jonathan Randal was represented by Geoffrey Robertson QC and Steven Powles of Doughty Street Chambers, and Fiona Campbell and Mark Stephens of Finers Stephens Innocent. Amici were represented by Floyd Abrams, Joel Kurtzberg, and Karen Kaiser of Cahill Gordon & Reindel.

Eric Lieberman is Associate Counsel for The Washington Post Company.

UPDATE: Kansas Criminal Libel Defendants Sentenced

Utah Case Against Student Revived

The editor and publisher of a monthly political newspaper were sentenced to pay \$3,500 each in fines and serve one year on probation for their convictions on seven misdemeanor counts of criminal defamation. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct., Wyandotte County sentencing Nov. 27, 2002); see also *LDRC MediaLawLetter*, Aug. 2002, at 5. The probation and all but \$700 of the fines were suspended pending appeal.

The sentences were meted out two weeks after Judge Tracy Klinginsmith rejected the defendants’ motion for judgment notwithstanding the verdict or a new trial based on juror misconduct. See *LDRC MediaLawLetter*, Nov. 2002, at 46.

The convictions stemmed from articles in *The New Observer* (www.thenewobserver.com), that questioned whether Kansas City Mayor Carol Marinovich and her husband, Wyandotte County District Judge Ernest Johnson, actually lived in the county as required by law.

Observer publisher David Carson is represented by Mark Birmingham of Kansas City. Douglas J. Patterson of Leawood – who is a Kansas state representative – repre-

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Kansas Criminal Libel Defendants Sentenced; Utah Case Against Student Revived

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sents editor Edward H. Powers, Jr. and the newspaper's corporate owner, Observer Publications.

New Charges In Utah Case

Three weeks after the Utah Supreme Court ended a prosecution against him by holding one of Utah's two criminal libel statutes to be unconstitutional, *see LDRC MediaLawLetter*, Nov. 2002, at 45, Ian Lake was subpoenaed to appear for arraignment in a new prosecution under the surviving statute for a web site maligning classmates, teachers and school administrators.

In its Nov. 15 decision, the Utah high court held that Utah Code § 76-9-501, *et. seq.*, a statute dating from 1874 which requires only that a defamatory statement be made intentionally and with malice, was unconstitutionally overbroad because it did not require actual malice or provide immunity for truthful statements.

Beaver County prosecutor Leo Kanell indicted Lake under the state's other criminal defamation statute, Utah Code

§ 76-9-404, while the Utah Supreme Court appeal was pending. This statute, passed in 1973, prohibits making a statement that the speaker knows to be untrue and defamatory. In a footnote to its decision, the high court explicitly stated that it was not ruling on the constitutionality of § 76-9-404. *In Re: I. M. L.*, No. 20010159, 2002 UT 110 (Utah Nov. 15, 2002), slip op., n. 12.

Despite the scheduled arraignment, the prosecution may not proceed; Kanell was defeated in a re-election bid and will leave office in early January.

In response to the subpoena, Lakes' father threatened to file a civil rights lawsuit against Beaver County. David Lake and former Milford High School Principal Walter Schofield reached a confidential settlement in September 2001 in mutual civil libel suits stemming from the case.

Lake is represented by Richard Van Wagoner and Robert J. Shelby of Snow, Christensen & Martineau, P.C. in Salt Lake City, and Janelle P. Eurick and Stephen C. Clark of the ACLU.

In LDRC BULLETIN2002:4 will be an extensive analysis, state by state, of criminal libel laws and the cases brought under them in the last 40 years.

Book on Ramsey Murder Held Not Libelous

The 11th Circuit Court of Appeals has affirmed a lower court's dismissal of a lawsuit brought by a former housekeeper against the parents of Jon Benet Ramsey, for a passage in their book that she said implicated her in the 1996 murder of their daughter. *Hoffman-Pugh v. Ramsey*, No. 02-12642, 2002 WL 31553963, 16 Fla. L. Weekly Fed. C 57 (11th Cir. Nov. 19, 2002); *see LDRC MediaLawLetter*, April 2002, at 14.

The appellate court, reviewing the lower court's dismissal *de novo*, ruled that, in the context of the entire book, the statements complained of by Hoffman-Pugh were not defamatory.

Judge Ed Carnes issued the opinion without argument from Hoffman-Pugh's attorney, Darnay R. Hoffman of New York, who did not appear for oral argument on Nov. 13. The panel hearing the case referred Hoffman to the Chief Judge J.L. Edmondson for possible disciplinary action.

On the same day that the 11th Circuit issued its opinion, Darnay Hoffman also failed to appear at oral argument before the 10th Circuit in Denver in another case brought by Hoffman-Pugh. The Denver case involves Colorado court

rules barring grand jury witnesses from publicly discussing their testimony; Hoffman-Pugh challenged the rules, and a district court struck them down as unconstitutional under the First Amendment. *Hoffman-Pugh v. Kennan*, No. 01-1385 (10th Cir. argued Nov. 19, 2002) (appeal of *Hoffman-Pugh v. Hunter*, Civil. No. 00-1597 (D.Colo. July 9, 2001)). The 10th Circuit accepted Hoffman-Pugh's case on the briefs.

The defendant was represented by James Rawls, Eric Schroeder, Stephen Derel Bauer of Powell, Goldstein, Frazer & Murphy; and L. Lin Wood.

The third recent development in the litany of suits stemming from the murder is the filing of a new libel case against the author and publisher of the 1999 book *Perfect Murder, Perfect Town*. The suit was filed on Oct. 8 in the District Court in New Mexico by Jeffrey Shapiro, who covered the case for the *Globe* tabloid newspaper. Shapiro is represented by Neville Johnson.

Several other defamation cases stemming from the Jon-Benet Ramsey murder and its aftermath are still pending. *See LDRC MediaLawLetter*, April 2002, at 14.

New Opinion, But Same Result in Texas Satire Libel Case

By Jim Hemphill

A Texas court of appeals has issued a revised opinion in a libel case involving a fictional satire criticizing two public officials, but its earlier ruling upholding the denial of the defendants' motion for summary judgment remains intact.

The case, *New Times v. Isaacks*, was the topic of previous *LibelLetter* articles in June 2001 at 23 and May 2002 at 7.

The article at issue was a critique of the actions of several public officials, including a juvenile court judge and a district attorney, involved in the real case of a 13-year-old boy who was jailed for writing a violent Halloween essay for school. The critique took the form of a fictional satire in which the public officials jailed a fictional six-year-old girl for writing a book report. Apparently some readers misinterpreted the satire as actual fact, although no testimony from any such reader is in the record. District Attorney Bruce Isaacks and Judge Darlene Whitten sued the newspaper (the *Dallas Observer*, an alternative newsweekly), along with the satire's author and editors.

The Fort Worth Court of Appeals, in an opinion by Justice Gardner, held that a reasonable reader could have believed the satire because, according to the court, there were no obvious clues as to its fictional nature. The article included a fictional quote from Judge Whitten defending "panic and overreaction" and stating "it's time for us to stop treating kids like children."

The appeals court also held there was a fact issue on actual malice, declining to adopt the defendants' suggested standard that actual malice cannot exist in the case of a fictional satire or parody unless the author intended readers to believe the satire was actually true.

The opinion can be read at 2002 WL 31626923 or at <http://www.2ndcoa.courts.state.tx.us/ops2003/201023&216CV.reh.pdf>. An appeal to the Texas Supreme Court is likely.

Jim Hemphill is a partner in Austin's George & Donaldson, L.L.P. He represents the defendants in New Times v. Isaacks along with his co-counsel, Steve Suskin of Phoenix, Arizona. Michael J. Whitten of Griffin, Whitten, Jones & Reib represents the plaintiff.

DiBella v. Hopkins: Jury Sends Hopkins to Canvas in Defamation Suit, Ordered to Pay Over \$600K

A jury sent boxing champion Bernard Hopkins to the canvas when it ordered him to pay his former promoter, Lou DiBella, \$610,000 in damages. DiBella had brought a claim of defamation and quantum meruit against Hopkins for remarks the fighter made on several occasions, specifically that DiBella demanded a bribe in return for Hopkins getting on an undercard fight to be broadcast on HBO. Hopkins must pay \$100,000 in compensatory and \$500,000 in punitives.

Background

In 1999, DiBella was a senior Vice President for Programming at HBO but had decided to leave his position and start his own boxing promotion company. While still under contract with HBO, and with HBO's permission, DiBella began to recruit boxers, including Hopkins, for his new endeavor. DiBella claims that the

\$50,000 payment from Hopkins was for services DiBella and his company would provide Hopkins, including general advice and services.

However, Hopkins maintained in a series of interviews and statements that the \$50,000 was a bribe in return for DiBella ensuring Hopkins was assigned the undercard of the Roy Jones-Richard Hall fight to be broadcast on HBO in May 2000.

Hopkins eventually was given the undercard and won the fight. Initially, Hopkins had nothing but praise for DiBella. Over the course of the following year, Hopkins made several statements to the media complimentary of DiBella and expressing thanks for helping the boxer's rising career. Hopkins won several fights over the next several months culminating with his victory over Felix Trinidad in September 2001.

After the Trinidad fight though, Hopkins ended the

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Jury Sends Hopkins to Canvas in Defamation Suit, Ordered to Pay Over \$600K

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professional relationship with DiBella. Beginning in December 2001, Hopkins began making comments to the media asserting that the \$50,000 was a bribe. Some of his statements included “every time I fought, Lou DiBella got paid, even when he was with HBO, which is f**king wrong,” to Maxboxing.com; and, “When the guy says, ‘I got HBO dates, you give me this and I’ll get you one,’ what am I supposed to do?” to the Philadelphia Daily News.

Conflicting Testimony over Nature of Payment

During the trial, conflicting testimony was presented from Hopkins and DiBella as to the nature of the \$50,000 payment. Hopkins testified that when the payment was made, he believed that was the normal course of business in boxing. DiBella countered that while the payment was made, he performed no services for Hopkins while still employed at HBO. The \$50,000 was for consulting and other services to be performed once DiBella left the network.

Portions of the Maxboxing.com interview were also played for the jury in which Hopkins told the reporter he had evidence to support his claims of bribery, and instructed the reporter to, “slay the f**king bastard [DiBella].” When questioned about the interview, Hopkins claimed that he did not intend to injure DiBella and was exceedingly frustrated as he had been informed prior to the interview that HBO employees could not accept bribes.

After less than a day of deliberations, the jury found for DiBella and awarded him \$600,000 in damages on the libel suit. However, DiBella’s other claim for quantum meruit was dismissed as the jury believed DiBella to have been adequately compensated for any and all services that he provided.

For DiBella: Judd Burstein and Peter Schalk of Burstein & McPherson.

For Hopkins: Robert Hayes, Marlo Pagano-Kelleher, Gary Leshko and Theresa Brennan of Cozen O’Connor.

UK Law Commission Recommends Reforms to Internet Defamation Laws

This month the Law Commission, an independent law reform body set up by the UK Parliament in 1965, released the results of its preliminary study on Defamation and the Internet, endorsing law reform in several key areas.

The Commission considered four areas of concern: 1) ISP liability for third party content; 2) statute of limitations rules for online publications; 3) internet jurisdiction issues; and 4) potential contempt of court liability for Internet publications.

Quite significantly, the Commission found that there is “a strong case for reviewing the liability of internet service providers.” And it noted that one reform would be to follow the US example of exempting ISPs from liability for third party content. The Commission also recommended a full review of statute of limitations law for online archives, noting that “possible reforms include the introduction of some form of ‘single publication rule’ or the development of a separate archive defense.”

On jurisdiction, the Commission expressed sympathy with publishers’ concern for “unlimited global risk” for Internet publications, but it noted that a solution would likely require an international treaty rather than law reform. But the Commission did recommend that the government sponsor research on how other countries deal with Internet jurisdiction issues to better inform policy makers.

Finally, the Commission considered contempt of court liability – which is not a defamation issue, but which may pose unique issues for Internet publishers. Under UK law, the press is generally prohibited from publishing “prejudicial” reports about ongoing criminal cases. The Commission noted that in some circumstances online archives may raise contempt issues, but the Commission concluded that the criminal justice system can rely on the “good sense of jurors” to avoid such problems, concluding that reform in this area is not a priority.

The likely next step is for the Commission to undertake an in depth review of ISP liability and statute of limitation issues with the goal of developing a full reform recommendation. The Commission has a high success rate – nearly two-thirds of its law reform recommendations have been adopted by Parliament.

A copy of the Commission report is available at: www.lawcom.gov.uk/files/defamation2.pdf.

Late Night Web Postings Cause Georgia Supreme Court to Strengthen Georgia Libel Law

By James C. Rawls and Eric P. Schroeder

Invoking Richard Jewell and the publishing opportunities afforded by the Internet, the Georgia Supreme Court reaffirmed the involuntary public figure standard in Georgia and will now require all Georgia libel plaintiffs to request a retraction within 7 days after any defamatory publication — including web postings — if they are to recover punitive damages. The 4-3 decision in *Mathis v. Cannon*, authored by Chief Justice Norman Fletcher, strengthens Georgia libel law by expanding statutory and First Amendment protections for speech on the Internet and erasing any distinction between media and non-media defendants in Georgia. *Mathis v. Cannon*, Case No. S02G0361 (Ga. November 25, 2002).

On The Internet, Late At Night

At issue in *Mathis* were late-night web postings about a waste management dispute in south Georgia. Defendant Bruce Mathis posted three messages on a “Yahoo” Internet bulletin board in 1999 concerning plaintiff Thomas C. Cannon’s involvement with the “Solid Waste Management Authority of Crisp County”, an agency charged with developing a profitable solid waste facility in rural Crisp County, Georgia. Mr. Cannon was instrumental in helping the Authority fund the waste facility and gain contracts with surrounding cities and counties to be “waste providers”. Mr. Cannon’s company, TransWaste Services, Inc., also happened to be the *exclusive* waste hauler for the project.

Defendant Mathis was a member of a citizen’s group that played a role in having a grand jury investigate the Authority when it became apparent that the waste facility was losing money. During the investigation, Cannon’s company sued the Authority for failing to make payments on its exclusive collection contract for the facility. In late October 1999, the grand jury issued a report criticizing the Authority. Three days later, on November 1, 1999, Mr. Cannon learned that the Authority had paid \$220,000 to Crisp County, instead of to TransWaste, and TransWaste stopped all deliveries to the waste facility.

That evening, Mathis posted three late-night messages on a Yahoo message board for Waste Industries

Inc., TransWaste’s corporate parent. The first message was:

what u doing???

by: [duelly41](#)

does wwin think they can take our county---stop the trash flow cannon we would love u for it--our county not a dumping ground and sorry u and It governor are mad about it--but that is not going to float in crisp county--so get out now u thief

The second message was:

cannon a crook????

by: [duelly41](#)

explain to us why us got fired from the calton company please???? want hear your side of the story cannon!!!!!!!!!!

The third message was:

cannon a crook

by: [duelly 41](#)

hey cannon why u got fired from calton company???? why does cannon and It governor mark taylor think that crisp county needs to be dumping ground of the south??? u be busted man crawl under a rock and hide cannon and poole!!! if u deal with cannon u a crook too!!!!!!!!!! so stay out of crisp county and we thank u for it

Plaintiff Prevails In Lower Courts

Mr. Cannon filed suit against Mathis for libel *per se*, seeking general and punitive damages. The trial court denied summary judgment to Mathis, instead granting Cannon partial summary judgment on the issue of liability. Mathis appealed, claiming that Cannon was a public figure, and could not prove the required actual malice, and also arguing that Georgia’s “retraction statute” — *O.C.G.A. 51-5-11* — which requires that plaintiffs request a retraction within seven days or punitive damages are not available — barred any claim for punitive damages because Cannon did not request a retraction.

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Late Night Web Postings Cause Georgia Supreme Court to Strengthen Georgia Libel Law

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The Georgia Court of Appeals affirmed the trial court, 252 Ga. App. 282, 556 S.E.2d 172 (2001), ruling that Mr. Cannon was a private figure because he had not injected himself into the waste facility controversy. Rather, the appeals court ruled, he was “involuntarily drawn into the controversy” and thus could not be a limited-purpose public figure. The ruling implied that public figure status must be reserved for “voluntary” actions.

The Court of Appeals affirmed the ruling that the comments about Cannon were libelous *per se*, and the ruling that Georgia’s “retraction statute” did not on its face apply to web postings, but instead was to be read narrowly to apply only to newspapers and printed media.

The Ga. Supreme Court Reverses on All Issues

Granting certiorari, the Georgia Supreme Court asked for briefing on whether a “private individual must show actual malice by clear and convincing evidence before punitive damages can be recovered from a private individual speaking on a matter of public concern.” The Court’s subsequent decision, however, went well beyond this question and reversed the Court of Appeals on each issue presented.

On the public figure issue, the Supreme Court made clear that a plaintiff could be an “involuntary public-figure” under Georgia law. Adopting a three-part test first adopted by the Georgia Court of Appeals in *Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808, 555 S.E.2d 175 (2001), the Court determined that Georgia courts must: 1) “isolate the controversy”; 2) “examine plaintiff’s involvement”; and 3) “determine whether the alleged defamation was germane to the plaintiff’s participation”.

Applying this test, the Supreme Court first broadly identified the public controversy as the Authority’s financial troubles, and determined that Cannon had “voluntarily injected” or “at a minimum, became drawn into” the controversy over operation of the Authority’s waste facility by gaining funding for the Authority and then accelerating the Authority’s financial crisis when his company sued.

The Court then ruled the web postings were germane to the controversy because they were “part of the ongoing debate” about garbage disposal in Crisp County, ruling that Cannon was thus a “limited-purpose” public figure.

As to the web posting themselves, the Court ruled that no person reading the postings could reasonably interpret “the incoherent messages as stating actual facts” about Mr. Cannon, citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), strongly suggesting that the postings were mere rhetorical hyperbole entitled to full constitutional protection.

On the retraction statute, the Supreme Court refused to draw a distinction between media and non-media defendants and extended Georgia’s retraction statute to all publishers, regardless of their identity. Declining to read the

statute as narrowly as the Court of Appeals, the Court ruled that “publication”, as used in the statute, was to be construed as it was commonly understood in libel law, and should “accommodate changes in communication and the publishing industry due to the computer and the

Internet”. Thus the retraction statute was held to apply to Mathis’ web postings, and eliminated Mr. Cannon’s punitive damage claim.

The Court acknowledged the “practical effect” of its decision requires Georgia libel plaintiffs “who intend to seek punitive damages to request a correction or retraction before filing their civil action against any person for publishing a false, defamatory statement.” The Supreme Court, citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), encouraged “self-help” by defamation victims to “contradict the lie or correct the error”, stating that its rule struck a balance in favor of “uninhibited, robust and wide open” debate.

In addition to its expansive reading of the public figure and punitive damages issues, the Supreme Court embraced strong protections for speech addressing matters of public concern, relying heavily on *Gertz*. Setting forth the requirements for stating a claim for libel *per se*, the Georgia Supreme Court clearly stated that plaintiffs in Georgia

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media defendants.**

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Late Night Web Postings Cause Georgia Supreme Court to Strengthen Georgia Libel Law

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must prove “actual injury” to reputation when the speech involves a matter of public concern. The Court further made clear that Georgia plaintiffs must prove falsity if the speech is on a matter of public concern, and the Court made no distinction between media and non-media defendants.

Three dissenting judges disagreed with the majority’s public figure analysis because, they countered, Mr. Cannon was not a public official, he had not injected himself into the controversy and the controversy at issue was not as significant as, for example, the Centennial Park bombing at issue in the *Jewell* case. The dissenters also disagreed with the majority’s retraction statute analysis, asserting that the majority expanded the plain language of the statute.

Mr. Mathis was represented by James W. Hurt of Cordele, Georgia. Mr. Cannon was represented by Robert C. Norman Jr. of Jones, Cork & Miller of Macon, Georgia.

The case was closely watched by the libel defense

community in Georgia. Amicus briefs were filed by the Georgia First Amendment Foundation and New World Communications of Atlanta, Inc. (represented by Joseph R. Bankoff and Jamie Norhaus Shipp of King & Spalding); the ACLU and Electronic Frontier Foundation (represented by Jeffrey O. Bramlett and Michael B. Terry of Bondurant, Mixson & Elmore LLP); the Georgia Press Association (represented by David E. Hudson of Hull, Towill, Norman, Barrett & Salley) and by Cable News Network, Gannett Co., Inc. and the Georgia Association of Broadcasters (represented by James C. Rawls and Eric P. Schroeder of Powell, Goldstein Frazer & Murphy LLP).

James C. Rawls is a partner, and Eric P. Schroeder is an associate, with Powell, Goldstein Frazer & Murphy LLP in Atlanta, Georgia. The two represented amicus CNN, Gannett Co., Inc. and the Georgia Association of Broadcasters in the Mathis case.

Revell v. Hoffman: 10th Circuit Rules Retired FBI Official is Public Official Dismissal of Defamation and Civil Conspiracy Claims Upheld

The dismissal of a retired FBI official’s defamation and civil conspiracy claims was affirmed when the 10th Circuit held that the plaintiff was a public official in regards to the purportedly defamatory statements in defendant’s book, and that the plaintiff had failed to establish actual malice. In *Revell v. Hoffman* (309 F. 3d 1228), Judge Tacha (in a decision joined by Judges Adisert and McWilliams) found that the statements at issue concerned events and actions occurring when the plaintiff was employed by the FBI, and that the public had a continuing interest in these events even after Revell’s employment ended. After finding plaintiff a public official, the court determined that Revell had not introduced “sufficient evidence” that the defendants had serious doubts as to the truth of the publication.

Background

Revell, a retired FBI official had worked at the Bureau for nearly 30 years, brought claims of defamation and civil conspiracy against David Hoffman, and Hoffman’s publisher (Alexander B. Magnus and his company, Americans for Responsible Media), as well as some of Hoffman’s sources for his book. The suit contended that statements in Hoffman’s book (*The Oklahoma City Bombing and the Politics of Terror*) suggested Revell had attempted, while he was Associate Deputy of the FBI, to create a “death squad” within the government to combat terrorism (with Oliver North); and removed his family from Pan Am 103 because he knew beforehand of the bombing, among other insinuations. Revell, who had since retired from the Bu-

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10th Cir. Rules Retired FBI Official is Public Official

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reau, brought suit in federal district court. Defendants moved for summary judgment on the basis that Revell was a public official and could not prove actual malice. The district court granted the defendants' motion and Revell appealed.

Revell is Public Official

The 10th Circuit first analyzed whether Revell is a public official for the purpose of the defamation suit. Using the test adopted by the Supreme Court in *Rosenblatt v. Baer*, the 10th Circuit found that Revell's 30 years of employment at the FBI and the various positions he held during his tenure gave him "substantial responsibility for or control over the conduct of governmental affairs." (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1971)).

Agreeing with the district court's findings that Revell had an "influential role" while at the FBI, the court determined that his experiences were of "apparent importance" to the public. This public interest was independent of the general public interest in the function of all government employees. Law-enforcement officials had also previously been classified as public officials by the 10th Circuit in *Gray v. Udevitz* (656 F. 2d 588 (1981)).

Revell argued that he could not be considered a public official as he is no longer a government employee. The 10th Circuit disagreed, holding that under its earlier decision in *Gray v. Udevitz*:

"If the defamatory remarks relate to his conduct while he was a public official and the manner in which he performed his responsibilities is still a matter of public interest, he remains a public official within the meaning of *New York Times*." *Gray v. Udevitz* at 591 n. 3

(quoting *Rosenblatt* at 87 n. 14)

The passages of Hoffman's book Revell cited concerned his work at the FBI and the public had an interest in this work. As a public figure, Revell then had the burden of providing evidence that the defendants acted with actual malice.

"Inherently Improbable" Does Not Equal Actual Malice

After finding him a public official, the 10th Circuit held that Revell had failed to establish that Hoffman or his publisher acted with the requisite degree of actual malice. The court stressed that determining actual malice was a subjective test, whether there has been presented, "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication." (quoting *St. Amant v. Thompson*, 390 U.S. 727 731 (1968)). According to the 10th Circuit, Revell had failed to meet this standard by not producing "sufficient evidence" that Hoffman had suspicions as to the truth of the publication or purposefully avoided the truth.

The court also stated that Revell's argument that malice was "facially 'apparent' and 'obvious' based on the 'inherent improbability' of the statements" at issue was incorrect. Evidence of actual malice, according to Revell, was found in the remote odds that the statements in Hoffman's book were true. This "evidence" only lessened the burden Revell had to satisfy, it did not fulfill the standard. Aside from this claim of

The court also stated that Revell's argument that malice was "facially 'apparent' and 'obvious' based on the 'inherent improbability' of the statements" at issue was incorrect.

"inherently improbability", Revell produced no evidence as to Hoffman's subjective state of mind, nor whether Hoffman believed his information to be false, or purposefully avoided the truth. The court noted that Hoffman had conducted a reasonable investigation for his book and that Hoffman had no reason to doubt his sources.

No Defamation, No Civil Conspiracy

Applying Oklahoma common law, the court also upheld dismissal of Revell's civil conspiracy claim. "There can be no civil conspiracy where the act complained of and the means employed are lawful," and as the defamation claim was dismissed, the defendants' acts were lawful. (quoting *Brock v. Thompson*, 948 P. 2d 279, 294 (Okla. 1997)).

For the appellant: Stan Twardy, Oklahoma City, OK.

For the respondent: J. Michael Johnston, Oklahoma City, OK

Split Indiana Supreme Court Sanctions Attorney for Footnote Remarks Critical of Intermediate Court of Appeals

By Dan Byron

In a recent 3-2 decision by the Indiana Supreme Court ("Court"), *In Re Wilkins*, 777 N.E.2d 714 (Ind. 2002), an Indiana attorney received a 30-day suspension for comments contained in a footnote of an appellate brief that the Court felt violated Indiana Professional Conduct Rule 8.2(a). This rule prohibits false or reckless statements by a lawyer concerning the qualifications or integrity of a judge. Although the Indiana attorney did not draft the footnote (it was drafted by forwarding counsel from Michigan), he did sign the brief and was jointly responsible for it.

Specifically, the footnote criticized an opinion by the Indiana Court of Appeals as "so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee [the opposing party] and then said whatever was necessary to reach that conclusion (regardless of whether the facts or the law supported its decision)." The Court found that this statement suggested an unethical motivation behind the decision of the three-judge panel of the Court of Appeals and included an assertion against their integrity that was either false or in reckless disregard of its truth or falsity.

First Amendment Tension

Acknowledging the tension between the First Amendment and the Indiana Code of Professional Responsibility, the Court rejected a generalized test and concluded that

"the state's interest in preserving the public's confidence in the judicial system and the overall administration of justice far outweighed any need for the respondent to air his unsubstantiated concerns in an improper forum."

This conclusion was based, at least in part, by the Court's finding that the attorney offered no evidence to support his contention, noting that even if there were such evidence, the proper forum for raising this issue would be the Indiana Judicial Qualifications Commission and not the appellate courts.

The Court also rejected the attorney's contention that the footnote was merely a critique of the Court of Appeals in a format commonly used throughout the bench and bar. Instead, the Court found that the attorney presented no support for his contention and, further, that neither the rules of appellate procedure nor the ethical rules allowed such a "critique."

The Dissent

The dissent, while agreeing that the footnote was poor advocacy, tasteless and intemperate, believed that the footnote was rhetorical hyperbole and well within the broad range of protected fair commentary on a matter of public interest. The dissent likened the footnote to barbs occasionally leveled in appellate opinions by judges at other judges. The dissent also believed the actual malice test should have applied and noted there was no evidence that the attorney in fact entertained serious doubts as to the accuracy of his claims. The dissent thought the actual malice test was particularly important where, as in this case, there is a mixed role of judge/jury thrust upon the Court in reviewing disciplinary cases for lawyer's acts questioning the judiciary itself.

A petition for rehearing before the Indiana Supreme Court has been filed in this matter and that petition is currently pending. It is unknown whether an appeal to the Supreme Court of the United States is ultimately planned. Finally, although apparently not addressed by the parties in the disciplinary proceedings, one Supreme Court justice in the majority on this sanction was also a member (at the time) of the three-judge Court of Appeals panel criticized in the footnote.

Donald R. Lundberg and Charles M. Kidd represent the Indiana Supreme Court Disciplinary Committee. Ronald Elberger, Robert Clemens of Bose, McKinney & Evans; and G. Daniel Kelly Jr. and Thomas Middorf of Ice Miller represent Wilkins

Dan Byron is a member of Bingham McHale LLP in Indianapolis, Indiana.

UPDATE: NY Appellate Ct. Upholds Dismissal of Suit Over "JFK Papers"

By Jeanette Melendez Bead

A New York appellate court has affirmed the dismissal of a lawsuit brought by Lawrence X. Cusack, III ("Lex Cusack"), his business associates and over 100 purchasers of the so-called "JFK Papers," documents Lex Cusack claimed contained the genuine handwriting of President Kennedy, Marilyn Monroe, Robert F. Kennedy and Joseph P. Kennedy, Sr. *Cusack v. 60 Minutes*, No. 600060/98 (N.Y. App. Div., 1st Dep't Nov. 12, 2002).

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NY App. Ct. Upholds Dismissal of Suit Over “JFK Papers”*(Continued from page 21)***Background**

The plaintiffs brought suit in 1998, alleging thirteen causes of action, including defamation, trade libel and breach of contract. Among the defendants were: CBS, Ed Bradley, Don Hewitt, the segment producers, Robert White, a Kennedy memorabilia expert who challenged Cusack's assertions that he had “authenticated” certain of the documents, and investigative journalist Seymour M. Hersh, who did not appear on the broadcast, but who had been critical of the documents in other contexts.

The gravamen of the complaint was that the JFK Papers were authentic and that the defendants defamed the plaintiffs and the JFK Papers by questioning their authenticity in a “60 Minutes” report. The JFK Papers consisted of over 700 pages of documents, including documents purporting to create trusts for Marilyn Monroe in return for her silence about President Kennedy's mafia connections, which Lex Cusack claimed he discovered among his deceased father's files. In the broadcast, CBS noted that other media outlets had also questioned the authenticity of the documents and featured an interview with a handwriting expert, who concluded that the JFK Papers were forgeries.

In 1999, Lex Cusack was convicted by a federal jury on thirteen counts of mail and wire fraud in connection with his sale of the JFK Papers, which the jury determined had been forged. Following Lex Cusack's conviction, the defendants in the defamation action demanded repeatedly, albeit without success, that the plaintiffs voluntarily dismiss the lawsuit. Accordingly, the defendants filed motions for summary judgment, arguing, among other things, that the plaintiffs were collaterally estopped from relitigating the issue of the authenticity of the documents in light of Lex Cusack's conviction, and that they could not carry their burden of proving that the documents were genuine in any event. The trial court granted the motions and dismissed the complaint in its entirety with prejudice.

The Appeal

The plaintiffs appealed the dismissal of four of the thirteen causes of action rejected by the trial court: trade libel, breach of contract, breach of the duty of good faith and fair dealing and fraud. The plaintiffs argued that the trial court

erred in holding that Lex Cusack was collaterally estopped from relitigating the authenticity of the documents because he did not have a full and fair opportunity in his criminal trial to litigate the issue. In addition, they argued that, on the one hand, there was ample evidence in the record that the JFK Papers were authentic and, on the other, that they were entitled to discovery to amass additional evidence of authenticity. The plaintiffs also attempted to recast the nature of the lawsuit by emphasizing their fraud and contract-based claims, which sought recovery for CBS's purported promises to air a broadcast that would be “favorable” to them.

The Decision

The Appellate Division of the First Department, in a ruling issued by Judge Barbara Kapnick on November 12, unanimously affirmed the trial court's grant of summary judgment against all of the defendants.

The appellate court agreed that Lex Cusack's conviction

The appellate court agreed that Lex Cusack's conviction collaterally estopped him from relitigating the authenticity of the JFK Papers.

collaterally estopped him from relitigating the authenticity of the JFK Papers. The court further held that, although Cusack's conviction did not estop the remaining plaintiffs, their claims also were properly dismissed “since the record demonstrates overwhelmingly that the papers in question are forgeries and plaintiffs have failed to raise any issue of fact to the contrary.”

The court also held that those plaintiffs who purchased the JFK Papers had failed to demonstrate damages proximately caused by the broadcast, holding that “their damages are entirely attributable to the circumstance that the papers purchased by them are demonstrably inauthentic.” Finally, the court granted the CBS defendants' motion for sanctions against Lex Cusack only, observing that, “he has refused to discontinue a completely meritless action despite numerous prior adverse determinations.”

The CBS defendants were represented by in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and Lee Levine, Jay Ward Brown and Jeanette Melendez Bead of Levine Sullivan & Koch, L.L.P. of Washington, D.C. Seymour Hersh was represented by Michael Nussbaum and J. Steven Baughman of Ropes & Gray in Washington, D.C., and Robert L. White was represented by Robert M. Adler of O'Connor & Hannan in Washington, D.C. and Steve S. Efron, a solo practitioner in New York City. Solo practitioner Carl E. Person of New York City represented the plaintiffs.

Winning On Libel *Per Quod*:

A Useful Doctrine For Business and Financial Journalism

By Charles J. Glasser, Jr.

If good ideas are timeless, perhaps the same can be said for good defenses in media law. The purpose of this article is to highlight the usefulness of one of those good ideas – the libel *per quod* doctrine – and to provide defense counsel with some pointers on this defense as illustrated by a recent media win.

In late November, the U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal of a \$100 million dollar libel claim against financial and business news provider Bloomberg L.P. in *Computerized Thermal Imaging, Inc. v. Bloomberg L.P.*, 2002 U.S.App. LEXIS 24187 (10th Cir., Nov. 26, 2002). The case turned on the finding that the sued-upon statements at issue (mostly descriptions of securities financing) were at worst libel *per quod*, and that plaintiffs did not (and could not) plead the special damages required of such claims.

The affirmance by Judge Porfilio of the dismissal below bodes well for publishers of financial or business journalism who often publish factual statements of a technical nature. Although the case discussed here was decided on Utah law, the principles are more broadly applicable, and should be of use to media defense counsel nationwide.

The libel *per quod* doctrine is particularly appealing to financial and business news publishers for two reasons. First, a statement must be more than false to be defamatory, but must also carry *on its face* the sting of opprobrium to avoid a *per quod* application. Descriptions of stock prices, corporate finance, and other securities-related details often do not carry such a sting. Second, once a judge determines that the sued-upon statement requires explanation and intrinsic fact to carry this sting, the requisite requirement of pleading special damages is an extremely high hurdle – almost impossible in the corporate context. Another advantage to this approach is that the defense of libel *per quod* is often appropriate for a motion to dismiss rather than post-discovery summary judgment motions.

The Doctrine Of Libel Per Quod

Libel *per quod* flows backwards from the presumption of damage flowing from a libel *per se*. For example, a state-

ment that imputes a crime or clear-cut moral turpitude (e.g., “John Doe embezzles money from orphanages”) has a sting apparent on its face, and it requires no explanation of why it harms reputation. Thus, damages may be presumed (if other elements of the claim are met).

By contrast, libel *per quod* requires extrinsic fact to plead defamatory meaning. Consider the statement: “Jane Smith treats capital contribution as earned income.” What’s so bad about that? Not a lot, unless you understand that Smith is an accountant, and that this treatment is an incorrect accounting method. Is it worthy of hatred? Does it make you want to cross the street to avoid Smith? Maybe, if you had more information. In Smith’s libel complaint, she would be forced to explain *why* the statement is harmful, setting forth the sued-upon statement, followed by paragraphs claiming that “this means ‘X’” or “this implies ‘X.’”

Unlike a Complaint based on our hypothetical embezzler Doe, if a sued-upon statement needs explanation as to *why* it damages reputation, it may be a good candidate for a libel *per quod* defense. *See, e.g., Dodd Ins. Servs., Inc. v. Royal Ins. Co.*, 935 F.2d 1152, 1156 (10th Cir. 1991) (statements relying on extrinsic fact or implication cannot be libel *per se*). Defense lawyers are well advised to consider Complaints crafted that way as an implicit admission that the article is at worst libel *per quod*.

CTI v. Bloomberg L.P.

Computerized Thermal Imaging (“CTI”) is a Utah corporation headed by congressional contemnor and notorious libel plaintiff General Richard V. Secord of Iran-Contra fame. (*See Secord v. Cockburn*, 747 F.Supp. 779 (D.D.C. 1990)). In July of 2000, Bloomberg reporter David Evans wrote that in a private placement offering, “CTI sold 11.1 million shares of its stock at a 72% discount to its market price.” CTI pleaded that this statement was false and defamatory because the discount rate of the private placement shares was considerably lower, and as a result of this falsity CTI had suffered losses exceeding \$100 million.

In the court below and on appeal, Bloomberg argued

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Winning On Libel *Per Quod*

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that even if erroneous, this statement (and others sued upon) lacked defamatory meaning on its face and required extrinsic facts to carry defamatory meaning under Utah law. In March of 2001, the District Court agreed with this argument, and finding that the plaintiff had not shown actual damages recoverable under libel *per quod*, dismissed the case for failure to state a claim. CTI filed a Motion for Reconsideration to try to amend the Complaint to add other allegations of special damages. This attempt at repleading was denied, and the denial was affirmed by the appellate court. This is also explained below in the section on special damages.

“On Its Face” vs. “By Reference To Extrinsic Fact”

Bloomberg pointed out that few people outside of financial professionals and securities lawyers have a working knowledge of what private placements are, and how they work. Thus, the central sued-upon statement requires extrinsic information to carry defamatory

meaning to the reader. Bloomberg argued that reporting a discount in the cost of shares available through a private placement – even if erroneous as to amount – does not carry with it any “sting” on its face. After all, there is nothing about a “discount” that is visibly defamatory: airline tickets are often sold at a discount, but that doesn’t mean the airline is unsafe.

In calculating the discount rate, Bloomberg’s Evans compared the offering price in private placement to the trading price of publicly held-shares on the last day of the private placement offering. The shares were offered at a fixed price of \$3.81, and on the last day of the private placement the stock was publicly traded at \$9-7/8. Comparing the two prices, a 72 % discount was reported. CTI argued that this was erroneous, because the discount “should” have been calculated on the *first day* the private offering was made, which because of that day’s lower trading price would have yielded a lower discount rate.

Even if erroneous, does an incorrect discount rate carry a defamatory sting? Because of CTI’s reliance on the word “implies” in its Complaint, Bloomberg argued that to say that a statement “implies” something, is to say that it requires a mental leap by the reader possessing extrinsic information to make the implication defamatory. The more mental leaps between the sued-upon statement and the defamatory conclusion, the greater the reliance upon extrinsic fact.

On motion to dismiss and at appeal, Bloomberg argued that in 1905, the Utah Supreme Court first recognized the libel *per quod* doctrine, holding that in order for a false statement to be libel *per se*, the “nature (of the words) necessarily must, or presumably will, as its *natural and proximate consequence*, occasion pecuniary loss.” *Nichols v.*

Daily Reporter Co., 83 P. 573, 574 (Utah, 1905) (italics in original). Bloomberg kept reminding the court(s) that libel *per se* requires that the words *themselves* must subject the plaintiff to opprobrium, they must in and of themselves subject the plaintiff to

Because of CTI’s reliance on the word “implies” in its Complaint, Bloomberg argued that to say that a statement “implies” something, is to say that it requires a mental leap by the reader possessing extrinsic information to make the implication defamatory.

“ridicule, contempt or scorn.”

The best CTI could plead was that the erroneous discount rate “must mean that there is a problem” with the company, its products or stock. CTI insisted that it “must” have been defamatory on its face, because after publication on the Bloomberg wire, the stock’s price fell dramatically. CTI insisted that the court must accept this argument as true on motion to dismiss. Because defamatory meaning is a threshold matter of law, the trial court correctly undertook this determination, and gave no mind to the plaintiff’s “cause-and-effect” argument.

In an obscurely-written opinion, the 10th Circuit agreed with defense counsel and the court below, citing *Nichols* for the proposition that when words are libelous “by proof of extraneous matters” presumed damages will not be allowed, and in such cases plaintiffs may only recover special damages. The appellate court also affirmed the lower court’s ruling that “no statement on its face, bore the pre-

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Winning On Libel *Per Quod*

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sumption of damage.” *Slip Op.* at *14. In turn, CTI’s inability to plead special damages resulted in the dismissal of the case.

Special Damages: The Death Sentence For A Per Quod Complaint

Special damages are extremely difficult to plead and prove. *See generally, Sack on Defamation*, Sec. 10.3.2.; Rule 9(g) FED. RULES OF CIVIL PROCEDURE. First, special damages must be alleged in the Complaint with a high degree of particularity: generalized allegations of damages do not suffice, and the plaintiff must plead a concrete number with a strong factual basis. *See, e.g., Nunez v. A-T Fin. Info., Inc.*, 957 F. Supp. 438, 441 (S.D.N.Y. 1997).

Second, few types of claims actually qualify as special damages. Special damages by definition are liquidated and out-of-pocket pecuniary losses. *See, e.g., A.H. Belo Corp. v. Saunders*, 632 S.W.2d 145, 146 (Tex. 1982). The loss of prospective deals or potential transactions do not qualify, because future transactions are not liquidated and out-of-pocket. (Interestingly, while corporate accountants routinely place a hard value on “goodwill,” any such loss is not liquidated and out-of-pocket).

Moreover, Utah, like most states, requires that such damages be a *direct and immediate* result of the libel. *See, e.g., Dowse v. Doris Trust Co.*, 208 P.2d 956, 959 (Utah) (1949). Plaintiffs are at a disadvantage because these special damages requirements are so fact-intensive: in short, a plaintiff has to produce a person who says “*I read the libel, I believed it, I thought less of the plaintiff, and as a result, I cancelled this specific contract.*” Even if a plaintiff could find a friendly witness willing to make such a statement under oath, the damages in that instance fall short of the payday most libel plaintiffs are looking for. Another advantage of this defense is that the determination of whether pleaded damages qualify as “special” is a matter of law, and plaintiffs’ lawyers are deprived the opportunity to confuse a jury over complicated facts.

The day after Bloomberg published the article, CTI’s stock price fell more than 30%. In its Complaint, CTI alleged three different “special damages.” First, CTI pleaded

that the article’s affect on stock price represented a drop in market capitalization of more than \$100 million. The second claim was that because of the drop in stock price, CTI’s pending application for a listing on NASDAQ was “unnecessarily delayed.” (The plaintiff tried to divert attention from the fact that their application was delayed *prior* to publication because NASDAQ was investigating an undisclosed civil fraud judgment against CTI’s Chief Executive Officer). Finally, CTI claimed that the article “resulted in a moratorium” on potential transactions and pending business deals.

Market Gap Loss Not Special Damages

Painting the plaintiff into the “special damages” corner became particularly useful in this case, and should be instructive to defense counsel. First, claims for a loss in market capitalization do not qualify as special damages. As the District Court held, special damages must be “liquidated” (that is, actually “out-of-pocket”) losses. *Baum v. Gillman*, 667 P.2d 41, 43 (Utah 1983).

Market capitalization cannot qualify as special damages, because it is an artificial construct that does not “belong” to the company or to any one entity. Market cap is defined as the aggregate of the value of the share price at any given moment, multiplied by the number of outstanding shares publicly traded. A drop in that aggregate value is not “liquidated” or “out-of-pocket” to the plaintiff: in fact, those shares are specifically *not* held by the company, so by definition, they cannot be a liquidated out-of-pocket loss to the company. At least one appellate court has previously refused to qualify a drop in share price as special damages in libel. *Salit v. Ruden, McClosky*, 747 So.2d 381, 388 (Fla. 1999).

In addition, market cap is not a concrete number and cannot be pinned down in the same way a lost contract can. Because share prices fluctuate moment by moment, so too, must market cap. As Bloomberg argued in the trial court, how could it be determined that the aggregate value at 9:05 am, as opposed to 10:30 am or 4:27 pm is the correct one?

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Plaintiff has to produce a person who says “I read the libel, I believed it, I thought less of the plaintiff, and as a result, I cancelled this specific contract.”

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It would require selecting an arbitrary number, which is anathema to special damages.

NASDAQ Listing Delay Not Special Damages

The other “special damages” claims also failed as a matter of law. Neither the District Court nor the Tenth Circuit agreed with CTI that the delay in being listed on NASDAQ was compensable as special damages. In opposition to the motion to dismiss, CTI attached an affidavit from one of its executives saying that at a meeting with NASDAQ officials, the exchange’s investigators were concerned about the “allegations” in the Bloomberg article. Even assuming that NASDAQ delayed CTI’s listing because of the article, it would be impossible to prove with particularity that not being listed on NASDAQ caused an articulable, concrete and liquidated loss.

This should serve as a guidepost for defense: it is not enough to show that “something bad” happened to the company after publication: that “bad effect” must translate into a direct and provable loss. Given the vagaries of the stock market, pinning a specific dollar amount on this “bad effect” is next to impossible. Similarly, rejecting CTI’s claims to “future business dealings” allegedly spoiled because of the article, the courts held to the principle that “speculative injury as to some future difficulty” is insufficient proof of special damages. *Larson v. SYSCO Corp.*, 767 P.2d 557, 599 (Utah 1989).

Lawyer Costs Claim Rejected

After the trial court dismissed the Complaint, CTI moved for a reconsideration of final judgment under F.C.R.P. Rules 59(e) and 60(b), arguing that “newly discovered evidence” of special damages should be considered, thus reactivating the Complaint. The “new” evidence consisted of an affidavit from the CEO alleging that attorney’s fees both in the libel case, and related to the delay in CTI’s NASDAQ listing were liquidated out-of-pocket expenses that should be recovered.

The courts rejected this on two grounds. As a proce-

dural matter, these expenses could hardly be considered “newly discovered,” as they were incurred before CTI even filed the libel Complaint. As a substantive matter, the courts followed the principle that attorneys’ fees are not an element of special damages recognized in law. As the trial court properly noted, allowing such a claim would eviscerate the requirement that special damages must be pleaded and proven because every plaintiff necessarily incurs attorney’s fees and costs. Under CTI’s theory, *all* libel cases would have built-in special damages: an absurd proposition that was correctly disregarded by the courts.

Conclusion: A Checklist for Defense

Consider the following checklist to see if your complaint is suitable for a libel *per quod* defense:

- Is the sued-upon statement a particularly technical or complicated matter?
- Do the words themselves carry the sting of opprobrium, or by contrast, do they require explanation as to why they defame the plaintiff?
- Do paragraphs in the complaint follow the sued upon words with paragraphs stating the “this implies” or “this would mean”? If so, it can be said that the plaintiff has implicitly admitted that the words are not defamatory on their face.
- If special damages are alleged, are they hard, “concrete” numbers? If so, has the plaintiff shown a direct and proximate casual link between the article and the damage?
- Are the claims seeking damages from speculative deals or forward-looking events?
- Are the damages liquidated and out-of-pocket?

Charles Glasser is Media Counsel for Bloomberg L.P. Bloomberg was represented by Tom Golden of Willkie Farr & Gallagher in New York, and Randy Dryer of Parsons Behle & Latimer in Salt Lake City. Plaintiffs were represented by Carl Schoeppel of Schoeppel and Burke in Boca Raton, Florida.

It is not enough to show that “something bad” happened to the company after publication: that “bad effect” must translate into a direct and provable loss.

Washington Court of Appeals Holds Fair Report Privilege Not Defeated By Actual Malice

By Eric M. Stahl

The fair report privilege cannot be overcome by a showing that the publisher acted with actual malice, according to a recent Washington Court of Appeals defamation decision, which also opined in *dicta* that the actual malice fault standard applies to private plaintiffs in cases involving matters of public concern.

The decision, *Alpine Industries Computers, Inc. v. Cowles Publishing Co.*, ___ P.3d ___, 2002 WL 31605780 (Wash. App. No. 20855-9-III, November 21, 2002), stemmed from an article in *The Spokesman-Review* (Spokane, WA) about a civil judgment Microsoft obtained in federal court against a local businessman who sold illegal copies of its software. According to the article, the businessman had admitted wrongfully selling counterfeit software at his stores. At a trial on damages, the article stated, the federal judge concluded that the sales were made in reckless disregard of Microsoft's intellectual property rights, and awarded Microsoft compensatory damages and attorneys' fees.

The store and its owner ("Alpine") subsequently sued Cowles Publishing Co., publisher of the newspaper, for defamation. The trial court granted Cowles' motion for summary judgment, finding that the common law fair reporting privilege applied; that the reporter and publisher had acted without actual malice; that the article was substantially true; and that Alpine had submitted no proof of damages. Alpine appealed.

Materially False Statement

Writing for the unanimous Court of Appeals panel, Division III Chief Judge Stephen Brown defined the salient issue to be whether Cowles was protected by the fair reporting privilege. But the court did not limit its inquiry to whether the newspaper article was an accurate report of official proceedings. According to the court, deciding this issue required consideration of the falsity of the disputed statements; applicable privileges; the burden of proof; and fault.

The appellate court first compared the newspaper story to the federal court's memorandum order granting judgment for Microsoft against Alpine's owner. The Court of Appeals found some "fleeting inaccuracies" in the newspaper's account. Of note, the newspaper reported that after Microsoft sent Alpine a cease and desist letter, investigators purchased copies of Office Pro and Windows 95 from Alpine; in fact, Alpine sold only Windows 95 after receiving the letter (though it previously had sold both products). The Court of Appeals determined that the statement that Alpine continued to sell Office Pro after receiving a cease and desist letter was materially false.

Although the opinion suggests this would have been sufficient to defeat summary judgment (had plaintiffs established the other elements of defamation), the court does not explain why this "fleeting inaccuracy" is material. Under Washington law, a defamation plaintiff must show that allegedly false statements caused him damage "that would not have been caused anyway by the substantively true" portions of the publication. *Schmalenberg v. Tacoma News*, 87 Wn. App. 579, 602-03, 943 P.2d 350 (1997). The gist of *The Spokesman-Review* article appears to be that Alpine's owner illegally sold counterfeit software; and it would seem that any damage from this substantively true report would be the same, regardless of the number of products Alpine sold on a particular date.

Actual Malice Won't Defeat Privilege

Turning to the issue of privilege, however, the court held that all of Cowles' statements were fully protected by the fair reporting privilege. The court asserted that "Washington has long afforded news media defendants a privilege for reporting on official actions and proceedings," citing, among other authority, *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162, 170, 736 P.2d 249 (1987) and *Mark v. Seattle Times*, 96 Wn.2d 473, 487-

"So long as the publication is attributable to an official proceeding and is an accurate report or a fair abridgment thereof, it is privileged."

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Washington Court of Appeals Holds Fair Report Privilege Not Defeated By Actual Malice

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88, 635 P.2d 1081 (1981). The court held, in accordance with the *Restatement (Second) of Torts*, § 611, that the privilege applies if the statement at issue (i) is attributable to an official proceeding, and (ii) is an accurate report or fair abridgement thereof.

Although this articulation of the legal standard is unremarkable, the opinion provides a useful discussion concluding that the fair report privilege, unlike other conditional privileges, is not defeated by a showing that the defendant acted with actual malice. An earlier Washington Court of Appeals case had stated that the privilege to report legal proceedings applies only if “the publication is a fair and accurate statement of the contents and *is made without malice.*” *O’Brien v. Tribune Publishing Co.*, 7 Wn. App. 107, 117, 499 P.2d 24 (1972). In addition, the trial court in *Alpine* opined that the state’s fair report privilege is rooted in a 1909 provision of Washington’s criminal libel statute, which exempts publishers from prosecution for fair and true reports of official proceedings made without “actual malice.” RCW 9.58.050.

The Court of Appeals in *Alpine* appeared to go out of its way to reject this earlier authority, noting that under the more recent doctrine, the fair reporting privilege protects a publisher for reports of official proceedings it believes, or even knows, to be false. According to the court, “So long as the publication is attributable to an official proceeding and is an accurate report or a fair abridgment thereof, it is privileged,” and the inquiry ends.

Meets Test for Privilege

Applying this standard, the court found that Cowles satisfied the first element: the challenged statements are “easily traceable to the District Court’s proceedings” as reflected in Microsoft’s complaint, the memorandum order, and other court documents.

The court considered the second element – whether Cowles’ report was “fair” – to be a closer question. Again, the court observed that the newspaper reported that Alpine had sold two types of software products after receiving Microsoft’s cease and desist letter from Microsoft, when in fact it had sold only one of the products. The Court of Appeals concluded, however, that the fair report privilege re-

quires only “substantial accuracy,” not “surgical precision.” Here, the statement that Alpine continued to sell the second product, though false, was “not substantial” when the story is read in its entirety. Although the court’s apparent difficulty with this question is somewhat puzzling – again, the falsity of the statement at issue seems clearly immaterial – the result appears correct.

Finally, although the court held that all of the challenged statements in the article either were not false or were privileged, the court went on to discuss the fault element, in order “to facilitate a full understanding of the issues implicated in this appeal.” In a lengthy passage, the court noted that Alpine was a private figure, and that “numerous Washington cases have stated as a general rule that a private figure plaintiff must prove negligence by a preponderance of the evidence.” But the opinion goes on to suggest that Washington case law has “not articulated a definitive standard of fault for private figure-public concern defamation cases,” and that the standard in such cases should be actual malice.

It may be best to regard this portion of *Alpine* as interesting *dicta*: it is unnecessary to the disposition of the case, and also does not fully analyze *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 546 P.2d 81, 86 (Wash. 1976), in which the Washington Supreme Court held that a private individual need only show negligence to recover for defamation, overruling a prior decision (*Miller v. Argus Publishing Co.*, Co., 490 P.2d 101 (Wash. 1971) that had adopted the actual malice standard for private plaintiffs involved in issues of public concern.

The *Alpine* court noted that the article touched on a matter of public concern – an open trial involving piracy of software sold to the general public – and that plaintiffs had failed to produce any evidence of actual malice. Therefore, the court concluded, summary judgment had been properly entered for Cowles even if the fair report privilege did not apply.

Alpine was represented by Richard D. Wall (Spokane). Cowles was represented by Duane M. Swinton of Witherspoon, Kelley, Davenport & Toole (Spokane).

Eric M. Stahl is an associate in the Seattle office of Davis Wright Tremaine.

Canadian Newspapers Win Trial on Substantial Truth

Public Official Sued Over Description of Criminal Record

By Damion Stodola

A British Columbia trial court recently considered the scope of evidence that media defendants can present to prove the defense of justification. *Jay v. Hollinger Canadian Newspapers et. al.*, 2002 BCSC 1655, No. 9395 (November 29, 2002) (T.M. McEwan, J) (available at www.canlii.org/bc/cas/bcsc/2002/2002bcsc1655.html).

Justification is a complete defense and must be proven by a balance of probabilities in order to rebut the presumption of falsity under common law libel in Canada. In proving this defense, defendants must adduce specific facts which prove the truth of the allegedly defamatory statement and of no other, notwithstanding errors in detail. In this case, the plaintiff attempted to apply this principle in a way that would have held the media defendants liable for inaccurately reporting a criminal record in a way that was no worse than what the plaintiff actually did.

The media defendants admitted the error but argued that their article was nevertheless substantially true. The plaintiff's strategy was to narrowly define the article's allegation and to take advantage of the case law prohibiting defendants from adducing evidence of a different event or crime to justify the publication of an otherwise defamatory statement. In dismissing the case, the Court declined to adopt the plaintiff's overly technical argument and instead applied the law in a coherent way.

Newspapers Reported Politicians Conviction

The plaintiff, a city councillor who failed to win a political party's approval to run in an upcoming election because of his criminal record, sued the reporters and publishers of the *Vancouver Sun* and the *Nelson Daily News* for inaccurately reporting that criminal record. The *Sun* published a follow-up article titled "Nelson Councillor Rejected By Liberals: Party officials found out that the 34 year-old has a criminal record." That article reported that 15 years earlier plaintiff "pleaded guilty to assaulting a Nelson resident *with a noxious substance*" – an offense that does not exist under the Canadian Criminal Code. In fact, the plaintiff was given a conditional

discharge for the offense of common assault. At that time, the plaintiff struck a young woman "with his hand, in which he held a pen-like wrench" and on that same day "pinned her on the bed" and that "she was struck on the head, face and back."

The article also reported, slightly inaccurately, that the plaintiff had "defied a court order to stay away from the assault victim before she could testify" whereas the plaintiff, properly speaking, was sentenced for "breach of an undertaking" not to approach or contact the victim of the assault.

Reports Were Substantially True

The defendants admitted that they incorrectly reported the precise nature of the offense. In researching the story, the reporter confused the section of the Criminal Code extant when the plaintiff was charged in 1987 with an amended section of the Criminal Code that had not yet been enacted. This mistake led to the reporter to incorrectly describe the assault as one "with a noxious substance." The reporter left a voice message with the plaintiff describing the reporter's understanding of the criminal record and inviting him to respond. The plaintiff, despite having this specific knowledge of the reporter's error, did not return the message and instead waited for the story to be published. When the plaintiff's attorney demanded that the *Sun* print a retraction, the newspaper stood by its story and invited the plaintiff to present evidence proving the inaccuracy of the story. The plaintiff refused and claimed that to do so would "waive his privacy rights."

The plaintiff again invoked his privacy rights, citing the seminal case *Hill v. Scientology*, [1995] 2 S.C.R. 1130, in opposing the defendants' motion to compel answers to certain interrogatories and the production of documents relating to the facts of the plaintiff's conditional discharge for assault. Defendants' motion to compel was decided in their favor earlier this year on the grounds that there was no constitutional right "not to speak" in a civil proceeding about the facts of the dis-

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Canadian Newspapers Win Trial on Substantial Truth

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charge for assault. *Jay v. Hollinger Canadian Newspapers et. al.*, 2002 BCSC 23, No. 9395 (January 8, 2002).

Trial Court Rejects Overly Technical Application of Substantial Truth Defense

At trial before Judge McEwan, the defendants pled justification and supported this defense with details of the plaintiff's crime as it had occurred to demonstrate that the "gist" or "sting" of the article was, in fact, substantially true. The plaintiff, however, argued that this evidence was inadmissible under the case law which limits the evidence a defendant can adduce in support of justification to "the very thing described, such that it is no answer to say that while a person did not deserve to be described in a particular way, other events will show that that he is just that type of person." The plaintiff argued that any evidence regarding common assault was technically evidence of another event.

The Court noted that this argument would "preclude any reference to what occurred without an admission that the defendants had defamed the plaintiff, leaving them with only a plea in mitigation of damages." The Court declined to adopt this overly technical argument in favor of finding that "the law, as complicated as it may be, tends toward coherence." The Court noted that the rationale for restricting the type of evidence that can be adduced in support of justification is to prevent defendants from publishing exaggerated accounts of events with impunity. In other words, one cannot justify the publication of a defamatory remark by adducing facts that the plaintiff committed a less odious but similar event.

Having determined that the common assault was not a different event in legal terms, the Court noted that the real question was whether the failure to prove that the assault occurred in the manner alleged was fatal to the defendants' plea of justification. This could only be determined by comparing the facts of the assault with the "sting" or "gist" of the published article, thereby

allowing the defendants to lead evidence of the plaintiff's common assault.

In fact, the court determined that the published words had a lesser "sting" than the facts of plaintiff's conviction. The Court noted that the article, read in context and by reasonable readers, could not be interpreted as having the lurid and defamatory meanings attributed to it by the plaintiff – that defendants implied the use of a date-rape drug, sexual assault, and illicit sexual intercourse. The Court noted that the statement that plaintiff was charged with assault with a noxious substance was more confusing than lurid and noted that it bore a less sexual connotation than the explicit sexual overtones of the circumstances in which the plaintiff was actually charged, namely an assault wherein the victim was "pinned to the bed." As such, the Court held that the impugned words in the article did not "add substantially to the defamatory quality of the acts concerning publication of which [the plaintiff] could have had no legal recourses."

The Court noted that the article, read in context and by reasonable readers, could not be interpreted as having the lurid and defamatory meanings attributed to it by the plaintiff.

Damion Stodola is an associate at Coudert Brothers in New York City. The newspapers were represented at trial by Barry Gibson QC of Farris, Vaughan, Wills & Murphy in Vancouver, B.C. Plaintiff was represented by T.W. Pearkes

Any developments you think other LDRC members should know about?

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PREPUBLICATION REVIEW:

Dependable Elements Thwart Libel Plaintiffs

By Alice Neff Lucan

The *Idaho-Statesman's* defense against a libel action based on a series of critical articles about the job performance of the executive director of a housing authority worked because the *Statesman's* copy gave the court (and the reader) these elements:

- essential facts behind criticism
- the subject's explanations and denials
- use of "value judgements" in conclusions

There are two decisions but the full explanation and discussion of the case appears as *Worrell-Payne v. Gannett Co., Inc.*, 134 F. Supp. 2d 1167 (D.Idaho 2000). With a short, less thorough discussion, this decision is affirmed under the same name at 2002 U.S. App. LEXIS (9th Cir. October 7, 2002).

As the trial court said, "On a number of occasions, the *Statesman* reported that [the plaintiff] Mrs. Worrell-Payne was being (or had been) accused of "nepotism," "absenteeism," or "mismanagement." The *Statesman* asserted that these statements, or words like them, were simply opinion words. The trial court agreed: the conclusions were value judgements that the plaintiff's behavior was inappropriate.

Repeatedly, the *Statesman* described the behavior, included the plaintiff's explanation and then came to a conclusion criticizing the behavior. Each time, the court noted, the *Statesman* had no reason to doubt the facts reported.

For example, one story reported criticism that the plaintiff was out of her office too frequently and called it "absenteeism." The story also reported that Mrs. Worrell-Payne served as a consultant for other housing authorities and was away from her office to advise those "clients." Payment for her services went to her employer. And, she didn't deny that she was away from her office a lot. The court said, ". . . the issue was not whether she was away from her office, but whether it was appropriate for her to be away as much as she was," a matter of opinion.

In another example, when the housing director was attempting to arrange financing for a new subdivision, critics - which included the *Statesman* - suggested financial mismanagement and predicted that taxpayers would be "called upon to bail out the program." The *Statesman* also reported that plaintiff had provided information showing that the housing authority was not in danger of default and that the Mayor believed the program to be in good shape.

"By disclosing the Mayor's opposing opinion, the *Statesman* put its readers on notice that its concern about default was simply one view of the situation."

It was also true that at time of this story, the housing authority hadn't gotten the funds it needed.

The appeals court also noted that Mrs. Worrell-Payne's denials were included in *Statesman* articles, but "these denials did not prove the falsity of the essential facts on which the stories were based," thus no proof of actual malice. Are these court opinions telling you to advise scrupulous fairness and balanced reporting? Thankfully, no.

"If a newspaper had a duty to be scrupulously fair, an argument could be made that the *Statesman* breached that duty. However, the Founding Fathers decided not to impose such an obligation upon newspapers... Frustrating though it may be to Mrs. Worrell-Payne, the *Statesman* had no legal obligation to present a balanced report of the controversy."

The case was dismissed on summary judgment by the trial court and that decision was affirmed by the Ninth Circuit.

Alice Neff Lucan is a sole practitioner in Washington, D.C. providing prepublication advice to newspaper clients. She is a member of LDRC's Prepublication/Prebroadcast Committee.

Summary Judgment In “Girls Gone Wild” Case

Federal judge Anne Conway in Florida has granted summary judgment for defendants in another of the line of cases stemming from videotapes of women exposing themselves in public at various celebratory events. *Lane v. MRA Holdings, Inc.*, Civil No. 01-1493 (M.D. Fla. summary judgment granted Nov. 26, 2002).

The plaintiff, Veronica Lane, was shown exposing her breasts and unzipping her pants in the “Girls Gone Wild” video. Lane had been filmed while driving a car with a friend – who also exposed herself – in Panama City, Fla. during Labor Day weekend of 1999.

The federal court, to which the defendant moved the case from Florida state court, granted summary judgment on the grounds that the plaintiff’s image had not been used for a commercial purpose under Florida law because it was not used to directly promote a product or service, that plaintiff had consented to the filming, and that such filming did not constitute misappropriation or false light invasion of privacy.

“[The] ‘Girls Gone Wild’ video depicts Lane accurately as exchanging nude photographs for beads on a street in Panama City, just as other women in the video are doing,” District Judge Anne Conway wrote in her order granting sum-

mary judgment. “Altogether, MRA’s juxtaposition of Lane with other women exposing themselves cannot give rise to the tort of false light invasion of privacy because the depiction of Lane was reasonable, accurate, and truthful.”

There have been two other recent cases stemming from the “Girls Gone Wild,” videos: one settled in October, while the other was dismissed in March. See *LDRC MediaLawLetter*, Oct. 2002, at 28.

For Plaintiff Veronica Lane: Joseph Daniel Tessitore of Motes & Carr (Orlando). For Defendant MRA Holdings: Thomas R. Julin and D. Patricia Wallace of Hunton & Williams (Miami). For Defendant Mantra Films: Thomas R. Julin and D. Patricia Wallace of Hunton & Williams (Miami). For Defendant AMX Productions: David Charles Willis and David Leonard Evans of Mateer & Harbert (Orlando). For Defendant Ventura Distribution: Thomas R. Julin and D. Patricia Wallace of Hunton & Williams (Miami). For Defendant Woodholly Productions: David Charles Willis and David Leonard Evans of Mateer & Harbert (Orlando); David A. Brooks and Jonathan B. Cole of Nemecek & Cole (Sherman Oaks, CA); Thomas R. Julin and D. Patricia Wallace of Hunton & Williams (Miami).

Lin Wood Representing Gary Condit in Slander Claims

According to The New York Times, Atlanta attorney Lin Wood – who also represents Richard Jewell and the Ramseys – is representing about-to-be-ex Congressman Gary Condit against writer Dominick Dunne. Dunne is alleged to have made false statements about Mr. Condit’s involvement with the Chandra Levy murder case. Lin Wood was quoted in The Times as saying that “Dominick Dunne and others in the media, whom I would call a foolish handful, turned accusations of sexual misconduct into accusations of murder...That crossed a line the congressman was not willing to sit back and tolerate without taking action.”

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Sarbanes-Oxley, Analyst Conflicts, and Press Freedom

Editor's note: On December 20, it was reported that NASD had announced that it was revising its proposed rule, submitted to the SEC for review and discussed below, to remove any requirement that analysts not talk to reporters whether or not their news organizations reported the conflicts held by the analysts.

By Rebecca Hulse

Rarely does an *interpretation* of a *proposed* rule generate as much furor as the recent attempt by the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) to encourage the publication of analyst conflicts information. According to an interpretation out last summer of rules proposed by the NASD and NYSE, journalists who publish analysts' opinions without also disclosing their stock ownership and company relationships could find themselves shut out by their sources. The interpretation suggests that the rules would require analysts to effectively boycott those journalists who refuse to publish the analysts' conflicts of interest.

Amidst this time of corporate uncertainty, the rules respond to the perceived need to "improve the objectivity of research and provide investors with more useful and reliable information when making investment decisions." NASD Notice to Members, 02-39 (July 2002). Whether or not these particular rules would achieve that goal remains open to debate. Following a torrent of criticism, the NASD has already indicated it might back down.

While the restraint on the press would be indirect and would involve private entities – the stock exchanges and investment brokers – rather than direct control of the press by state actors, members of the Fourth Estate believe the proposed rules raise serious constitutional concerns. Those in the print media insist that good journalists will (and do) publish conflict information when relevant. In their view, journalists should not be told – especially not by the government – when to do so. The Supreme Court has agreed. In *Tornillo* the Supreme Court held that a "a responsible

press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." 418 U.S. 249, 256 (1974).

Print Similar to "Public Appearance?"

To those who support the proposed requirements, the rules simply bring the print media in line with other forms of media already implementing the rules. Television interviews with analysts, for example, following NYSE rules adopted last summer, already feature conflicts information at the bottom of the screen.

The dispute centers around what may seem to some a harmless interpretation of the NASD and NYSE implementation of the Sarbanes-Oxley Act mandating increased disclosure for analysts that make "public appearances." Sarbanes, Section 501. Until recently, the NASD and NYSE have been satisfied defining the term as appearances on television or other live interview formats. An interpretation of the rules published by the NASD last July, however, would include print media in this rubric. Critics argue that print media are unlike other media because the editorial space is limited and because editorial discretion, to include some information and not include other, is central to the freedom and functioning of a free press.

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The rules would require analysts to effectively boycott those journalists who refuse to publish the analysts' conflicts of interest.

Calling All Trials!

We are now collecting information for our report on trials against the media during 2002. If you were involved in or are aware of a trial that resulted in a verdict during 2002, please tell us about by contacting Eric Robinson at erobinson@ldrc.com. With your help, our annual report will remain an accurate and comprehensive resource to libel, privacy and related litigation against the media.

Sarbanes-Oxley, Analyst Conflicts, and Press Freedom

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State Action

To be held to constitutional standards however, state action must be present. Proponents of the new rules argue that NASD and the NYSE are private, member-driven organizations. Indeed many – if not all – courts ruling on the matter have specifically found that although securities organizations are heavily regulated by the SEC, and although rules promulgated by the NYSE and the NASD must be SEC-approved, they are not state actors for purposes of civil claims.

A close look at these decisions, however, leaves open an avenue of argument. Private organizations and individuals that act as arms of the state can be held constitutionally liable. Congress, through Section 501 of Sarbanes-Oxley, has explicitly required securities organizations to promulgate rules exposing analysts' conflicts of interest. The cases deeming the NYSE and NASD non-state actors are therefore inapposite. These cases arise out of instances where the NASD and NYSE are in fact acting as private actors – such as the NASD's use of mandatory arbitration clauses in its contracts. Unlike arbitration clauses, here the NYSE and NASD are undertaking congressionally mandated action, buttressing the argument that while they may not be state actors, they are in fact engaging in state action.

But even if state action were present, the rules are crafted in a way that they do not directly regulate newspapers – they regulate analysts. Any effect on the media is arguably indirect and incidental. Courts have found time and again that the press has no implicit right of access to information not under state control (e.g., not in the hands of a court or state body). Again, perhaps the argument that the state has effectively deputized the NASD and NYSE to do its bidding will have some impact on the legal analysis.

Rules May Reduce Public Info

One of the fundamental ironies of this debate, from the standpoint of those who support the proposed rules

at least, is that it appears those in the print media critical of the new rules are arguing for the right to *deprive* the public of information. They want the editorial discretion to leave out conflicts information without the repercussion of losing their source. Proponents of the rules may argue that freedom of the press exists not to protect this discretion in and of itself, but to ensure that “the government ... never limit[s] the stock of information from which members of the public may draw.” *Belotti*, 435 U.S. 765, 783 (1978).

But it has rightly been emphasized that the rules, lofty as they seem, will certainly operate to decrease the amount of information available to the public. Is it practical to think that firms will have the resources or inclination to track every print “appearance” of their analysts? Firms and their legal departments are already buckling

How many will follow Prudential's lead in prohibiting their analysts from talking to the press at all?

under the pressure of complying with Sarbanes' many complexities and under-formed mandates. How many will follow Prudential's lead in prohibiting their analysts from talking to the press at all?

These very questions with the rules as they are currently interpreted have many, including those at the NASD and the NYSE, reconsidering their workability. Rumor has it that even as this article goes to press, the NASD is on the verge of amending its rules to address some of the concerns noted here (for example, by specifying that the rules apply to articles written by analysts, but not to news reports). Said Mary Shapiro of the NASD, “we had a goal to get information to investors... [b]ut I don't think we have the right to achieve that goal by cutting off access to newspapers.”

In any event, to the extent that the principles of good journalism can and indeed already do ensure that relevant and newsworthy conflict information is provided to the public, the interests of Sarbanes-Oxley and the print media are perfectly aligned. It is just a matter of finding the right mechanism to maximize instead of constrict the flow of information.

Rebecca Hulse is an Associate at Hill & Barlow in Boston, Massachusetts.

Homeland Security Update: Fighting Terrorism Through Secrecy

By Robert D. Lystad

Congressional approval of the Homeland Security Act, said President George W. Bush, marked “an historic and bold step forward to protect the American people.” Sen. Joseph I. Lieberman (D-Conn.) concurred, calling it “an historic day in this new age of insecurity.”

For advocates of access to government information, it was an historic day as well. For all the wrong reasons. Long-time freedom of information champion Sen. Patrick Leahy (D-Vt.) called it “the most severe weakening of the Freedom of Information Act in its 36-year history.”

Why? Because the new law – which was passed and signed into law in November – provides a broad exemption from disclosure under the FOIA for business information voluntarily supplied to the new Department of Homeland Security that relates to “critical infrastructure.” As if an automatic FOIA exemption were not enough, the law imposes criminal penalties for leaks of business information. And companies that share information with the government also gained immunity from civil liability even if the information reveals wrongdoing, as well as immunity from anti-trust suits for sharing the information with the government and each other.

Thus, as Sen. Leahy explained, if a company submits information that its factory is leaking arsenic in ground water, “that information no longer could be used in a civil or criminal proceeding brought by local authorities or by the neighbors who were harmed by drinking the water.”

With passage of the Homeland Security Act, Americans will be subject to the most powerful government agency in history, one that seeks to fuse nearly two dozen federal organizations into a single mega-department with one urgent mission: stopping terrorism. The department could command more than 70,000 armed federal agents with arrest powers.

The FOIA exemption attracted little notice on Capitol Hill until several journalism organizations joined forces this summer with environmental advocates and other public interest groups to lobby against the White House-backed provisions. The groups succeeded in having compromise language approved in the Senate. That language, sponsored by Sens. Leahy, Carl Levin (D-Mich.) and Robert Bennet (R-Utah), would have created a narrow exemption from disclosure for confidential business information shared with the

government. (For further details of the competing provisions, see *LDRC MediaLawLetter*, July 2002, at 35).

Emboldened by the November election results, however, the Bush Administration and House Republicans persuaded Senate Republicans and a few Democrats to reject the narrower Senate compromise and instead support the broad, business-friendly language passed by the House of Representatives, angering access proponents.

“The principles of open government and the public’s right to know are cornerstones upon which our country were built,” said Sen. Levin. With the White House proposal, “we are sacrificing these principles in the name of protecting them.”

While some groups are devising a strategy to revisit the broad FOIA provision in the next Congress, prospects appear dim. With Republicans assuming majority control of the Senate, it seems unlikely they will want to disturb the legislation that passed. Indeed, private industries may become more emboldened to seek exemptions from the FOIA for other types of information provided to the government.

Robert D. Lystad is a partner at Baker & Hostetler LLP, Washington, D.C. The firm serves as First Amendment counsel to the Society of Professional Journalists.

UPDATE **Access to War,** **Inspections Are Issues**

Pentagon Plans to “Embed” Media

As the military prepared for possible action against Iraq, Pentagon officials have said several times over the past several months that their plan is to embed journalists within military units in any such conflict, in addition to activating the military reporting pool.

“Can I give you assurance that we recognize the desirability of having people embedded?” Defense Secretary Donald Rumsfeld asked himself during an Oct. 30 meeting of Pentagon officials with media Washington bureau chiefs. A transcript of the meeting is available at www.defenselink.mil/news/Nov2002/t11012002_t1030sd.html.

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Access to War, Inspections Are Issues

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“Yes, we do recognize that,” Rumsfeld answered. “Do we want to try to get them in as early as possible, that it's not going to put at risk the U.S. forces that are in there? Yes, we do want to do that.”

Rumsfeld added, however, that he could not assure that reporters would be able to travel with military units immediately once war begins, because of the unpredictable nature of warfare.

Asked whether having journalists embedded in military units was a “core principle,” Rumsfeld said that it is “generally almost always helpful to have the press there to see things and be able to report and comment and provide information about what's taking place.” But he added that “[t]here are obviously times when that's not appropriate, the danger is too great or the confidentiality of what's taking place is such that it's not appropriate.”

Military officials also told media representatives that journalists may have to alter their equipment so that it does not reveal the location of American troops.

Placing reporters with military units would mark a departure from recent military operations, including the overthrow of the Taliban regime in Afghanistan last year, during which journalists were generally prevented from entering war zones until long after the initial attacks. Rumsfeld explained the delay in Afghanistan by stating that “we spent days and ultimately weeks trying to get first Special Forces people and later ground forces into Afghanistan, and to do it we had to first develop relationships with the Northern Alliance and then we had to develop an arrangement whereby we could physically get them in there.”

The Pentagon has already offered the first of what is meant to be a series of training sessions during which reporters will learn about military culture and operations. See *LDRC MediaLawLetter*, Nov. 2002, at 41. Officials said that participation in the program is not a pre-requisite to being placed with troops or with the media pool.

Rumsfeld said that he “think[s] it is particularly useful because we see intelligence that they [Iraqi officials] are already arranging things that will mislead the press in Iraq as to how they want to do things.

“There's a risk that they will do that and try to blame it on the United States in the event that something takes place in Iraq, and having people who are

honest and professional see these things and be aware of that is useful,” he added. “So I consider it not just the right thing to do but also a helpful thing.”

Inspectors Hold Media At Bay, While Iraqis Invite Them In

United Nations weapons inspectors have had little comment for reporters that have trailed them from inspection site to inspection site, and reporters have not been allowed to accompany the inspectors during their visits.

“We don't want journalists to be with us in the facilities,” International Atomic Energy Agency spokeswoman Melissa Fleming told the Associated Press. “We believe we can't carry out our professional job (with journalists accompanying inspectors).

“We want to be the ones who draw the conclusions about what we see,” she added. “We are the experts. Our nuclear inspectors know what given dual use items might mean, whereas a journalist doesn't.”

In many cases, however, Iraqi officials allowed reporters limited access to inspection sites after the UN teams have finished their surprise visits.

“We will allow everybody to follow in order that international public opinion be acquainted with what is going on in our country and from our point of view, the press will be granted full access to every single site,” an anonymous Iraqi official told the Associated Press. “Taking into consideration the transparency of our position, we are not hiding anything. Every journalist is allowed.”

Developments in Access Cases

Cases regarding public access to court hearings and information involving the Sept. 11 terrorist attacks and their aftermath continue, with several new developments:

- The 3rd Circuit Court of Appeals rejected a motion for rehearing *en banc* in a lawsuit challenging the blanket policy of holding closed immigration hearings in cases that the government says are related to terrorism investigations. *North Jersey Media v. Attorney General*, No. 02-2524 (3rd Cir. motion denied Dec. 3, 2002). On Oct. 8, the appellate court reversed a lower court

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Access to War, Inspections Are Issues

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ruling that the policy was unconstitutional. 308 F.3d 198 (3rd Cir. 2002). Five of the court's 12 sitting judges favored granting the rehearing; Judge Anthony Scirica filed a dissent of the denial.

- The 3rd Circuit's opinion conflicts with the 6th Circuit's ruling that immigration hearings involving Muslim activist Rabih Haddad could not be closed under the blanket order. *See Detroit Free Press v. Ashcroft*, Civil No. 02-1437, 303 F.3d 681 (6th Cir. 2002). An open hearing was held in Haddad's case in October under the 6th Circuit's ruling. *See LDRC MediaLawLetter*, Oct. 2002, at 53; *see also Detroit Free Press v. Ashcroft*, 2002 WL 31317398 (E.D. Mich. Oct. 7, 2002) (granting in part plaintiff's emergency motion to compel compliance with court order). *See insert on this page*.
- The government reached an agreement with the ACLU and other groups that sued for information regarding searches that have been conducted under the USA Patriot Act since its passage last October. *ACLU v. Department of Justice*, Civil No. 02-2077 (D.D.C. Nov. 26, 2002); *see LDRC MediaLawLetter*, Nov. 2002, at 43. The Act allows records searches at libraries, bookstores and Internet service providers. *See LDRC Libel-Letter*, Dec. 2001, at 47. Under the agreement, the government will release the documents by Jan. 15, as well as a list of documents it feels must remain confidential. The plaintiffs – which besides the ACLU include the Electronic Information Privacy Center, the American Booksellers Foundation for Free Expression, and the Freedom to Read Foundation – may then challenge the decision to withhold any documents. The suit was filed after the government did not respond to a Freedom of Information Act request for the information.
- On Nov. 22, the government agreed to release a secret FBI report on how the agency interrogated Abdallah Higazy, who falsely confessed to owning a radio capable of ground-to-air communication that was found in a hotel near the World Trade Center, rather than challenge motions brought by several news organizations seeking access to the report. *U.S. v. Higazy* (S.D.N.Y. motions filed Nov. 14, 2002). The request was filed by the *New York Times*, CNN, the *Daily News* and *Newsday*.

Update regarding access to immigration proceedings. In late October, Attorney General John Ashcroft filed a petition with the Sixth Circuit Court of Appeals seeking en banc reconsideration of that Court's decision in *Detroit Free Press and Detroit News v. Ashcroft*. In that case, the Sixth Circuit held that the First Amendment creates a presumptive right of access to immigration proceedings. The Court has asked the newspapers to file a response to the petition. If you would like additional information about the case status, contact Detroit News attorneys and MLRC members Len Niehoff and Jim Stewart or Free Press attorney and MLRC member Herschel Fink.

-- Len Niehoff

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Plea Agreements Made Public in Southern California Federal Court

By Scott A. Wahrenbrock

The United States District Court for the Southern District of California recently reversed a five-year unwritten judicial policy under which plea agreements were not filed with the Court. Under the policy, judges returned plea agreements to the prosecutors after reviewing them, instead of filing them in the court files. This policy violated not only Ninth Circuit precedent, but also the U.S. Attorney's own rule, which requires the filing of plea agreements with the court.

The court referred *The San Diego Union-Tribune* reporters who sought plea agreements to the U.S. Attorney. The U.S. attorney was given unfettered discretion in deciding whether to release all, part, or none of these court records to reporters. In almost all cases, access was denied. The newspaper's informal efforts at remedying this unlawful policy were rebuked by both the U.S. Attorney's office and the Presiding Judge of the District Court.

The Union-Tribune filed several motions for access, not only seeking plea agreements being held by the U.S. Attorney, but also challenging the Court's policy. In each case, the Court refused to address the lawfulness of its policy, and permitted the agreements to remain sealed for reasons also expressed under seal. Only after *The Union-Tribune* appealed the Court's ruling to the Ninth Circuit did the District Court issue its order stating that all future plea agreements will be filed with the Court. Still left unresolved is whether the plea agreements at issue on appeal should remain sealed and whether the court must require public filing of all of the plea agreements it ruled on during the past five years.

Scott A. Wahrenbrock is of counsel to The Copley Press, Inc., the publisher of The San Diego Union-Tribune. He headed the legal team that challenged the District Court procedure on plea agreements. Carol Lam was opposing counsel for U.S. Attorney.

Judge Enjoins Reporter from Asking Questions

Editor's note: On Thursday, December 20, the trial court lifted the injunction after a hearing on the merits at which the only witness called was the reporter, Steve Andrews.

By Gregg D. Thomas

Florida judge Eric Meyers has issued a temporary injunction preventing a reporter from contacting the subject of a story. The temporary injunction was based upon allegations that the reporter asked "unwarranted questions," improperly displayed information concerning the subject of the story, and videotaped the subject without his knowledge.

The controversy stems from a story by Steve Andrews, an investigative reporter for WFLA-TV Channel 8, concerning a Tampa judge's treatment of DUI cases. Minh B. Ross was one of the defendants mentioned in the story. In the course of investigating the circuit judge's handling of DUI cases, Andrews asked Ross and his attorney questions outside of the courthouse in Tampa. WFLA also obtained videotape of Ross driving to work while his license was suspended. On December 4, 2002, WFLA broadcast a news report concerning Ross's DUI case.

On December 5, Ross petitioned a circuit court to enjoin

Andrews from (among other things) contacting him. In the petition, Ross alleged that Andrews "or other persons associated with him filmed me, without my knowledge, during day to day functions." He also accused Andrews of "improperly displaying information about me" during a "newscast" and of asking "unwarranted questions."

That same day, the court granted the petition and entered a temporary injunction without a hearing. The court set the matter for a full evidentiary hearing on December 19, 2002. Andrews immediately filed an emergency motion to dissolve the temporary injunction. On December 12, 2002, the court held a hearing on Andrews' motion. The court denied Andrews' request to dissolve the injunction and refused to stay the injunction pending the December 19 hearing. The court also refused to view the videotape of the encounter between Andrews and Ross until the December 19 hearing.

Andrews immediately appealed the matter to the Second District Court of Appeal on December 13, 2002, and requested expedited consideration. That appeal is pending.

Gregg D. Thomas, James B. Lake and Rachel E. Fugate of Holland & Knight LLP are counsel for Steve Andrews. James Thomas represent Ross.

Give Up Your Guns

City of Chicago Wins FOIA Suit Against ATF; Seventh Circuit Affirms Summary Judgment

The Supreme Court is being asked to review the issue of privacy and government information on firearms in a cert petition on behalf of the Bureau of Alcohol, Tobacco and Firearms (ATF) seeking reversal of a Seventh Circuit judgment which would afford access to the City of Chicago to certain records regarding the sale and purchase of firearms in the Chicago area and nationwide. *City of Chicago v. United States Department of Treasury*, 287 F. 3d 628

The Seventh Circuit, affirming summary judgment on behalf of the City of Chicago issued by District Court Judge Brauer, held that none of the three FOIA exceptions cited by ATF were applicable in the case. The court of appeals ruled that there is no legitimate privacy interest in the purchase of a firearm; nor can a gun purchaser or seller have a reasonable expectation of privacy in information maintained by ATF concerning a gun purchase; and that any potential privacy interest would be outweighed in this circumstance by the public's interest in the information.

In the underlying case, Chicago brought suit against various firearm manufacturers, dealers and distributors for creating a public nuisance in the city by "intentionally marketing firearms to city residents" thereby interfering with the city's ability to enforce municipal gun control ordinances. Chicago requested information from the ATF, including the names and addresses of firearm manufacturers, dealers and purchasers from ATF's Trace, and Multiple Sale databases.

The ATF provided Chicago some of the requested information, but refused to divulge the names and addresses. Chicago thereupon brought a claim against ATF in federal district court. ATF asserted the information requested by Chicago fell within three exceptions to FOIA: interference with law enforcement proceedings; invasion of personal privacy relating to personnel, medical and/or "similar files"; and disclosure of information gathered for law enforcement purposes would "reasonably be expected to constitute an unwarranted invasion of personal privacy". The district court granted Chicago's motion for summary judgment

holding that none of the three exceptions covered the records at issue.

"Law Enforcement" Exception Not Applicable

ATF first claimed that the agency could withhold the requested information under Exception 7 (A) of FOIA. This exception permits the government to refuse a FOIA request for records "compiled for law enforcement purposes but only to the extent that the production of such law enforcement records...could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). The Seventh Circuit held this exception inapplicable because ATF had not met its burden of explaining how the disclosure would interfere with a pending enforcement proceeding.

The Seventh Circuit explained that while the court would show some deference to the agency's judgment, this deference would be exercised only when the agency has provided a specific connection between the requested information and an investigation. Here, ATF only provided the court with speculative, hypothetical scenarios in which the

disclosure would harm potential law enforcement proceedings. None of these hypothetical situations were deemed reasonable by either the district court or Seventh Circuit.

In amending their decision in a later opinion, the court explained that while the ATF did not have to provide specific situations where disclosure of this type of information has, in the past, harmed enforcement proceedings, the agency had to present to the court hypothetical scenarios which were reasonable to occur, or a showing of enforcement proceedings that are "pending or reasonably anticipated." (297 F. 3d 672).

Info Not "Similar" to Personnel or Medical Files; Purchasing Firearm not Private Act

Next, the Seventh Circuit held that Exception 6 to FOIA also did not apply to the requested information. Ex-

The court held, there is no recognizable privacy right in the purchase of a firearm, which is a public transaction.

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Give Up Your Guns

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ception 6 applies to information, the disclosure of which, would infringe on the privacy of the individual, including personnel, medical and “similar files.” The court first determined whether the requested records fell within one of these three categories. As the requested records were neither personnel nor medical files, the court had to determine whether they were “similar” in nature to these two other type of records.

Agreeing with the district court, the Seventh Circuit held that the information in the requested ATF files was not of the same “sensitive nature” as the information typically stored in personnel and medical files. The court distinguished *United States Department of State v. Washington Post* (456 U.S. 595 (1982)), in which the Supreme Court rejected a FOIA request made by the Washington Post to the State Department, holding that the information requested (in this case, whether certain Iranian citizens held valid U.S. passports) fell within Exception 6. In *Washington Post*, the Court described the requested information as sensitive in that it could be used to identify an individual, a similar function of personnel files.

The Seventh Circuit distinguished *Washington Post* writing that the information requested here, was not highly personal and disclosure would not cause any individuals mentioned in the records to “harm” or embarrassment. According to the court, “firearm manufacturers, dealers and purchasers are on notice that records of their transactions are not confidential and are subject to regulatory inspection.” (citing *United States v. Biswell*, 406 U.S. 311 (1972)) Because there is no privacy in the purchase of a firearm, the privacy rights of the individuals mentioned in the ATF records could not be infringed. Because the requested records did not fall within the exception, the court found it unnecessary to determine whether the disclosure would violate the personal privacy of any individual mentioned in the records.

Public Interest Outweighs Potential Privacy Interest

Finally, the court dismissed ATF’s argument that FOIA Exception 7(C) applies. 7(C) applies to “records or information compiled for law enforcement purposes...to

the extent that the production...could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. §(b)(7)(C) The government has the burden in showing the existence of a privacy right of an individual which would be infringed with the disclosure of the record, and that the public interest in the information does not outweigh the privacy interest. (citing *United States Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989)).

The Seventh Circuit found ATF had not met this burden. ATF argued that disclosure would infringe on the legitimate privacy interest of individuals named in the records, and there is no public interest in this particular information. First the court held, there is no recognizable privacy right in the purchase of a firearm, which is a public transaction (citing *Ctr. to Prevent Handgun Violence v. United States Dept. of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997)). The Gun Control Act also places firearm purchasers on notice that their names and addresses will be available to the public. citing *Biswell* at 775. Therefore, individuals referred to in ATF’s records have no privacy right which can be infringed by disclosure.

The court then proceeded to explain that even if a privacy interest existed in the records, this would be severely outweighed by the public’s right to the information. Disclosure of the records would further the purpose of the FOIA, namely to “contribute significantly to public understanding of the operations or activities of the government”. (quoting *Reporters Committee* at 775) Chicago’s motivation in enforcing municipal gun control ordinances cannot be a factor in judging the public interest. However, the public does have a serious interest in knowing how efficiently and effectively the ATF is accomplishing its mission, and whether ATF’s analysis of illegal gun trafficking can assist the city with executing its ordinances.

For City of Chicago: Lawrence Rosenthal, David A. Graver of the Office of the Corporation Counsel

For Department of Treasury/ATF: Steve Frank of the Department of Justice, Civil Division

Massachusetts Superior Court Dismisses Freelancers' Suit Against the Globe

Post-Tasini Agreement on Copyright Not Unlawful

By William N. Berkowitz and Rachel A. Viscomi

On November 26, 2002, Massachusetts Superior Court Judge Ralph D. Gants granted the Globe Newspaper Company's motion for summary judgment in an action brought by six former Globe freelancers in which the freelancers alleged that the Globe had engaged in "unfair and deceptive" trade practices. The case, *Marx v. Globe Newspaper Company, Inc.*, 2002 WL 31662569 (Mass. Super.), upholds a newspaper's freedom to set, in good faith, the terms on which it does business with independent contributors.

Background

In addition to publishing the print newspaper for which it is known, the Globe provides an on-line version of the paper through an affiliated website, boston.com, and offers content to other electronic media, such as NEXIS. Prior to 1997, the Globe generally excluded freelance content from its submissions to electronic publications.

The Globe's relationships with its freelancers were long governed by individual oral agreements. These oral arrangements typically gave the Globe the right to publish the work, while the freelancers, as independent contractors, retained the copyright. In 1996, the Globe briefly introduced a work-for-hire agreement that required those contributors who signed it to assent to an outright assignment of the copyright in their work to the Globe. Many regular contributors to the Globe did not sign this agreement, continuing to work under the terms of the preexisting oral agreements.

Impact of *Tasini*

In 1997, in *Tasini v. New York Times Company, Inc.*, 972 F.Supp. 804 (S.D.N.Y. 1997), *reversed*, 206 F.3d 161 (2d Cir. 1999), *affirmed*, 533 U.S. 483 (2001), the United States District Court for the Southern District of New York ruled that Section 17 U.S.C. § 201(c) of the Copyright Act rendered the New York Times Company a partial owner of its freelance content as a collective work; as such, the paper was permitted to republish and redistrib-

ute freelance content in online media as "revisions" of the publisher's "collective works." *Tasini*, 533 U.S. at 488. Following the District Court's *Tasini* decision, the Globe began to distribute freelance content in electronic media alongside content produced by staff.

On September 24, 1999, the Second Circuit reversed the District Court's grant of summary judgment in the *Tasini* case, finding that republication of freelancers' work without their consent constituted copyright infringement. 206 F.3d 161 (2d Cir. 1999). This reversal prompted the Globe to revert to the prior practice of not distributing to electronic media the work of freelancers who had not signed the work-for-hire agreement.

The License Agreement

In the Spring of 2000, the Globe promulgated a written license agreement which sought to delineate the contours of the paper's relationship with its freelancers. The agreement permitted freelancers to retain their copyright, but required, in part, that they grant the Globe "the non-exclusive, fully-paid up, worldwide license to use the accepted Work" for the entire term of the copyright, and "a non-exclusive, fully-paid up, worldwide license to use all of the Works that The Globe had previously accepted from [the freelancer], if any."

The non-exclusive license granted to the Globe "include[d] the right to publish the Works; to create derivative works; to use, adapt, modify, perform, transmit or reproduce such material and derivatives in any form or medium whether now or hereafter known throughout the world including, without limitation, compilations, microfilm, library databases, videotext, computer databases, CD-ROMS, and the Internet..." provided the Globe's use, transfer, or sublicense of the Work is limited to inclusion of the Work in works marketed or grouped under the Globe's name.

The Complaint

Six longtime freelance contributors to the Globe, unhappy with the terms of the Globe's License Agreement, brought an action in Massachusetts Superior Court alleg-

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Massachusetts Superior Court Dismisses Freelancers' Suit Against the Globe

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ing that the Globe's requirement that freelancers sign the Agreement constituted an unfair or deceptive trade practice in violation of the Massachusetts "Little FTC" Act, Chapter 93A. One of the six, Cate McQuaid, had actually executed the Agreement, but claimed she had done so under duress. During the course of the litigation, the Superior Court denied the freelancers' motion for preliminary injunction to enjoin the use of the License Agreement, and subsequently denied the Globe's initial motion to dismiss the action.

The Decision

On the Globe's motion for summary judgment, Judge Gants observed that under *PMP Associates, Inc. v. Globe Newspaper Co.*, 366 Mass. 593 (1975), the Globe would have been well within its rights to simply terminate its relationship with the freelancers. See *PMP*, 366 Mass. 596 (mere refusal to deal, without more, does not constitute an unfair trade practice under Chapter 93A). Next, he noted that, although they did not favor the terms, the plaintiffs did not assert that there was anything illegal in the Globe's insistence that its freelancers grant it broad licensing rights as to electronic media. Rather, he identified as "the crux of [plaintiffs'] claim. . . that the Globe may . . . not require them to relinquish their licensing rights with respect to work provided to the Globe before execution of [the] Agreement."

He commented,

"[t]his ultimatum left the freelancers with an unpleasant choice: either surrender, for past and future works purchased by the Globe, the copyright victory they had vicariously obtained from the Second Circuit in *Tasini* and continue to have the opportunity to sell their freelance work to the Globe, or preserve the fruits of that victory and lose the ability to sell their work to the Globe."
Id.

The court explored two potential theories under which the plaintiffs could make out a case for unfair business practice: violation of the implied covenant of good faith and fair dealing and bad faith modification of contract terms.

No Violation of the Implied Covenant of Good Faith and Fair Dealing

Judge Gants reasoned that a violation of the covenant of good faith and fair dealing would imply bad faith and unfair dealing, which would suffice to support a finding of violation of Chapter 93A. Reviewing the doctrine, he noted that Massachusetts appellate courts consider two types of conduct violative of the covenant: first, when one

contracting party violates the express terms of a contract in an attempt to improve the terms of the deal; and second, where a principal acts to deprive an agent of commissions that have been legitimately earned.

Judge Gants found that neither of these categories fit the facts of this case. He declined to expand the doctrine, reasoning that, given the

inarguably terminable nature of the relationship between the Globe and the freelancers, barring discrimination or violation of public policy, nothing prevented the Globe from renegotiating the terms under which it agreed to do business. The court reasoned that "if the Globe could terminate its relationship with a freelancer for bringing a copyright infringement claim, then it could certainly require the freelancer to relinquish such a claim as a condition of continuing that freelance relationship."

No Bad Faith Modification of Contract

Judge Gants next considered whether the Globe's demand that its freelancers relinquish their copyright in previously published work actions made out a claim for bad faith modification of the prior oral contract that previ-

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"If the Globe could terminate its relationship with a freelancer for bringing a copyright infringement claim, then it could certainly require the freelancer to relinquish such a claim as a condition of continuing that freelance relationship."

Massachusetts Superior Court Dismisses Freelancers' Suit Against the Globe

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ously governed the parties' relationship. The court adopted a standard taken from Comment 2 to G.L. c. 106 § 2-209, which outlines a "test of good faith" that governs the modification of contracts in a commercial setting. This test includes "'observance of reasonable commercial standards of fair dealing in the trade' and may in some situations require an objectively demonstrable reason for seeking a modification." G.L. c. 106, 106 § 2-209, Comment 2. Applying this test, Judge Gants concluded that the conduct alleged in the Complaint did not rise to the level of bad faith modification of a contract.

The court pointed out that the Globe only began to distribute freelance content in reliance on the first *Tasini* decision. Judge Gants explained: "Essentially, the Globe gambled that the District Court's decision would hold up on appeal, and it lost that bet." The court concluded that the institution of the License Agreement was prompted by this change in the legal landscape rather than any alleged desire to extort additional rights from its freelance contributors. While he acknowledged that the Globe's chosen course of action may have placed its freelancers "between a rock and a hard place," Judge Gants found that "it was chosen for an objectively demonstrable reason and therefore falls within the realm of reasonable commercial standards of fair dealing."

Duress

The court quickly disposed of Plaintiff McQuaid's claim that she had been forced to sign the License Agreement under duress, calling it "plainly untenable." Judge Gants noted that she had sufficient time to debate and consider the License Agreement before electing to sign it. He found, "[h]er claim of duress is really a claim that, financially, she could not risk losing her freelance relationship with the Globe." The court went on to note that the fact that a decision is difficult does not rise to the level of duress.

Conclusion

While the plaintiffs may have hoped to maintain both their business relationship with the Globe and their copyright claims against it, *Marx et al. v. Globe Newspaper Company* holds that in the absence of bad faith, a newspaper remains free to negotiate (or renegotiate) the terms on

which it deals with freelance contributors. The paper's determination not to accept work from those who sought to preserve their potential copyright claims against the Globe was not bad faith, "unfair" or "deceptive" conduct.

Ira Sills, Indira Talwani and Michael Doheny of Segal, Roitman and Coleman represented plaintiffs William Marx, Greg Mironchuk, Michael Quan, Carl Walsh, Linda Weltner and Cate McQuaid. George Freeman, Assistant General Counsel to The New York Times Company, and William N. Berkowitz, Fiona S. Trevelyan, and Rachel A. Viscomi of Bingham McCutchen LLP represented the defendant Globe Newspaper.

So, Who Poisoned the Insurance Guys...

A group from State Farm Fire & Casualty Company had lunch at the Catfish Cabin in Louisiana. Upon returning to work, four of them became ill. Another employee, hearing of the incident, sent around an email which reported the illness, noting that some of the guys were taken away in an ambulance, and then said:

"A manager of one of the divisions told us that it takes at the very least two to three hours for the very worst food poisoning to take that kind of effect. They think someone intentionally poisoned the food."

Catfish Cabin sued. The restaurant alleged that it had been accused of poisoning the insurance team. The Court of Appeal of Louisiana, Second Circuit, upheld summary judgment for State Farm, Judge Williams finding, correctly, that the statement e-mailed was just an opinion – someone may have poisoned the State Farm employees, but the e-mail did not state that it was the restaurant. *Catfish Cabin of Monroe, Inc. v. State Farm Fire & Casualty Company* (La.App.2 Cir. December 11, 2002).

Catfish was represented by Curtis D. Street. Anthony Sims was represented by William H. Hallack, Jr. State Farm was represented by Wayne Lee, Robert J. Bozeman and Joseph A. Aluisse

New Hampshire Supreme High Court Finds Presumption for Cameras in Courtrooms

By Jeffrey C. Spear, Orr & Reno, P.A.

In *Petition of WMUR Channel 9, et al.*, No. 2002-0181 (N.H. December 13, 2002), the New Hampshire Supreme Court ruled that New Hampshire's common law tradition of open and accountable government supported a presumption in favor of electronic media coverage of court proceedings, which can be overcome only upon a specific, fact-based showing of harm or prejudice.

Petitioners, WMUR Channel 9, New Hampshire Association of Broadcasters and Boston Globe, had sought permission from the Grafton County Superior Court to provide electronic coverage – television and audio recording – and still photography of all pretrial and trial proceedings in the trials of Robert Tulloch and James Parker. Tulloch and Parker were charged with the murders of Susanne and Half Zantop, professors at Dartmouth College. The murder investigation, the arrests of Tulloch and Parker, and the ensuing trial proceedings generated an intense amount of media and popular attention, both in New Hampshire and nationally.

Trial Court Bars Cameras

The trial judge, without a hearing, refused petitioners' request to televise, make audio recordings and still photographs of any proceedings in *Tulloch*. The trial judge relied on an administrative order forbidding any electronic media coverage in Grafton County Superior Court. The judge also relied upon New Hampshire Superior Court Rule 78, which provided that electronic media coverage of court proceedings is not permitted unless the trial court, "based upon the law and discretion," decides otherwise. Focusing exclusively on television, the judge determined that the presence of cameras posed a risk to the defendants' right to a fair trial, and that electronic coverage would not be permitted unless petitioners could "guarantee" that no prejudice would result.

Petitioners appealed to the New Hampshire Supreme Court, challenging the trial court's order. They argued that both the state and the federal constitutions protected their right to cover judicial proceedings by electronic means and photography. Petitioners also argued that New Hampshire's

long tradition of open and accountable government, combined with empirical evidence demonstrating the transparent nature of modern media coverage and the benefit to public understanding all supported a rule allowing electronic media coverage unless specific prejudice could be shown. The Supreme Court accepted the appeal, and in October 2002 heard oral argument before an audience of high school students as part of its efforts to open its own processes to the public.

Supreme Court

In an opinion issued on December 13, 2002, the Supreme Court addressed three main issues. First, it rejected petitioners' argument that their request for electronic media access implicated either the state or federal constitution. It stated that "the petitioners were given unrestricted access to be present, to gather information and to report upon the proceedings in *State v. Tulloch*; the only limitation the trial court imposed was its prohibition of cameras or other electronic media. . . . Such a limitation does not infringe upon the petitioners' constitutional right of access or gathering news." *Id.*, slip op. at 3.

Second, the court struck down the trial judge's administrative order prohibiting cameras and electronic coverage because it violated Superior Court Rule 78, stating that

"[w]hile the superior court rule and its guidelines leave the final decision to allow cameras in the courtroom to each individual judge, they do not authorize administrative orders or policies automatically excluding cameras or imposing heavy burdens on the media to justify allowing cameras into a courtroom."

Id. at 4.

Third, and most significantly, the court agreed that New Hampshire's longstanding policy in favor of open judicial proceedings, the advances made in camera and broadcasting technology in the 25 years since the adoption of rule 78, and the important role the modern electronic media play in informing and educating the public, all supported a presumption in favor of electronic media coverage. The Court stated:

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New Hampshire Supreme High Court Finds Presumption for Cameras in Courtrooms

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Advances in modern technology, however, have eliminated any basis for presuming that cameras are inherently intrusive. In fact, the increasingly sophisticated technology available to the broadcast and print media today allows court proceedings to be photographed and recorded in a dignified, unobtrusive manner, which allows the presiding justice to fairly and impartially conduct court proceedings. Radio and television broadcasts are important ways by which citizens receive news. They are effective channels of news transmission because they can carry the unfiltered content of proceedings directly to the public.

Id. at 5. As a result, the court adopted a presumption allowing electronic media access to court proceedings in all cases unless the party opposing such coverage could meet four requirements.

[T]o withstand appellate review, we recommend that future trial court orders restricting cameras or other electronic media from the courtroom be: (1) based upon clearly articulated findings of fact; (2) made after an evidentiary hearing at which all interested parties are given an opportunity to be heard; (3) drawn narrowly to address a particular problem posing a substantial likelihood of prejudicing the proceedings; and (4) imposed only when no other practical alternative is available.

Id. at 7. Because the court's decision "invalidate[d] Superior Court Rule 78, at least in part," it directed the Advisory Committee on Rules to "initiate the rule-making process for the adoption of a new rule not inconsistent with the policy of openness reaffirmed in this opinion." *Id.* at 8.

Together with James P. Bassett, Jeffrey C. Spear, Orr & Reno, P.A., represented the petitioners at trial and before the New Hampshire Supreme Court.

Virginia Court Denies Motion to Televisе Trial of Alleged D.C. Sniper John Allen Muhammad

By Kathleen Kirby

On December 12, 2002, Prince William County Circuit Court Judge LeRoy F. Millette Jr. denied a motion filed by numerous media organizations seeking leave to record and telecast pre-trial and trial proceedings involving alleged D.C. sniper John Allen Muhammad. Muhammad will be tried in Prince William County, Virginia in the October 9, 2002 killing of Dean Harold Meyers, who was shot once in the head as he pumped gas at a Sunoco station north of Manassas. Muhammad and John Lee Malvo, 17, are charged or suspected in 13 shootings in the Washington D.C. area — 10 of them fatal — and eight other attacks across the country.

Fair Trial Paramount

In ruling from the bench immediately following oral argument, Judge Millette emphasized that the defendant's right to a fair trial was "paramount." He agreed with the positions advanced by the Commonwealth's attorney and defense

counsel that televised coverage might intimidate witnesses, affect testimony, cause counsel to behave differently, and make it difficult for jurors to follow the court's instructions. He also cited the potential for prejudice should Muhammad stand trial in other jurisdictions where charges are pending.

The prosecutor, Peter Ebert, cited his experience in the same courthouse nine years ago with the Lorena Bobbitt penis-slashing trial, which was televised. He said witnesses had a tendency to "ham it up" when a camera was present, and that the coverage provided by reporters with seats in the courtroom for the Muhammad proceedings would be "adequate."

Defense counsel Peter Greenspun stated that media coverage would serve only to fuel public interest in the trial. He argued that televised coverage "would create an actual prejudice in this and all future prosecutions." Mr. Greenspun also stated his objection to still cameras in the court, which to date have been permitted in the Muhammad proceedings.

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Virginia Court Denies Motion to Televisе Trial of Alleged D.C. Sniper John Allen Muhammad

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Virginia AV Statute Applied

The media's motion was filed pursuant to Virginia Code § 19.2-266, which sets forth the framework for audio-visual coverage of court proceedings. The statute provides in pertinent part as follows:

§ 19.2-266. Exclusion of persons from trial; photographs and broadcasting permitted under designated guidelines; exceptions

* * *

A court may solely in its discretion permit the taking of photographs in the courtroom during the progress of judicial proceedings and the broadcasting of judicial proceedings by radio or television and the use of electronic or photographic means for the perpetuation of the record or parts thereof in criminal and in civil cases, but only in accordance with the rules set forth hereunder.

Va. Code Ann. § 19.2-266.

The statute also sets forth specific guidelines—violations of which are punishable by contempt—which the Virginia legislature intended to ensure that electronic coverage does not negatively affect the proceedings, or in any way prejudice the parties. For instance, the presiding judge has the authority at any time to interrupt or terminate coverage. Va. Code Ann. § 19.2-266, Coverage Allowed (1). Coverage of proceedings for hearings on motions to suppress evidence is prohibited. Va. Code Ann. § 19.2-266, Coverage Allowed (2). Coverage of jurors is prohibited. Va. Code Ann. § 19.2-266, Coverage Allowed (4). Moreover, the guidelines provide that the location and operation of camera equipment, and the movements of media personnel, are not distracting. Va. Code Ann. § 19.2-266, Location of Equipment and Personnel (1-9).

The statute provides that a court may exercise its discretion and prohibit the recording and telecast of proceedings only upon a finding of "good cause." Va. Code Ann. § 19.2-266, Coverage Allowed (1). According to the Virginia Supreme Court, a party opposing electronic coverage has the significant burden of demonstrating "good cause" that justifies prohibiting coverage. *Diehl v. Commonwealth*, 9

Va.App. 191 (1989). at 197, 385 S.E.2d at 232. Moreover, the Court has held that the "good cause" standard cannot be met by conclusory allegations of prejudice. *Vinson v. Commonwealth*, 258 Va. 459, 470, 522 S.E.2d 170, 178 (1999) (on review of capital murder conviction, Virginia Supreme Court rejected defendant's "conclusory argument" that television cameras prejudiced defendant's "right to a fair and impartial jury" and found no abuse of discretion in permitting television cameras in courtroom); *Fisher v. Commonwealth*, 236 Va. 403, 410 n.2, 374 S.E.2d 46, 50 n.2 (1988) (on review of capital murder conviction, Virginia Supreme Court rejected defendant's "generalized objection" to cameras in the courtroom, and found no prejudice or infringement of the defendant's due process rights).

Media Argument

The media groups sought permission to station two pool cameras in the back of the courtroom under the guidelines

set forth in the statute, and in accordance with the internal guidelines issued by the Virginia Association of Broadcasters. Electronic coverage of the trial, their motion argued, would be consistent with Virginia's common law presumption in

favor of open judicial proceedings and would best allow the press to fulfill its role as surrogate for the public in this case. Given that the Virginia General Assembly has recognized that audio-visual coverage of judicial proceedings can be accomplished without prejudice to the parties and without disruption or distraction, the motion argued, electronic coverage should be permitted absent a demonstration of "good cause."

Moreover, the Commonwealth's indictment under Virginia's new anti-terrorism statute alleges that Muhammad engaged in the "commission of or attempted commission of an act of terrorism with the intent to intimidate the civilian population at large." Under this definition, the entire community is the "victim" in this case. "There is a significant need for recording and telecast of these proceedings, because the physical confines of the courtroom and the importance of preserving order and decorum in the courtroom necessarily limit attendance," the motion stated.

(Continued on page 47)

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Virginia Court Denies Motion to Televis Trial of Alleged D.C. Sniper John Allen Muhammad

(Continued from page 46)

Defense Counsel Opposition

In a written opposition filed on December 6, Defense counsel argued that the Virginia Code does not provide a specific set of circumstances that justify an exclusion of cameras from the courtroom. Further, the Virginia courts have not provided an approved checklist of approved findings which a trial judge must make to properly render such a decision.

The unique and unusual circumstances of this case, the counsel for Mr. Muhammad argued, require exclusion given that cameras in the courtroom would prejudice:

- (1) the Defendant's right and ability to obtain a fair and impartial jury in this jurisdiction and any other,
- (2) the ability of the prosecution to protect witnesses from intimidation, influence or distraction,
- (3) the ability of the Accused to call for witnesses in the absence of intimidation, undue influence and distractions,
- (4) the Defendant's right to have a fair trial such that the court, counsel, court personnel, witnesses, and trial participants are distracted by the presence of cameras,
- (5) the additional pressure the ultimate jurors, already facing the huge task of setting aside public perception and pressure will receive, sequestered,
- (6) the likelihood from pre-trial proceedings that evidentiary matters will be revealed and argued, and
- (7) the greater likelihood the jury will have to be sequestered, and
- (8) the impact televising this case would have on the ability of Mr. Muhammad to receive a fair trial in any of the other jurisdictions where capital murder, first degree murder, and numerous other serious charges are pending.

Media Rebuttal

At oral argument, the media attempted to rebut the objections asserted by the prosecution and defense, relying on the Virginia Supreme Court precedent stating that generalized objections or assertions that the presence of cameras "may" have an adverse effect upon the interest of the defendant, without further proof, do not rise to the level of "good cause." The media asserted that fear of jurors being exposed to potentially prejudicial information or of witnesses being exposed to the testimony of other witnesses could be addressed

through means other than closure of trial proceedings to the electronic media, including instructing the jury on the nature of such media coverage and maintaining control of the courtroom.

In addition, particularly in response to defense counsel's allegations that news coverage often tends to "mislead" the public, the media argued that media coverage of the case would be extensive regardless of whether or not cameras were permitted inside the courtroom, and that permitting a camera to record the proceedings would allow the public to witness the most orderly presentation of the evidence and arrive at their own conclusions. Since the crimes themselves (regardless of who committed them) have had a direct, extraordinary impact on the public, it is critical, we argued, for the public to be able to directly watch the case regardless of the outcome of the trial.

Ruling Denies Access

Judge Millette's oral ruling was brief. He emphasized that the defendant's right to a fair trial was paramount, and concluded that it was more than "mere speculation" that participants in the trial would be affected "by having their every word broadcast and seen by many people across the country." Given the confines of the courtroom, Judge Millette left open the possibility of providing a closed-circuit telecast for victims' families perhaps others. He also gave a preliminary ruling that still photography would be allowed at the trial, provided that it is not disruptive.

The media parties, represented by Barbara VanGelder are considering an appeal. Muhammad will be tried in Prince William in the October 9, 2002 killing of Dean Harold Meyers, who was shot once in the head as he pumped gas at a Sunoco station north of Manassas. Muhammad's trial in Prince William is scheduled to begin on October 14, 2003. Malvo's first trial will be in Fairfax County, Virginia, where he is charged with the shooting death of FBI analyst Linda Franklin outside a Home Depot store. Malvo's court-appointed guardian is preparing for preliminary hearing early next year at which a judge is expected to determine whether Malvo will be tried as an adult and face the death penalty. A date for his capital murder trial has not yet been set.

Kathleen Kirby, Wiley Rein & Fielding LLP, is First Amendment counsel to the Radio-Television News Directors Association.

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