

MULRC Media Law Resource Center
MEDIA LAW LETTER

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Thank you Robin Bierstedt and Mary Ann Werner!

At the end of 2003, Directors of the MLRC Board, Robin Bierstedt of Time Inc. and Mary Ann Werner of The Washington Post, will be stepping down. Both have served this organization exceptionally well. Each has brought ideas and energy, wisdom and good humor to our proceedings on the Board and to the management of MLRC.

The staff of MLRC relies to an enormous extent on the input of the Board of Directors (and the DCS Executive Committee) — a body through which all of the ideas for projects, committees, etc. must be vetted. Indeed, many proposals start with and at the Board. Robin and Mary Ann, both of whom are experienced media counsel, were incredibly important to the success of this organization over recent years. And, quite honestly, it is hard to imagine running the joint without them!

The Directors put in a fair bit of time in the management of MLRC. They all deserve our gratitude for that, and for the attention they give to the operation of the organization. On behalf of MLRC I want to thank Robin and Mary Ann, but also the other directors of MLRC. The list of the directors, including the two new directors who will step into the Board starting 2004:

2004 MLRC Board of Directors

Harold W. Fuson, Jr. (chair)

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Susan E. Weiner

National Broadcasting Company

Bruce Johnson, (ex officio)

Davis Wright Tremaine LLP

Thank you Lee Levine

Lee Levine is stepping down as President of the Executive Committee of the Defense Counsel Section, a post he held during 2003. He deserves our deepest gratitude for all that he has contributed to the MLRC.

[For the uninitiated, the DCS EC has four members, each of whom moves up a step each year, serving four years total on the EC, the last as President, and then a fifth year as President Emeritus.]

But let us be clear about this — Lee's contributions to this organization go way back, long before he joined the Executive Committee ... and since I know he has already taken on an assignment for 2004, MLRC can only hope his contributions will extend forever. I have been one of many who have sat in awe of Lee's prodigious intellect and creativity...who has sat in awe of his incredible productivity...who has marveled at his ability to articulate the most difficult concepts in comprehensible fashion, to write with speed and yet sophistication, and to do it all with charm and grace.

Lee is one of those who can not only imagine a great project, he can and he will endeavor to make it happen. The breakout sections at the London Conference are but one of the many projects that owe their organization and ultimately, their success, to Lee. On behalf of MLRC, I thank Lee Levine.

- Sandra Baron, MLRC Executive Director

And the Defense Counsel Section Executive Committee for 2004 will be:

2004 DCS Executive Committee

Bruce Johnson, President

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Michael Weisskopf, Others Injured in Iraq

2003 MLRC Dinner Panelists Returned to Iraq

We at MLRC were very saddened to hear that TIME magazine senior correspondent Michael Weisskopf, who talked about conditions in Iraq in the aftermath of war at MLRC's Annual Dinner on Nov. 12, was seriously injured in Baghdad on Dec. 11. TIME photographer James Nachtwey and two soldiers from the U.S. Army's 1st Armored Division suffered less severe injuries in the incident.



Michael Weisskopf

According to press reports, Weisskopf, Nachtwey and the soldiers were in a Humvee on routine patrol in Baghdad when a hand grenade was thrown into their vehicle. Weisskopf reportedly attempted to throw the grenade out of the vehicle, but it exploded while he was doing so, severely injuring his arm. Nachtwey suffered shrapnel wounds. The two soldiers also were injured, but the nature and extent of their injuries were not immediately known.

Various observers said Weisskopf's quick action saved his life and the lives of the others in the Humvee. "He picked it up not knowing exactly what it was, but he knew he had to get rid of it quickly," Weisskopf's wife, Judith Katz, told the *Washington Post* after speaking with her husband. "I don't know what went through his mind, but that's what he was doing."

The participants in MLRC's panel discussion, titled "In the Trenches Revisited: War Reporting and the First Amendment - Part II," discussed their experiences reporting in Iraq. Weisskopf arrived in Baghdad a few days after the statue of Saddam Hussein was toppled by American troops, and spent four weeks there afterwards. He returned to Iraq in late November.

At the dinner, Weisskopf said that his most poignant experience in Iraq came when he and a colleague took a man who had been shot and left for dead in the middle of a road to the hospital. At first the doctors refused to accept the man, but Weisskopf insisted that he be brought into the emergency room, which he described as being in a state of chaos. "Everything was sort of contained – the trauma, the tragedy. That city was contained in this little frozen moment of the hospital. And it was a compelling story for me because it reflected just the impact of our invasion and also the trouble ahead. And it continues to haunt me because it's the kind of problem that continues to haunt Baghdad."

Cheryl Diaz Meyer Also in Iraq

Another panelist, *Dallas Morning News* photographer Cheryl Diaz Meyer, has also returned to Iraq, where she is



covering reconstruction. "The attack on Weisskopf and James Nachtwey really hit home with most journalists here in Baghdad because many of us know either or both of them," she wrote in an e-mail to MLRC. "Details have been slowly coming in about the attack and we are

Cheryl Diaz Meyer alternately gasping in horror and heaving sighs of relief that they are both alive.

"It is a very sobering moment for all of us."

ABA's Section of Intellectual Property Law To Seek Resolution In Favor of Federal Right of Publicity Statute

By Landis C. Best

The American Bar Association's Section of Intellectual Property Law (the "IP Section") plans to seek a resolution from the ABA supporting the enactment of a federal right of publicity statute. The IP Section will present its proposal to the House of Delegates in February 2004. Several organizations are mobilizing against such a resolution, including: the ABA Litigation Section's First Amendment and Media Litigation Committee, the ABA Litigation Section's Intellectual Property Litigation Committee, and the Tort Trial and Insurance Practice Section of the ABA.

The IP Section attempted to obtain a similar resolution last year, and circulated a proposed resolution, a report in favor of the resolution, and draft language of a federal right of publicity statute. The IP Section's proposal, however, was met by opposition from several media and intellectual property organizations and did not succeed.

For this round, the IP Section has omitted reference to a draft statute, and instead is focusing its efforts on adoption of a general resolution in favor of the federal right. The proposed resolution reads as follows:

RESOLVED, that the American Bar Association supports the enactment of federal legislation to protect an individual's right of publicity to the extent the individual's identity is used for a commercial purpose in "commerce", as that term is defined in Section 45 of the Lanham Act, 15 U.S.C. § 1127, and to prospectively preempt inconsistent state laws.

The IP Section has cited several reasons for its proposed resolution, such as that a federal statute will bring uniformity, stability, and predictability to an area that is currently governed by a patchwork of state laws. After reviewing the proposal and considering the issues for the second year in a row, the ABA Litigation Section's First

Amendment and Media Litigation Committee, along with the Intellectual Property Litigation Committee, are not in favor of such a resolution. These Committees within the Litigation Section of the ABA have identified three key areas of disagreement: (i) concern that the "right of publicity" will be codified in too broad a fashion; (ii) concern about federalizing an area that has historically been a matter for the States to decide; and (iii) concern that First Amendment interests will not be adequately protected. These Committees also found it difficult to analyze the proposed resolution in the abstract without any suggested statutory language. Given the

delicate First Amendment interests that are implicated in right of publicity situations — such as the right to comment on public figures through media such as music, art, or books — the proposed statutory language is a critical piece of information that is sorely missing.

There are many other organizations that will be weighing in on the subject over the coming weeks. If you would like to get involved, you may want to contact your local bar association representative to the American Bar Association.

Landis C. Best is a partner at Cahill Gordon & Reindel, LLP, and is co-chair of the ABA Litigation Section's First Amendment and Media Litigation Committee

There are many other organizations that will be weighing in on the subject over the coming weeks. If you would like to get involved, you may want to contact your local bar association representative to the American Bar Association.

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National Geographic Wins Suit By Freelancers Over CD-ROM

S.D.N.Y. Judge Rejects 11th Circuit Views

By Robert G. Sugarman and Pierre M. Davis

Introduction

United States District Judge Lewis A. Kaplan has held in *Faulkner v. Nat'l Geographic Soc'y*, 2003 WL 22927506 (S.D.N.Y. Dec. 11, 2003), that "The Complete National Geographic" (the "CNG"), a CD-ROM reproduction of all of the issues of *National Geographic Magazine* (the "Magazine"), is a "revision" permitted by § 201(c) of the Copyright Act of 1976.¹ In so doing, Judge Kaplan declined to give preclusive effect to the decision in *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 347 (2001), in which the Court of Appeals for the Eleventh Circuit held that the CNG infringed the copyrights of a photographer because it was a "new collective work," not authorized by § 201(c).

The CD-ROM

The CNG was created by digitally scanning each issue of the Magazine published between 1888 and 1996 chronologically, page by page, into a computer system, including all photographs, texts, advertisements and layout information. The scanned images of the Magazine are referred to by Judge Kaplan as the "Replica." *Faulkner*, at *3.² In addition to the Replica, the CNG contains a "multimedia sequence that displays [the Society's] logo followed by a promotional message by Kodak and a sequence depicting covers of ten issues of the Magazine that transition from one into another," referred to by Judge Kaplan as the "Moving Cover Sequence." *Id.* The third element of the CNG is "computer software that serves as the storage repository and retrieval system for the Magazine images," referred to herein as the Program. Some of the later iterations of the CNG, while eliminating the transitioning covers, included a "very short summary of each article" and certain other enhancements to the Program. *Id.* at *3.

The 11th Circuit

In December 1997, photographer Jerry Greenberg sued the Society and Mindscape, the distributor of the CNG, in the United States District Court for the Southern District of Florida. Greenberg claimed that, while the Society had the rights to publish his images in the Magazine, it did not have the right to publish them in the CNG. On June 8, 1999, Judge Joan A. Lenard granted the Society's motion for summary judgment, holding that the CNG was a "revision" permitted by § 201(c). *Greenberg v. Nat'l Geographic Soc'y*, 1999 WL 737890 (S.D. Fla. 1999), *rev'd*, 244 F.3d 1267 (11th Cir. 2001), *cert. denied*, 122 S.Ct. 347 (2001); *see also Faulkner*, at *4.

In April 2001, one week before the oral argument of *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), in the United States Supreme Court, the Court of Appeals for the Eleventh Circuit reversed, holding that the combination of the Replica,

Moving Cover Sequence and the Program resulted in a "new work" which was not protected by § 201(c). *Greenberg*, 244 F.3d at 1268.

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A CD-ROM reproduction of all of the issues of National Geographic Magazine is a "revision" permitted by § 201(c) of the Copyright Act of 1976

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National Geographic Wins Freelancer Suit

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Tasini and Its Impact on the § 201(c) Landscape.

The plaintiffs in *Tasini* were freelance authors who sold individual articles to The New York Times, Sports Illustrated and Newsday between 1990 and 1993. Those publications then licensed the articles for republication in three on-line database services: NEXIS, and two CD-ROM databases, the “New York Times OnDisc” (“NYTO”) and “General Periodicals OnDisc” (“GPO”).

NEXIS is a computerized database containing articles originally published in thousands of print publications. It reproduces the articles in text-only format. The NYTO CD-ROM is also text-based, but only contains articles from The New York Times. GPO, which, unlike NEXIS and NYTO, is image-based, contains articles from approximately 200 publications, including The New York Times, its Sunday Book Review and Magazine.

While GPO preserves the layout and graphics of the original print version of the article, it does not include surrounding pages or otherwise depict the issue or edition of the publication in which the article originally appeared. End users of these database products could, thus, access the freelance contributors’ articles individually, out of the context of the publications in which they originally appeared. Defendants argued the electronic publications involved were revisions of the collective works – the issues of the newspaper or magazine – in which they undeniably owned the copyrights.

Then District Court Judge Sonia Sotomayor, since elevated to the Second Circuit, agreed, and granted the publishers’ motion for summary judgment, holding that the privilege afforded by § 201(c) was transferable and that the electronic versions of the portions of the publications in which the Plaintiffs’ articles appeared were indeed “revisions” of the collective works within the scope of the 201(c) privilege. *Tasini v. New York Times Co., Inc.*, 972 F. Supp. 804 (S.D.N.Y. 1997).

The Second Circuit reversed, holding that republication in the databases infringed the authors’ copyrights because they were not merely revisions of the collective works in which the articles originally appeared, but, instead, were, in effect, republications of individual articles in electronic

form. *Tasini v. New York Times Co., Inc.*, 206 F.3d 161 (2d Cir. 2000).

The Supreme Court, with Justices Stevens and Breyer dissenting, affirmed the Second Circuit’s decision, holding that

“[t]he publishers are not sheltered by § 201(c)... because the databases reproduce and distribute articles standing alone and not in context, not ‘as part of that particular collective work’ to which the author contributed, ‘as part of...any revision’ thereof, or ‘as part of...any later collective work in the same series.’” *Tasini*, 533 U.S. at 488.

Significantly, the Court affirmed that the copyright law is media neutral, holding that the mere transfer of a work from one medium to another – specifically from paper to electronic format – does not alter the character of that work for copyright purposes. *Id.* at 502. Therefore, the database products infringed the copyrights of freelance writers not because they were reproduced in an electronic medium, but because they “reproduce and distribute articles standing alone and not in context, not ‘as part of that particular collective work’ to which the author contributed...” *Id.* at 488.

The Court rejected the publishers’ attempt to analogize their electronic publications to microfilm and microfiche because, unlike their database products:

Articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspapers...[T]he microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the Article, to the exclusion of surrounding material. Nonetheless, the user first encounters the Article in context. In the Databases, by contrast, the Articles appear disconnected from their original context.

Tasini, 533 U.S. at 501.

Judge Kaplan found the Eleventh Circuit’s opinion in Greenberg was irreconcilable with the Supreme Court’s decision in Tasini.

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National Geographic Wins Freelancer Suit

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Judge Kaplan's Opinion in *Faulkner*

Judge Kaplan began his analysis in *Faulkner* by declining to apply non-mutual offensive collateral estoppel against defendants because, *inter alia*, “a new determination is warranted in order to take account of an intervening change in the applicable legal context” wrought by the *Tasini* decision. *Faulkner*, at *8 (internal citations omitted). Judge Kaplan then found the Eleventh Circuit’s opinion in *Greenberg* was irreconcilable with the Supreme Court’s decision in *Tasini*, stating:

Greenberg resolved the revision issue by looking to the question of whether the CNG contained independently copyrightable elements in addition to the

Judge Kaplan held CNG “is a package that contains substantially everything that made the Magazine copyrightable as a collective work – the same original collection of individual contributions, arranged in the same way, with each presented in the same context.”

previously published collective works, i.e., the *Magazine*. *Tasini* took a different approach. It focused instead on whether the individual contributions appeared in the putative revisions – the electronic databases – in the same contexts in which they appeared in the original collective works. Moreover, its reference to the microform analogy has significant implications for the CNG. Accordingly, while it perhaps is possible, as a matter of formal logic, to reconcile the holdings of *Tasini* and *Greenberg*, the difference in the Supreme Court’s approach to the revision issue is nonetheless striking. *Id.* at 9.

In deciding the merits of whether the CNG is a revision under § 201(c), Judge Kaplan looked to § 201(c)’s legislative history, particularly the House Judiciary Committee Report, which in relevant part states:

“Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 122-23 (1976), reprinted in 5 U.S.C.C.A.N. 5659, 5738 (1976).

The encyclopedia example established that collective works could be updated over time with independently copyrightable entirely new articles, but still fall within the scope of the § 201(c) privilege. Thus, in Judge Kaplan’s view, the Eleventh Circuit’s holding in *Greenberg*, “that the presence of independently copyrightable material is inconsistent with a conclusion that the CNG is a

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'revision' of the print versions of the *Magazine* – cannot be reconciled with the legislative history. Indeed, it 'defies the very legislative history' upon which the Eleventh Circuit relied." *Faulkner*, at *10 (internal citations omitted).

Judge Kaplan, relying on *Tasini*, instead focused on "the manner in which [the freelancer's individual contribution] is 'presented to, and perceptible by, the user.'" *Id.* (internal citations omitted).

In deciding whether the CNG qualified as a revision, Judge Kaplan observed that the CNG created a page by page "exact image" of the *Magazine*, and that "each page of each issue appears to the user exactly as it was in the scanned print version of the *Magazine*, including all text, images, advertising and attributions." *Id.* at *11. In so holding, Judge Kaplan rejected the two essential arguments put forth by Plaintiffs.

He rejected the first, that the CNG contains material that did not appear in the paper version of the *Magazine*, such as the transitioning cover sequence, music and the Kodak promotional video message, because, like the encyclopedia referenced in § 201(c)'s legislative history, the privilege extends to collective works which contain "original contributions along with new or updated material." *Id.*

He rejected the second, that the software tools provide the user with a media experience different from the print version of the *Magazine*, first by holding that the technological advantages of software were akin to the advent of bound volumes and paper indices which no one would claim constituted infringement. *Id.* at *12. He further observed that the argument was "evocative of the Eleventh Circuit's suggestion" that status as a "new product" in a "new medium, for a new market" meant that the CNG was not protected by § 201(c). He found this argument unpersuasive because "[e]very revision is an original work of authorship and therefore a new product, yet each is protected by Section 201(c)." *Id.* at *11. He went on to state that,

"[t]he fact that this product appears in a new medium makes no difference, in and of itself, as media neutrality is a fundamental principle of the Copyright Act." *Id.* (internal citations omitted).

Judge Kaplan therefore held that, "the CNG is not a new collection...a new anthology or an entirely different magazine or other collective work." *Id.* at *12 (internal citations omitted). Instead, the CNG "is a package that contains substantially everything that made the *Magazine* copyrightable as a collective work – the same original collection of individual contributions, arranged in the same way, with each presented in the same context." *Id.* Because, "it is readily recognizable as a variation of the original," then, Judge Kaplan held that "the CNG is a revision" and he therefore "respectfully disagrees with so much of *Greenberg* as held otherwise." *Id.*

Judge Kaplan also held, relying on then district court Judge Sotomayor's opinion in *Tasini*, that the § 201(c) privilege is transferable and that the Society therefore had a right to allow defendant Mindscape to take responsibility for the reproduction and distribution of the CNG. *Id.* at *14.

Plaintiffs have indicated that they plan to appeal the decision.

Weil is counsel for all defendants (save Dataware, which is in bankruptcy and currently being dissolved) in all of the cases to which the decision applies, and the following lawyers are counsel for the Plaintiffs in the cases: Andrew Berger, who is counsel at Tannenbaum, Helpert Syracuse & Hirschtitt LLP (NYC); Stephen A. Weingrad, of Weingrad & Weingrad LLP (NYC); and Richard Schaden and Danial Nelson of Schaden, Katzman, Lampert & McClune (Broomfield, Colorado).

Mr. Sugarman is a partner and Mr. Davis an associate of Weil, Gotshal & Manges, LLP. The firm has represented the defendants in these cases since their inception.

¹ The decision is applicable to four of the several actions brought by photographers and authors against the National Geographic Society, National Geographic Holdings, its wholly owned subsidiary (collectively referred to herein as the "Society"), Eastman Kodak Company and Mindscape, Inc. It is not currently applicable to defendant Dataware Technologies, Inc., which is currently in bankruptcy.

² The full Westlaw citation number has been omitted from short-form citations throughout this article. Short-form citations instead are made only to the star pagination numbers in that opinion.

Jury Awards \$18.3 Million for Reporting on Deadly Accident

Jury Deadlocks on Punitives in False Light Case

A Florida jury has awarded Joe Anderson, Jr., the former owner of a road paving company, almost \$18.3 million in compensatory damages for an article in the *Pensacola News Journal* that he said caused the denial by the Florida Department of Environmental Protection of a cement plant permit. Anderson claimed that the article, which he conceded contained only true statements, placed him in a false light. But the jury deadlocked on punitive damages, leading the court to declare a mistrial on that issue. Florida Circuit Judge Michael Jones said after the verdict that he would hold a hearing to determine how to proceed in light of the jury's deadlock on the issue of punitive damages. *Anderson Columbia Co., Inc. v. Pensacola News Journal, Inc., No. 2001 CA 001728 (Fla. Cir. Ct., Escambia County partial verdict Dec. 12, 2003).*

Multiple Claims—But Only False Light is Tried

The lawsuit, originally filed by plaintiffs Anderson Columbia Co., Inc. and Joe Anderson, Jr., in March 2001, alleged that a series of articles published in December 1998 and in February and November 1999, and an editorial from 2000 had resulted in lost business for the company. These articles examined paving company Anderson Columbia's environmental record and contracts with the Florida Department of Transportation. An additional claim was brought by Joe Anderson, Jr. individually on the basis of an article that recounted the death of Anderson's wife in a hunting accident. This article was the basis not of a claim for libel but a claim of false light invasion of privacy.

In December 2001, Judge Jones ruled that most of Anderson Columbia's claims were barred by Florida's two-year statute of limitations. But, he allowed Anderson Columbia to amend the complaint to allege that two *News Journal* reporters had interfered with company contracts by making comments to elected officials about the company that went beyond their newsgathering activities. He also allowed the company to proceed with a claim for libel and allowed Joe Anderson, Jr. to proceed with his claim of false light.

The claim for contractual interference was later dismissed and Anderson Columbia voluntarily dismissed its remaining libel claim several days before trial began. By the time the case was tried, the only remaining claim was for false light, stemming from a portion of a single story published by the *Pensacola News Journal* on December 14, 1998. The statute of limitations in Florida for a claim of false light invasion of privacy is four years.

The Dec. 14, 1998 article focused on Anderson Columbia's political clout and campaign contributions and Joe Anderson Jr.'s plea of guilty to mail fraud charges after he was found to have bribed Hillsborough County commissioners in connection with road work projects. Anderson was

sentenced to three years probation, paid a \$384,000 fine in the bribery case, and testified against the officials. His conviction on mail fraud charges was later reversed on appeal based on case law that mail fraud cannot be used in cases of political corruption.

“Amie Streater made it appear that Mrs. Anderson’s death was intentionally caused by Joe Anderson and that his political connections allowed him to avoid prosecution.”

The article, by *News Journal* reporter Amie Streater, also included several paragraphs regarding a 1998 hunting accident in which Anderson, shooting at a deer, also accidentally shot and killed his wife, Ira, who was with him in the hunting party. After the incident, Anderson's probation was extended for two years because his possession and use of the firearm violated his parole.

Anderson claimed that in that article, “Amie Streater made it appear that Mrs. Anderson's death was intentionally caused by Joe Anderson and that his political connections allowed him to avoid prosecution.” Anderson also claimed that the article led the Florida Department of Environmental Protection to delay approval of a cement plant permit for Suwannee American Cement, an affiliate of Anderson Columbia Co., Inc.

At the start of jury selection, Anderson sought to have the trial delayed because of allegedly “biased” articles in the *News Journal* on the pending trial. The court rejected this motion, and a jury of five women and one man was selected in one day.

(Continued on page 12)

Jury Awards \$18.3 Million for Reporting on Deadly Accident

(Continued from page 11)

Opening Statements

In opening statements, plaintiff's lawyer Madison McClellan said that the article used "deceptive, well-chosen words" to imply that Anderson had intentionally killed his wife and got away with it because of his political connections. He added that including the incident in the political clout story was meant to "sex up" the article by adding an element of violence.

The plaintiff's main contention at trial had to do with the way the shooting incident was introduced in the article. The first sentence of the portion of the story dealing with the shooting incident stated that Anderson had "shot and killed" his wife, and plaintiff contended that the article did not state until two sentences later that law enforcement officials "determined the shooting was a hunting accident."

Newspaper attorney Dennis Larry's opening statement responded by stating that including the shooting incident was important to the story, since it explained why Anderson's probation from the bribery case was extended and that the bribery charge and resulting consequences to Anderson were relevant to the story detailing Anderson and Anderson Columbia's political clout.

A Nine Day Trial

The trial lasted nine days, with a grueling schedule that often stretched daily proceedings to twelve hours. On the third day of the trial, a legal assistant to Anderson's attorneys collapsed in the courtroom, prompting a pledge by Judge Jones to end each day's session at 6 p.m., and to allow the attorneys a lunch break and two ten-minute breaks during the day.

The plaintiff conceded that facts in the News Journal articles were true. His case was based on the argument that the shooting was irrelevant to the story and that they way that the incident was related made it appear as if Joe Anderson had intentionally killed his wife. This, in turn, led the state to deny Anderson the cement plant permit.

The plaintiff presented videotaped testimony from Florida Department of Environmental Protection Secretary

David Struhs, who made the decision regarding the cement plant permit. During questioning by the newspaper's attorney, Struhs testified that he denied the cement plant permit proposed by Suwannee American Cement Co., an affiliate of Anderson Columbia, because of the poor environmental record of Anderson's related companies.

On cross-examination, Anderson's attorney recounted Struhs' testimony in an earlier deposition in the suit that Suwannee American brought over denial of the permit. In that deposition, Struhs said that the permit was denied because of the company's lack of environmental compliance, but that information contained in the News Journal articles did enter his thinking. A lobbyist for Anderson Columbia then testified that in the course of several discussions about the permit rejection, Struhs and one other state environmental official had specifically asked him about the shooting incident.

The plaintiff also presented testimony by a former lending executive with GE Capital, who said that he had planned to lend funds for the cement plant un-

til, during a routine background check on Lexis Nexis in May 1999, as part of Anderson's loan application, he came across a "Dateline: Pensacola" story excerpt mentioning the killing of Ira Anderson. The executive said that what he read gave him the impression that Anderson had murdered his wife, and that it wasn't until two weeks later, when he read the full PNJ story, that he realized Ira Anderson's death was an accident. By that time, however, it was too late to resurrect the deal.

However, defendants called as a witness an executive from Lexis Nexis who testified that the *News Journal* articles on Anderson Columbia had not been available on the Lexis Nexis database in May of 1999,

The Plaintiff's Journalism Experts

The plaintiff presented three journalism experts – former *Tampa Tribune* news editor Jim Head, Florida A&M University professor and former editor Joe Ritchie, and former reporter John Van Gieson. All three criticized the

We are going to ask for punitive damages in the billions," another of Anderson's lawyers, Willie Gary, told the jury. "These people have got to be stopped."

(Continued on page 13)

Jury Awards \$18.3 Million for Reporting on Deadly Accident*(Continued from page 12)*

delayed mention that the shooting of Ira Anderson was accidental. "I was initially left with the impression [that] Mr. Anderson was a cold-blooded killer," Ritchie testified. Saying two sentences later that it was an accident was insufficient to cure the impression.

Head also criticized the reporter for failing to quote Anderson in the article. Head withdrew this criticism during cross-examination, when Larry pointed out that the reporter had made 39 attempts to contact Anderson and other Anderson Columbia representatives via telephone, cell phone and fax. Judge Jones denied the newspaper's motion to introduce documentary evidence of the reporter's efforts to contact Anderson, stating that defendants had not previously disclosed the records during discovery. At the same time, Judge Jones also ruled that the plaintiff could not argue there was no such evidence.

The plaintiff's case ended with his own testimony. "The Pensacola News Journal didn't write this as an accident," Joe Anderson, Jr. said in a day of teary-eyed testimony. "They said I shot and killed my wife, period."

Newspaper attorneys questioned Anderson as to why he refused the newspaper's offer to run a rebuttal — which Anderson had initially sought to place as a paid advertisement in the paper — for free; Anderson responded that he refused the offer because the paper reserved the right to edit his response. "I had all the editing I could stand from the Pensacola News Journal, free," he said.

In cross-examination Anderson also conceded that his settlement with the state over the cement permit, which he negotiated and signed, stated that denial of the permit was based solely on his company's prior environmental record. As to the GE Capital executive's statement that the killing halted plans to lend funds for the cement plant, Anderson testified to his attorney that, "I never heard him say that out of his mouth till he was sitting in this courtroom."

The plaintiff rested at the conclusion of Anderson's testimony, whereupon newspaper attorney Bob Bernius argued for a directed verdict. Jones denied the motion, and set the case to resume on Tuesday, Dec. 9.

Jones also reiterated a prior ruling that the newspaper could not introduce at trial evidence concerning the shooting. "It wasn't tried in 1988, and it's not going to be tried today," he said.

The portion of the news report at issue in this trial:

In 1988, while still on probation and before his conviction was reversed, Anderson shot and killed his Wife, Ira Anderson, with a 12-gauge shotgun.

The death occurred in Dixie County just north of Suwannee, where days before the shooting Joe Anderson had filed for divorce but then had the case dismissed.

Law enforcement officials determined the shooting was a hunting accident.

A federal judge ruled that by having the shotgun, Anderson violated his probation, and the judge added two years to Anderson's probation.

Capt. Bob Stanley of the Florida Game and Fresh Water Fish Commission was one of the officials who went to the scene of the shooting.

Anderson said that he and his wife were deer hunting when she walked one way down a road and he walked the other way, Stanley recalls. A deer ran between them and Joe Anderson fired twice. One shot hit the deer, the other hit his wife.

"One buckshot pellet hit her under the arm and went through her heart," Stanley said.

When investigators arrived on the scene, he said, they found that the other people in the hunting party had taken the deer back to the hunt club and were cleaning it.

"You have to understand, it's Dixie County," he said. "Back then, they shut down the schools for the first week of hunting season."

He said Anderson had stayed behind at the shooting scene, and he described Anderson as looking "visibly upset" after the shooting.

The Defense Case

Defendants' case included videotaped testimony from a former Florida DEP official and a former agency lawyer, both of whom said the cement plant permit had been denied solely because of Anderson Columbia's poor environmental record, not because of Anderson's hunting accident. The defense also presented three other officials — a former county engineer, a former DEP employee and

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Jury Awards \$18.3 Million for Reporting on Deadly Accident

(Continued from page 13)

a current DEP marine biologist – each of whom testified about problems with Anderson Columbia’s road work and that the company had operated its asphalt plant in a way that caused serious environmental damage.

The defense also presented deposition testimony of former *News Journal* executive editor Teresa Wasson, who defended the Anderson-Columbia articles as being factual and objective, and a video deposition of reporter Amie Streater, who said that she included the shooting in the story because it explained why Anderson’s probation was extended. Streater also explained some of the efforts she made to get either Anderson or Anderson Columbia to comment for the stories.

***In their closing arguments,
the newspaper’s attorneys said
the New Journal should not be
held liable for reporting facts
that were true.***

Finally, the defense surprised the plaintiff’s side by re-calling Anderson and presenting evidence that a subsidiary of Anderson Columbia received funding from GE Capital two months after the parent company was rejected for the cement plant loan, and used the funds to buy a helicopter. The defense also got Anderson to admit that the value of his company’s government contracts doubled from 1998, the year in which the articles were published, and the following year.

In their closing arguments, the newspaper’s attorneys said the News Journal should not be held liable for reporting facts that were true. But Anderson’s lawyers said that the newspaper had used the killing to “sex up” the article. “That’s National Enquirer. That’s tabloid,” plaintiff’s attorney Madison McClellan told the jurors. “But it sells.”

After five hours of deliberation, the jury found that the article had portrayed Anderson in a false light and awarded him \$18.28 million in compensatory damages. But the jury was unable to decide on a punitive damages figure, and Judge Jones declared a mistrial on that issue.

Anderson’s attorney, Willie Gary of Stuart, Fla., said after the partial verdict that he would seek \$2.5 billion in a retrial on punitive damages. Dennis Larry, Robert Kerrigan, and Robert Bernius, attorneys for The Pensacola News Journal, do not believe the verdict will stand under constitutional law and other precedent.

The News Journal was represented by Dennis Larry of Clark, Partington, Hart, Larry, Bond & Stackhouse, Bob Kerrigan of Kerrigan, Estess, Rankin & McLeod, LLP, both in Pensacola, and Robert Bernius of Nixon Peabody LLP in Washington, D.C. Anderson was represented by Willie Gary and Madison McClellan of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson, & Sperando, in Stuart, Fla.

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Sports Illustrated's Turn to Strip

Court Orders Magazine to Reveal Identities of Confidential Sources in Former Alabama Coach Mike Price's Defamation Lawsuit

By James P. Pewitt

On December 8, 2003, Judge Lynwood Smith of the U.S. District Court for the Northern District of Alabama entered an order and memorandum opinion rejecting Sports Illustrated's attempt to shield from disclosure the name of a confidential source cited and quoted by the magazine in its May 2003 story on Coach Price's alleged exploits in a Pensacola, Florida strip club and hotel. *Price v. Time, Inc. and Don Yaeger*, CV No. 03-S-1868-S (N.D. Ala.).

Bad Behavior

In the story, entitled "Bad Behavior: How He [Price] Met His Destiny At A Strip Club," Sports Illustrated reporter Don Yaeger quotes an unnamed woman, who agreed to speak to the magazine on the condition that her name not be used,

as part of a vivid account of Price's visit to Pensacola, his encounter with a stripper named "Destiny," and his night in the hotel. Yaeger also appeared on a local radio talk show and discussed the information contained in the article on the air.

Price had recently been hired as head football coach for the University of Alabama and had yet to coach his first regular season game. He was in Pensacola to play in a golf tournament. After information about Price's visit to Pensacola and the article became public, the University fired Price. He filed suit against Sports Illustrated's owner, Time, Inc., and Yaeger, asserting claims for libel, slander, and outrage. He contends that the information in the article about the events in his hotel room was false, although at a press conference shortly after his firing he admitted "making mistakes" and "at times inappropriate behavior."

In the course of discovery, Price sought the names of Sports Illustrated's confidential source for the story. Sports Illustrated objected, asserting that the source of the reporter's information is privileged under Alabama's shield law. In the alternative, Sports Illustrated asserted that the identity of its source is exempted from disclosure under the qualified reporter's privilege afforded by the First Amendment. Price argued that the identity of Sports Illustrated's source is not only relevant, but essential to his ability to carry his burden of proof in the case.

Tough Luck for Magazines

In an 18-page memorandum opinion, Judge Smith first analyzed Alabama's shield law, Section 12-21-142 of the Alabama Code, finding that, unlike the shield laws of other states, the Alabama statute does not protect those who write for magazines. Section 12-21-142 provides in part that "no person engaged in,

Judge Smith first analyzed Alabama's shield law, Section 12-21-142 of the Alabama Code, finding that, unlike the shield laws of other states, the Alabama statute does not protect those who write for magazines.

connected with or employed on any *newspaper, radio broadcasting station, or television station*, while engaged in a newsgathering capacity, shall be compelled to disclose" sources. (Emphasis added.) Following the maxim *expressio unis est exclusio alterius*, Judge Smith ruled that magazines are not covered:

"If the legislature had intended for the scope of the statutory privilege to include magazines or other media, it could have done so clearly and unequivocally."

The court next analyzed the qualified privilege. Recognizing that other courts had applied the privilege in various circumstances, the court nevertheless determined that Price had made the showing necessary to defeat it. According to Judge Smith,

"[t]here is no question that the identity of the undisclosed sources is relevant to a determination of the

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Sports Illustrated's Turn to Strip

(Continued from page 15)

truth or falsity of statements attributed to those sources in the article.”

The court also found that Price sufficiently demonstrated the absence of alternative means to obtain the identity of the source and that the information goes to the heart of the case. Quoting *Miller v. Mecklenburg County*, 602 F.Supp. 675 (W.D.N.C. 1985), the court wrote

“[t]he only way [plaintiff] can establish malice and prove his case is to show that [defendants]

knew the story was false or that it was reckless to rely on the informant. In order to do that, he must know the informant's identity.”

Price is represented in the case by Stephen E. Heninger of Heninger, Burge, Vargo & Davis, LLP. Time, Inc., and Yaeger are represented by Gary C. Huckaby, Kenneth M. Perry, and Kimberly Bessiere Martin of Bradley Arant Rose & White LLP.

James P. Pewitt is a partner with Johnston Barton Proctor & Powell LLP in Birmingham, Alabama.

Sheckler Accepts \$1 Million After Remittitur

The plaintiff in a Virginia libel case whose \$10 million compensatory damage defamation verdict was remitted to \$1 million by an appellate court has accepted the lower figure rather than insisting on a retrial. The defendant, television station WVIR-TV, has not decided whether it will appeal.

The case, *Sheckler v. Virginia Broadcasting Corp.*, Case No. 02-60 (Va. Cir. Ct., Charlottesville), arose out of a news report first aired in April 2001 on WVIR-TV. The report accurately explained that five people, including the plaintiff, Jesse Sheckler, were arrested and charged in connection with a conspiracy to distribute cocaine. But the report inaccurately reported that the DEA and local drug enforcement agents “confiscated 50 grams of crack cocaine and 500 grams of powdered cocaine . . . at Sheckler's home and business.” In fact, no cocaine was ever found at Sheckler's business or residence. WVIR rebroadcast the partially false report in October 2001 during Sheckler's criminal trial, at which the jury acquitted him of all charges.

Sheckler sued two of WVIR's reporters and its owner, Virginia Broadcasting Corporation, contending that the broadcasts were false and defamatory. On May 23, after a three-day trial, the jury rendered a \$10 million verdict — the entire amount Sheckler requested — solely for actual compensatory damages. Before trial, the court had granted WVIR's motion to strike Sheckler's punitive damages claim, holding that he had not presented sufficient evidence of actual malice to support an award of presumed or punitive damages. See *MLRC MediaLawLetter*, June 2003, at 7.

WVIR filed a post-trial motion to set aside the verdict and for a new trial (either *in toto* or on the issue of damages only) or, in the alternative, for remittitur. In an eleven-page order, the trial court granted the motion in significant part and explained in detail why the \$10 million verdict was “so disproportionate to the plaintiff's defamation-related injuries as to ‘shock the conscience of the court.’” See *MLRC MediaLawLetter*, Nov. 2003, at 9.

The “most plausible explanation,” for the excessive verdict, the court concluded, was that the jury “misperceived the law” and “set out to punish the Defendant in addition to compensating the Plaintiff.”

The court set aside the verdict and ordered that plaintiff either remit \$9 million of the \$10 million award or, in the alternative, submit to a new trial on damages only. The court's order required that Sheckler make his selection by November 21.

Sheckler decided to accept the \$1 million on November 21, although a final order had not been entered as of Dec. 16.

Thomas E. Albro of Tremblay & Smith, L.L.P. in Charlottesville represented the defendants at trial, while the plaintiff was represented by Matthew B. Murray of Richmond and Fishburne, L.L.P. in Charlottesville. Lee Levine, Ashley I. Kissinger and Alia L. Smith of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. assisted with WVIR's post-trial motion.

California Appeals Court Reverses Defense Jury Verdict in Privacy Case Against MGM

A California appellate court reversed a jury verdict in favor of MGM/UA and its parent company, Metro Goldwyn Mayer, Inc., on common law and statutory invasion of privacy claims based on the broadcast of a telephone conversation on a police reality show. *Marich v. MGM/UA Telecommunications, Inc.*, 2003 WL 22708668 (Cal.App.2.Dist. Nov. 18, 2003) (Hastings, J., concurring Vogel, P.J. and Epstein, J.). The court held that an erroneous and prejudicial jury instruction on the media defendants' intent required a new trial.

Call From Police Taped

Plaintiffs Robert and Marietta Marich sued over an episode of the television series *LAPD: Life on the Beat* which featured a four-minute segment in which Los Angeles officers discover plaintiffs' deceased son at his home and telephone the couple to inform them of their son's death. The video portion showed the officer's side of the conversation, but his lapel microphone picked up plaintiffs' reactions over the telephone. Although the original recording was allegedly unintelligible, plaintiffs argued that a sound editor enhanced the quality of the recording, making it audible in the broadcast.

The trial court initially dismissed the action under the California anti-SLAPP statute, §425.16, but was reversed on appeal. See 27 Media L. Rep. 2036 (Cal. App. 2 1999) (unpublished). Plaintiffs' claims for common law intrusion and eavesdropping in violation of California Penal Code Sections 631, 632 and 634 went to trial in 2001. After requesting several clarifications and read backs on the meaning of "intentional," the jury returned an 8-4 verdict in favor of the defense. (The parties had stipulated to an 8-4 verdict to avoid a deadlock.)

Answering a special verdict form, the jury found that defendants

- 1) had not "intentionally" intruded into plaintiffs' solitude; and
- 2) that defendants used an electronic recording device to eavesdrop on plaintiffs but had not "intentionally" eavesdropped on their telephone conversation.

Erroneous Jury Instructions

On appeal, plaintiffs contended that the court's jury instructions on intent for both claims was erroneous. The court delivered the pattern instruction for invasion of privacy, BAJI No. 7.20, ("the essential elements of the claim are: the defendant intentionally intruded, physically or otherwise, upon the solitude or seclusion, private affairs or concerns of the plaintiff," that it was highly offensive and caused damage), but added, at the request of defendants, the following additional instruction on the meaning of "intentional":

For liability the intrusion must have been intentional. Any unintended or mistaken foray into the territory of another does not give rise to liability.

The intrusion must also have been injurious or damaging. Any act committed or an omission made in ignorance or by reason of a mistake of fact disproves any intent to commit such act or omission. Thus, a person does not act unlawfully if he or she commits an act or admits the act under an actual belief in the existence of certain facts and circumstances which, if true, would make the act or omission lawful.

This language was taken from *Miller v. NBC*, 187 Cal.App.3rd 1463, 232 Cal.Rptr. 668 (Cal. App. 2 1986) which, on reversal of summary judgment for the defense, held that plaintiffs stated a claim for invasion of privacy against media defendants who entered plaintiffs' home without consent while on a ride-along with paramedics.

Impermissible Shift of Burden

The Court of Appeals admonished the trial court for using an extracted portion of an appellate court decision which did not specifically concern the definition of the term "intentional" – particularly for purposes of a jury instruction.

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The court held that an erroneous and prejudicial jury instruction on the media defendants' intent required a new trial.

Appeals Court Reverses Defense Verdict

(Continued from page 17)

The trial court's definition of intent, the appellate court said, should have followed the Restatement which provides:

"The word 'intent' is used throughout the Restatement ... to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second) Torts §8A.

Instead the trial court's instruction impermissibly shifted the burden onto the plaintiffs to disprove mistake of fact as an element of the cause of action. Mistake of fact would, if anything, be an affirmative defense for the media defendants to prove, but the court found no evidence of mistake of fact in the record. According to the court, the sound people who miked the police officers knew that their equipment would pick up the plaintiffs' phone conversation.

The court found that the jury's "confusion over the court's definition of intentional was manifest," especially given the answer on the special verdict form that defendants had eavesdropped on plaintiffs. The court remanded for new trial, finding that plaintiffs had not properly preserved a request for a directed verdict.

Rex Heinke and Mirah Horowitz of Akin, Gump, Strauss, Hauer & Feld in Los Angeles represented the defendants on appeal. Laurence Watts, Watts & Associates, and Evan Marshall represented plaintiffs.

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Judge Recuses Himself from Libel Suit

Threatened Newspaper in Unrelated Case

In response to a defense motion, New York trial court judge Nelson H. Cosgrove voluntarily recused himself from a libel suit he was presiding over involving *The Buffalo News* after the newspaper's motion papers revealed that he had threatened the newspaper with retribution if it published an article about the arrest of an attorney who was trying an unrelated case before the judge. In a letter received by the administrative judge of the Eighth Judicial District on December 3, Judge Cosgrove said he was submitting the libel case, *Cottrell v. The Buffalo News*, for reassignment. In that case, Buffalo area businessman Sidney Cottrell is seeking \$5 million in compensatory damages and \$10 million in punitive damages from *The News*.

Judge Cosgrove's action took place less than one week after *The News* filed a motion to disqualify him in the libel case and bar him from hearing any future cases involving the newspaper. According to affidavits sworn to by editors at *The News*, Judge Cosgrove telephoned the newsroom on November 12, 2003, demanding that editors refrain from publishing a report on the arrest of attorney Carmen Tarantino for burglary, grand larceny and criminal mischief for breaking into his girlfriend's apartment. According to court papers, Judge Cosgrove told *The News* he wanted the editors to shelve the story until Tarantino completed trying a medical malpractice before him, which he predicted could last several weeks, claiming a news story about the arrest could cause a mistrial in the case. After the newspaper refused the judge's request, he purportedly went into a tirade, telling an editor that he was "pissed off" and would find a way to "hurt" *The News* in the future.

The News' motion argued that the judge's appearance of bias made disqualification and recusal mandatory under New York's Code of Judicial Conduct Canon 1, the parallel Rules of the Chief Administrator, (22 N.Y.C.R.R. §§100.1 - 100.5), and NY Judiciary Law § 14. Moreover the motion to disqualify Cosgrove was intended to protect *The News'* short term and long term interests and to defend the independence of the press from official interference and intimidation.

Joseph Finnerty of Stenger & Finnerty in Buffalo, New York represented the *The Buffalo News*.

Georgia Appeals Court Affirms Libel Verdict For Deputy Sheriff

The Georgia Court of Appeals has affirmed a \$225,000 award to a Lowndes County sheriff's deputy, whom a jury found was libeled by a weekly newspaper's coverage of the death of prisoner while in police custody. *Lake Park Post v. Farmer*, No. A03A0842, ___ S.E.2d ___, 2003 WL 22765350, 2003 Ga. App. LEXIS 1467 (Ga. Ct. App. Nov. 24, 2003).

Previously, the newspaper's publisher said that if his appeal was not successful, it could result in the newspaper's demise.

Arrestee's Death Leads to Case

The case stemmed from the death of Willie J. Williams, who died in police custody on Sept. 2, 1998, more than 24 hours after the plaintiff, Deputy Kevin Farmer, stopped him for a traffic violation and discovered that there was an outstanding warrant against him. According to police, Williams' head hit the pavement when he resisted arrest; he later died of what an autopsy found to be "complications of blunt force head trauma."

In several articles published after Williams' death, the *Lake Park Post* accused Farmer of beating Williams and called him a murderer. Farmer made several demands for a retraction, and filed suit after the paper refused.

When the suit was filed, Parsons claimed that it was backed by Lowndes County Sheriff Ashley Paulk, in retaliation for the newspaper's reports on abuse of prisoners at the county jail. Paulk confirmed that he had recruited former state attorney general Mike Bowers to represent Farmer, and that he allowed a captain to solicit about \$90,000 in donations for the case.

The jury awarded \$65,000 compensatory damages and \$10,000 in punitive damages against each of the defendants – the *Post*, publisher/editor Parsons and columnist Charles Moore – for a total of \$225,000. See *LDRC MediaLawLetter*, July 2002, at 3.

In their appeal, the defendants argued that the plaintiff had not presented clear and convincing evidence that they had acted with actual malice, and that the trial court improperly denied their motion for a directed verdict.

Court Finds Actual Malice

After explaining the elements of libel, including the actual malice standard, the court reviewed the evidence presented at trial and concluded that "the evidence fully supports the jury's conclusion that the Lake Park Post defendants published the articles in question with constitutional malice." The court's opinion was written by Judge Anne Elizabeth Barnes.

Even though Parsons and Moore testified that they believed the statements in the articles were true, the evidence plainly demonstrates that they had no reason for doing so. The Lake Park Post defendants repeatedly labeled Farmer as a murderer and Moore said that he 'lynched' Williams when no proof existed to support either version. More significantly, Parsons and Moore had available to them abundant evidence that these claims were false.

The court also noted that "the defendants so doubted the truthfulness of their articles that they refused to print any information that contradicted their version of the events."

J. Converse Bright of Valdosta, Ga. represented the Lake Park Post and its publisher/editor Al Parsons. Columnist Charles Moore was represented by Patrick Cork of Cork & Cork in Valdosta. Mike Bowers and Chris Anulewicz of Meadows, Ichter & Bowers, P.C. in Atlanta represented plaintiff together with Bill Langdale, Jr. of Langdale, Vallotton, Linahan & Wetherington in Valdosta.

Any developments you think other MLRC members should know about?

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Directed Verdict in Mistaken Identity Case Newspaper Reported Arrest of Defendant's Alias

A New Jersey judge issued a directed verdict in late November in a libel case where the newspaper defendant erroneously published plaintiff's name as that of a criminal defendant, having been given the name by the police. The court ruled that the newspaper's story was a fair report of government information, and found for the newspaper. *Yeager v. Daily Record*, No. MRS-L-312-01 (N.J. Super. Ct., Morris County directed verdict Nov. 20, 2003).

On Dec. 29, 2000, police responded to reports of a disorderly male at a methadone clinic in Randolph, N.J. The man, who clinic officials identified as Joseph Overko, left the clinic before the police arrived. When police ran the name and other information provided by the clinic through a national crime database, the computer reported that Overko's real name was Daniel J. Yeager.

Alias From 80s Survives

It turns out that when Overko was stopped for speeding in the late 1980s, he had told police that his name was Daniel J. Yeager, a former classmate. Even though Yeager had attempted to correct the confusion at the time, his name remained in the national crime database as Overko's "real name."

Based on the information in the database, Police Officer Jeffrey Gomez prepared an investigation report and a criminal complaint, both of which named the man at the methadone clinic as Daniel J. Yeager. Based on these documents, a local judge issued a warrant for the arrest of Yeager. Gomez then went to an address in Netcong, N.J. and arrested "Yeager." Overko apparently did not correct this misimpression until he pleaded guilty to a disorderly person's offense in April, four months later.

Some of the court documents named the defendant as "Daniel J. Yeager, a/k/a Joseph Overko." This is the standard form used when a defendant has used an alias in the past.

An item in the police blotter of the Morris County, N.J. *Daily Record* of Jan. 2, 2001 gave the correct identity of the defendant, Joseph Overko, as did a Jan. 4 article in the *Newark Star-Ledger*. But a full article on the case published on Jan. 4, 2001, written by reporter Peggy Wright and based on the documents and court records, reported that the defendant was Daniel J. Yeager of Hopatcong, N.J.

Towards the end of that month, Wright received a letter

from Daniel J. Yeager stating that he was not involved in the criminal case. She later testified that she confirmed the mixup with Police Lieutenant Gary Gouk, although he did not recall the discussion. The *Record* ran a correction on Jan. 27.

Yeager filed suit against the paper. In a pre-trial proceeding, Superior Court Judge W. Hunt Dumont held that the negligence standard applied to the case.

Dumont also initially ruled that the plaintiff need not show actual harm in order to prevail, but later reversed himself.

The defense moved for a directed verdict at the conclusion of the plaintiff's case, but Superior Court Judge W. Hunt Dumont denied the motion. He granted it, however, at the conclusion of the defense case.

Story Was "Right"

"This Court concludes that Defendant Wright got the story right on January 4, 2001, even though the accused is misidentified," Dumont said in an oral ruling on Nov. 20, 2003. "One can conclude that Miss Wright had a reasonable basis to rely on the information at the time she got it from Assistance Prosecutor Rodriguez without going into the two names in her article."

Dumont added that even if Wright had seen the Jan. 2 blotter item, she would have called the police to verify the identity of the arrested person, and would have been given the wrong information.

He also added that plaintiff had failed to show any actual harm.

"The blame, if any, lies with Joseph Overko in the first instance, who used Daniel J. Yeager's name," Judge Dumont concluded, "and then with state and local law enforcement for not getting it straightened out before the article was published. Peggy Wright did nothing wrong; nor for that matter, [did] her editor, Joseph Ungaro."

After the directed verdict, Yeager said that he would not appeal.

The *Daily Record* was represented by John C. Connell of Archer & Greiner in Haddonfield, N.J. Reporter Peggy Wright was represented by Collier, Jacob & Mills in Somerset, N.J. Plaintiff Daniel Yeager was represented by Jennifer Broznak of Giblin & Combs in Morristown, N.J.

DC Circuit Affirms Dismissal of Female Jet Fighter's Libel Suit Finds Her to Be Limited Purpose Public Figure

The D.C. Circuit Court of Appeals affirmed dismissal of libel and invasion of privacy claims brought by Carey Lohrenz, one of the first female combat fighter pilots, against a public policy group and its director for publishing reports that she was unqualified and the beneficiary of a double standard to promote women in the Navy. *Lohrenz v. Donnelly*, 2003 WL 22927418 (D.C.Cir., Dec. 12, 2003) (Rogers, J., Roberts, J. & Silberman, J.)

In a decision by Judge Judith Rogers, the court affirmed that Lohrenz was a limited-purpose public figure and found that she became one by choosing to become an F-14 combat fighter pilot at a time when there was a public controversy swirling around the issue of women in combat roles. The court also affirmed that she failed to provide sufficient evidence to show that defendants acted with actual malice in attacking her competence.

The case arose from a series of reports and statements made by the Center for Military Readiness ("CMR"), a public policy group, and its president, Elaine Donnelly, that Lohrenz was unqualified as a combat pilot, that she should have failed out of the fighter training program, but was retained under a double standard to promote her status as a pathbreaking female combat aviator.

Avoids "Involuntary" Analysis

Plaintiff's appeal focused on the dispositive issue of her status. The trial court held that Lohrenz was "a limited-purpose public figure, albeit possibly involuntarily." 223 F.Supp.2d 25, 45 (D.D.C.,2002) *citing Dameron v. Washington Magazine*, 779 F.2d 736, 741-42 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1141 (1986).

The D.C. Circuit found no need to explore the rare involuntary public figure category, instead holding that Lohrenz was clearly a voluntary limited-purpose public figure under the three-part test set forth by the D.C. Circuit in *Waldbaum v. Fairchild Publications, Inc.*, 627

F.2d 1287 (1980). Under *Waldbaum* the court must (1) isolate the public controversy; (2) determine whether the plaintiff either plays a tangential role or has achieved a special prominence in the debate; and (3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy.

Lohrenz did not contest the first and third prongs of the test, essentially conceding that there existed a public controversy about women in combat and that Donnelly's comments were germane to the subcontroversy about women combat pilots and the Navy's alleged double standards. The major issue scrutinized by Judge Rogers is whether Lohrenz achieved a 'special prominence' in the public debate on female combat aviators.

The court held that by choosing to accept an F-14 assignment while knowing of the preexisting public controversy over the appropriateness of women in combat positions, Lohrenz assumed the risk that she would find herself at the

center of the controversy. The court characterized Lohrenz's contention that she did not affirmatively insert herself into the controversy because it was the Navy that selected her assignments as "legally irrelevant."

No Actual Malice Despite Bias and Official Denials

As a public figure, Lohrenz bore the burden of proving by clear and convincing evidence that defendants published with actual malice. The court adopted the standard for actual malice set forth in *Tavoulaareas v. Piro*, 817 F.2d 762, (D.C. Cir. 1987). Under *Tavoulaareas*, defendants act with actual malice if at the time of publication they were subjectively aware that the story was (1) fabricated; (2) so inherently improbable that only a reckless person would have put it in circulation; or (3) based wholly on an unverified anonymous telephone call or some other source that appellees had obvious reasons to doubt.

The court found that Lohrenz's evidence showed Donnelly's actions did not meet the *Tavoulaareas* standard for

(Continued on page 22)

The court held that by choosing to accept an F-14 assignment while knowing of the preexisting public controversy over the appropriateness of women in combat positions, Lohrenz assumed the risk that she would find herself at the center of the controversy.

DC Cir. Affirms Dismissal of Female Jet Fighter's Libel Suit

(Continued from page 21)

actual malice because her publication was based on a knowledgeable, non-anonymous source. Evidence that the publishers of the alleged defamatory statements were on a mission to reinstate the ban against women being assigned to combat positions in the military was deemed insufficient to establish actual malice.

Finally, despite the Navy's official denials, no reasonable juror could find that defendants knew their charges were false, or obviously doubted them. Defendants were not required to accept such denials because "such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Lohrenz* at *12.

Rodney A. Smolla, Dean and Allen Professor of Law, School of Law, University of Richmond, represented plaintiff on appeal. Defendants were represented by Kent Masterson Brown and Frank M. Northam of Webster, Chamberlain & Bean in Washington, D.C.

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Michigan Court Throws Out False Light Case Against Eminem

A Michigan trial court granted summary judgment in favor of rap music artist Marshall Mathers III, a/k/a "Eminem Slim Shady" in a false light action brought against him by a grade school classmate. *Bailey v. Mathers*, 2003 WL 22410088 (Mich. Cir. Ct., Oct. 17, 2003). At issue were the lyrics of Eminem's 1999 song "Brain Damage," as well as his statements in a *Rolling Stone* magazine article, that described being harassed by plaintiff in elementary school.

Among the statements at issue, were passages from the song stating:

"I was harassed daily by this fat kid named D'Angelo Bailey ... One day he came in the bathroom while I was pissin/And had me in the position to beat me into submission/He banged my head against the urinal til he broke my nose/ Soaked my clothes in blood, grabbed me and choked my throat."

The *Rolling Stone* article stated, in part:

"Yes, the bully who gets it with a broomstick in 'Brain Damage' was entirely real. 'Motherfucker used to beat the shit out of me,' Eminem said."

Judge Deborah Servitto of Macomb County ruled that although most of these were statements of fact ca-

pable of verification, they were substantially true based on plaintiff's admission that during elementary school he, indeed, was part of a group that used to do "bully type things" to Eminem, including "push defendant down, throw defendant, or flip defendant over." Moreover, the lyrics were not highly offensive where plaintiff conceded he "basked in the limelight" for six months following the song's release and granted two interviews about the song in which he admitted to doing "bully type things" to Eminem.

Judge Servitto concluded that alternatively the complained of statements were, in context, non-actionable rhetorical hyperbole. Reasonable people would not interpret the song as stating actual facts about plaintiff, but rather would understand that Eminem was simply "telling a story, a fictional recitation of hard time during grade school."

Finally, taking her own stab at the rap genre, Judge Servitto summarized the decision in rhyme, concluding "it is therefore this Court's ultimate position that Eminem is entitled to summary disposition."

Eminem was represented by Peter W. Peacock, Plunkett & Cooney, P.C., Mt. Clemens, Michigan; plaintiff D'Angelo Bailey, by Byron Nolen of Detroit.

Pennsylvania Supreme Court Rejects Judge's Bid to Unmask Anonymous Speaker

By Susan Yohe

An anonymous internet critic of Pennsylvania Superior Court Judge Joan Orié Melvin has won the latest round in Judge Melvin's now three-year old campaign to discover her critic's identity.

In early 1999, an anonymous author of Internet web page known as "Grant Street '99," accused Judge Melvin of "misconduct" by lobbying former Pennsylvania Governor Tom Ridge on behalf of a particular attorney who was said to be seeking appointment to an upcoming vacancy on the Allegheny Court of Common Pleas bench. Judge Melvin first went to Virginia, home of AOL, "Grant Street '99's" web host, and sought an ex parte order requiring AOL to reveal the identity of "John Doe." When AOL notified Doe of Melvin's action, Doe contacted the ACLU, which had the Virginia action dismissed for lack of jurisdiction. Judge Melvin then filed her libel suit against Doe in Pennsylvania, where she again sought an ex parte order unmasking Doe. Again, the ACLU intervened on Doe's behalf and Melvin again sought Doe's identity, this time in discovery.

Plaintiff Wins in Lower Courts

The ACLU objected to the discovery and argued that Doe had a First Amendment right to engage in anonymous political speech and that the only way to adequately protect that right was to require public officials who seek the identity of their anonymous critics to demonstrate first that they suffered some pecuniary loss proximately caused by the alleged defamation. Judge Melvin admitted that she had not suffered any pecuniary loss as a result of the "Grant Street '99" posting. The ACLU, consequently, moved for summary judgment. Melvin, in turn, moved to compel a response to her discovery request seeking Doe's identity.

The trial court declined to erect a special barrier to suits by public officials against anonymous critics and ordered Doe's identity revealed. The ACLU appealed to the Superior Court, arguing the interlocutory appeal should be allowed under Pennsylvania's collateral order doctrine. Three fellow judges of Melvin's on the Superior Court declined to consider the merits of the appeal, finding that the lower court's order did not qualify as collateral to the defamation claim and therefore, was not worthy of interlocutory review.

Supreme Court Sends it Back

The Pennsylvania Supreme Court granted the ACLU's petition for allowance of appeal, and on November, 19, 2003, sent the case back down to the Superior Court for a consideration of the merits. *Melvin v. Doe*, 2003 WL 22724628 (Pa.).

The Supreme Court found the lower court's order that Doe's identity be revealed was a collateral order because it was not impermissibly intertwined with the resolution of the underlying defamation action, and because the trial court's discovery order affected a right which would be lost if review was postponed until the end of the trial and which was too important to be denied review.

While acknowledging the tension between the First Amendment and the States' recognized interest in preventing and punishing defamation, the Court found that

"the court-ordered disclosure of [Doe's identity] presents a significant possibility of trespass upon First Amendment rights."

The Court concluded,

"There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy that goes beyond this particular litigation, and that it falls within the class of rights that are too important to be denied review."

Three justices on the seven justice court wrote separately, (Chief Justice Cappy, joined by Nigro and Eakin) concurring in the result but chastising the majority for commenting on the merits of the appeal, rather than simply concluding that the right involved was sufficiently important to warrant interlocutory review of the trial court's discovery order.

Ann Beeson, Pro Hac Vice; Ronald D. Barber, Witold J. Walczak for Appellants. John Andrew Valentine, for Appellant Amicus Curiae, America Online, Inc. John Orié, Robert Lampl, Pittsburgh for Appellee, Joan Melvin.

Susan A. Yohe is a shareholder with Buchanan Ingersoll practicing in the Commercial Litigation Group in Pittsburgh, PA.

Fair Report Privilege Protects Story about Bankruptcy First Meeting of Creditors

By Thomas J. Williams

Applying the Texas statutory privilege for fair, true and impartial accounts of a judicial proceeding to a story about a First Meeting of Creditors in a bankruptcy case, a Texas state trial judge dismissed a libel suit brought by an Austin advertising agency against the publisher of DRTV News, a New York based trade publication. *Fast Media, LLC v. Mill Hollow Corp.*, Case No. 99-08200, (126th District Court of Travis County, Texas).

The suit arose out of a story published in the May 17, 1999 issue of DRTV News concerning the bankruptcy of American Television Time, Inc., a now-defunct Austin advertising agency. Sean Sexton, a DRTV News reporter covering the American Television Time case, prepared a story about the 341 First Meeting of Creditors held in the course of the bankruptcy proceeding. Although Sexton did not attend the meeting, he learned from the bankruptcy trustee's office that the meeting had been tape recorded, and the trustee's office provided Sexton with duplicate tapes of the meeting, which he then used in preparation of the article.

During that meeting of creditors, there was testimony that some of American Television Time's employees had left the agency and formed a new advertising agency, Fast Media, LLC. The evidence also showed that some of these common employees lived at Barsana Dham, a Hindu temple complex near Austin owned by the International Society of Divine Love, that American Television Time leased its office space from the International Society of Divine Love and that the International Society of Divine Love temple was on the same property as the American Television Time office, and that Fast Media had acquired several of American Television Time's clients.

After this testimony came out, an attorney who appeared at the meeting of creditors and examined American Television Time's president under oath said:

"We have customers and goodwill that were transferred via one entity to another entity in preparation for a bankruptcy. And I'm not characterizing that now as bankruptcy fraud since I'd like to reserve judgment on issues like fraud, but

if I ever saw a case that lent itself to that sort of interpretation this is certainly well on the road."

The bankruptcy trustee then responded, "Well, we're getting there, too."

The suit was based on the following one paragraph from DRTV News' article:

There is concern in the media industry that the American Television bankruptcy is a part of an orchestrated attempt by the temple and its members to avoid paying stations and cable networks, while continuing to make money under a new company name, Fast Media, LLC.

In its libel suit, Fast Media argued that the article implied that it had been part of a "conspiracy to defraud" American Television Time's creditors and that the statements made at the First Meeting of Creditors did not support that conclusion. In its motion for summary judgment, DRTV News argued that although the reporter did not report verbatim the exchange given at the meeting, the article was a substantially true account of the meeting and that the statement published would be no more damaging to Fast Media's reputation than a verbatim report of the meeting would have been. Therefore, argued DRTV News, the Texas statutory privilege for a fair, true and impartial account of a judicial proceeding applied. On October 8, 2003, Judge Scott Jenkins granted DRTV News' motion for summary judgment, and Fast Media has not appealed.

Thomas J. Williams, a partner in the Fort Worth office of Haynes and Boone, LLP, along with Andrea Sloan, an associate in the Austin office of Haynes and Boone, LLP, represented Mill Hollow Corp., the publisher of DRTV News.

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Massachusetts Appeals Court Recognizes Reverse Wire Services Defense

By Elizabeth A. Ritvo

In *Reilly v. The Associated Press, et al*, 59 Mass. App. Ct. 764 (2003) (Cypher, J.), a defamation case involving a private figure plaintiff, the Massachusetts Appeals Court affirmed summary judgment as to the Associated Press (the "AP") based on a "reverse wire service defense." It also reversed summary judgment granted in favor of the Boston Herald and a reporter and editor and found that there were genuine issues of material fact as to the truth or falsity of certain statements complained of by the plaintiff.¹

AP Distributed Newspaper's Story

The plaintiff Mark T. Reilly, a Cape Cod veterinarian, claims that he was defamed by an article, published by the Boston Herald in May 1995, which concerned his alleged negligence in caring for a dog. The AP disseminated a condensed version of the Herald article which a local newspaper later published.

Previously, following the death of their dog in October 1994, the dog's owners had gone to the local media with their complaints about Dr. Reilly. The Barnstable Patriot, the Cape Cod Times and another local newspaper all had published articles concerning these dog owners and Dr. Reilly. (Dr. Reilly brought separate defamation actions against these newspapers). The Boston Herald article and the AP condensed version of the article at issue ran after these other articles were published and after the Board of Registration of Veterinary Medicine, in May 1995, referred a complaint by the dog owners to the Division of Registration's legal unit to initiate formal disciplinary action.

Extending the Wire Service Defense

The Supreme Judicial Court, the highest Massachusetts Court, previously recognized the wire service defense in *Appleby v. Daily Hampshire Gazette*, 395 Mass.

32 (1985). In *Reilly*, the Appeals Court extended the defense to the AP, when it republished an article from The Boston Herald, one of its members.

In *Appleby*, the court had found that a newspaper was not negligent in relying on the accuracy of a story from a reputable wire service, where the wire service story relied upon was not inherently improbable or inconsistent so as to give the newspaper reason to doubt its accuracy and where the newspaper had no reason to know facts extraneous to the story that would raise doubts as to the wire service story's accuracy. The Appeals Court in *Reilly* found the rationale of *Appleby's* wire service defense equally applicable where a wire service itself picks up a news story from a reputable newspaper or other media outlet member of its service.

In the context of this "reverse wire service defense," the

court made no distinction between fast-breaking news stories of national or international import and local, human interest or news features described by the court as arguably "lesser" events. To do so, the court found, would place an impermissible burden on the media and the courts, forcing them to

make subtle distinctions between published material that must be independently verified and that which does not.

Rejects Newspaper's Fair Report Privilege

The Appeals Court in *Reilly* also rejected the Boston Herald's claim that it was privileged to publish records of citizen's complaints that the local police department created and maintained. While it recognized the fair report privilege as applicable to media reports of official government action, including police action, such as the fact of an arrest, a search warrant issued or a crime charge, it restricted the privilege such that it "does not apply to witness statements to police, *whether appearing in an official police report or not*, where no police action is taken." (italics added).

While it recognized the fair report privilege as applicable to media reports of official government action ... it restricted the privilege such that it "does not apply to witness statements to police, whether appearing in an official police report or not, where no police action is taken."

(Continued on page 26)

Mass. App. Ct. Recognizes Reverse Wire Services Defense¹

(Continued from page 25)

The court found that such reports to the police were unverified hearsay and that extending the privilege to such reports would not further the public's interest in learning of official conduct.

The Appeals Court, in passing, also noted that Massachusetts has not recognized the neutral reporting privilege.

The Boston Herald defendants filed an Application for Further Appellate Review to the Supreme Judicial Court, which was pending as of December 10, 2003.

Elizabeth A. Ritvo is a partner in the Boston office of Brown Rudnick Berlack Israels LLP. Her partner, M. Robert Dushman, and her associate, Jeffrey P. Hermes, represented The Boston Herald defendants. Hillary Lane

of Clifford Chance, New York, and Michael Bongiorno of Hale & Dorr, Boston, represented the defendant Associated Press. Edward M. Reilly of Abington and John Kerr of Lexington represented the plaintiff.

¹ The court also affirmed the award of summary judgment as to the Boston Herald's publisher Patrick Purcell, finding that there was no evidence Mr. Purcell had any control over or knowledge of the contents of the article in dispute or of the editorial process. Summary judgment based on a wire service defense was previously entered in favor of the defendant Enterprise Publishing Co.; the defendants Clapprod and American Radio Systems settled with the plaintiff shortly after the plaintiff appealed the lower court's granting of summary judgment in their favor.

Calling Public Figure a "Liar" Held Opinion

A federal district court in Delaware held that labeling a public sports figure a "liar" was not defamatory because the average reader was more likely to view the term as an epithet than a statement of fact. *Gill v. Delaware Park, LLC*, 2003 WL 22888932 (D. Del. Dec. 2, 2003).

Plaintiff Michael Gill is one of the largest and most successful owners of thoroughbred race horses in the U.S. On February 8, 2003, the *Washington Post* published an article entitled "Gill's Claim to Fame" which discussed plaintiff's aggressive strategy of buying horses at claiming races and the ire this raised among other horse owners, trainers and racing officials. Plaintiff claimed that a racing official threatened that if he continued his aggressive buying he would not be allowed to race his horses at Delaware Park and other venues. The official, Delaware Park Racing Secretary Sam Abbey, is quoted in the article as calling plaintiff a "liar," in response to plaintiff's accusation.

Gill filed suit against Abbey and other non-media defendants for defamation and other claims. Dismissing the defamation claim, Judge Robinson held that in context the term "liar" was protected opinion. Applying the factors test set forth in *Riley v. Moyer*, 529 A.2d 248 (Del. 1987) to distinguish fact and opinion, the court

noted that the context of the statement would lead the average reader to the conclusion that term was merely used as an epithet.

Malcolm Cochran, IV, and David Felice of Richards, Layton & Finger; and Alexander Walker, Devine, Millimet & Branch represent plaintiff. James Burnett, Potter, Anderson & Corroon; and Joseph Gabay, Swartz Campbell, represent defendants.

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Muzikowski v. Paramount Redux: Second Amended Complaint Based On Fictional Movie Portrayal Survives Motion to Dismiss

Questionable and Novel Claims Move Forward

By Samuel Fifer and Gregory R. Naron

The saga of *Muzikowski v. Paramount Pictures Corp.* continues. When last we reported, the Seventh Circuit Court of Appeals had reversed dismissal of a defamation claim complaining of plaintiff's portrayal in a fictional motion picture. *Muzikowski v. Paramount Pictures Corp.*, 322 F.3d 918 (7th Cir. 2003). Now on remand, an apparently chastened U.S. District Court for the Northern District of Illinois (Kocoras, J.) has declined the defendants' invitation to dismiss plaintiff's second amended complaint, which added further defamation allegations, and a variety of ancillary tort claims. *Muzikowski v. Paramount Pictures Corp.*, 2003 WL 22872117 (N.D. Ill., Dec. 3, 2003).

Nonfiction Book/Fiction Movie

Plaintiff Robert Muzikowski "devoted years of his life to coaching Little League Baseball teams in economically depressed areas of Chicago." A non-fiction book entitled *Hardball: A Season in the Projects*, was written about the 1992 season of the league Muzikowski co-founded. Paramount Pictures produced a movie, entitled *Hardball*, which was based on the book.

The movie tells the story of a coach named Conor O'Neill (played by Keanu Reeves). No character in the movie is named Robert or Muzikowski, and the credits state, "While this motion picture is in part inspired by actual events, persons and organizations, this is a fictitious story and no actual persons, events or organizations have been portrayed." Nevertheless, Muzikowski contended the movie defamed him,

"on the theory that one particular character easily identifiable as himself [O'Neill] was portrayed in a negative way, and that this amounted to disseminating falsehoods about him and about his league."

Following *Bryson v. News Am. Publ'ns, Inc.*, 672 N.E.2d 1207, 1214 (Ill. 1996), the Seventh Circuit held the fact that the story was "labeled 'fiction' and, therefore, does not purport to describe any real person," did not mean it could not be defamatory *per se*; the Court found the complaint listed "in great detail many similarities between [plaintiff] and O'Neill

that could cause a reasonable person in the community to believe that O'Neill was intended to depict him and that Paramount intended *Hardball's* mischaracterizations to refer to him."

Adds Claim on Remand

On remand, plaintiff amended his complaint to add nine new causes of action; defendants responded with a motion to dismiss. As a threshold matter, the court considered (and ultimately rejected) a dismissal argument based on Fed. R. Civ. P. 41(a)(1) and the Illinois single-filing rule, 735 ILCS § 5/13-217. Defendants' theory was that plaintiff had "voluntarily dismissed" his action twice, meaning the second dismissal was "final": first, when he voluntarily dismissed a prior action filed in the Central District of California; and second, when the Northern District of Illinois dismissed his original complaint without prejudice, and plaintiff opted to appeal to the Seventh Circuit rather than amending his complaint. In order to exercise jurisdiction over the appeal, the Seventh Circuit had treated the appealed-from order as "akin to a voluntary dismissal."

Even so, the district court held the second amended complaint should not be considered an impermissible "third filing." The court noted that "Paramount has not expressly raised this issue at any point in the litigation, even on appeal"; and that "Muzikowski has been allowed to amend the complaint twice since the case was remanded. . . . We therefore conclude that the new complaint is not barred by either the Illinois single-filing rule or Fed. R. Civ. Proc. 41."

Defamation Per Se Claim

On the merits, defendants' arguments fared no better. The new defamation *per se* counts alleged that plaintiff was prejudiced (a) in his profession as a Little League coach and fundraiser, and (b) in his occupation in the securities field.

As to the former, the court rejected defendants' argument that, as a matter of law, plaintiff's volunteer activities could not be his "profession" for the purposes of a defamation *per se* claim.

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Muzikowski v. Paramount Redux

(Continued from page 27)

“Paramount has presented no authority that would indicate that, for the purposes of a defamation per se claim, a person can have only one business, trade, or profession ... Muzikowski’s volunteer efforts [could] comprise a second profession.”

As for the latter, the gist of plaintiff’s claim was that the film depicts activities “that would prompt reporting responsibilities and possible disciplinary action by regulatory agencies.” Defendants argued that this claim required extrinsic facts to explain its defamatory meaning, and hence, could not be defamatory per se. The court rejected that one too:

“As the Illinois Supreme Court noted in *Owen v. Carr* [497 N.E.2d 1145, 1149 (Ill. 1986)], statements imputing a violation of the regulations of one’s profession can be defamatory per se.”

False Endorsement and Advertising Claims

The court then turned to plaintiff’s claims for false advertising and endorsement in violation of the Lanham Act, the Illinois Uniform Deceptive Trade Practices Act, and the Illinois Consumer Fraud and Deceptive Business Practice Act.

Plaintiff’s false endorsement claims alleged that “the use of a character similar to him in the movie gives the false impression that he sponsored or endorsed the film”; plaintiff relied on cases like *White v. Samsung Electronics America*, 971 F.2d 1395, 1400 (9th Cir. 1992) holding that “endorsements can be implied through use of identifiers other than name or likeness,” i.e., by use of plaintiff’s “persona.” The court found that the “recently passed Illinois Right of Publicity Act (765 ILCS § 1075/5) defines a person’s ‘identity’ broadly, and

“the breadth of this new statute supports the conclusion that Illinois courts would use an expansive approach in determining what kinds of attributes are protected under the statute.”

The district court acknowledged that other cases, not to mention the First Amendment,

“support the conclusion that the amalgamation of events transpiring during a person’s life is not a protectible interest (even when a person’s actual name and likeness are used and particularly when fictional-

ized elements are included) and therefore does not amount to a ‘persona.’”

Yet, the court concluded that

“the protections of the [First] Amendment are not so absolute that they automatically bar Muzikowski from bringing his claims under the Lanham Act and similar state statutes. To properly assess Paramount’s contention, we would be required to balance public interest in the free flow of ideas and creativity against Muzikowski’s ability to control marketing of his claimed celebrity value. The time for such an inquiry has not yet come in this case.”

Plaintiff also pled a dubious claim for “false advertisement”; rejecting defendants’ arguments that the claim did not “contain sufficient allegations that the two parties are competitors,” the district court held “it is apparent from the face of the complaint that Muzikowski claims that he and Paramount are competitors in marketing the goodwill he has accumulated with his philanthropic efforts.” Defendants did win a modest victory: plaintiff conceded that he had not alleged actual consumer reliance, and hence, to the extent he sought money damages for false advertising, such claim was dismissed.

Unjust Enrichment Theory

The district court refused to dismiss a somewhat novel theory of unjust enrichment as well. Plaintiff contended that he and the author of the underlying non-fiction book “had an implied contract that Muzikowski would cooperate with the author’s efforts, including giving him special access to the details of Muzikowski’s life,” and in return, the author “would use the information only in a nonfiction book that accurately reflected (in Muzikowski’s opinion), the stories he related.” Plaintiff alleged that “by not complying with the terms of this implied agreement in making the film, Paramount was unjustly enriched at his expense.” Sustaining the claim, the court noted that, in some instances, “Illinois courts recognize unjust enrichment claims in which the benefit plaintiff seeks has been transferred to the defendant by a third party.”

And once again, the court gave short shrift to the defendants’ concerns about freedom of expression. “Because a person does not own his or her life story,” defendants argued,

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Muzikowski v. Paramount Redux

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“there can be no implied contract involving the right to tell that story.” Conceding defendants’ “argument is correct as far as it goes,” the court nevertheless held the alleged “benefit” went “beyond just the telling of his story” to include “access to details that only [plaintiff] could provide ... [F]or the purposes of a motion to dismiss, Muzikowski states a cognizable claim under Illinois law.”

All in all, having once been reversed by the Seventh Circuit, the district court made it clear that it was willing to let some questionable tort claims clear the 12(b)(6) hurdle, while leaving the door open to a summary judgment motion in which the serious First Amendment issues posed by those claims could be fully aired.

Plaintiff was represented on remand by Michael B. Roche, Lawrence Andrew Brehm, and Michael T. Roche, of Schuyler, Roche & Zwirner, Chicago. Defendants were represented by David Mark Greenwald, Debbie L. Berman, and Michael Allen Doornweerd, of Jenner & Block, LLC, Chicago.

Samuel Fifer is a partner, and Gregory R. Naron is of counsel at Sonnenschein Nath & Rosenthal, Chicago, Illinois. Sonnenschein submitted an amicus curiae brief for a number of media entities to the Court of Appeals in the above case, which brief the court refused.

UPDATE: Jennifer Flowers v. James Carville et al.

By Matthew Leish

In the four years since Jennifer Flowers first brought a lawsuit against James Carville, George Stephanopoulos, Hillary Rodham Clinton, and Little, Brown and Company (the publisher of Stephanopoulos’ memoir), alleging that she had been subjected to a continuing conspiracy to defame her and invade her privacy, Flowers’ claims have been gradually whittled down by a series of decisions by the district court and the Ninth Circuit. In the latest development in this ongoing saga, Flowers’ last remaining claim against Senator Clinton – for a supposed conspiracy dating back to 1992 – has been dismissed on statute of limitations grounds.

In the decision, *Flowers v. Carville et al.*, ___ F.Supp.2d ___, 2003 WL 22844112 (D.Nev. Nov. 24, 2003), Judge Philip Pro found that Nevada’s four year statute of limitations for conspiracy begins to run when the plaintiff discovered or should have discovered all of the necessary facts constituting a conspiracy claim, and concluded that the conspiracy claim against Senator Clinton was time barred because Flowers knew of the alleged conspiracy no later than 1995.

However, in an unusual and troublesome twist, Judge Pro declined to find that the conspiracy claims against Stephanopoulos and Carville were similarly time-barred, on the novel ground that since Flowers is a public figure who must prove actual malice as to the underlying defamation claim, the conspiracy to defame claim did not accrue until she knew or should have known that Stephanopoulos and Carville acted with actual malice. Since “the evidence does

not irrefutably prove if or when Flowers knew Carville and Stephanopoulos acted with actual malice,” the court found that summary judgment as to those defendants was “not appropriate at this time.” 2003 WL 22844112 at *8, *9. Thus, the court essentially used the actual malice requirement to save a conspiracy claim that otherwise would have been time-barred.

Of course, all of this will be a moot point if the underlying defamation claims are ultimately dismissed. At the same time that the motions for summary judgment as to the conspiracy claim were pending, discovery limited to the issue of actual malice was proceeding. That discovery is now essentially complete, and the remaining defendants will be moving for summary judgment on the grounds of lack of actual malice in January of 2004. Stay tuned for further developments.

George Stephanopoulos and Little, Brown and Company are represented by Laura R. Handman of Davis Wright Tremaine, LLP in Washington, DC, and Matthew A. Leish of Davis Wright Tremaine, LLP in New York, NY. James Carville is represented by William Alden McDaniel, Jr. of McDaniel & Griffin in Baltimore, MD. Hillary Rodham Clinton is represented by David E. Kendall and Gabriel Gore of Williams & Connolly, LLP in Washington, DC. Plaintiff Jennifer Flowers is represented by Michael J. Hurley of Judicial Watch, Inc. in Washington, D.C.

Matthew Leish is an associate in the New York City office of Davis Wright Tremaine.

Georgia Court of Appeals Dismisses Humane Society's SLAPP Suit Against Whistleblower

By Christopher L. Mezell

On November 14, 2003, a panel of the Georgia Court of Appeals, including Chief Judge J.D. Smith, Presiding Judge John H. Ruffin, Jr. and Judge M. Yvette Miller, held that Georgia's anti-SLAPP statute requires trial courts, if requested, to undertake a preliminary, substantive review of the lawsuit. The Court further held that where the undisputed facts reveal a SLAPP suit the complaint must be dismissed. *Harkins v. Atlanta Humane Soc'y et al.*, No. A03A1422, 2003 WL 22682636 (Ga. App. Nov. 14, 2003).

SLAPP Suit Stems From Investigative Series

During the summer of 2001, Atlanta ABC affiliate WSB-TV prepared an investigative series on the Atlanta Humane Society ("AHS") finding mismanagement of the significant tax dollars the AHS received to serve as the official county animal control agency. Defendant/Appellant Barbara Harkins, a long-time volunteer and worker at animal shelters throughout the country, and an adoption counselor at the AHS from 1998 until her resignation in September of 2001, was interviewed by WSB-TV for the series. During that interview, Harkins discussed her concerns regarding the mismanagement of AHS and the fact that when she raised those concerns with the AHS' director (and co-Plaintiff/Appellee) Mr. Bill Garrett, he had dismissed them.

When the series aired in November of 2001, public outcry was so great that the County Commissioners held a series of public meetings to discuss the AHS' performance; and, ultimately, the AHS' contract was not renewed. At the same time, the AHS' donations plummeted and on December 19, 2001, the AHS and Garrett filed a defamation suit against Harkins. The suit was based upon statements Harkins had made during her interview for the WSB-TV investigative series, and included the following (as noted by italics):

Once the Court established that the verification requirement of the anti-SLAPP statute required a preliminary substantive review of the underlying claim itself, it performed that review and found that the AHS' claims were indeed barred by the anti-SLAPP statute.

1. In response to WSB-TV's inquiry regarding information in the AHS's fundraising brochure stating that its clinic is "in service 24 hours a day, 7 days a week, 365 days a year," Harkins said: "*No. There's no one there at night.*"

2. Harkins also said: "*Prior to leaving [AHS], I asked, 'Why do we not investigate cruelty?'*" [and Bill Garrett] said "*[W]e don't – we lose money on every cruelty investigation.*"

3. Harkins also said: "*And I'm passionate to a cause. And things are not right, and they need to change. And the people of Atlanta need to know. Things are desperately wrong [at AHS].*"

4. In connection with her stated observation that AHS ambulances were not used, Harkins said:

"That's my experience, yes."

5. When WSB-TV asked: "In your three years at AHS, how many formal cruelty investigations do you know of?" Harkins replied: "*I just know of one.*"

Trial Court Allows Pro-Forma Affidavits

Georgia's "anti-SLAPP" statute (O.C.G.A. § 9-11-11.1), ensures that the exercise of free speech rights will not be chilled through abuse of the judicial process and provides an early-disposition mechanism for First Amendment cases, along with a fee-shifting provision and special verification requirements for the plaintiff and his attorney. Plaintiffs/Appellees failed to file any verifications with their complaint and Harkins moved to dismiss the suit pursuant to the anti-SLAPP statute. When, on the morning of the hearing on Harkins' motion to dismiss, Plaintiffs/Appellees amended their complaint to add pro forma verifications, the trial court denied Harkins' motion without further inquiry.

Harkins then filed a second motion to dismiss, based on the substantive argument that the lawsuit had been unlaw-

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Georgia SLAPP Suit Dismissed

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fully initiated against her in response to her exercise of her right to free speech during the investigative series.

The trial court, without performing any review of the underlying facts, again denied Harkins' motion under the belief that Plaintiffs/Appellees' simple act of filing verifications was sufficient to place a defamation complaint beyond the reach of the anti-SLAPP statute. Harkins sought relief from the Court of Appeals.

Court of Appeals Requires Preliminary Substantive Review

The Court of Appeals panel definitively held that, based upon the plain language of Georgia's anti-SLAPP statute, existing case law, and the statute's express purpose, that: (1) "the verification requirement of the anti-SLAPP statute is procedural in nature in that verifications must contain certain assertions and must be filed within a certain time" and, (2) that the anti-SLAPP statute "is also substantive in nature in that to determine whether the requirements of the statute have been met, the court must take a substantive look at the verification offered to ensure that the underlying lawsuit has not been initiated for an improper purpose." Moreover, the Court noted that any other interpretation would undermine the protections afforded by the anti-SLAPP statute and would, accordingly, render the statute "virtually meaningless."

Finds Claim Substantively "Improper"

Once the Court established that the verification requirement of the anti-SLAPP statute required a preliminary substantive review of the underlying claim itself, it performed that review and found that the AHS' claims were indeed barred by the anti-SLAPP statute.

The Court reviewed the record and, seeing that AHS received significant operating funds from both Fulton County and the City of Atlanta and that the use of those funds had been the subject of significant public debate and discussion, found that Harkins' statements were plainly in furtherance of Harkins' right of free speech in connection with a matter of public concern, and were thus protected statements under the anti-SLAPP statute. Accordingly, AHS's lawsuit, which was brought in response to those statements, was improper and the complaint subject to dismissal.

Defendant/appellant Barbara Harkins was represented by, Hollie Manheimer, Stuckey & Manheimer of Decatur, Georgia and Gerald Weber, ACLU of Georgia, Atlanta; plaintiffs/appellees Atlanta Humane Society and Bill Garrett were represented by Edward Greenblatt and James Zito of Lipshutz, Greenblatt & King, Atlanta, Georgia.

Christopher L. Mezell is an associate in the Atlanta office of MLRC member firm Dow, Lohnes & Albertson, PLLC, and, together with Peter C. Canfield and Thomas M. Clyde, filed an amicus brief in the case on behalf of WSB-TV.

Criminal Libel Update

As MLRC explored in detail in earlier this year in *Criminalizing Speech About Reputation*, 2003 MLRC Bulletin No. 1 (March 2003) 17 states and two U.S. territories still have criminal defamation statutes on the books.

Actual prosecutions involving these statutes are rare, and cases involving the media are even more infrequent. But there have been two recent criminal defamation cases involving media in Kansas, and a new, non-media case in Arkansas.

New Observer Appeal

In July 2002, the publisher and editor of a small political newspaper, *The New Observer*, were convicted by a jury of multiple counts of criminal defamation under Kansas' criminal defamation law, Kan. Stat. § 21-4004, for articles

alleging that the Mayor of Kansas City – who was then running for reelection – and her husband, a judge, lived outside the county in violation of the law. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct. Wyandotte County jury verdict July 17, 2002). After the defendants' motion for a new trial based on alleged juror misconduct was dismissed, the publisher and editor were both ordered to pay \$3,500 in fines, and sentenced to one year unsupervised probation; the sentences were suspended pending appeal. See *MLRC Media-LawLetter*, Aug. 2002, at 5.

The defendants are now appealing their conviction to the Kansas Court of Appeals. The newspaper submitted its brief to the Kansas Court of Appeals on Sept. 30; the state's brief was due Dec. 3, but at press time had filed for an extension

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Criminal Libel Update

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that was expected to be granted. See *Kansas v. Powers*, No. 90690 (Kan. Ct. App. appeal filed June 12, 2003).

In the appeal, the newspaper is represented by Mark Birmingham of Kansas City, while editor Edward Powers is representing himself; publisher David Carson is not appealing. The state is represented by J. David Farris, an attorney in Atchison, Kansas who is acting as special prosecutor.

Civil Case in Baxter Springs

In Baxter Springs, Kansas, the defendants who were charged in an aborted criminal defamation prosecution have filed notice of their intent to sue the municipal officials who brought the charges.

The publisher and a columnist for the weekly *Baxter Springs News* and city council candidate Charles How, Jr. were charged in March 2003 under a municipal provision that mimics the Kansas state statute. The municipal criminal defamation ordinance had been enacted by the city by its adoption of the "Uniform Public Offense Code" promulgated by the Kansas League of Municipalities, which includes municipal versions of the defamation statute and other Kansas criminal statutes. See *MLRC MediaLawLetter*, March 2003, at 4.

The Baxter Springs prosecution, based on a column and political advertising in the newspaper that criticized the town clerk, was dismissed after the city attorney failed to name a special prosecutor. Although the case was dismissed without prejudice, it has not been refiled. See *MLRC MediaLawLetter*, June 2003, at 11.

In their notice of intent to sue the city, the three defendants demanded an apology and payment of attorney fees from the city officials who filed the charges. They are rep-

resented by Sam Colville of Holman, Hansen, Colville and Coates, PC in Kansas City.

New Arkansas Case

Meanwhile, in Arkansas a dispute between a local police officer and a state trooper has led to a case under the state's criminal slander statute, Ark. Stat. § 5-15-101. The slander statute remains on the books even though Arkansas repealed its criminal libel statute after that provision was found unconstitutional in *Weston v. State*, 258 Ark. 707, 528 SW.2d 412 (Ark. 1975).

The case arose from an incident that began when Edmondson, Ark. police officer Ozell Craft was apparently speeding while driving his wife, who had injured her foot, to the hospital on Aug. 28. Arkansas State Trooper Sammy D. Koons pulled Craft over, but agreed to accompany him to the hospital when the situation was explained. At the hospital, Koons wrote Craft a summons for speeding.

Craft complained to his supervisor, Edmondson Police Chief James Rainey, Jr., who wrote a letter to the director of Arkansas State Police complaining about the stop and alleging that Trooper Koons acted unprofessionally, abusively, and with racial prejudice.

On Oct. 9, Koons filed an affidavit of arrest alleging that the letter constituted criminal slander in violation of the statute, and on Nov. 3 a St. Francis County Circuit Judge issued a warrant for the arrest of Craft and Rainey. They surrendered to the county sheriff's office two days later and were released on their own recognizance.

St. Francis County prosecutor Fletcher Long told the *Arkansas Democrat-Gazette* that he was unsure whether he would actually prosecute the case.

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Trouble At the Palace

By David Hooper

Media lawyers in the United Kingdom have normally proceeded on the basis that members of the Royal Family do not sue, but a spate of recent cases brings that into question.

A Servant With A Secret

Last month there was enormous media coverage given to allegations which turned out to relate to Prince Charles and Michael Fawcett, his former valet. The allegations apparently originated with George Smith, another former Royal servant. The Mail on Sunday, which wished to report the existence of these allegations that had gained currency after the dramatic collapse of the trial of Paul Burrell, Princess Diana's former butler, found itself the subject of a rare pre-publication injunction preventing publication of the alleged libels.

Initially the court even banned the publication of the name of the Plaintiff, Michael Fawcett. Exactly what these allegations were has never been published in the United Kingdom although an unprecedented public denial issued by Prince Charles' Private Secretary of any improper relationship between Prince and valet gave us some idea of what line of alleged country we were in.

There were exceptions of course to the Royals' reluctance to sue. In 1990 the Queen's nephew, Viscount Linley, recovered £35,000 libel damages against Today newspaper for false allegations that he had behaved like an upper class lager lout in a Chelsea pub. In 1997 Princess Diana received £75,000 damages against the Sunday Express for false allegations that she would be pocketing half the proceeds of the sale of her evening dresses which were being auctioned in New York. Those on the fringes of royalty did sometimes sue; Camilla Parker-Bowles' husband collected damages when a book had him married to the wrong person. However, if actions were brought at all they tended to be for breach of confidence.

Indeed the law of confidence largely developed from the case brought by Prince Albert in *Albert -v- Strange* (1849) 18 LJ CH 120 where the Prince was able to restrain a Windsor bookseller from publishing a catalogue of etchings by

Queen Victoria and the Prince. In 1993 Princess Diana obtained an injunction on breach of confidence and breach of contract grounds when photographs were taken by a hidden camera of her working out in a gym. Before a decision could be reached on this early instance of a claimed breach of privacy, the newspaper having sold an extra 80,000 copies, settled by paying £75,000 to the Princess.

Dianna's Butler v. the Duke

More recently Princess Diana's former butler, Paul Burrell, published his account of life as a royal butler provocatively entitled "A Royal Duty." The book contained short extracts from correspondence between Princess Diana and her father-in-law the Duke of Edinburgh. His account of the goings on at the Palace certainly appeared to be a breach of his obligations of confidence under his contract of employment.

Even though the copyright extracts were short, the splash given to them by the Mirror made it likely that the English courts would have felt that the quality, if not necessarily the quantity, of the material quoted was sufficient to constitute substantial copying.

The family of Princess Diana would probably have had a valid claim but in all likelihood decided that litigation would only give greater publicity to the book and that perhaps the butler could have given even greater details in court of what he had seen.

Stories about the Royal Family did not, however, go away and so it was that at the beginning of November 2003 the remarkable injunction was granted against The Mail on Sunday on the still untested grounds that it was threatening to publish defamatory material.

Guardian Wins Right to Name Names

The Guardian was, a few days later, successful in identifying Fawcett as the Plaintiff. The High Court rejected the Plaintiff's request that he be allowed to proceed anonymously. Material that the Mail on Sunday was subsequently able to publish made it clear that the Royal concerned was Prince Charles but exactly what the allegations were could

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There were exceptions of course to the Royals' reluctance to sue ... Indeed the law of confidence largely developed from the case brought by Prince Albert in *Albert -v- Strange* (1849).

Trouble At the Palace

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not be made clear. Indeed when foreign newspapers, notably those in Italy but surprisingly also those in privacy-loving France, published the allegations the British distributors declined to import them into the United Kingdom. There were, however, no shortage of websites prepared to speculate on the nature of the allegations. English readers cannot at present read the allegations which are in the public domain elsewhere.

A marker was put down by the Royal Family that it might be prepared to sue in such cases and the case was a reminder of the fact that actions could be brought by people linked with, but not part of, the Royal Family who claimed to be affected by the proposed story. The bringing of libel actions by the Royal Family would nevertheless appear to be a perilous activity. More promising for the Royal Family is their enforcement of obligations of confidentiality against former employees.

Enjoining the Fake Footman

So it was that later in November the Queen won an injunction against a Mirror reporter who had, in a case with some echoes of the *Food Lion* case in the US, used a fake reference to secure a job as a footman at Buckingham Palace. After two days and 27 pages of coverage in the Mirror of goings on at the Palace and the alarming revelation that the Mirror reporter might have served President Bush an early morning cup of tea had the reporter not earlier resigned from his post to write about this lapse of security, the Queen obtained an injunction against the Mirror preventing any further revelations.

Subsequently the Mirror agreed to a permanent injunction and contributed £50,000 towards the Queen's legal costs. The newspaper had greatly increased its circulation with these issues and the Queen's legal bills would have comfortably exceeded £50,000. The marker was, however, put down that the Royal Family will continue to seek to enforce contractual obligations of confidentiality and the English courts are likely to uphold such claims. It was accepted that the Mirror could expose the breach of security but their reporter was precluded by his contract of employment from regaling us with details of life at the Palace.

David Hooper is a partner at Reynolds Porter Chamberlain in London.

Jailed Intelligence Source Sued by News Subject

In the January 2003 MediaLawLetter, MLRC reported on a criminal indictment, and guilty plea, of Jonathan Randel, a former intelligence analyst with the Drug Enforcement Agency (DEA). Mr. Randel was sentenced to a year in prison by a federal district court after he admitted to passing on government information to The Times of London about Lord Michael Ashcroft, former treasurer of the Conservative Party in England. He began serving his sentence in September 2003.

Now, Lord Ashcroft has sued Mr. Randel in federal court in Atlanta, Georgia. *Ashcroft v. Randel*, Civil Action No. 1:03-CV-3645 (N.D. Ga.) Using 18 U.S.C. Section 1030, the Computer Fraud and Abuse Act, Lord Ashcroft is seeking damages for economic damages as a result of the illegal disclosure of information about him. He also has some designated "Bivens" claims, charging violations of the Fourth and Fifth Amendments. It is not clear whether Randel has been served as yet.

The information that Randel passed to a freelance reporter, and which ultimately was published in the Times of London, was not classified. It was designated as "sensitive." According to the Government indictment of Randel, he received money for the information and documents.

The Government in the criminal case indicated that it hoped that the case would serve as a warning to government employees who might be tempted to divulge government information to the news media. Sadly for the media, the case escaped all notice until Randel's guilty plea. Although the indictment suggested a number of offenses, the guilty plea was only to conversion of government property in violation of 18 U.S.C. Section 641. The value of the property was apparently determined by the Government on the basis of monies paid to Randel by The Times of London, money which he contended paid for the expenses of a trip he made to London in connection with the transaction, and to compensate him for his time.

Lord Ashcroft, represented by Alston & Bird LLP, Atlanta, and Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., Washington D.C.

Advertisements for Protected Comic Book Characters Protected by First Amendment, Provided Advertising Is not Likely to Deceive

By Timothy L. Alger and Jessica A. Uzcatogui

In an unpublished decision, *Winter v. DC Comics, Inc.*, 2003 WL 22765174, No. B12101 (Cal. Ct. App. Nov. 24, 2003) (Hastings, J., Vogel, P.T. & Curry, J.), California's Second District Court of Appeal followed up on a string of decisions concerning the publication of the comic book miniseries *Jonah Hex: Riders of the Worm and Such*. This time, the court concluded that musical performers Johnny and Edgar Winter could not recover damages for advertising that used their real names (rather than the names of their fictionalized comic book counterparts) because the advertisements were not likely to deceive their intended audience.

"Transformative" Test Applies

In a previous opinion, the Court of Appeal dismissed the Winters' claims for defamation and related torts arising from the comic book's use of half-worm, half-human characters "Johnny and Edgar Autumn." However, the court remanded the brothers' misappropriation of the right of publicity claims for a finding of whether the comic books met the "transformative test" established by the California Supreme Court in *Comedy III Productions, Inc. v. Saderup*. *Winter v. DC Comics, Inc.*, 99 Cal. App. 4th 458 (2002).

Defendants petitioned the California Supreme Court, which reversed and held that the comic books, as a matter of law, contained "significant creative elements that transform them into something more than mere celebrity likenesses." *Winter v. DC Comics, Inc.*, 30 Cal. 4th 881, 885 (2003). Having met the "transformative test," the comic books were protected by the First Amendment, and the misappropriation claims involving those publications were dismissed. However, the California Supreme Court expressly declined to reach the question of whether defendants' promotional activities were actionable as misappropriation. *Id.* at 891 n.3. The latest Court of Appeal decision concluded that they were not.

Were Promotional Activities Actionable

To promote sales of the series, defendants Lansdale and Truman, the writer and illustrator of the *Jonah Hex* comic books, granted two interviews with comic book aficionados, one of which was commissioned by DC Comics. Articles describing one interview contained the following statement: "You get the idea, and if you want to discover other interesting things such as, oh, exactly how rockers Johnny and Edgar Winter sort of turn up in *Riders of the Worm and Such*, You'll just have to wait." *Winter v. DC Comics*, 2003 WL 22765174, at *4. Another article quoted Truman as saying, "We have Johnny and Edgar Winter in this one too." *Id.*

DC Comics argued that these promotion statements were protected by the "incidental use privilege" established in

Gugliemi v. Spelling-Goldberg Productions, 25 Cal. 3d 860 (1979) and *Cher v. Forum International, Ltd.*, 692 F.2d 634 (9th Cir. 1982). When the use of an individual's name or likeness in a creative work is found not to infringe the individual's right of publicity, this privilege

The promotional statements were not likely to deceive, therefore the limited use of the names Johnny and Edgar Winter "did not go beyond what is allowed in promotion and advertising of a protected product."

allows the "incidental" use of the name or likeness in advertising for that work. "It would be illogical to allow respondents to exhibit [the work] but effectively preclude any advance discussion or promotion of their lawful enterprise." *Gugliemi*, 25 Cal. 3d at 873.

The Winters argued that triable issues of fact precluded application of the incidental use privilege on summary judgment. They argued that a triable issue existed as to whether the use in a promotional context of their real names was false or misleading, or created the false impression that the Winters endorsed, or associated themselves with, the comic book series.

Promotions Not Deceptive

As an initial matter, the Court of Appeal concluded that "[n]one of the evidence . . . can be reasonably understood to infer or suggest that respondents falsely im-

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Ads for Protected Comic Book Characters also Protected by First Amendment, Provided Advertising Is not Likely to Deceive

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plied that appellants endorsed or otherwise associated themselves with the subject comic book series.”

Winter v. DC Comics, Inc., 2003 WL 22765174, at *5. The court then questioned whether the use of the actual names “Johnny and Edgar Winter” for the promotion of the transformative depictions, “Johnny and Edgar Autumn,” removed the advertisements from the scope of the incidental use privilege. The court found as a matter of law that the half-worm, half-human Autumn brothers portrayed in the *Jonah Hex* comics were clearly fictional, and not intended to be an accurate portrayal of the Winters.

“Thus reference to the actual Winter brothers in the promotion of the series was a comment addressing the artistic relevance of their likeness to the characters in the series and explains how they ‘sort of’ show up in the series.” *Id.* at *7.

The court appeared to focus on the fact that adult readers of comic books, the intended audience for the advertise-

ments, “would not reasonably expect actual individuals to be accurately portrayed in the blatantly fictional comic book series.” *Id.* at *6. Throughout its opinion, the court reiterated that false advertising more likely to deceive than inform is not entitled to constitutional protection. Here, the promotional statements were not likely to deceive, therefore the limited use of the names Johnny and Edgar Winter “did not go beyond what is allowed in promotion and advertising of a protected product.” *Id.* at *8. This opinion presents an encouraging approach to summary judgment in misappropriation cases, when it is clear that no infringing use of the individual’s name or likeness was intended and no confusion is likely to result.

Vincent Chieffo of Greenberg and Traurig for Plaintiffs and Appellants.

Michael Bergman, Julie Waldman and Anjani Mandavia for Defendants and Respondents.

Timothy L. Alger and Jessica A. Uzcategui are with Quinn Emanuel Urquhart Oliver & Hedges in Los Angeles, California.

Supreme Court Denies Cert. in Lawsuit over Rap Song

The Supreme Court refused to hear an appeal by the rap music duo, Outkast, of a Sixth Circuit decision that reinstated Lanham Act and right of publicity claims brought by civil rights icon Rosa Parks against the group for using her name as the title of a song. *LaFace Records v. Parks*, 329 F.3d 437 (6th Cir.), cert. denied 72 USLW 3391, No.03-504 (Dec. 9 2003). The case could now proceed to trial in federal district court in Michigan.

The petition for certiorari followed a surprising Sixth Circuit decision this summer to reverse a well-reasoned decision by Michigan federal district court judge Barbara K. Hackett granting summary judgment to defendants. 76 F.Supp.2d. 776 (E.D. Mich. 1999). Applying the test set forth in *Rogers v. Grimaldi*, 875 F.2d. 994 (2d. Cir. 1989), the district court held that there was an obvious relationship between the content of the song and the title in a “metaphorical and symbolic” sense. In dicta, Judge Hackett also warned that courts should avoid passing artistic judgment on expressive content when determining the level of protection to which such expression is entitled.

On appeal, after conducting its own analysis of the lyrics of the song, the Sixth Circuit held that there was no obvious

artistic relationship between the title and the content of Outkast’s song. The Sixth Circuit found it persuasive that the song does not mention Parks in the lyrics and the group conceded is not about her or the Civil Rights Movement.

The song does refer to Parks’ most memorable act in the chorus which says: “ah, ha hush that fuss/Everybody move to the back of the bus/Do you wanna bump and slump with us/We the type of people make the club get crunk. While the song repeatedly uses the refrain “move to the back of the bus,” the Sixth Circuit found that in context the phrase was completely unrelated to Rosa Parks, and simply referred to Outkast’s claim that it was superior to rival groups.

Whether there is any relevance between the song title and its content is now a jury question. If the jury concludes there is no relevance, it could then determine whether the title was merely a commercial use designed to boost album sales.

Rosa Parks is represented by Johnie Cochran, Cochran Sherry Giovens & Smith, in Los Angeles; and Gregory J. Reed of Gregory J. Reed & Associates in Detroit. Defendants are represented by Joseph Beck and Christopher Kellner of Kilpatrick Stockton LLP, Atlanta.

“The Definitive Elvis” Has Left the Building

Ninth Circuit Affirms Preliminary Injunction Barring Distribution of Video Biography on Copyright Grounds

By Roger Myers and Lisa Sitkin

Demonstrating once again that it often has a tin ear when it comes to First Amendment concerns in copyright cases, a divided panel of the Ninth Circuit affirmed a prior restraint in the form of a preliminary injunction against the producers of a video biography of Elvis Presley. *Elvis Presley Enterprises, Inc. v. Passport Video*, 2003 WL 22510352 (9th Cir. Nov. 6, 2003). The opinion also illustrates the risk that media entities and their attorneys take if they rely on the fair use defense to justify use of copyrighted material that can be viewed, in hindsight, as exceeding what is necessary to comment on, parody or criticize the original work – or to report on a controversy or publicity involving that work – in an effort to profit off the commercial value in the original.

Excerpts In 16-Hour Video Biography

At 16 hours and \$99, *The Definitive Elvis* is, as a reviewer for *USA Today* put it, “the most comprehensive overview yet of the King’s personal and professional life.” Like many film biographers before them, the producers, Passport Entertainment, incorporated original interviews (of more than 200 individuals) with pre-existing footage, still photographs and, naturally, snippets of many Presley songs.

Of course, entities and individuals other than the producers owned the copyrights in Presley’s movie and television appearances, his photographs and the songs that Presley recorded and performed. For example, SOFA Entertainment owns a registered copyright in Presley’s appearances on the *Ed Sullivan Show*, Promenade Trust owns copyrights in Presley’s television specials *The Elvis 1968 Comeback Special* and *Elvis Aloha from Hawaii*, photographer Alfred Werheimer owns copyrights in his photographs of Presley and song-writers Jerry Leiber and Mike Stoller own copyrights in several songs that

Presley made famous, including *Jailhouse Rock* and *Hound Dog*.

Two months after the video biography was released in July 2002, a coalition of these and other copyright owners sued the producers for infringement and sought a preliminary injunction against sale and distribution of *The Definitive Elvis* pending final resolution of the case. Brushing aside concerns that enjoining a video biography would violate the First Amendment if the district or appellate court ultimately concluded the biography was not infringing, as well as precedent indicating that monetary damages are preferred to injunctions in such cases, the district court granted the preliminary injunction. The Ninth Circuit affirmed in a 2-1 decision. *Elvis Presley Enterprises, Inc. v. Passport Video*, -- F.3d --, 2003 WL 22510352 (9th Cir. Nov. 6, 2003).

On appeal, the producers raised – and the majority rejected – two arguments of note. On the merits, the majority found that the district court had not abused its discretion in finding that all four fair use factors – purpose and character of the use, nature of the copyrighted works, amount and substantiality of the portion used, and the effect of the use on plaintiffs’ potential market – will likely weigh against a finding of fair use, though it admitted that each factor presented a “close call” and none of the individual plaintiffs showed it would prevail on all four factors. *Id.* at *6-8. The majority also brushed aside the First Amendment ramifications of affirming an injunction against distribution of editorial content, where the question of whether the use is unfair and thus infringing presents such a close call.

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Ninth Circuit Rejects Fair Use

There is much to debate in the mechanical application of the fair use factors in the majority opinion, which was authored by Judge Tallman and joined by Judge Rawlinson. On the first factor, for example, the majority thought the

None of the plaintiffs showed all four of the factors favored a finding that the use was not fair, but the majority nonetheless affirmed because at least some of the plaintiffs were likely to prevail on each.

(Continued on page 38)

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commercial nature of the biography outweighed the transformative incorporation of the underlying works into a historical documentary, notwithstanding at least two prior opinions that had found the use of copyrighted film clips in biographies to be transformative and thus fair. See *Monster Communications, Inc. v. Turner Broadcasting System, Inc.*, 935 F. Supp. 490 (S.D.N.Y. 1996) and *Hofheinz v. A & E Television Networks*, 146 F. Supp. 2d 442 (S.D.N.Y. 2001). The majority distinguished these cases in part by noting that the packaging of the Presley biography emphasized the commercial value in the Presley footage over its scholarly or historical value. *Id.* at *5 (“Every *Film and Television Appearance* is represented.”) (emphasis in original packaging).

On the second factor, the majority found the historical and “newsworthy” nature of the footage – which supported a finding of fair use – was outweighed by the creativity inherent in other plaintiffs’ songs and photographs, which it concluded (without analysis) not to be newsworthy. *Id.* at *6. Thus it was the songs and photographs that supported the injunction on the second factor.

But on the fourth, the majority reached the opposite conclusion – while the biography posed no threat to the market value of the songs or photographs (because those in the market to license the songs or photographs would not find the biography to be a meaningful substitute), the majority found that “widespread use” of the television and film appearances in products like *The Definitive Elvis* would deprive the copyright owners of a lucrative market for licensing those materials (at up to \$10,000 per minute for Presley’s appearances on the *Ed Sullivan Show*). *Id.* at *8.

In short, none of the plaintiffs showed all four of the factors favored a finding that the use was not fair, but the majority nonetheless affirmed because at least some of the plaintiffs were likely to prevail on each. This is a curious way to analyze fair use, and it seems to have been motivated by majority’s editorial judgment that the producers had simply used too much of the plaintiffs’ material.

Throughout its opinion, the majority time and again emphasized both the frequent and repeated use, and the length

of use, of the underlying works. “Use of the video footage ... is not limited to brief clips,” the majority said, but instead included more than one minute of Presley’s appearance on *The Steve Allen Show*, three minutes of Presley’s *1968 Comeback Special* and 35% of his appearances on *The Ed Sullivan Show*.

Although it appeared to recognize that a video biography of Presley must include clips from his television and movie appearances, as well as excerpts from concert and studio recordings, the majority was clearly troubled that the producers could base “at least 5% to 10% of *The Definitive Elvis* [on] Plaintiffs’ copyrighted materials,” and emphasize that use in their marketing and packaging, without a license. *Id.* at *1, 5-6 & 7-8.

The dissent argued, with some force, that the district court and majority had exaggerated the nature and extent of the use – by, among other things, ignoring voice-overs that placed the underlying works in their historical context and the incorporation of those works into a larger biographic narrative. But, in the majority’s view, the extent of the use converted an otherwise fair use into a fundamentally unfair one. In this way, the majority, without explicitly saying so, treated the third factor in the fair use analysis – the amount and substantiality of the use – as if it was dispositive.

First Amendment Dissent

The producers also contended the injunction was an unconstitutional prior restraint on protected speech. The majority refused to “jump into this briar patch” because, under Ninth Circuit precedent (such as the *Napster* and *Cat in the Hat* opinions), the First Amendment does not preclude enjoining an otherwise infringing use that is not fair. *Id.* at *3. But even taking this precedent at face value, the Ninth Circuit’s response begged the question – because all the district court determined was that plaintiffs would “probably succeed on the merits,” and the appellate court repeatedly emphasized the fair use analysis was close and might differ at trial on a more complete record, there remains a not-

The majority, without explicitly saying so, treated the third factor in the fair use analysis – the amount and substantiality of the use – as if it was dispositive.

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inconsequential chance that the biography ultimately would be determined to be fair use, in which case the preliminary injunction was and is unconstitutional.

What is missing in the Ninth Circuit’s analysis is any understanding that it needs to utilize more “sensitive tools” before enjoining editorial content presumptively protected by the First Amendment. See, e.g., *Speiser v. Randall*, 357 U.S. 513, 525 (1958). As Judge Noonan noted in dissent,

“[i]n a case of this kind involving the biography of a man with an immense following, it is necessary for a court to keep in mind that injunctions are a device of equity and are to be used equitably, and that a court suppressing speech must be aware that it is trenching on a zone made sacred by the First Amendment.” 2003 WL 22510352, at *11.

The dissent also suggested how a more First Amendment-sensitive analysis could – and should – be incorporated into the determination of whether an injunction is appropriate. In recent years, the Ninth Circuit has repeatedly emphasized that, in addition to the traditional factors of likelihood of success and irreparable harm, a court considering a motion for preliminary injunction must also determine whether an injunction would serve or harm the public interest. *Id.* at *10.

In light of the First Amendment, many courts have recognized “a strong public interest favoring the publication of books and novels,” as well as the dissemination of movies and filmed biographies. *Id.* (quoting and citing several cases). This public interest should disallow an injunction in a case like this – at least where, as the majority conceded, the merits present a “close call” and monetary damages remain available as an alternate remedy should infringement ultimately be proven.

That would also require the Ninth Circuit to revise its long-standing rule that irreparable harm (*i.e.*, the inadequacy of damages as a remedy) is presumed where a copyright plaintiff proves a likelihood of success on the merits, at least in cases raising First Amendment concerns. But such a modification is warranted not only by the First Amendment but also by the Ninth Circuit’s more recent recognition that the public interest cannot be ignored in the injunction analysis.

Roger Myers is a partner and Lisa Sitkin an associate at Steinhart & Falconer LLP in San Francisco.

Petition for Cert. Filed in Tony Twist Publicity Case

A comic book creator and an amici group of entertainers, novelists, and comedians have asked the Supreme Court to review the Missouri Supreme Court’s decision in *Doe v. TCI Cablevision of Missouri, Inc. et al.*, 110 S.W.3d 363, 31 Media L. Rep. 2025 (Mo. 2003), *pet. for cert. filed*, 72 U.S.L.W. 3309 (Oct 22, 2003). The Missouri Supreme Court reinstated a misappropriation claim by former professional hockey player Tony Twist over a like named fictional character in the comic book and animated television series *Spawn*. A \$24.5 million jury verdict for Twist was vacated on post trial motion – a decision affirmed last year by a Missouri appellate court. Reinstating the claim and remanding for a new trial, the Missouri Supreme Court held there was sufficient evidence to go to the jury that defendant deliberately used Twist’s name for commercial advantage and that such use was not protected by the First Amendment despite containing expressive elements.

The petitions ask the High Court to clarify whether and to what extent artists are protected by the First Amendment when they use the names of public figures in fictional works.

Supreme Court Rejects Earnhardt Photo Appeal

The Supreme Court this month denied certiorari in *Campus Communications v. Theresa Earnhardt*, 821 So.2d 388 (Fla. App. 2002), *cert. denied*, 2003 WL 222513 (Dec. 1, 2003). The High Court rejected an appeal from *The Alligator*, the unofficial student newspaper at the University of Florida, seeking access to autopsy photos of famed race car driver Dale Earnhardt who was killed in a racing accident in 2001. The newspaper had challenged the constitutionality of a Florida law passed after Earnhardt’s death, Fla. Stat. § 406.135, that bars public access to autopsy pictures. The Florida appeals court held that statute was not overbroad and that it could be applied retroactively to bar public access to Earnhardt’s autopsy photos.

New Hampshire District Court Rules Disclosing Fugitive's Relative's Sensitive Data Online Does Not Violate Right to Privacy

The New Hampshire federal district court held that a state government decision to disclose on the Internet the names, home addresses, telephone numbers and drivers license numbers of relatives of an escaped felon did not violate any constitutional or statutory right of privacy. *Gaylor v. McLaughlin*, 2003 WL 22848929 (D.N.H. Nov. 19, 2003).

Plaintiffs Dorothy, William and Richard Gaylor, the parents and brother of convicted felon turned fugitive-of-justice, Gregory Gaylor, sued state officials for violation of their Constitutional right to privacy and the Driver's Privacy Protection Act ("DPPA") and for state law invasion of privacy and defamation after their names, addresses, home telephone numbers and drivers license numbers were listed on the Internet. State officials posted the data in an attempt to discover information regarding Gaylor's whereabouts.

Holding that the decision to post this personal information was narrowly tailored to serve the state's legitimate interest in apprehending a fugitive, Chief Judge Barbadoro granted defendants' motion to dismiss the case. In dicta, the judge suggested that there may not be a reasonable expecta-

tion of privacy in preventing government officials from releasing personal information on the Internet because of the abundance of non-government sources that make such data available. Treating the issue of drivers license numbers separately, the court declined to extend a constitutional right to privacy to those records because that information "is not the kind of deeply personal information that the right to privacy was intended to protect." *Id.*

The court held that plaintiff's DPPA claim failed because defendants were engaged in a legitimate law enforcement activity when they disclosed the information that they allegedly obtained from motor vehicle records.

Additionally, the court rejected plaintiffs defamation and false light claims because the online notice could not have reasonably created the false impression that plaintiffs had been engaged in criminal activity.

Dorothy J. Gaylor, William C. Gaylor, Richard L. Gaylor, pro se, Dallas, TX, for Plaintiffs. Andrew B. Livernois, NH Attorney General's Office, Department of Justice, Concord, NH for Defendant.

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Miami Police Embed Reporters For Trade Talks With Mixed Results

By David Tomlin

If “embedding” journalists with military units enhanced coverage of live combat in Iraq, why couldn’t it do the same thing for accounts of potentially violent trade protests in an American city?

Several reasons, as news organizations discovered last month when thousands of activists came to downtown Miami for the Free Trade Area of the Americas conference November 16 -21.

Miami police, with help from state and federal reinforcements, braced for the kind of violent disorder that has marked anti-trade protests in Seattle and elsewhere. Their planning included an offer to embed journalists with police units.

Mixed Reviews

Although news organizations gave the authorities credit for creativity, the results were mixed. Difficulty in finding their assigned units and lack of time to form the close relationships with their subjects that made the Iraqi version a success left some reporters doubting that embedding could pay off nearly as well in a domestic setting.

The police embedding proposal appeared to present news organizations with an opportunity to assure access to protests and any enforcement actions from a relatively secure vantage point.

Despite concerns about possible privacy invasion, trespass and other claims that might arise in a domestic setting in what amounted to a ride-along context, The Associated Press decided to participate. So did the Miami Herald, CNN, Fox News, the Sun-Sentinel of Fort Lauderdale and several others.

In evaluating the program afterward, journalists identified these drawbacks:

- Some reporters were unable to locate their assigned police units and were not allowed to cross police lines to look for them.
- When some reporters did join up, they found themselves covering officers who were playing cards or reading newspapers while they waited for something to happen.
- The relatively short time that journalists spent with police was not enough to make officers feel at ease with their “embeds” and open up for interviews.
- Photographers found that the best pictures when protesters actively confronted police could be made from the protester, not the police side.

In one respect, editors found the Miami experiment similar to the embedding program in Iraq. Complete coverage was only possible if it included journalists operating independently as well as embedded.

David Tomlin is a former reporter, editor and bureau chief for The Associated Press, where he is now assistant general counsel.

Kentucky Governor Snubs Newspaper after Expose

By Jon Fleischaker and Jeremy Rogers

Kentucky has just finished a long and brutal campaign for governor, dominated by the Republicans’ constant refrain to “clean up the mess in Frankfort” (Frankfort is Kentucky’s State Capitol). The “mess” referred to by the Republican candidate for governor, Ernie Fletcher, had been exposed by numerous newspaper articles and other media disclosures over the last several years. Many of the articles were the result of superb investigative reporting by the Louisville *Courier-Journal*, the state’s largest newspaper.

After his victory on November 4, 2003, governor-

elect Fletcher appointed a transition team, and within two weeks *The Courier-Journal* had the audacity to publish stories about numerous and substantial conflicts of interest that several members of the transition team had. The transition team is populated with lobbyists and businessmen who do business with the state or who are involved with disputes with state agencies.

For example, Fletcher named a businessman as part of the transition team for the labor cabinet despite ongoing enforcement proceedings brought by the labor cabinet against him. Another example is the appointment of a nursing home operator to the transition team for the cabinet which regulates nursing homes.

Kentucky Governor Snubs Newspaper after Expose

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While relying heavily in his campaign on news articles regarding conflicts of interest and misuse of governmental power in the prior Democratic administration, Governor-elect Fletcher apparently believes that his new administration should be exempt from such oversight and criticism, and he implemented a new policy directed solely at *The Courier-Journal*. While a small number of changes were made in the transition team after *The Courier-Journal* published its stories about the conflicts of interest, the major change by Fletcher was the introduction of his new, written questions only policy for *The Courier-Journal*. He announced that he and his administration would not respond to any questions from *The Courier-Journal* reporters unless those questions were submitted in writing. Fletcher applies the new written-questions-only policy exclusively to *The Courier-Journal*. Fletcher has not asked other media outlets to submit their questions in writing in order to be addressed. At press conferences, Fletcher responds to questions from other news agencies while continuing to insist that *Courier-Journal* reporters submit all questions in writing.

The Courier-Journal has vowed not to change the way it reports on state government and has continued to make ef-

forts to question governor-elect Fletcher, at news conferences and elsewhere, without success as of the date of this column was written. In addition, *The Courier-Journal* has begun to publish a regular "Ask Ernie" section with detailed, written questions to the governor-elect. To date, the governor-elect has responded to one of these questions (about education spending) with a statement, more typical of a non-response in a structured televised debate. More importantly, this entire episode appears to be only the beginning of what we believe will be regular and systematic attacks by the Republican administration on the press and press rights in Kentucky. It ought to be an interesting four (or eight) years.

Jon Fleischaker is a partner and Jeremy Rogers is an associate at Dinsmore and Shohl in Louisville, Kentucky.

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D.C. Circuit Says Government Has Limited Burden to Investigate Whether Persons Named in Records Are Alive When Relying on FOIA Law Enforcement – Personal Privacy Exemption

By Chad R. Bowman

The D.C. Circuit has affirmed summary judgment for the U.S. Department of Justice in a Freedom of Information Act case, agreeing that officials sufficiently investigated whether individuals referred to in McCarthy-era investigative files – and whose names were redacted in disclosures under the Act on privacy grounds – were still alive. *Schrecker v. U.S. Department of Justice*, No. 02-5317, 2003 WL 22703478 (D.C. Cir. Nov. 18, 2003), is the latest ruling in long-running litigation by a history professor and author to secure documents concerning government investigations of suspected Communists in the 1940s and 1950s.

It is also the latest ruling in a line of cases going back to 1991 in the D.C. Circuit in which the court has presumed that names and identifying information in law enforcement files are exempt from disclosure under FOIA. (see, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003)(names and details of terrorism detainees, including their lawyers, exempt from disclosure). The *Schrecker* decision holds that this presumption can be invoked by the government, even for records more than a half-century old.

Historian Seeking Records

Historian Ellen Schrecker filed her first FOIA request in 1988, seeking records relating to investigations in 1947 and 1953. She challenged the adequacy of the disclosure in a lawsuit, eventually leading to a 1998 concession by the government that “a ‘significant portion’ of its withholding may have been inappropriate,” and a reprocessing of the request that yielded 24,000 pages of documents and

a 100-page index of redactions and exclusions. In a 2001 decision, 254 F.3d 162 (D.C. Cir. 2001), the court upheld the exclusions except to the extent that the government claimed a law enforcement exemption to protect the privacy of people who may not still be alive.

Although the D.C. Circuit has adopted a presumption of nondisclosure of law enforcement records unless “necessary ... to confirm or refute compelling evidence that the agency engaged in illegal activity,” *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991), the exemption nevertheless requires a balancing of the public interest in disclosure against personal privacy. Because

knowing whether the named individuals were still alive would weigh heavily in such a balancing, the court in its 2001 decision asked for confirmation that the government “took basic steps to ascertain whether an individual was dead or alive.”

The November 2003 decision considered the adequacy of the methods employed by government officials to ascertain the individuals named in the 50-year-old files are still alive.

Debate Over “Basic Steps”

The Department of Justice used several “clues and sources” to check names, according to the decision. Officials checked *Who Was Who*, previous FOIA requests, and “internal sources.” Where the records included a birth date, officials presumed the person was dead if they would be more than 100 years old. Additionally, where the records included a social security number, officials checked a privately maintained database containing Social Security Administration data, the Social Security Death Index (“SSDI”). Evaluating these methods, the district court

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FOIA Law Enforcement – Personal Privacy Exemption

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held that “the Government had done all it was required to do in investigating whether the individuals whose personal information was withheld were dead.”

Schrecker, who noted that the government had failed to disclose even a single additional name as a result of its “investigation,” disagreed with the district court’s conclusions. She observed that the government failed to check the SSDI unless the redacted records themselves contained a social security number, and argued that Justice Department officials should have engaged in internal searches for the individual’s social security number or, alternatively, “name-based searching of the SSDI.”

Further, Schrecker attacked the 100-year rule on two grounds. She argued that because few investigative records contained birth dates of third parties, the rule was only applied to a tiny subset of names. She also argued that, where it is applied, the rule overly protects privacy interests because, according to statistical evidence, just one in 10,000 30-year-old men alive in 1950 (and one in fifty 30-year-old women) could expect to live to 100. Additionally, just 28 percent of men (and 47 percent of women) who were 30 years old in 1950 could be expected to be alive today. And of those who were 40 years old during the investigations, only 4 percent of men and 13 percent of the women are likely still alive.

Government Methods Adequate

Writing for a three-judge panel, Circuit Judge Harry T. Edwards considered and rejected each of Schrecker’s criticisms of the government effort. Because many Americans have common names, any name-based search of the SSDI would not “verify that the individual appearing in the SSDI is the same individual referred to in a responsive document.” The court concluded that

“[t]he fact that a name-based search of the SSDI may reveal other identifying information, such as the date and place of an individual’s birth, does not obviate or diminish this need for ready verification.”

Further, the court agreed that requiring the government to search its own non-responsive records for social security numbers of particular individuals would be unduly burdensome.

“To require the Government to shoulder such a potentially onerous task – with dubious prospects of success – goes well beyond the ‘reasonable effort’ demanded in this context,”

according to the appellate court.

Finally, the court upheld the 100-year rule as a reasonable “prophylactic presumption” aimed at ensuring that most individuals would be dead before any material was released under an Exemption 7(C) balancing test:

“While the 100-year rule is more protective of personal privacy than Schrecker would prefer, it is not unreasonable.”

Balancing Appropriate

Having determined that the government sufficiently investigated whether individuals identified in the records are still alive, the court affirmed the district court’s ruling that their privacy interests outweighed any “weak” interest in public disclosure. The court cited the circuit’s *SafeCard* rule of presumptive nondisclosure of law enforcement records, due to the stigma associated with one’s inclusion in law enforcement files. Weighing this assertedly strong interest in personal privacy against a potential disclosure that “is simply not very probative of an agency’s behavior or performance,” the court concluded that summary judgment for the government was appropriate.

James H. Lesar represented Schrecker. U.S. Attorney Roscoe C. Howard and Assistant U.S. Attorneys Michael J. Ryan and R. Craig Lawrence represented the Department of Justice. Michael E. Tankersley filed an amicus brief supporting Schrecker for Public Citizen, Inc. and other organizations.

Chad R. Bowman is with MLRC-member firm Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C.

The court cited the circuit’s SafeCard rule of presumptive nondisclosure of law enforcement records, due to the stigma associated with one’s inclusion in law enforcement files.

Judge Refuses to Seal Records In Long Island Hazing Case

By Tom Curley

At the urging of *Newsday*, a New York trial judge has refused the request of a Long Island school district to seal the records in a case brought by three high school students who allege that they were the victims of a brutal hazing incident at an overnight football camp. *John Doe 3, et al. v. Bellmore-Merrick Central High School District, et al.*, Index No. 16008/03 (Supreme Court Nassau County Dec. 2, 2003). The ruling reiterates that, even in the context of a proceeding involving the alleged sexual abuse of minor children, there remains “an overwhelming presumption that the public has the right of access to ensure the actual and perceived fairness of the judicial system.”

Student Assault Charges - Civil Suit to Follow

The case arises out of a notice of claim filed by a three Long Island high school students, proceeding anonymously as “John Doe” plaintiffs, who allege that they were sexually assaulted while participating in preseason football camp in Pennsylvania. The suspected assailants are other students on the football team who reportedly were engaging in a brutal hazing ritual. The alleged attackers face criminal charges and the alleged victims have served notice that they intend to institute a civil lawsuit against various school officials and the Bellmore-Merrick Central High School District.

In the civil proceeding, the school district moved to seal the record in its entirety. The school district argued that sealing was necessary to protect the privacy interests of the alleged victims. In addition, the school district asserted that, because N.Y. Civil Rights Law § 50-b(1) requires the identity of a sex offense victim to be kept confidential, the court was required to seal the proceeding, without regard for whether a particular document identified the victims or whether any document could readily be redacted.

Newspaper Opposes Sealing

Newsday, which has reported extensively on the hazing allegations, moved to intervene in the civil case to oppose the school district’s motion to seal the proceeding. Supreme Court Justice Zelda Jonas granted *Newsday*’s motion to intervene and ruled that the proceeding must remain open to the public.

“In balancing the interests of the parties with those of the public, at this juncture, it is clear that the right of the public to be informed of the allegations in these papers far outweighs the rights of the parties,” the judge wrote in a seven-page opinion. “The safety of students participating in sports in the public school system is of paramount interest to the public.”

Even in the context of a proceeding involving the alleged sexual abuse of minor children, there remains “an overwhelming presumption that the public has the right of access to ensure the actual and perceived fairness of the judicial system.”

With respect to the alleged victims’ privacy interests, the court noted that the minors themselves had not moved to seal the proceeding and, in fact, joined with *Newsday* in opposing the school district’s motion to close the court record. The court also noted that the minors were proceeding anonymously, which afforded them some measure of

privacy protection. With respect to N.Y. Civil Rights Law § 50-b(1), the court held that the statute did not authorize the blanket sealing of the proceeding.

At bottom, the court concluded that the

“mere fact that embarrassing allegations may be made against [the school district], or other parties to the litigation, even if ultimately found to be without merit, is not a sufficient basis for a sealing order.”

The Bellmore-Merrick Central High School District was represented by Christine Gasser, Esq., of Congdon, Flaherty, O’Callaghan, Reid, Donlon, Travis & Fishlinger of Garden City, New York.

Newsday was represented by in-house counsel Stephanie S. Abrutyn of the Tribune Company and also by David A. Schulz and Thomas Curley of Levine Sullivan Koch & Schulz, L.L.P. of New York City.

California Courts Say Venture Capital Losses Aren't "Trade Secrets"

By Karl Olson

Three California courts, including the state's high court, have dealt a decisive defeat to claims by the University of California that the performance of venture capital firms in which UC's pension plan invests are "trade secrets" exempt from disclosure to the public. The courts have also rebuffed UC's attempt to close meetings at which investment strategy is discussed.

The California Supreme Court's September 30 decision to let stand two lower court rulings brings to a close a year's worth of contentious litigation against both the UC pension plan and, earlier, the nation's largest pension plan, the California Public Employees' Retirement System (CalPERS), to shed light on the pension plans' venture capital investments. *Coalition of University Employees v. Regents of University of California*, No. 119-291 (Cal.)

Background

The litigation began last year after the *Houston Chronicle* successfully pressured the University of Texas Investment Management Company (UTIMCO) to release the performance results of UTIMCO's private equity investments.

After the UTIMCO decision, *San Jose Mercury News* reporter Matt Marshall pressured CalPERS to disclose the results of its investments in venture capital. CalPERS – which had been releasing the results when its venture capital investments were showing stellar numbers – refused.

The *Mercury News* sued CalPERS under the California Public Records Act in October 2002 and, after a tentative ruling in favor of the San Jose paper, CalPERS capitulated, agreeing in a December 20, 2002 Stipulated Judgment that it would disclose the internal rate of return (IRR) of its venture capital fund investments. IRR is the standard measurement of venture capital fund investments.

In the wake of CalPERS' decision, several other pension funds, including the California State Teachers Re-

tirement System (CalSTRS), decided to disclose IRR.

But the University of California Retirement Plan refused, and on April 1, 2003, the Coalition of University Employees (CUE), a union representing 18,000 UC clerical employees who depend on the UC pension fund for their retirement benefits, sued UC under the California Public Records Act.

UC doggedly resisted the lawsuit, claiming that venture fund performance results were a "trade secret" and that the benefit to the public from releasing performance results would be clearly outweighed by the danger that venture funds would exclude UC as a partner.

Lower Court Proceedings

In a 20-page July 24 ruling, Alameda County Superior Court Judge James Richman soundly rejected all of UC's claims. Citing the widespread disclosure of IRR by many other pension funds, he commented, "If all this is evidence of a valuable 'trade secret,' it comes in a novel guise." Judge Richman also ruled that the UC Board of Regents had violated open meetings laws when it

discussed general investment strategy – as opposed to specific investments – in closed session. *Coalition of University Employees v. Regents of University of California*, No. RG 03-08-9302, (Alameda County Superior Court).

UC sought reconsideration of that ruling, and on the eve of a reconsideration motion hearing, one of the nation's most successful venture firms, Sequoia Capital, kicked UC out as a partner, claiming it was being hounded, badgered and stalked by open government activists who were cynically using the Public Records Act for professional and financial advancement.

Sequoia's claim that people were using the Public Records Act for financial advancement was supremely ironic. The venture firms commonly take fees, win or lose, of 1 to 2 1/2 percent of the investment, and UC alone has invested over \$500 million in venture capital funds. Meanwhile, the plaintiffs in the lawsuit against UC were clerical employees and a retired physics professor watchdog.

This battle exemplifies the trend of some private companies which do business with the government to resist disclosure of information with a talismanic incantation that their finances are "trade secrets."

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CA Courts Say Venture Capital Losses Aren't "Trade Secrets"*(Continued from page 46)****At California Supreme Court***

In any event, UC's motion for reconsideration was denied. It then sought immediate review in the California Court of Appeal and, when that failed, in the California Supreme Court. The Supreme Court rejected UC's entreaties with uncommon speed: UC filed a writ petition on Friday, September 26; CUE responded late in the afternoon of Monday, September 29; and the next morning, September 30, the Supreme Court unanimously denied UC's writ petition.

UC's performance results, as expected, showed that it had shoveled hundreds of millions of dollars into venture capital firms at the top of the market in 1999 and 2000 and that, so far at least, those investments are deeply in the red. UC, like other pension funds, has released its results with a disclaimer that performance results for late-stage invests are not meaningful because it takes many years for investments in venture capital to bear fruit, since the venture firms invest in early-stage companies.

The highly-publicized battle to shed light on the secretive venture capital industry is now over, at least for now, with a resounding victory for open government advocates. But it exemplifies the trend of some private companies which do business with the government to resist disclosure of information with a talismanic incantation that their finances are "trade secrets," and the trend of government – in all areas of its operations – to claim that anything which might be embarrassing to policymakers should be off-limits to the public.

UC was represented by James Holst, John Lundberg, Christopher Patti, Steven Rosen and Maria Shanle of the UC general counsel's office in Oakland, and Jerome Falk and Steven Mayer of Howard, Rice, Nemerovski, Canady, Falk & Rabkin in San Francisco.

Karl Olson and Erica Craven of Levy, Ram & Olson in San Francisco represented the Coalition of University Employees and Charles Schwartz in the lawsuit against the University of California Board of Regents. Judy Alexander represented the San Jose Mercury News in that case. Olson and Alexander also represented the Mercury News in last year's lawsuit against CalPERS.

Another Suspect, Another Seal

On Dec. 10, the Minneapolis Star-Tribune reported, based on anonymous sources, that the FBI arrested a man who they say was associated with the al-Queda terrorist network and is aware of the activities of Zacarias Moussaoui. Moussaoui was arrested in Minneapolis in 2001 and is the only defendant who has been brought to trial as an accused terrorist.

But the detainee's name was omitted from the roster of Hennepin County Jail inmates, and his prosecution is not listed on the public docket system of the U.S. District Court in Minneapolis. He thus joins a growing list of defendants whose cases are officially hidden to the public and the press, and about which the details that have been revealed come only from leaks to the news media.

Other sealed cases that have recently come to light include the prosecution of eight Columbians on kidnapping and murder charges and a variety of drug and other cases in Connecticut, Florida, and Washington, D.C. See *MLRC MediaLawLetter*, Nov. 2003, at 35; May 2003, at 41; and March 2003, at 47.

A certorari petition is currently pending before the U.S. Supreme Court in one of the Florida cases, which the *Miami Business Review* reported involved a Deerfield Beach, Fla. man who challenged his detention after the Sept. 11 terrorist attacks. The Solicitor General, who originally declined to respond to the case, has been given until Jan. 2 to comply with the Court's order to submit a brief in the case. See *M.K.B. v. Warden*, No. 03-6747 (U.S. order extending time filed Nov. 26, 2003).

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Colorado Supreme Court: County Manager's Diary Not a Public Record

By Eileen Kiernan-Johnson & Steve Zansberg

On December 15, 2003, Colorado's Supreme Court ruled that a County Manager's "private" diary, in which he made notes concerning a county employee's work performance, was not subject to disclosure under Colorado's Open Records Act (CORA). *In re Wick Communications v. Montrose County BOCC*, 2003 WL 22938903 (Martinez, J.).

Generated Testimony From his Diary

During the public grievance proceeding of an employee terminated by the County Manager, the County Manager used an outline of events he generated from information in his diary. The local newspaper, the *Montrose Daily Press* then sought access to the County Manager's diary, claiming it was a "public record." The trial court ordered an *in camera* review of the diary to determine whether it constituted a "public record" under CORA.

The Supreme Court ruled that before a trial court can conduct such an *in camera* review it must first determine whether the CORA applies. Adopting the same test used by federal courts under the federal FOIA, the Colorado Supreme Court held that where it is unclear whether a particular record is held by an individual in his public or private capacity, the requesting party must make a threshold showing that the document is "likely" a public record. Shifting the burden of proof to the records requester in these fairly unique circumstances makes sense, the court stated, because the public entity is not in the best position to demonstrate why the CORA does *not* apply and individuals' private documents warrant greater protection.

Applying this new test, the court concluded that the newspaper had not shown that the diary was "made, maintained, or kept" by a public entity, because the County Manager used the diary for his personal use, not in his official capacity, and the County had not required him to keep the diary or to make it available to other County employees for inspection. Accordingly, the Su-

preme Court concluded, the trial court was not authorized to order an *in camera* review of the diary.

John A. Brooks and Aaron J. Brooks of Montrose, Colorado represented the *Montrose Daily Press*; Paul Sunderland of Grand Junction, Colorado represented the County of Montrose and its County Manager.

Eileen Kiernan-Johnson is an associate and Steve Zansberg is a partner with Faegre & Benson in Denver, Colorado

Confidential Source Sues The Aspen Times for Revealing Her Identity

A source for a news story published by *The Aspen Times*, a daily newspaper in Roaring Fork Valley, Colorado, has filed suit against the paper for publishing the story in such a way that it enabled readers to discover her identity. *Poissant v. Eagle Summit Publishing Co., aka Colorado Mountain News Media Co., dba The Aspen Times* (Pitkin Dist. Ct. 2003).

The plaintiff Carolyn Poissant was a town planner for Snowmass Village. On October 7, 2003, *The Aspen Times* published a front page article discussing a controversial development project. The article quoted an unnamed source, identified as a "town planner" and referred to as "she," accusing the government of hatching "back-room" deals. Poissant was the only female town planner. After the article appeared she was placed on unpaid administrative leave and subsequently fired.

Poissant alleges that the reporter promised to keep her identity secret and her complaint sets out claims for breach of contract, promissory estoppel, outrageous conduct and negligence.

Tom Kelley of Faegre & Benson represents the newspaper. Sander Karp represents plaintiff.

California Court Lifts its Own Prior Restraint, but Analyzes “Lawfully Obtained”

By Roger R. Myers and Lisa M. Sitkin

In a prior restraint case testing the meaning of “lawfully obtained” material, a newspaper convinced a California trial judge to reverse a decision prohibiting the publication of photographs taken in the brief period between entry of a court order allowing photography in the courtroom and the judge’s subsequent decision to rescind the order based on objections from defense counsel.

Court Grants, Then Rescinds, Request To Photograph Preliminary Hearing

The case, *People v. Almaraz et al.*, Case No MCR 416066 (Sonoma County Superior Court, Aug. 14, 2003), involved several defendants accused of murdering a local businessman in the course of a botched robbery. In the months leading up to the preliminary hearing, the court allowed photographers for the Santa Rosa *Press Democrat* to photograph the defendants during courtroom proceedings, and the newspaper ran a number of stories that included those photographs. On the morning of the preliminary hearing, Chris Chung, a photographer for the *Press Democrat*, filed a request with Judge Cerena Wong seeking permission pursuant to California Rule of Court 980 to photograph the proceedings. After the bailiff informed Chung that the Court had approved the request, Chung proceeded to photograph the defendants as they entered the courtroom.

Soon afterwards, however, counsel for one of the defendants objected on grounds of prejudice. Without holding a hearing on the question of prejudice, Judge Wong immediately rescinded her prior order and told Chung to stop taking photographs.

Then Issues Prior Restraint

The judge acknowledged that she could not restrain the *Press Democrat* from publishing photographs of the defendants already in the newspaper’s archives, but then veered

into unconstitutional territory by ordering the newspaper to refrain from publishing any of the photographs Chung had taken that morning pursuant to her initial order.

The *Press Democrat* vigorously objected to the prior restraint. At the resumption of the preliminary hearing the next morning, counsel for the newspaper appeared and argued that the previous day’s photos had been lawfully obtained pursuant to the court’s initial order granting Chung permission to take photographs in the courtroom, and that any restraint on their publication was therefore presumptively invalid under *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) and its progeny.

The newspaper also relied on *South Coast Newspapers, Inc. v. Superior Court*, 85 Cal. App. 4th 866, 869-70 (2000), which holds “[a]n order enjoining publication of a photograph of a [party] in a pending court proceeding is

The newspaper cited a number of authorities holding that even when the media is granted access to information by mistake or because of another party’s improper conduct, that information is still “lawfully obtained” for purposes of prior restraint analysis.

[a] classic prior restraint of speech,” as well as other California cases limiting a trial court’s discretion to exercise control over publication of visual material obtained in the courtroom pursuant to a court order. *E.g.*, *KFMB-TV Channel 8 v. Municipal Court*, 221 Cal. App. 3d 1362, 1368

(1990) (directing trial court to vacate order allowing media to film proceedings but prohibiting publication of certain footage without further authorization of the court); *KCST-TV Channel 39 v. Municipal Court*, 201 Cal. App. 3d 143, 147-48 (1988) (order restraining publication of lawfully obtained drawing of defendant’s face vacated as an unconstitutional prior restraint).

In response, attorneys for the defendants argued that Judge Wong’s initial Rule 980 order was invalid because the photographer had not filed his request five days before the preliminary hearing began, as required by the Rule. Consequently, they reasoned, the court order allowing the photography was invalid, photographs taken pursuant to it were not “lawfully obtained,” and the order prohibiting publication need not be analyzed as a prior restraint but as an exercise of the court’s discretion to forbid photography

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California Court Lifts its Own Prior Restraint

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in the courtroom. When it appeared that Judge Wong was willing to consider this novel argument, the newspaper requested leave to submit further briefing.

Court Order Allowing Photos Procedurally Flawed — Lawful?

In its supplemental brief, the *Press Democrat* argued that the five-day advance filing provision in Rule 980 is not jurisdictional, because, *inter alia*, it allows a court to consider requests submitted less than five days before the proceeding where good cause is shown. See Rule 980(e) (1). Moreover, submission of Rule 980 requests on the morning of a proceeding is a common and accepted — though unwritten — practice at the Sonoma County Superior Court (and many other courts in the state). Accordingly, a delay in filing such a request should not render nugatory a court order granting the request and permitting photographic access pursuant to Rule of Court 980.

In support of its position, the newspaper cited a number of authorities holding that even when the media is granted access to information by mistake or because of another party's improper conduct, that information is still "lawfully obtained" for purposes of prior restraint analysis. See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524, 536 (1989) (government's failure to prevent release of rape victim information made confidential by statute did not justify imposition of civil damages against newspaper for publication of that information); *Jacksonville Television, Inc. v. Florida Dept. of Health & Rehabilitative Services*, 659 So.2d 316, 318 (Fla. Ct. App. 1994) (inadvertent disclosure by Court of names of juveniles did "not undermine the conclusion that the information was lawfully obtained," and the court's order restricting media reports based on that information constituted an unconstitutional restraint on speech); *In re Daniel Hays*, 493 N.Y.S.2d 904 (N.Y.App. Div. 1985) (vacating order prohibiting reporter from publishing information contained in court document improperly placed in the public court file).

No Prejudice to Defendants

With respect to the Rule 980 ruling on photographic access to the ongoing preliminary hearing, which Judge Wong also agreed to reconsider, the newspaper argued that

the defendants had not offered sufficient justification for denying access. Since the newspaper had already run photos of the defendants taken during previous courtroom proceedings and was free to republish those archive photos, the *Press Democrat* reasoned, restraining publication of additional photos taken during the preliminary hearing could not in fact prevent whatever minimal prejudice might flow from letting the public see the defendants as they appeared in the courtroom.

Judge Sees Need for Guidelines

Judge Wong acknowledged that it was the court's standard practice to accept and grant Rule 980 requests on the day of a proceeding, but expressed concern over the practice and noted that the judges would be conferring about the matter and working with the media to develop clearer and more explicit guidelines in the future.

In the meantime, Judge Wong granted the *Press Democrat's* request that she reverse her order prohibiting publication of Chung's photographs. Having gone that far in recognizing the constraints imposed by the First Amendment, Judge Wong then opted to split the baby and upheld that portion of her previous order barring cameras in the courtroom for the balance of the preliminary hearing.

While regarding the decision as a Solomonic gesture lacking in real wisdom, the *Press Democrat* chose to accept victory on the more important issue of the prior restraint and did not pursue further review of the Rule 980 decision, particularly since appellate courts traditionally defer to trial courts on such matters. The newspaper will, however, monitor the Sonoma Court's policies regarding Rule 980 requests, and intends to participate in developing and codifying those policies in order to minimize the possibility that opponents of access might seize on a technical misstep as justification for a future prior restraint.

Roger Myers is a partner and Lisa Sitkin an associate at Steinhart & Falconer LLP in San Francisco, which represented the Santa Rosa Press Democrat in this case.

California Trial Judge Grants Newspaper Access to Legal Bills of Private Firm Hired and Paid by the State

By Roger R. Myers and Lisa M. Sitkin

In a case presenting an issue of first impression in California, a state trial court recently ordered California's Department of General Services to provide a *San Francisco Chronicle* reporter with new copies of thousands of pages of legal invoices after finding that the Department's decision to redact all narrative information from the records violated California's Public Records Act. *Hearst Corp. d/b/a San Francisco Chronicle v. Kelso*, No. 03 CS 00819, Order and Judgment (Sacramento County Superior Court, Aug 6, 2003). The court's decision underscored the broad reach of the California PRA, as well as the narrowness of the attorney-client and litigation privilege exemptions in this context.

Reporter Seeks Info on Lawsuit Costs

The case arose out of education reporter Nanette Asimov's investigation of the State of California's involvement in *Williams v. State of California*, a class action alleging that the State has failed to spend sufficient money on education in certain districts. When Asimov learned that, rather than spend more money on education to resolve the case the State had paid the law firm of O'Melveny & Myers more than \$12 million (later increased to \$18 million) during the first three years of pretrial litigation to defend it, Asimov submitted a written PRA request to the Department of General Services requesting, among other records, billing records showing services rendered, expenses incurred and charges to the State by O'Melveny in connection with the Williams case.

Asimov acknowledged in her request that certain limited information in the legal bills she was requesting might be privileged, and therefore limited the request to the contents of the bills that were not so privileged.

The following day, the Department emailed Asimov to request clarification of the scope of her request with regard to the description of legal services in the O'Melveny &

Myers bills to the State. Asimov confirmed that she was not seeking any specific information regarding names or litigation strategy, but only general information about services rendered, expenses incurred and charges to the state, such as whether charges were for depositions, research, travel or accommodations.

State Offers Heavily Redacted Bills

After a delay of several weeks, counsel for the *Chronicle* contacted the Department in an effort to expedite the response. Then, nearly six weeks after the date of Asimov's original request, the Department's Office of Legal Services sent a written response explaining that the Department was providing O'Melveny's billing records, but had redacted information it claimed was exempt from production pursuant to Government Code §§ 6254(b) (pending

litigation privilege) and 6254(k) (referencing attorney-client and work product privileges). Along with this letter, the Department sent over two thousand photocopied pages, most of which had been redacted so heavily that they contained only columns of numbers listing hours or amounts. All narrative

information in the billing records provided, including even the most general references to the nature of the legal services provided, had been completely redacted.

In an effort to avoid litigation, the *Chronicle* sent a further letter through counsel explaining in detail that the redaction of all narrative information from the billing records violated the PRA, and renewing Asimov's request for copies of the billing records redacted only to the extent that information therein actually implicated the exemptions claimed by the Department — *i.e.*, with information about the general nature of the legal services rendered unredacted.

The *Chronicle* then gave the Department a further extension of several weeks to review the matter, but after several conversations between counsel, the Department still refused to provide any further records. Accordingly, the *Chronicle* filed a petition for writ of mandate in Sacra-

Because there were no California authorities directly on point, the Chronicle relied on cases from other jurisdictions holding that withholding generalized information would not achieve the purposes of these privileges.

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Access to Legal Bills of Private Firm Hired by the State

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mento County Superior Court seeking the unredacted records, along with its fees and costs. See Cal. Gov. Code § 6259 (authorizing procedure).

The *Chronicle* argued that information in legal bills about the general nature of legal services rendered is not exempt from disclosure under the PRA pursuant to the privileges cited by the Department. With respect to the pending litigation privilege, Government Code § 6254(b), the *Chronicle* showed that the privilege does not apply literally to every record related in any way to a pending lawsuit, relying on California cases holding that § 6254(b) only applies insofar as necessary to achieve “the obvious purpose of this exemption [which] is to prevent a litigant from obtaining a greater advantage against the governmental entity than would otherwise be allowed through normal discovery channels.” *City of Los Angeles v. Superior Court (Axelrad)*, 41 Cal. App. 4th 1083, 1090 (1996) (citing *Roberts v. Palmdale*, 5 Cal. 4th 363 (1993)); *accord Fairley v. Superior Court*, 66 Cal. App. 4th 1414, 1421-22 (1998); *Poway Unified School District v. Superior Court*, 62 Cal. App. 4th 1496, 1505 (1998).

Because disclosure of notations concerning the kind of activity or expense being billed for — e.g., “legal research” or “telephone conference” or “travel” — would not reveal information prejudicial to the state’s position in the *Williams* litigation, there was no justification for withholding such information from the public pursuant to § 6254(b).

Relied on Precedents From Other States

With respect to the attorney-client and work product privileges, Government Code § 6254(k) (referencing privileges in the Evidence Code), the Department took the position that all narrative content in legal billing records is per se privileged. Because there were no California authorities directly on point, the *Chronicle* relied on cases from other jurisdictions holding that withholding generalized information would not achieve the purposes of these privileges.

In *Clarke v. American Commerce National Bank*, 974 F.2d 127, 130 (9th Cir. 1992), for example, the Ninth Circuit held that information in billing records about “the gen-

eral nature of services performed,” is not covered by attorney-client privilege.

Several state courts have similarly restricted the reach of such exemptions in their public records acts. See, e.g., *Cypress Media, Inc. v. City of Overland Park*, 997 P.2d 681, 691 (Kan. 2000) (“where the narrative descriptions in billing statements provide only general descriptions of the nature of the services performed and do not reveal the subject of confidential communications with any specificity, they are not privileged”); *City Pages v. State of Minnesota*, 655 N.W.2d 839, 844-46 (Minn. App. 2003) (billing records are not protected in their entirety by the attorney-client or work product privileges); *Huron Restoration, Inc. v. Board of Control of Eastern Michigan University*, 1999 WL 33455136 at *2 (Mich. App. 1999) (“a bill for legal services ... is only protected [by the attorney-client privilege] to the extent that it contains confidential client information or the opinions of counsel”); *Tipton v. Barton*, 747 S.W.2d 325, 331-32 (Mo. App. 1988) (legal bills that merely identify the nature of an attorney’s activities “are extraneous to [the attorney’s] legal advice or work product” and are thus not privileged as attorney-client communications or work product).

In its opposition, the Department first tried to take advantage of language in Asimov’s initial request to argue that the request did not in fact encompass any of the narrative portions of the legal bills. Although this argument was easily refuted given the Department’s subsequent correspondence with Asimov, it did point up the need to carefully craft PRA requests so as not to provide a public agency with an opportunity to derail a PRA petition on procedural grounds.

The Department also filed an extensive declaration by an attorney at O’Melveny & Myers cataloging the supposed harms that would follow from disclosure of the unredacted billing records. However, the declaration focused on the very type of specific information Asimov had explicitly excluded from her request — i.e., specific names, subjects of legal research and topics of strategy meetings — and therefore did very little to persuade the court that the more generalized information she was actually seeking should be exempt from disclosure.

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Several state courts have similarly restricted the reach of such exemptions in their public records acts.

Access to Legal Bills of Private Firm Hired by the State

(Continued from page 52)

At the hearing, Judge Connelly briefly examined the billing records *in camera*, then quickly ordered the Department to provide the *Chronicle* with copies of the records with “all narrative entries constituting general descriptions of services performed or costs incurred (e.g., ‘legal research,’ ‘telephone conference’ or ‘attend deposition’) unredacted.”

The order noted that the Department was not required to unredact specific information regarding, for example, the subject of legal research or the identity of the party with whom a telephone conference was held, but required the

Department to provide a privilege log for any such redactions. Judge Connelly also stated that he had not found information falling into that latter category in his preliminary review of the records, and cautioned the Department not to take the Court’s comments as a license to withhold information. The State opted not to appeal and instead provided the unredacted records by the deadline mandated by the court.

Roger Myers is a partner and Lisa Sitkin an associate at Steinhart & Falconer LLP in San Francisco, which represented the San Francisco Chronicle in this case.

Over Dissent, Ninth Circuit Denies *En Banc* Rehearing in *Batzel v. Smith* CDA Case

By Samuel Fifer and Gregory R. Naron

On December 3, 2003, the U.S. Court of Appeals for the Ninth Circuit denied (over dissent) a petition for rehearing and rehearing *en banc* in a recent case interpreting the “Safe Harbor” immunity of the Communications Decency Act (“CDA”). *Batzel v. Smith*, 2003 WL 22852732 (9th Cir., Dec. 3, 2003). As reported in the July 2003 Media Law Letter, the 2-1 panel decision in *Batzel* ruled that an electronic mailing list (“listserv”) operator that posted an e-mail it had received was entitled to CDA immunity, because it was a provider or user of “interactive computer services” who published information provided by an “information content provider.”

The CDA defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(e)(3). The panel held that if a person who posted defamatory material on the Internet “develop[ed]” that material, that person would become the “information content provider,” and lose § 230(c) immunity, but the majority found the listserv operator did not “develop” the information by “merely editing portions of [the] e-mail and selecting [it] for publication.” *Batzel v. Smith*, 333 F.3d 1018, 1031 (9th Cir. 2003).

Dissenting from the denial of rehearing *en banc*, Judge Gould (joined by Judges Tallman and Callahan) disagreed

with the panel majority’s conclusion that the listserv operator’s actions in editing and posting the e-mail were not “develop[ment]” of information, and prophesied a parade of horrors. Fundamentally, Judge Gould (who dissented from the panel decision) argued that the panel majority failed to recognize “the difference between selection and screening that Congress recognized: Screeners of matters posted by others get immunity; those who select what is posted do not. Section 230 demonstrates a clear Congressional intent to immunize screening and post-publication removal, but shows no corresponding Congressional intent to immunize pre-publication selection and editing.”

The dissent maintained that the panel majority’s interpretation was not only “unfaithful to the statutory text, it opens the door for any Internet publisher to amplify the defamatory words of any person who communicates, or reasonably seems to communicate, a desire that their defamatory missive be published. . . . Under the panel majority’s rule, there might be a remedy against the initial sender, but there is no remedy against the person who willingly chooses, with no exercise of care, to amplify a malicious defamation by lodging it on the Internet for all persons and for all time. Unless this result were commanded by Congress, we should not create such a system.”

Samuel Fifer and Gregory R. Naron are Partner and Of Counsel, respectively, of Sonnenschein Nath & Rosenthal LLP.

Directed Verdict in Suit Over Electronic Store Warranties

TV Station Reported That Buyer Would Not Honor Service Contracts

A Roanoke, Va. television station won a directed verdict in a defamation case stemming from its coverage of a controversy over a new owner of a chain of electronics stores that refused to honor extended warranties sold by the previous owner. *Bagwell v. WDBJ Television, Inc.*, No. CL 01000943-00 (Va. Cir. Ct., Roanoke directed verdict Dec. 16, 2003).

The claim alleged that the station's coverage, which focused on customers who were upset that the extended warranties that they had purchased from Holdren's were not being honored by Crenshaw's, had inaccurately reported the Holdren's purchase. The suit argued that the general tone of the coverage had a defamatory impact on the company, and had resulted in lower sales. The company sought \$30 million in damages.

"If you'd have reported correctly that Crenshaw's bought only the assets from Holdren's, and did not assume the liabilities," Bagwell told a WDBJ reporter covering the filing of the defamation claim, "... then [there] wouldn't have been the uproar that we had."

In June 1996, Crenshaw's TV and Appliance of North Carolina purchased the Holdren's electronics chain and took over its five stores. But Crenshaw's bought only the Holdren's assets; it did not buy its liabilities, including the extended service contracts. In 1998, the company reached an agreement with then-Virginia Attorney General Mark Earley to offer customers partial refunds of the cost of the warranties.

The defamation claim was filed in June 1997, shortly after WDBJ-TV filed suit over almost \$50,000 in unpaid bills for Crenshaw's advertising in late 1996. The station eventually won that lawsuit. *WDBJ Television v. Crenshaws of Virginia, Inc.*, No. CL 97000337-00 (Va. Cir. Ct., Roanoke final order July 20, 1999).

The plaintiff in the case were the Crenshaw's company and Harold G. Bagwell, a North Carolina businessman who owned the Crenshaw's chain when it took over the Holdren's stores.

Circuit Judge Jonathan Apgar denied a defense motion to dismiss shortly after the suit was filed. But after the

plaintiff presented his case during one-and-a-half days of trial, Apgar granted a defense motion to strike the suit.

In granting the motion, Judge Apgar held that the WDBJ stories could not be defamatory because all of the facts in them were correct. "[N]othing that was reported is different from the actual existence of the facts for the transaction," he said in an oral ruling. Apgar said that the claim that the reporting was negligent could survive on the basis that it may have been incomplete, but should be struck because the defendant had no hard evidence of actual damages.

In this particular case, the damage information that was before the jury is probably some of the speculative and conjectural I've seen in a long, long time. ... There are many things upon which to speculate why their sale figures dropped. Certainly having this information released could have been it, but many other things could have been, and there is no way a rational fact finder could make a reasonable estimate of how much they may have actually cost the corporate plaintiff.

"Although I think that the negligent reporting [claim] survives the motion to strike, if you can't prove the damages, that doesn't survive the motion to strike," he concluded.

Apgar also dismissed Bagwell's claims, saying that while the corporation may have been damaged, he personally suffered no harm.

WDBJ, which is owned by Schurtz Communications, Inc., was represented by solo practitioner Robert F. Rider of Roanoke. Plaintiff Harold Bagwell was represented by John L. Cooley and Peter Vieth of WootenHart PLC in Roanoke.

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ABC Wins Motion to Quash Subpoena

California District Court Rejects Branzburg, Relies on Criminal Procedure Rules

By Rochelle L. Wilcox

On November 18, 2003, the U.S. District Court for the Northern District of California quashed a prosecution subpoena directed to ABC, seeking outtakes and other information from a 20/20 episode that aired in April 1997. *United States v. Schneider*, No. CR 02-0403 SI (N.D.Cal.)(Illston, J.). While rejecting ABC's arguments arising from Branzburg, the DOJ Guidelines, and the California shield law, the court found for ABC under Federal Rule of Criminal Procedure 17(c).

Tapes on Tax Shelter Story

The 20/20 episode discussed Jerome Schneider's seminars on offshore banking and tax shelters. Among other things, ABC broadcast Schneider's statement that the taxpayer controls the offshore bank to be established as a tax shelter – "you control it."

Over the next two years, undercover agents attended other seminars given by Schneider. Like ABC had, the agents posed as prospective clients. However, the government agents went one step further than ABC, actually purchasing an offshore bank from defendant.

The prosecutor primarily wanted the tape containing the "you control it" statement. However, the subpoena was much broader and sought, among other things, all of the outtakes from the seminar. When ABC advised the prosecutor that it could not find the "you control it" tape, the prosecutor insisted that ABC comply with the subpoena in its entirety. ABC moved to quash the subpoena, relying on the First Amendment qualified privilege, 28 C.F.R. § 50.10 (the Department of Justice Guidelines), California's shield law and Federal Rule of Criminal Procedure 17(c).

The court rejected ABC's arguments based on the qualified privilege. It found that *Branzburg v. Hayes*, 408 U.S. 665 (1972) foreclosed recognition of a privilege in federal criminal cases absent a showing that "the investigation itself is in bad faith, or that [the reporter's] testimony has been sought where there is no 'legitimate need of law enforcement.'" The court also held that

the Department of Justice Guidelines do not provide an independent ground for quashing the subpoena. Finally, it held that California's shield law did not apply in federal court on a federal charge.

The court did, however, sustain ABC's objection based on Federal Rule of Criminal Procedure 17(c). In rejecting the prosecutor's demand for the names and addresses of ABC employees who attended Schneider's seminar, the court discussed the extensive meetings between government agents and Schneider, noting that "[t]he indictment describes each of these encounters in detail, including the substantive content of the discussion, the meeting location and date, and the pseudonym used by the agent."

The court found that information in ABC's possession would be cumulative and the prosecutor failed to meet its burden of establishing that it was unavailable elsewhere. The court also held that the seminar brochures and handouts which the prosecutor sought from ABC were readily available elsewhere, having been published to "hundreds, if not thousands of people, including the government's own agents."

Finally, the court quashed the prosecutor's request for ABC's outtake footage, reasoning that "it is not reasonable to suggest that cutting room floor material is the sole evidence upon which the government can effectively try Schneider. The government admits that it intends to frame its case around Schneider's statement 'You control it,' which the government presently has in its possession. If, as the government alleges, that phrase is uniquely probative of the defendant's guilt, it is difficult to see how further recorded statements will advance that portion of its case."

Concluding that "the government has failed to show that the material sought by the Rule 17(c) subpoena is relevant, specific, and non-cumulative," the court quashed the subpoena in its entirety.

ABC was represented by Thomas R. Burke (San Francisco) and Rochelle L. Wilcox (Sacramento/Los Angeles) of Davis Wright Tremaine. The government was represented by Assistant United States Attorney Jay R. Weill.

Tribune-Review Reporter Found Guilty of Trespass at Chemical Plant

On November 10, 2003, a reporter for the Pittsburgh Tribune-Review was found guilty of defiant trespass before an Allegheny County magistrate. District Justice Carla Swearingen, of Robinson Township, found reporter Carl Prine guilty of the charge that stemmed from a September 22 incident at the Neville Chemical Co. on Neville Island in Allegheny County.

Prine, Steve Kroft, a correspondent for "60 Minutes," and Gregory Andracke, a freelance cameraman working for CBS, were given citations while researching a story about lax security at the nation's chemical companies. The journalists were able to enter the facility through an open gate in an otherwise fenced-in area. They had just left the grounds when a security guard stopped them and asked them to remain while he called local authorities.

Prine and the Tribune-Review have filed a summary appeal to the Court of Common Pleas of Allegheny County, a trial court of general jurisdiction. A hearing has been scheduled for March 3, 2003 in Pittsburgh.

Supreme Court to Intervene in Cheney Task Force Litigation

The Supreme Court has decided that it will rule on whether Vice President Dick Cheney can be compelled to disclose documents relating to an energy policy taskforce he led in 2001. *In re Cheney*, 334 F.3d 1096 (D.C. Cir.), cert. granted, sub. nom. *Cheney v. United States District Court for District of Columbia*, 72 U.S.L.W. 3403 (Dec. 16, 2003) (No. 03-475). The High Court agreed to hear an appeal from a Bush administration stunned by a district court order requiring the government to release the documents. In July, the U.S. Court of Appeals for the D.C. Circuit refused to vacate the district court order. A few months later, the Circuit Court denied the administration's motions for rehearing and rehearing *en banc*. See *MLRC MediaLawLetter*, September 2003, at 15.

The underlying lawsuit was filed in July 2001 by Judicial Watch, Inc., who was later joined by the Sierra Club. The interest groups are seeking the names of task force participants, details of the group's workings and information about Cheney's involvement. The Federal Advisory Committee Act (FACA), 5 U.S.C. Appendix 2, requires that documents from federal advisory committees be made public, unless exempt from disclosure under the provisions of the Freedom of Information Act, 5 U.S.C. §§ 552, *et seq.*

The Bush administration claims that requiring a vice president to turn over documents pertaining to communique with the Chief Executive impinges on the president's constitutional powers and raises separate questions about separation of powers.

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Toledo Radio Host Appeals Contempt Finding

Host Reluctantly Reveals Source, But is Fined Nevertheless

A Toledo, Ohio radio talk show host has appealed an order holding him in contempt for refusing to reveal a source and ordering him to pay almost \$6,000. *Svoboda v. Clear Channel Communications*, No. G-4801-CI-200001224 (Ohio Ct. C.P., Lucas County order entered Nov. 3, 2003), *appeal pending*, No. _____ (Ohio Ct. App., 6th Dist. filed Nov. 26, 2003) (appeal of contempt order).

The issue arose in a slander suit against the host, Denny Schaffer, over statements he made on the "Breakfast Club" program on WVKS-FM in October 1999 criticizing articles that *Toledo Blade* reporter Sandra Svoboda had written about the University of Toledo.

According to Svoboda's lawsuit, Schaffer stated that the reporter had unfairly slanted her articles at the direction of *Blade* publisher and editor-in-chief John Robinson Block. The lawsuit further alleges that Schaffer said that Svoboda and Block had a sexual relationship.

Schaffer Refuses to Name Sources

In the course of depositions, questions arose regarding the sources of three separate allegations regarding

Svoboda and Block, some of which Schaffer had used on the air.

The first allegation was that Block had once gotten mad and thrown his shoe across his office. Schaffer did not use the shoe-throwing allegation on the air.

During a deposition in September 2000, Schaffer said he was told of the incident by someone who worked at the newspaper, who was a friend of a friend. But he invoked Ohio's reporters' privilege statute and refused to name either the source or the intermediary friend.

The second allegation was that that Block had dated other *Blade* employees. In the September 2000 deposition, Schaffer said that this allegation came from the same source who had told him the shoe-throwing allegation. He later recanted this, saying that he did not recall the source of the dating allegation, but that it was not the same source as for the shoe-throwing allegation.

The third allegation was that Block and Svoboda had a sexual relationship. Schaffer said that this came from a source unrelated to the sources for the other allegations.

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Toledo Radio Host Appeals Contempt Finding

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Motion to Compel

In the underlying slander suit, only the third allegation was at issue: the allegedly slanderous statements about Svoboda's alleged sexual relationship with Block. But the parties got into a confusing battle over the sources of the first and second allegations.

On April 22, 2002 the plaintiff filed a motion to compel Schaffer to reveal his source for the second allegation, that Block had dated employees of the *Blade*. The court granted this motion on May 8, 2002, ordering disclosure by May 14, 2002.

Despite his earlier statement that the same source provided the information regarding the alleged shoe-throwing incident and Block's dating habits, in an August 22, 2003 affidavit Schaffer said that he could not recall who told him that Block had dated *Blade* employees. He added that there was "nothing to my knowledge that would refresh my recollection."

Svoboda nevertheless moved that Schaffer be held in contempt for his continued refusal to name his source of the shoe-throwing allegation. At a Sept. 23, 2003 hearing on this motion, Judge Skow was incredulous that the radio host could have forgotten the identity of his source. "It's inconceivable ... he could forget such specific information," Skow said, according to a report in the *Blade*.

"There are two possibilities," Skow said. "Mr. Schaffer is lying in his affidavit, or there never was a specific source, and still is not to this day." Skow held Schaffer in contempt, and scheduled a hearing Oct. 30 to determine the penalty.

Host Cites a Source

On Oct. 24, Schaffer filed an affidavit from former *Blade* employee Alan Abrams, who stated that he was the source of the second allegation. In the affidavit Abrams stated that, after hearing of Svoboda's lawsuit against Schaffer, he had told the radio host that *Blade* publisher Block had dated various newspaper employees.

In light of Abrams' affidavit, Schaffer asked Skow to reconsider the contempt finding.

But the judge pushed forward regarding the source for the first allegation, and when Judge Skow yet again asked Schaffer to reveal the names of his source for the shoe-

throwing allegation and of the mutual friend who introduced them, the radio host asked to reveal the names only in the judge's chambers out of fear that the source would lose his/her job at the *Blade*. When plaintiff's counsel objected, Judge Skow ordered Schaffer to reveal the names in open court. The radio host then identified both the source and the mutual friend who put Schaffer in contact with the source.

After Schaffer named his source, Judge Skow denied the defense motion to reconsider or vacate the contempt finding. He also ordered Schaffer to pay \$5,955, the amount of Svoboda's legal costs related to the contempt motion since May 14, 2002, the day by which Skow had originally ordered Schaffer to reveal his source.

Schaffer filed notice of his appeal of the contempt order and fine on Nov. 26. *Svoboda v. Clear Channel Communications*, appeal pending, No. _____ (Ohio Ct. App., 6th Dist. appeal filed Nov. 26. 2003).

Other Appeal Pending

The Sixth District Court of Appeals is also considering an appeal from Tricia Tischler, one of Schaffer's co-hosts.

While being deposed in Svoboda's slander suit, Tischler said that she had heard that Svoboda and Block were dating second-hand, from someone who had heard it from someone else. Tischler invoked the privilege statute and refused to name the original source. In September 2002, Skow ruled that although "her function in part on the radio show ... is that of a news person, it's mainly by default and all she does is rip and read wire service stories ... and that doesn't include gossip, and this is gossip at best."

Based on this reasoning, Skow ruled that the reporters' shield statute did not apply to Tischler. Argument in Tischler's appeal of this ruling was heard on Oct. 14. *Svoboda v. Clear Channel Broadcasting, Inc.*, No. _____ (Ohio Ct. App., 6th Dist. argued Oct. 14, 2003). A decision is pending.

Meanwhile, no trial date has been set in the underlying slander case.

Schaffer and the other defendants are represented by Thomas G. Pletz, Neema Bell and Stephen Rothschild of Shumaker, Loop & Kendrick in Toledo. Svoboda is represented by Frederick M. Gittes of Gittes & Schulte in Columbus, Ohio.

Federal Court Declares New York Law Criminalizing “Annoying” or “Alarming” Communications Unconstitutional

By Seth D. Berlin and Chad R. Bowman

A 38-year-old New York statute making it a misdemeanor to use the mail, phone, or other technology to communicate “with intent to harass, annoy, threaten or alarm another” cannot constitutionally be applied to merely “annoying” or “alarming” speech, according to a recent decision by the Southern District of New York. The decision, *Vives v. City of New York*, No. 02 Civ. 6646SAS, 2003 WL 22771504 (Nov. 24, 2003), arose in the context of a civil rights lawsuit against New York City and two New York City Police Department detectives following the plaintiff’s arrest under the statute.

Background

The plaintiff, Carlos Vives, engaged in a twenty-year campaign to send unsolicited letters and attached newspaper clippings to thousands of people. According to an affidavit by the Vives, he has sent some 27,000 letters to “people of the

Judge Scheindlin concluded that merely annoying or alarming communications, such as the Vives letters, cannot qualify as “true threats.”

Jewish faith with the intent to alarm them about current world events that have been prophesied in the Bible, including the unification of the European countries into a single political and military entity.” Until his arrest, Vives included his name and address in mailings.

Jane Hoffman, a candidate for state lieutenant governor, received a letter in early 2002 that her campaign manager described to two city detectives as “alarming and/or annoying.” The detectives interviewed the campaign manager and prepared a report stating that the letter “does not have any threaten [sic] wording on it.” Rather, the detectives noted that “[m]ost of the letter contains political and religious

statements and photocopy of a cut-out newspaper article.”

Nevertheless, the detectives visited Vives several days later and asked him to come downtown because “the mayor wanted to see him.” Outside, the detectives

handcuffed the plaintiff, took him to the precinct, and charged him under N.Y. Penal Code § 240.30(1). The district attorney’s office declined to prosecute, and Vives was released approximately twelve hours after his arrest.

Statute Violates First Amendment

The statute at issue, popularly known as the “Malicious Telephone Call Act,” includes a provision concerning aggravated harassment, which it categorizes as a Class A misdemeanor and defines as communicating or causing a communication to be initiated “anonymously or otherwise, by telephone, or by telegraph, mail, or any other form of written communication, in a manner likely to cause annoyance and alarm . . . with intent to harass, annoy, threaten or alarm another.” Although Section 240.30(1) had never before been squarely struck down as facially unconstitutional, the Vives court noted that four prior state and federal decisions over the past eighteen years had cast doubt on the statute’s constitutionality.

Judge Scheindlin concluded that merely annoying or alarming communications, such as the Vives letters, cannot qualify as “true threats” under *Virginia v. Black*, 123 S. Ct.

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“Website of the Month”

For a quick and handy listing of recent Supreme Court decisions in the area of First Amendment law, the Thomas Jefferson Center for the Protection of Free Expression has an internal page of its website where the past 7 years of Supreme Court decisions in this area are displayed in reverse chronological order. Each case is identified by name, accompanied by a single sentence summarizing the subject matter of the case, the Justices’ votes, a brief description of the holding, and a link to the full opinion of the Court (from the Legal Information Institute at Cornell University): <http://www.tjcenter.org/whatsnew.html#newlitigation>

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Federal Court Declares New York Law Criminalizing “Annoying” or “Alarming” Communications Unconstitutional

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1536 (2003), and *Watts v. United States*, 394 U.S. 705 (1969), because “they are not ‘serious expressions[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals.’” Nor did the letters fall into any other category of unprotected speech such as defamation, incitement, obscenity, or child pornography. Thus, despite an admitted intent to alarm recipients, “Vives has a constitutionally protected right to engage in this conduct.” As a result, the court also held that New York City and the two detectives violated Vives’s Fourth Amendment rights when they arrested him.

Although the court found Section 240.30(1) unconstitutional as applied to merely annoying or alarming communications, the court did not strike down the entire provision. Rather, the court declined to consider whether Section 240.30(1) is unconstitutional to the extent that it prohibits communications intended to “harass” or “threaten” or to rule on whether the statute is unconstitutionally vague.

Motion for Summary Judgment on Qualified Immunity Denied

The court denied the detectives’ motion for summary judgment on qualified immunity grounds, holding that the “dubious history” of the provision raised a question of fact for the jury whether the officers acted in good faith and were thus entitled to such immunity. “In light of this country’s long history of protecting free speech, as well as more than fifteen years of jurisprudence specifically questioning the constitutionality of section 240.30(1), I cannot conclude that [the] detectives’ . . . conduct was reasonable under these circumstances,” the court concluded. While “police officers cannot be expected to analyze state laws and determine whether they are constitutional,” the court nevertheless held that the officers might have had notice of the statute’s infirmities, and denied their motion.

Injunction Issued

The court issued an injunction against further prosecution of Vives under Section 240.30(1), but declined to

issue a general injunction prohibiting all prosecutions under the statute, on the grounds that doing so was “outside the scope of the Court’s power.” The court noted, however, that “the ever-growing number of courts holding this statute unconstitutional suggests that the state and local police officers and prosecutors would be well-advised—after fourteen years—to cease arrests and prosecutions under this statute.”

Vives was represented by Christopher Dunn, Arthur Eisenberg, and Donna Lieberman, all of the New York Civil Liberties Foundation. Katie O’Connor, Assistant Corporation Counsel for the New York City Law Department, represented the defendants.

Seth D. Berlin and Chad R. Bowman are with Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C.

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Legislative Update

By Kevin Goldberg

The first session of the 108th Congress has now ground to a close without any major bills being passed that harm the First Amendment or access to government information. However, no bills were passed, or even significantly considered, that would greatly improve the media's ability to do its job. This includes any major revisions to either the USA Patriot Act or the Homeland Security Act. As we move into 2004, the majority of Congressional efforts are likely to be dictated by Senators and Representatives seeking to make a mark in an election year. Below are two of the bills which were introduced late in the year that could see action as the second session of the 108th Congress convenes in January.

Patient Safety and Quality Improvement Act (S 720 / HR 663): A possible disaster for those reporting on quality of care at local facilities of all types.

- Introduced in the House on February 11, 2003 by Rep. Michael Bilirakis (R-FL), with approximately twenty co-sponsors. The Senate version was introduced by Sen. Jim Jeffords (I-VT), Bill Frist (R-TN) and John Breaux (D-LA) on March 26, 2003.
- The bill notes that "research on patient safety unequivocally calls for a learning environment, rather than a punitive environment, in order to improve patient safety." Increased voluntary data gathering, but not increased mandatory data gathering, from within the health care field is apparently necessary to achieve this goal of a learning environment. Organizations supporting this increased voluntary data gathering also support legal rules that will allow them to review this protected information in order to "collaborate in the development and implementation of patient safety improvement strategies."
- It contemplates the creation of "patient safety organizations" which will receive "patient safety data" that is voluntarily provided by health care providers.
- These "patient safety organizations" are public or private entities that:
 - Collect and analyze patient safety data voluntarily submitted by a provider;
 - Develop and disseminate information to providers regarding patient safety,
 - Including recommendations, protocols or information on best practices; or
 - Utilize patient safety data to encourage safety and minimize patient risk.
- "Patient safety data" is defined as any data, reports, records, memoranda, analyses, deliberative work, statements, or quality improvement process. This does not specifically include individual medical records, nor is it information that contains personally identifiable information. Rather, patient safety data will most likely consist of aggregated statistics reflecting trends in a given organization or office, such as the number of people who died during surgery in the past year or the number of patients who died from post-operative infection. It may also include individual reports -- minus personally identifying information -- of medical or administrative errors which are reported to the patient safety organization in order to receive feedback regarding the ability to avoid similar mistakes in the future.
- A health care provider submitting this information can be any person or entity furnishing medical or health care services, including, but not limited to, physicians, pharmacists, renal dialysis facilities, ambulatory surgical centers, long term care facilities, behavioral health residential treatment facilities and clinical laboratories.
- The bill's controversial provisions grant confidentiality to this patient safety data. The legislation states that all patient safety data shall remain privileged and confidential, preventing its release even in the face of a subpoena or discovery request (or its use as evidence) in any civil, criminal or administrative proceeding, or its disclosure pursuant to FOIA. Disclosure of this information can only occur if:
 - A health care provider makes the disclosure as part of a separate request for information that

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Legislative Update

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contains this information (such as a proper request for a patient's file when that file contains a reference to patient safety data or the data itself); or

- A health care provider or patient safety organization releases the information as part of a disciplinary proceeding or criminal proceeding if the information is material to the proceeding, within the public interest and not available from any other source.
- Some believe that S 720 and S 663 would trump existing state laws, such as a recently-passed Illinois law which requires the reporting of hospital-acquired infections. This concern stems from the very broad definition of "patient safety data". Any advocacy against this bill must contain opposition to this definition.
- By including "any data, reports, records, memoranda, analyses, or statements that could result in improved patient safety or health care outcomes that are (1) collected or developed by a provider for reporting to a patient safety organization, (2) requested by a patient safety organization, or (3) collected from a provider", in the definition of "patient safety data", the bills would allow health care providers or patient safety organizations to bring records, information, or other evidence of improper care through the back door into the safe haven of protection from disclosure
- The bills' supporters disagree, claiming that the bills would not limit the availability of any information already in the public domain, nor would they relieve physicians from maintain a proper standard of care.
- In addition, the exception for information that has been collected or developed separately from patient safety data is not sufficiently precise to allow a requestor to claim access to such records -- they would apparently allow medical information such as specific patient records to be grouped with patient safety data in a way that results in both being protected by the law. It almost certainly would restrict access to the self-generated "hospital report cards" that are a good indication of a hospital's health care practices.
- HR 663 has passed the entire House and has been referred to the Senate Committee on Health, Education, Labor and Pensions. That Committee has already passed S 720, which awaits a floor vote, which at this time has not been scheduled.

Any comments or views on either bill should be directed to members of that Committee. A list of those Senators can be found at: http://health.senate.gov/committee_members.html.

Congressional Research Accessibility Act (HR 3630): Burying non-secret CRS reports

- The Congressional Research Service ("CRS") is considered the top source for nonpartisan objective evaluation of legislation-related issues. These materials include issue and legislative briefs, and authorization and appropriation products. Citizens, scholars, journalists, librarians, businesses, and many others have long wanted access to CRS reports via the Internet. Despite the fact that the CRS is a taxpayer-funded service, the results of its research are available to the public only if a citizen requests certain information from his or her Congressman.
- Last month, the MLRC reported that Representatives Mark Green (R-WI) and Chris Shays (R-CT) had removed access offered through their websites to CRS documents.
- On November 21, 2003, Rep. Shays introduced HR 3630, which requires the Congressional Research Service to make available
 - Congressional Research Service Issue Briefs.
 - Congressional Research Service Reports that are available to Members of Congress through the Congressional Research Service website and
 - Congressional Research Service Authorization of Appropriations Products and Appropriations Products.
- These documents must be provided within thirty to forty days after it is made available to Congressmen through the CRS website
- Because the bill was introduced so late in the legislative session, the Committee on House Administration has not taken any action

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or kmg@cohnmarks.com.

Making Sense of McCain-Feingold

by Eric Mogilnicki and Stacy Beck

On December 10th, the U.S. Supreme Court issued a landmark election law decision in *McConnell v. FEC*, 540 U.S. ____ (slip op. December 10, 2003). In a 5-4 majority opinion, co-authored by Justices John Paul Stevens and Sandra Day O'Connor, the Court upheld all the core provisions of the Bipartisan Campaign Reform Act ("BCRA")¹ -- the campaign finance reform law known as McCain-Feingold.

A majority of the Court recognized that BCRA was not the epochal change in the law that its critics had alleged. Indeed, since the administration of Theodore Roosevelt, Congress has passed legislation to address the problems of apparent and actual corruption in our federal political process. In the early 1900s, Congress first prohibited corporate contributions in connection with federal elections -- a ban that was later extended to labor unions. In the wake of Watergate, Congress limited the amount of campaign contributions, required disclosures of contributions and expenditures, and established a Federal Election Commission ("FEC") to administer and enforce the Federal Election Campaign Act ("FECA"). And over the past quarter-century, starting with *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has largely upheld such reforms.

In passing BCRA, Congress attempted to restore the integrity of the post-Watergate legislation by reacting to three relatively recent developments:

(a) the creation of the "soft money" loophole;

(b) the proliferation of "sham issue ads"; and

(c) the "disturbing findings" of the Senate's investigation into the campaign abuses of the 1996 elections. 540 U.S. ____ (2003) (slip op. at 11) (Stevens and O'Connor, J.J.) "Soft money" describes funds raised by the political parties outside the source and amount limitations that FECA applies to federal candidates and political committees. Such "soft money" could be raised in unlimited amounts and could be contributed from corporate or union general treasury funds.

The evidence presented in the *McConnell* litigation made clear that, although these contributions escaped regulation through the fiction that they had nothing to do with federal elections, the parties were in fact using federal officeholders and candidates to raise soft money, and then using soft money to influence federal elections. In the 2000 election cycle alone, corporations, unions, and wealthy individuals contributed almost half a billion dollars in soft money to the national parties. *Id.* at 11-15.

¹ The Court struck down two minor provisions: (1) the "minors provision," which prohibited individuals under the age of 18 from making contributions to federal candidates and committees; and (2) the "forced choice" provision, which required political parties to choose either to spend in coordination with or independently of the party's nominee for federal office. The Court also narrowed the reach of one provision, holding that political party committees are only prohibited from donating soft money -- not hard money -- to certain tax-exempt organizations.

Similarly, “sham issue ads” are those broadcast advertisements that are intended to influence federal elections, but escape regulation by avoiding the so-called “magic words” of express advocacy, such as “Vote for Bush” or “Dean for President.” During the 1990s, corporations and unions spent hundreds of millions of dollars on such ads, which -- like soft money -- were unregulated under FECA. *Id.* at 15-18.

These abuses were well-documented by the Senate Committee on Government Affairs’ investigation of the campaign practices in the 1996 federal election and only worsened during the 1998 and 2000 election cycles. *Id.* at 16-21. In passing BCRA, Congress was not breaking any new constitutional ground, but rather acting again ‘to purge national politics of what was conceived to be the pernicious influence of ‘big money’ campaign contributions.’” and to “confine the ill effects of aggregated wealth on our political system.” *Id.* at 4, 118 (internal citations omitted).

Now that the nation’s highest court has ruled, many lawyers -- including those who practice media law -- are trying to understand McCain-Feingold and what the high Court’s decision might mean for their clients. Here is a short primer on the Court’s ruling regarding this complex statute:

- **Soft Money Ban:** The Court upheld BCRA’s soft money ban, whose purpose is to reduce the appearance of corruption that accompanies massive campaign contributions flowing into the coffers of our nation’s political parties, often from corporations and labor unions. All funds raised by national parties and those funds raised by state and local parties for federal election activities are now limited: individuals can contribute a maximum of \$25,000 to each national party per year, \$10,000 to each state or local party per year, and \$95,000 in total contributions to candidates, political action committees (“PACs”), and parties over a two-year period. The source of contributions is also regulated: corporations and unions are prohibited from making any contributions in connection with federal elections from their general treasury funds, though they are permitted to make such contributions from their PACs. In addition, federal candidates and officeholders are barred from soliciting soft money in connection with a federal election. This important aspect of the bill prevents access and influence from being peddled in exchange for large soft money contributions.
- **Electioneering Communications:** The Court also sustained BCRA’s electioneering communication provisions, which require corporations and unions to use hard money (funds raised in compliance with the source and amount limitations of FECA) to finance certain broadcast advertisements. Under BCRA, radio and television advertisements that (a) mention a federal candidate; (b) are targeted to that candidate’s electorate; (c) and are broadcast within 30 days of a primary or 60 days of a general federal election must be funded with hard money. This means that unions and corporations (including non-profit corporations) must pay for such ads with political action committees (“PAC”) funds, not with dollars from their corporate or union treasuries.

While the *McConnell* litigation primarily focused on challenges to the soft money ban and electioneering communication provisions, the 75-plus plaintiffs involved in the consolidated lawsuits also challenged many other provisions of BCRA. Two of these may be of particular interest to attorneys with a media law practice.

- **Lowest Unit Charge:** Section 305 of BCRA amended the provision of the Communications Act that requires broadcasters to provide the lowest unit charge for broadcast advertising to every qualified federal candidate within 45 days of a primary or 60 days of a general election. Under the new law, broadcasters are only required to provide this benefit if the candidate: (a) certifies in writing that his or her campaign ads will not make any direct reference to the opposing candidate; or (b) clearly identifies him or herself at the end of the broadcast and states that he or she approved it. 47 U.S.C. § 315(b). The effect of this so-called “stand by your ad” provision has already been seen in the Democratic presidential primary. For example, an ad that ran during Saturday’s Jets-Patriots football game featured General Wesley Clark in a New England Patriots football jersey, stating, “I’m Wes Clark, and I approve this ad because deep down, we are all Patriots.” Howard Kurtz, *Good Press, Bad Press*, WASH. POST, Dec. 20, 2003 at A04.

In a separate opinion written by chief Justice Rehnquist, the Court unanimously upheld the District Court’s dismissal of the challenges to this provision, ruling that none of the plaintiffs had standing to challenge it. Slip op. at 4 (Rehnquist, J.) Accordingly, the provision remains in effect, though is subject to challenge in the future.

- **Record Keeping Requirements for Broadcasters:** In a separate 5-4 opinion written by Justice Breyer, the Court also sustained Section 504 of BCRA, which requires broadcasters to keep and make publicly available records of politically-related broadcasting requests. Specifically, the provision requires broadcasters to keep records of broadcasting requests: (a) made by any legally qualified candidate for public office; or (b) made (by anyone) to broadcast messages that refer to a candidate for Federal office, a “national legislative issue of public importance,” or a “political matter of national importance.” 47 U.S.C. § 315(e)(1).

The National Association of Broadcasters had challenged this provision, arguing that it imposes onerous burdens, serves no legitimate governmental interest, and violates the First Amendment. While the District Court had found these arguments persuasive and held that Section 504 was unconstitutional, the high Court reversed this ruling.

The Supreme Court held that the requirement relating to requests by candidates was almost identical to a longstanding FCC regulation -- one that the agency has estimated imposes only six to seven hours of work per year on each licensee. The Court ruled that this was a “microscopic amount compared to the many millions of dollars in revenue broadcasters receive from candidates who wish to advertise.” Slip op. at 4-5 (Breyer, J.)

With respect to the requirements relating to broadcasts of particular topics, the Court held that they “seem likely to help the FCC determine whether the broadcasters are carrying out their ‘obligations to afford reasonable opportunity for the discussion of conflicting views on issues of public importance’ . . . and whether broadcasters are too heavily favoring entertainment, and

discriminating against broadcasts devoted to public affairs.” *Id.* at 11 (quoting 47 CFR § 73.1910 and citing 47 U.S.C. §315(a) and *Red Lion Broadcasting Co. v. FCC*, 395, U.S. 367, 380 (1969)).

However, the Court did leave the door open for the FCC to limit the provision’s potential burdens through regulation, and noted that the parties were free to bring as-applied challenges in the future. *See id.* at 11.

No sooner had the constitutionality of BCRA been established when analysts began discussing ways in which it could be evaded. The National Rifle Association has plans -- announced even prior to the Court’s release of its opinion -- to try to take advantage of FECA’s long-standing media exemption, perhaps by purchasing its own broadcast outlet. *See, e.g.*, Sharon Theimer, *NRA Seeks Status as News Outlet*, WASH. POST, Dec. 7, 2003 at A09.

Press reports have also focused on the activity of “527” committees, named after the provision in the tax code that governs them and which are generally not subject to FEC regulation. Eliza Newlin Carney, et al., *New Rules of the Game: A Primer on the Money Magnets*, NAT’L JOURNAL, Dec. 20, 2003. However, just last week, incoming Federal Election Commission Chair Bradley Smith suggested that under *McConnell*, the Commission may have to treat “527s” as political committees subject to FEC regulation, meaning that they would be limited to accepting no more than \$5,000 in donations from each individual, be banned from taking corporate or union money, and have to disclose their finances and spending to the FEC. *See* Sharon Theimer, *FEC Leader: Political Groups Face Limits*, WASH. POST, Dec. 19, 2003.

As the Court itself stated,

“We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet.” Slip op. at 118 (Stevens and O’Connor, J.J.)

However, BCRA reflects a concerted effort by Congress to identify and prevent those practices that most recently threatened to destroy public confidence in federal elections and officials.

“What problems will arise, and how Congress will respond, are concerns for another day.” *Id.*

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