

MILRC Media
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MEDIA LAW LETTER

Reporting Developments Through December 28, 2007

MLRC

Thank you Peter Canfield! 3

Ethics Corner: Florida Leads the Way to Regulate Attorney Websites 49

LIBEL / PRIVACY

Ga. Cir. Ct. Richard Jewell's Final Claim Against Atlanta Journal-Constitution Dismissed 5
Incremental Harm Rule Applied
Estate of Jewell v. Atlanta Journal-Constitution

Public Censure Recommended for Judge Who Won Libel Suit 8
"Bizarre" Letters to Boston Herald "Crossed th[e] Line"

Cal. App. Ct. The Power of California's Anti-SLAPP Statute 11
Taus v. Loftus Ends with a Nuisance Settlement and a \$241,000 Attorneys' Fees Award
Taus v. Loftus

Cal. Super. Ct. Anti-SLAPP Motion Granted in Dog the Bounty Hunter Case 13
Reality Show a Matter of Public Interest
Follner v. Chapman, et. al.

D. Mass. Update: Mistrial Declared in Mandel v. Boston Phoenix 15
Mandel v. Boston Phoenix

N.D. Okla. Newspaper Wins Summary Judgment In Private Figure Libel Case 16
No Falsity or Negligence
Ackley v. Bartlesville Examiner, Enterprise

Michigan Michigan Court Again Throws Out Privacy/Eavesdropping Case by Cops Caught 18
On Tape Censoring Concert Performance
No Reasonable Expectation of Privacy Under the Circumstances
Bowens v. Aftermath Entertainment, et al.

Ia. App. Ct. Lost in transit – Iowa court affirms \$500,000 verdict 20
stemming from Internet 'watchpage'
Kono v. Meeker

Ariz. App. Ct. Arizona Appeals Court Adopts Three Part Test for Revealing 22
the Identity of an Anonymous Internet Speaker
Mobilisa, Inc. v. John Doe 1 and The Suggestion Box, Inc.

Fla. Cir. Ct. Florida Court Dismisses Insurance Company's Defamation 23
Action Against The Associated Press
United Automobile Insurance Company v. Freidin

Tex. App. Ct. Texas Court Considers Online Anonymity 24
Adopts Summary Judgment Standard
In re Does 1 – 10

New York	New York Court of Appeals Rejects Ehrenfeld Declaratory Judgment Action <i>No Long Arm Jurisdiction Over Saudi Libel Plaintiff</i> Ehrenfeld v. Bin Mahfouz	24
D. Mass	Facebook Founder's Documents May Remain Online <i>Court Rejects Motion to Enjoin Further Publication</i> ConnectU v. Facebook	26
W.D. Wisc.	Wisconsin Federal Court Limits Grand Jury Subpoena To Protect Privacy of Reading Choices <i>Government Denied Access to Names of Amazon Customers</i> In re Grand Jury Subpoena to Amazon.com	29
	2007 in Review: Single Publication Rule and the Internet	41
<u>PRIVILEGE</u>		
D. Kan.	Kansas City Star Reporters Ordered to Testify to Grand Jury <i>Prosecutors Wanted Testimony to Prove Target's Waiver of Attorney Privilege</i> In re Grand Jury Subpoena to Kansas City Board of Public Utilities	27
S.D. Cal.	Judge Refuses To Subpoena Reporters For Leak Sources United States v. Wilkes	30
<u>FREEDOM OF INFORMATION</u>		
D.D.C.	White House Visitor Lists are Public Records Under the FOIA <i>Secret Service Must Disclose Names</i> Citizens for Responsibility and Ethics in Washington v. U.S. Dep't of Homeland Security	31
<u>INTERNATIONAL</u>		
	The Other Side of the Pond: UK & European Law Update	33
U.K.	The Reporting of Criminal Convictions Under UK Law <i>Libel, Contempt & Data Protection Issues</i>	37
<u>COPYRIGHT</u>		
E.D. Va.	Entertainment Law: <i>Court Finds That Co-Producer of Documentary is Joint Author for Copyright in Absence of Written Contract</i> Berman v. Johnson	39
2d Cir.	Second Circuit Vacates Tasini Settlement <i>Unregistered Copyrights a Jurisdictional Bar to Class Settlement</i> In re Literary Works in Electronic Databases Copyright Litigation	25
<u>RIGHT OF PUBLICITY</u>		
Arizona	Arizona Right of Publicity Statute for Soldiers Trumped by First Amendment Frazier v. Boomsma	44
<u>LEGISLATION</u>		
	'Tis the Season: Congress's Attention Turns to Media Issues as the 2007 Session Comes to a Close	45

Thank you Peter Canfield!

At the end of December, Peter Canfield will step down as President of the MLRC Defense Counsel Section. He will remain on the DCS Executive Committee for two more years as emeritus. And thank goodness for that!! I have had the delightful experience of working with Peter from the very beginning of my tenure at MLRC, then known as LDRC. It has been the great good fortune of this organization that Peter has been engaged and involved with us for years and has brought extraordinary service to MLRC.

Peter, a litigator of the very first rank and a tough, tough guy in that role, is such a lovely, funny, genuine man that, I would guess, some are surprised at this seeming dual personality. What surprises no one, however, who has ever had the pleasure of knowing Peter is his sharp and incisive intellect. Peter knows the questions to ask to get at the heart of issues and problems, and, even better, he knows how and where to find the answers. He is intensely smart and resourceful.

AND, he is a doer. I have now worked with Peter on countless matters and I have never known him not to have a practical, “let’s just get it done and done well” approach to whatever problem or project is at issue. He makes it all happen and without fanfare. I would not be able to count the number of times someone has said “hey, can we get Peter Canfield on the project, or the committee, or the team?”

Who wouldn’t want Peter on their team?! So, Peter, you are on notice – we have no intention of letting you hang up your MLRC jersey any time soon.



Sandy Baron

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PANELS

Panel One > *Building on Solid Ground: The New Business Relationship*

Moderator: **Jeanne Newman:** Partner, Hansen Jacobson Teller Hoberman Newman Warren & Richman
Panelists: **Howard Kurtzman:** Executive VP, Business & Legal Affairs, Twentieth Century Fox Television
Brian Weinstein: Senior VP of Strategy and Business Development, Creative Artists Agency
Jana Winograde: Executive Vice President, Business Affairs, ABC

Panel Two > *Shaking It Up: How the Talent Guilds Influence (or Want to Influence) Traditional and New Media*

Moderator: **Maya Windholz:** Senior Vice President, Legal Affairs, NBC Universal
Panelists: **Alan Brunswick:** Partner, Manatt, Phelps & Phillips
Grace Reiner: Vice President Legal Affairs, The Disney Channel
Karen Stuart: Executive Director, Association of Talent Agents

Panel Three > *It's Everyone for Themselves: Managing the Legal Challenges of User Generated Content*

Moderator: **David Cohen:** Vice President, Legal, ABC
Panelists: **Thomas R. Burke:** Partner, Davis Wright Tremaine,
Craig Cardon: Partner, Sheppard Mullin Richter & Hampton
Michael Downing: Co-Founder, Chairman and Chief Executive Officer, GoFish Corporation
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Richard Jewell's Final Claim Against Atlanta Journal-Constitution Dismissed

Incremental Harm Rule Applied

By Michael Kovaka

Citing the incremental harm doctrine and a change of heart by the plaintiff, a Georgia trial court has dismissed the final remaining claim in Richard Jewell's decade-old libel suit against *The Atlanta Journal-Constitution*. [*Estate of Jewell v. Atlanta Journal-Constitution*](#) (Fulton State Court, December 11, 2007).

Background

Jewell filed suit against the newspaper in January 1997 alleging that he was entitled to damages for some 22 allegedly defamatory statements contained in 11 articles published by *The Journal-Constitution* over a six-day period following the 1996 Olympic Park bombing.

The Journal-Constitution immediately responded with a motion for judgment on the pleadings, but the trial court deferred decision on the motion until the close of discovery. In December 1998, following the close of discovery, *The Journal-Constitution* moved for summary judgment.

Consideration of the motion was delayed for years by Jewell's unsuccessful quest for identification of the newspaper's confidential sources and by his unsuccessful attempt to appeal to the Georgia Supreme Court and the United States Supreme Court a determination by the trial court and the Georgia Court of Appeals that Jewell was a voluntary and involuntary limited purpose public figure.

In October 2006, when Fulton County State Court Judge John Mather finally considered the motion, he granted summary judgment on 21 of the 22 claims – at least 18 of them on grounds that Jewell could not raise a triable issue of falsity.

Judge Mather's December 11 order dismissed the one remaining claim, which had been for set for trial January 14. Lawyers for Jewell, who passed away in August, virtually invited the order, but say they intend to appeal it, along with prior trial court rulings, to "the highest court in [the] state."

The claim thrown out by the December 11 order arose from an article published on August 4, 1996, over a week after the bombing and several days after *The Journal-Constitution* first accurately reported that Jewell was a suspect in the bombing.

The August 4 article reported on the execution of yet an-

other FBI search warrant at Jewell's home the day before. As recounted by Jewell's original lawyer, G. Watson Bryant, Jr., the agents asked Jewell to repeat the text of a 911 call placed by the bomber: "There is a bomb in Centennial Olympic Park. You have 30 minutes."

In reporting Bryant's claim that the FBI was trying to "railroad" Jewell, the article reported, as *The Journal-Constitution* and other news media had previously, that: "Investigators have said they believe Jewell ... planted the bomb and phoned in the warning to 911." But the article also reported that while the FBI had described the 911 caller as having an indistinguishable accent, Jewell had a southern drawl and that the FBI in Atlanta would not comment on "persistent reports out of Washington" that the agency had determined the 911 caller's voice and Jewell's did not match.

In his October 2006 summary judgment ruling, Judge Mather ruled the August 4 report was not actionable to the extent it repeated an earlier report that investigators had said they believed Jewell planted the bomb. Noting that Jewell himself had said the FBI thought he was the bomber, the court found Jewell failed to produce any evidence of actual malice.

However, Judge Mather ruled that the August 4 report was actionable in repeating the earlier report that investigators had said they believed Jewell placed the 911 call. According to the court, a triable issue of actual malice existed because the reporter knew (and reported) that questions were being raised about the validity of the investigators' belief that Jewell placed the call. The court reached this conclusion even though the reference to the investigators' belief clearly was offered only to explain why they had requested voice samples.

Newspaper Presses Incremental Harm Defense

At *The Journal-Constitution's* request, the trial court certified its October 2006 summary judgment order for interlocutory review. Lawyers for Jewell vigorously opposed any review, complaining that Jewell "should be afforded his right to a jury trial without further delay."

The Georgia Court of Appeals and the Georgia Supreme Court ultimately declined immediate review and the case re-

(Continued on page 6)

Richard Jewell's Final Claim Against Atlanta Journal-Constitution Dismissed

(Continued from page 5)

turned to the trial court. *The Journal-Constitution* then filed a 'motion for entry of judgment on remand' urging that liability on the remaining claim was barred, *inter alia*, under the incremental harm doctrine.

The incremental harm doctrine, as recognized in a growing number of cases, including Jewell's own prior lawsuit against the *New York Post*, holds that "when unchallenged or non-actionable parts of a particular publication are damaging, another statement, though maliciously false, may not be actionable because it causes no harm beyond the harm caused by the remainder of the publication." *Tonnessen v. Denver Pub. Co.*, 5 P.3d 959, 965 (Colo. Ct. App. 2000). See also *Herbert v. Lando*, 781 F.2d 298, 311 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986); *Austin v. Am. of Neurological Surgeons*, 253 F.3d 967, 974 (7th Cir. 2001); *Church of Scientology v. Time Warner, Inc.*, 932 F. Supp. 589, 594 (S.D.N.Y. 1996), *aff'd* 238 F.3d 168 (1999); *Jewell v. NYP Holdings, Inc.*, 23 F. Supp.2d 348, 387 (S.D.N.Y. 1998).

The trial court already had ruled that the challenged August 4th statement was protected by the First Amendment to the extent it reported that investigators believed Jewell was the bomber. Damages therefore were barred as to that portion of the statement. Because a suggestion of having made the 911 call could not possibly cause harm beyond such constitutionally prohibited damages, *The Journal-Constitution* argued liability was barred by the doctrine of incremental harm.

The lack of any possible incremental harm also was shown by the trial court's prior ruling that the First Amendment barred liability for the newspaper's publication of a near-identical 911-call statement several days prior to publication of the August 4th article.

Jewell passed away in late August 2007, before the motion was decided. However, his death did not extinguish his claim. Under Georgia law, libel actions have been held not to abate upon the plaintiff's death. In early October, the trial court permitted Jewell's executor and original lawyer G. Watson Bryant, Jr., to be substituted as plaintiff.

On November 5, the trial court denied *The Journal-Constitution's* incremental harm motion. The court based its ruling largely on its belief that Georgia had not previously rec-

ognized the doctrine of incremental harm, and on its perception of the doctrine as akin to that of the "libel proof" plaintiff, of which the court was also skeptical.

On November 7, the court set the case for a January 14 trial, requiring the submission of motions in limine and a proposed pretrial order on November 19.

Final Claim Falls – Appeal Promised

On November 19, along with the submission of its proposed pretrial order, *The Journal-Constitution* filed a motion in limine making clear, *inter alia*, that Jewell could not seek punitive damages as to the remaining claim because his attorneys had failed to request a retraction.

At the same time, detecting a further cooling in the Jewell attorneys' interest in the case, *The Journal-Constitution* moved for reconsideration of the court's denial of the incremental harm motion. The newspaper emphasized the anomaly of permitting a plaintiff to seek an award of damages based on a report that merely republished a statement

the court had already ruled was constitutionally protected; particularly given the context of the republication, which aired questions regarding the validity of the investigators' beliefs regarding Jewell.

On November 20, Jewell's attorneys asked the court by letter to deny the motion for reconsideration. On November 29, however, they filed an additional two-page response brief, exclaiming again that the motion was "baseless in both law and fact" but stating in addition:

Plaintiff recognizes that if the motion for reconsideration is granted, the Court's decision — along with all prior rulings — would be ripe for appeal. Numerous potential errors throughout the eleven year history of this case will eventually be subject to appeal following trial. Appellate consideration of these errors will likely result in retrial. Although Plaintiff opposes the motion for reconsideration, in the event that this Court grants the motion for reconsideration and grants Defendants' motion for summary judgment on Plaintiff's last remaining claim, the issue of incremental

(Continued on page 7)

"the incremental harm doctrine should be applied where the damage to reputation [allegedly caused by a challenged statement] is identical as that caused by statements which are not actionable."

Richard Jewell’s Final Claim Against Atlanta Journal-Constitution Dismissed

(Continued from page 6)

harm as well as numerous other decisions by this Court can receive much needed appellate consideration prior to an extensive trial in January of 2008 and may likely avoid the trouble and expense of multiple trials.

On December 11, the trial court issued its order granting *The Journal- Constitution’s* motion for rehearing and awarding summary judgment on the remaining claim. In doing so, the court observed it was “clear that Plaintiff has made only a gesture of resistance to the motion and would prefer to seek appellate review of all prior rulings in advance of trial.” The court then went on to hold summary judgment was required because “the incremental harm doctrine should be applied where the damage to reputation [allegedly caused by a challenged state-

ment] is identical as that caused by statements which are not actionable.”

Lawyers for Jewell deny that their unusual filing signals a loss of enthusiasm. Rather, they attribute their turnaround to a desire to have the “significant legal issues” raised by the case addressed promptly “by the highest court in [the] state.”

Peter Canfield, Tom Clyde, and Michael Kovaka of Dow Lohnes represent The Atlanta Journal-Constitution. Richard Jewell and now his estate are represented by Lin Wood, Nicole Jennings Wade, and Katherine Hernacki of Powell Goldstein; Wayne Grant and Kimberley Rabren (now Grant) of Wayne Grant, P.C.; and G. Watson Bryant, Jewell’s original lawyer and the executor of the Jewell estate, who has now been substituted as plaintiff.

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Prepared by the Media Law Resource Center Employment Law Committee, this pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

Each member firm has already received one printed copy of the pamphlet, with additional printed copies available for purchase from MLRC. The pamphlet is also available to MLRC members in electronic form on the MLRC web site at no cost.

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Public Censure Recommended for Judge Who Won Libel Suit

“Bizarre” Letters to Boston Herald “Crossed th[e] Line”

By Bruce W. Sanford and Bruce D. Brown

A specially-appointed Hearing Officer recommended on Nov. 19 that Superior Court Judge Ernest B. Murphy, who sued the *Boston Herald* over statements published in 2002 alleging that the judge made uncaring statements about a 14-year-old rape victim, be publicly reprimanded for two threatening letters he sent to *Herald* publisher Patrick J. Purcell in the wake of a \$2.1 million libel verdict.

Background

The *Herald* was only just beginning to formulate its plans for an appeal when Murphy sent what Hearing Officer Peter Kilborn termed “bizarre” letters that the *Herald* saw as an attempt to intimidate it into dropping its effort to have the jury verdict reversed. See “Massachusetts Judge Apologizes for Letters to Herald Seeking to Deter newspaper’s Appeal: Victorious Trial Plaintiff Sent Letters on Court Stationery,” *MLRC MediaLawLetter* Dec. 2005 at 9-10.

The recommendation filed by Kilborn with the Commission on Judicial Conduct stems from complaints filed by both the Commission and the *Herald* in early 2006. The complaints accused Murphy of judicial misconduct for sending the letters, one of which was written on Superior Court stationery.

Judicial Conduct Complaint

The Commission issued formal charges against Murphy in June 2007, alleging that Murphy’s behavior “constitute[d] conduct prejudicial to the administration of justice and unbecoming a judicial officer, brought the judicial office into disrepute,” and violated six separate Canons of the Code of Judicial Conduct. See “Ethics Charges Proceed Against Judge Who Won Libel Suit,” *MLRC MediaLawLetter* Oct. 2007 at 12.

In defending against the charges, Murphy argued that the communications were part of confidential settlement discussions with Purcell. But in his decision, Kilborn, a retired Chief Justice of the Land Court, found that Murphy’s belief that the letters constituted confidential discussions was “unreasonable” and “imprudent.”

Murphy’s indiscretion formed the basis of Kilborn’s 22-page opinion finding that the Commission proved by clear and

convincing evidence 8 of the 10 counts alleged. In support of his findings, Kilborn wrote that that Murphy “crossed th[e] line” with comments in the first letter and “much of the content of the second letter.”

“Do what I say or you’ll be sorry,” was the message, Kilborn wrote, and the *Herald* could have reasonably believed that “a judge can find ways to make good on threats.” The letters were, in Kilborn’s words, “injudicious in content and tone.”

At the formal hearing in front of Kilborn on Oct. 15 and 16 in Boston, Murphy attempted to mitigate the charges by testifying that the tone of the letters was deliberately “strong” because he wanted to persuade the *Herald* to settle so that he could spare his family the anguish of further litigation.

Purcell, on the other hand, testified that the letters were “strange” coming from a judge, and that they seemed similar to “ransom notes” intended to intimidate the *Herald*, which lost its appeal of the jury verdict at the Supreme Judicial Court in May 2007.

In addition to dismissing Murphy’s purported mitigating factors, Kilborn recognized several aggravating factors: that Murphy’s argument that he was not aware that the Code of Judicial Conduct contained an “express prohibition against the use of judicial stationery” rang hollow because of a previous warning he had received about using court stationery for personal use; that Murphy, a four-and-a-half-year veteran of the bench, was not a “newcomer” to judicial office; and that Murphy took the risk that letters sent to the publisher of a large newspaper would be “subject to wide scrutiny.”

Counsel for Murphy argued at the disciplinary hearing that the blunt quality of the letters “obvious[ly]” reflected Murphy’s own “colorful style of speaking.” This argument echoed, ironically, the *Herald’s* position on appeal that the prosecutor who told the newspaper about Murphy’s comment concerning the rape victim was justified in viewing Murphy’s remarks as insulting to the girl because Murphy’s “style” was subject to such an interpretation.

Kilborn had no trouble concluding that Murphy’s style was not a “mitigating factor” in the disciplinary proceeding. In fact, he wrote that Murphy’s style “may be part of what got the judge into trouble.” The Supreme Judicial Court, on the other

(Continued on page 10)

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
BOSTON, MA 02109

EMERY S. MURPHY
ASSOCIATE JUSTICE

2/20/05

Dear Pat,

I trust you continue (as do I) to honor the privacy of our personal communications in the nature of what is generically referred to as "settlement discussions" in my business.

As you no doubt clearly recollect, de Mike Ditka has warned you against playing "the Team from Chicago" in this particular Super Bowl.

Well, you know, I don't walk around telling that story. I just think it's sad I had to prove it to you. Took a lot out of me.

The reason I write now is that I think you a smart and honorable guy. And since every single thing I told you about what was going to happen in this case thus far, has happened, maybe, just maybe, I have some credibility with you at this point.

So, here's the deal. I'm heading off to St. Maarten, and I'll be back in town, for business purposes, on Monday, March 7. I will be checking my e-mail [Email address eliminated] while I'm down there.

I'd like to meet you at the Union Club on Monday, March 7. (No magic to the date.) (But it needs to be early in that week.)

Here's what will be the price of that meeting. You will have one person with you at the meeting. I suggest, but do not insist, that such a person be a highly honorable and sophisticated lawyer from your insurer.

Under NO circumstances should you involve Brown, Rudrick

And that is you have a ZERO chance
of reversing my jury verdict on appeal.

Anyone who is counselling you to the contrary . . .
is WRONG. Not 5% ZERO.

AND I will NEVER, that is as in
NEVER, share a dime from what you owe me.

You and/or your insurer want to pay me
\$331,056/yr for the next two or three years while
you spend another 500 large tilting at windmills
in the appellate courts Be my guest.

You are lucky, Mr. Purcell that that jury
came back at 2 million. I was betting on 5.

Ernie

(Continued from page 8)

hand, which has final say over judicial disciplinary matters, was unwilling to take Murphy's reputation for rhetorical excess into account when it dismissed the Herald's appeal earlier this year.

Kilborn's recommendation that Murphy be slapped with a public censure now goes to the full Commission, which will make a final recommendation to the Supreme Judicial Court.

Bruce W. Sanford and Bruce D. Brown of Baker & Hostetler LLP represented the Boston Herald in the appeal and filed the

complaint on the Herald's behalf with the Commission on Judicial Conduct in February 2006. Elizabeth A. Ritvo, Jeffrey P. Hermes, and the late M. Robert Dushman of Brown Rudnick Berlack Israels LLP represented the Herald at trial and Ms. Ritvo and Mr. Hermes are representing the Herald in connection with the Commission's disciplinary proceeding. Michael Avery of Suffolk Law School and Howard M. Cooper of Todd & Weld LLP represented Judge Murphy in the appeal. Howard Neff represents the Commission on Judicial Conduct in the disciplinary proceeding. Michael E. Mone of Esdaile, Barrett & Esdaile represents Judge Murphy.

The Power of California's Anti-SLAPP Statute

Taus v. Loftus Ends with a Nuisance Settlement and a \$241,000 Attorneys' Fees Award

By Rochelle L. Wilcox and Thomas R. Burke

Earlier this year, the California Supreme Court issued its decision in *Taus v. Loftus*, 40 Cal. 4th 683, 54 Cal. Rptr. 3d 775, 151 P.3d 1185, 35 Media L. Rep. 1657 (2007), a factually complex invasion of privacy and defamation action involving a magazine article written by prominent psychologists Elizabeth Loftus and Melvin Guyer. The article, "Who Abused Jane Doe? The Hazards of the Single Case History," published in *Skeptical Inquirer* magazine, questioned the veracity of a prominent case study that had been routinely cited as evidence that childhood memories of sexual abuse can be repressed and later recalled.

The article recounted Drs. Loftus and Guyer's review of public records and interviews with family members, raising serious questions about continued reliance on the "Jane Doe" case study. Plaintiff's anonymity was consistently maintained in the article and during later speeches by Dr. Loftus.

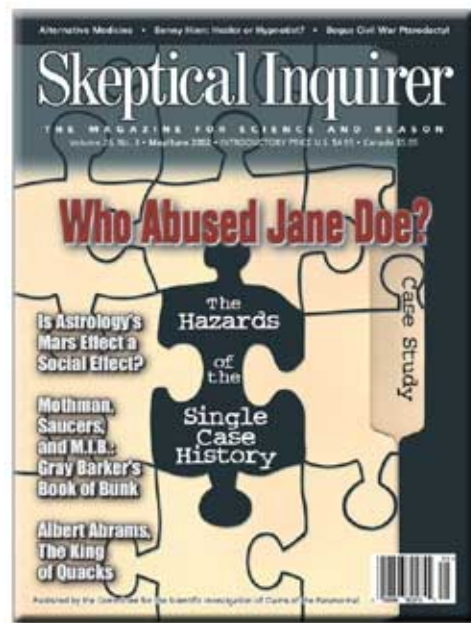
Jane Doe, using her real name – Nicole Taus – filed suit against Drs. Loftus and Guyer, and also sued Carol Tavis (who authored a companion article that appeared in the *Skeptical Inquirer*), *Skeptical Inquirer* magazine, the Committee for the Scientific Investigation of Claims of the Paranormal (which publishes the *Skeptical Inquirer*) and the Center for Inquiry West (a related entity). Defendants promptly filed a Special Motion to Strike using California's anti-SLAPP statute, which was only partially granted by the trial court. On appeal, although it dismissed some 16 theories of defamation and privacy asserted by Plaintiff, the Court of Appeal kept alive four claims. *Taus v. Loftus*, 33 Media L. Rep. 1545, 2005 WL 737747 (2005) (unpublished opinion).

After agreeing to review defendants' case, the California Supreme Court unanimously dismissed three out of those four claims, holding that the "overwhelming majority of plaintiff's claims properly should have been struck in the trial court under the anti-SLAPP statute." 40 Cal. 4th at 742. Setting the stage for the Defendants' attorneys' fees award, the Court also held that, "consistent with the fundamental purpose of the anti-SLAPP statute to minimize the chilling of conduct undertaken in furtherance of the consti-

tutional right of free speech," defendants were entitled to their costs on appeal. *Id.* at 742-43.

By a 5-2 vote, due to the procedural posture of the case which prohibited the Court from resolving any factual disputes – and while acknowledging the adamant denial of Dr. Loftus that any misconduct occurred – the Court left alive a single cause of action for invasion of privacy by intrusion, based on Plaintiff's claim that Dr. Loftus misrepresented herself in order to obtain private information about Plaintiff, purportedly claiming that she was working with a psychiatrist whom Plaintiff trusted (although that psychiatrist never treated Plaintiff). *Id.* at 740-41. The Court's decision to keep alive Plaintiff's novel intrusion claim prompted a 19-page dissent by Associate Justice Carlos Moreno, joined by Justice Baxter. For a full discussion of the facts of this case, and the Supreme Court's decision, see the MLRC *MediaLawLetter* March 2007 at 3,

Before and while the case was pending in the California Supreme Court, Plaintiff repeatedly insisted that her case was worth in excess of a million dollars. Following remand to the trial court, Defendants promptly filed two motions – one seeking all of their fees and costs incurred in connection with the SLAPP motion (because California's anti-SLAPP statute mandates an award of fees to prevailing defendants), and one seeking summary judgment on Plaintiff's remaining intrusion claim against Dr. Loftus. Faced with the likelihood of a substantial fee award and an order granting summary judgment to Dr. Loftus on the intrusion claim, Plain-



(Continued on page 12)

The Power of California's Anti-SLAPP Statute

(Continued from page 11)

tiff made what appears to have been a “Hail Mary” attempt to avoid a large judgment against her.

Plaintiff served a statutory Offer of Judgment on Dr. Loftus, offering to accept judgment in the amount of \$7,500 and a mutual waiver by Plaintiff and Dr. Loftus of their fees and costs incurred in the litigation. Dr. Loftus accepted Plaintiff's Offer of Judgment, settling the intrusion claim for a nuisance amount. Plaintiff then sought to use the settlement with Dr. Loftus to avoid

paying fees and costs to the remaining defendants. She argued that Dr. Loftus's waiver of her own fees and costs effectively waived the fees and costs in-

curring by the remaining defendants, and consequently that defendants should be awarded nothing. Plaintiff also made the inconsistent argument that because the Supreme Court decision did not expressly dismiss defendants from the lawsuit – although it did expressly reject all claims asserted against them – plaintiff was entitled to pursue additional claims against them on remand. Plaintiff concurrently asked the court's permission to take discovery on defendants' purported knowledge of or participation in Dr. Loftus's alleged misrepresentation, although plaintiff had failed to submit any evidence to support this claim in opposition to defendants' SLAPP motion.

The trial court rejected Plaintiff's claims. It reduced defendants' fee award by approximately \$17,000 – less than 5% of the amount sought – and then eliminated half of the remaining \$483,000 in fees claimed, reasoning that plaintiff's primary focus in the litigation had been on Dr. Loftus and the settlement with her waived those fees. Thus, the court awarded the remaining defendants \$241,872.23 in attorneys' fees incurred in connection with the SLAPP motion.

The court also summarily rejected plaintiff's argument that defendants had not prevailed in the litigation, and that therefore plaintiff's claims against defendants should be allowed to proceed. The court found that although the primary defendant in the litigation was Dr. Loftus, “plaintiff still had an obligation to produce evidence sufficient to es-

tablish a probable basis of derivative liability against the other moving defendants.” The court concluded that the Supreme Court's failure to identify any causes of action remaining against Drs. Guyer and Tavis and the *Skeptical Inquirer* entities “reflected the failure of plaintiff to meet her burden in opposing the motion” by these Defendants. The court held that the remaining defendants were the prevailing parties and entitled to recover their costs incurred in the litigation.

Taus v. Loftus is a compelling example of the power of the anti-SLAPP statute in California.

Taus v. Loftus is a compelling example of the power of the anti-SLAPP statute in California. In most cases, the trial court's denial of a dispositive motion filed early in the case would have left the parties

with no choice except to engage in expensive, time-consuming discovery. Defendants would have been faced with the prospect of settling for the large amounts demanded by plaintiff, or facing a jury that might not understand the importance of protecting defendants' ability to engage in this very public, scientific debate.

This is particularly true here, where defendants were faced with a plaintiff who believes she was abused as a child, yet overcame adversities to become an admirable, well-educated adult, serving in the military during a time of war. A trial court judge and three justices of California's Court of Appeal were swayed, perhaps by sympathy for plaintiff, to find that some viable claims had been asserted.

Although the California Supreme Court did not entirely resolve the case, it positioned the case for prompt resolution following remand. This complex and high-stakes lawsuit concludes with no depositions having been taken and a substantial attorneys' fees award to defendants, vindicating their First Amendment right to participate in the “repressed memories” debate. No word yet whether plaintiff intends to appeal the fees award.

Thomas R. Burke and Rochelle L. Wilcox, partners in the San Francisco office of Davis Wright Tremaine LLP, represented Drs. Loftus, Guyer and the Skeptical Inquirer. Plaintiff was represented by Julian J. Hubbard, McCloskey, Hubbard, Ebert & Moore.

Anti-SLAPP Motion Granted in Dog the Bounty Hunter Case

Reality Show a Matter of Public Interest

By Nathan Siegel

Apparently, “Reality does not Bite” as much as media lawyers litigating in California may have feared after the decision earlier this year in *Dyer v. Childress*, 147 Cal.App.4th 1272 (2007). That at least appears to be the message from *Follner v. Chapman, et. al.*, No. 461638 (Cal. Sup. Ct. Nov. 28, 2007), which granted an anti-SLAPP motion in a lawsuit arising out of the reality-genre television program “Dog the Bounty Hunter.” The 34-page trial court decision addresses a potpourri of hot topics in California media law.

Background

The case arises out of an episode of “Dog the Bounty Hunter,” produced by defendant Hybrid Films, Inc. and broadcast by defendant A&E Television Networks, that first aired on March 21, 2006. The program depicts a family of bounty hunters who work together to catch fugitives, in this case a felon who had fled from Hawaii to the San Francisco Bay area.

The plaintiff owned a semi-pro football team for which the fugitive played. Towards the beginning of the program, the bounty hunters come to a team practice to try to capture the fugitive, only to find that he is not present. The plaintiff explained to them that the fugitive had been injured and claimed to have no knowledge of his whereabouts. Subsequently, an informant indicated that plaintiff was not telling the truth. At the end of the program, the fugitive was located and captured while working for the plaintiff at a construction site. During the capture, police ordered the plaintiff to the ground and put him in handcuffs, while the bounty hunters verbally accused him of aiding and abetting a fugitive.

The Lawsuit

The lawsuit alleged that the program cast the plaintiff in a false light in two respects. First, plaintiff alleged the program created the false impression that he lied to the bounty hunters and was attempting to aid a fugitive. Two months actually passed between the bounty hunters’ first encounter with plaintiff on the football field and the fugitive’s capture. Plaintiff alleged that he did not know where the fugitive was during those two months,

and first saw him several days before his capture when he claimed that he had taken care of his legal problems. Second, plaintiff alleged that the program created the false impression that he was also arrested along with the fugitive, when in fact he was released on the scene.

However, the plaintiff did not assert claims for defamation or false light invasion of privacy. Rather, the plaintiff asserted a claim for misappropriation of his name and likeness pursuant to Cal. Civ. Code § 3344, and tort claims for the publication of private facts, intentional infliction of emotional distress, and negligence. Thus, like some of the recent cases arising out of the ‘Borat’ movie and last year’s decision in *Nieves v. Home Box Office, Inc.*, 817 N.Y.S.2d 227 (A.D. 1st Dept. 2006), also involving a family of bounty hunters, the case squarely presented the issue of whether misappropriation theories may be used to challenge the non-consensual depiction of private individuals in program genres that differ from traditional news and documentary formats.

Anti-SLAPP Statute Applied

As the anti-SLAPP statute requires, the court first considered whether the television program qualified for the protection of the statute, i.e. whether the program involved matters of public interest. The court found that the general subject matter of “the capture of fugitives by a professional bounty hunter is sufficiently a matter of legitimate public concern” for purposes of the anti-SLAPP statute.

However, the court then noted some apparent tension in the case law addressing anti-SLAPP motions in which the depiction of private individuals is alleged to have some relationship to a matter of public concern.

On the one hand, the court noted cases like the recent decision in *Hall v. Time Warner, Inc.*, 153 Cal. App. 4th 1337 (2007), involving the inclusion of Marlon Brando’s housekeeper in his will, as exemplifying the principle that the statute applies where “the identities of private individuals were disclosed in connection with publications on public issues.” On the other hand, the court noted the “Reality Bites” case, *Dyer v. Childress*, 147 Cal. App. 4th 1272 (2007), which seem to follow a quasi-public figure analysis and hold that lawsuits by private persons who do not inject themselves into public issues are not subject to the statute, even if the

(Continued on page 14)

Anti-SLAPP Motion Granted in Dog the Bounty Hunter Case

(Continued from page 13)

general subject-matter of the publication at issue might be. The court concluded that this case fell on the Hall side of the line, because the plaintiff “was sufficiently involved in a matter of public concern to bring his claims within the scope of the anti-SLAPP statute.”

California’s Misappropriation Statute

Next, the court addressed whether the plaintiff had demonstrated a probability of prevailing on the merits, focusing primarily on the statutory cause of action for misappropriation of the plaintiff’s name, voice and likeness. First, the court considered whether the program fell within the statute’s exemption for “public affairs” programming. Cal. Civ. Code § 3344(d). Consistent with its ruling regarding the public interest prong of the anti-SLAPP statute, the court concluded that it did, a ruling that is a useful precedent for similar reality-genre programming.

However, plaintiff argued in the alternative that even if the program would normally be exempted, he could pursue a misappropriation claim under the rationale of *Eastwood v. Superior Ct.*, 149 Cal. App.3d 409 (1983) because he alleged the program conveyed false statements about him made with actual malice. *Eastwood* held that Clint Eastwood could pursue a misappropriation claim based on allegations that *The National Enquirer* fabricated an entire story about him, which was then used on the magazine’s cover and in related advertisements to promote the publication. Subsequent cases with analogous facts, such as *Solano v. Playgirl, Inc.*, 292 F.3d 1078 (9th Cir. 2002), have applied the same theory.

The defendants argued that *Eastwood* does not apply to these facts, because the *Eastwood* genre of cases all involved situations in which a media entity was alleged to have in effect stolen the plaintiff’s personality by completely fabricating an entire story about, or picture of, him for the sole purpose of commercially promoting its publication. In this case, there was no promotional use at issue and there was no dispute that the program portrayed real events in which the plaintiff was in fact a participant.

Like any garden-variety defamation case, what the parties disputed was whether some of those events were portrayed inac-

curately. Defendants argued that *Eastwood* did not intend to supplant the law of defamation and recognize a much broader misappropriation claim every time a publication about actual events is alleged to contain some knowingly false statement of fact about a person.

The court pointed out that neither *Eastwood* nor any other published California state court decision since has resolved the question of what limits there are, if any, to this type of misappropriation claim. Judge Miram concluded that Eastwood does reach broadly, so long as a publication or broadcast is alleged to contain “sufficient falsity to materially mislead the reader or viewer” in some respect. In this case, the court found the allegation that de-



Bounty Hunter advertisement

fendants’ editing of the program created a false impression that plaintiff was arrested was sufficient to state a statutory misappropriation claim. In this respect, the decision seems to reflect the increasing willingness of courts to expand the reach of misappropriation theories well beyond their origins as commercial speech torts.

However, in this case the court’s discussion about the law in the abstract did not affect the result. On the facts, Judge Miram held that the plaintiff failed to adduce clear and convincing evidence of actual malice. He found the evidence suggested that defendants believed the plaintiff had lied to them, and found insuffi-

(Continued on page 15)

Anti-SLAPP Motion Granted in Dog the Bounty Hunter Case

(Continued from page 14)

cient evidence suggesting they knowingly or recklessly created a false impression that plaintiff was arrested. Therefore, he dismissed the misappropriation claim.

Other Claims

The court also dismissed the plaintiff's remaining claims for publication of private facts, intentional infliction of emotional distress and negligence. With respect to the intentional infliction claim, the court relied in part on California's defamation retraction statute, Cal. Civ. Code §48a, which bars the recovery of general and punitive damages for allegedly defamatory speech if no retraction is demanded (as none was here).

The court found that it would effectively nullify the statute to permit a claim premised on suffering emotional distress caused by allegedly defamatory speech. The court also implicitly found that the retraction statute applies broadly to both cable television programs and programming outside the context of current news, points the plaintiff had contested.

The decision thus joins a few other recent cases which have applied the statute to cable television programs. See, e.g., *In re Cable News Network*, 106 F.Supp.2d 1000 (N.D. Cal., 2000).

Leave to Amend the Complaint

Finally, the court addressed another issue that several recent appellate decisions have considered: whether or to what extent a

plaintiff may seek leave to amend a complaint in response to an anti-SLAPP motion. After the anti-SLAPP motion was filed, plaintiff filed a motion for leave to amend the complaint to add claims for defamation and false light. Defendants argued that once an anti-SLAPP motion is filed, amendments are not permitted to try to avoid complete dismissal of a case, as some cases have suggested. The court did not finally resolve that question. Rather, it denied the motion for leave to amend on the grounds that the proposed amended complaint included all of the claims dismissed by the SLAPP decision.

However, the court noted that its decision was without prejudice to the plaintiff's right to file another motion for leave to amend, "if it is demonstrated that the proposed new causes of action do not appear to be barred by the anti-SLAPP statute." About two weeks after the SLAPP decision, plaintiff filed another motion for leave to file an amended complaint limited to defamation and false light claims, which remains pending.

Nathan Siegel, Jeanette Bead and Amanda Leith of Levine Sullivan Koch & Schulz LLP, Cameron Stracher, General Counsel of Hybrid Films, and David Sternbach, Litigation and Intellectual Property Counsel for AETN, represented defendants Hybrid Films, Inc. and AETN. James Quadra of Moscone, Emblidge and Quadra LLP represented Defendants Duane and Beth Chapman. Katherine Cox of the Law Offices of Katherine Cox, and Bridgette Bane, represented plaintiff Matt Follner.

Update: Mistrial Declared in Mandel v. Boston Phoenix

Following days of deliberation without a verdict, a mistrial was declared in *Mandel v. The Boston Phoenix*. As reported last year, the First Circuit reversed a \$950,000 jury verdict against the *Boston Phoenix* over an article that described plaintiff, a former Maryland state attorney, as a "child molester" in discussing his custody dispute with his ex-wife -- the second trial in the case, this one under the actual malice standard. *Mandel v. The Boston Phoenix, Inc.*, 456 F.3d 198 (1st Cir. 2006). The court held that plaintiff was erroneously determined to be a private figure on an inadequate record at the summary judgment stage and remanded for a full jury retrial of all issues, including plaintiff's status. On remand, the district court granted defendants' motion to bifurcate the trial with a first phase of evidentiary hearings before the judge to determine plaintiff's status. After hearing testimony from plaintiff's former supervisors and a retired judge from plaintiff's district, the court ruled from the bench that plaintiff was a public official. The court also issued a written decision clarifying that the defendant bears the burden of proving plaintiff's public official status by a preponderance of evidence. See *Mandel v. Boston Phoenix*, 492 F.Supp.2d 26 (D. Mass. 2007).

Newspaper Wins Summary Judgment In Private Figure Libel Case

No Falsity or Negligence

By Jon Epstein

The United States District Court for the Northern District of Oklahoma granted summary judgment in favor of the *Bartlesville Examiner - Enterprise* in a private figure defamation action on the grounds that the plaintiffs, Maxwell and Stephanie Ackley, failed to establish the existence of a false and defamatory statement or that the newspaper acted negligently in reporting the subject news story. [*Ackley v. Bartlesville Examiner, Enterprise*](#), Case No. CIV-06-529 (N.D. Okla., Nov. 29, 2007).

Background

The plaintiffs' defamation claim against the newspaper arose out of an article published on September 29, 2005 entitled "Bartlesville Couple Arrested in Connection with Baby's Death" and subtitled "Police Say Meth Use Contributed to Death of Seven Week Old." Criminal actions were initiated against both plaintiffs in connection with the tragic death of their son.

Bartlesville Police Officer Steve Birmingham executed two affidavits which were filed in the criminal actions and are a matter of public record. Based on those affidavits, the court issued arrest warrants and the plaintiffs were arrested on charges of child neglect and enabling child neglect. In February 2006, nearly five months after the articles were published, the criminal charges were dismissed. Seven months later, the plaintiffs initiated their suit against the *Examiner - Enterprise* alleging that the article defamed them.

The newspaper filed its motion for summary judgment arguing that many of the statements made in the article are taken verbatim from the two affidavits and other statements in the article are accurate restatements of the information included in them. The newspaper argued that the statements in the article are substantially true, are privileged as fair reports by statute and common law, and were not made with the requisite degree of fault to establish any liability.

The paper contended that the article accurately reports the allegations being made against the plaintiffs, including the statements of witnesses contained in the investigator's affidavits on which the court relied to authorize the arrest of the plaintiffs. The newspaper then argued that the measure

of "truth" is not whether the statements in the affidavits of the police officer are true, but whether the newspaper accurately reported the substance of what the affidavits said.

In light of the accuracy of the article, the paper said the plaintiffs failed to present any evidence that it was professionally negligent, that is, that it failed to exercise "that degree of care which ordinarily prudent persons engaged in the same kind of business usually exercise under similar circumstances." *Malson v. Palmer Broadcasting Group*, 1997 Okla. 42, ¶9, 936 P.2d 940, 942 (quoting *Martin v. Griffin Television, Inc.*, 1976 Okla. 13, ¶23, 549 P.2d 85, 92).

It contended that the information for the article was secured from an official source and was obtained in connection with an official proceeding -- the filing of charges against the plaintiffs and their arrest -- and that for the same reasons a newspaper is privileged to report official proceedings, it cannot be negligent in doing so.

Summary Judgment Ruling

In granting summary judgment, the court did not address the fair report privilege issue. Instead, it first found that the plaintiffs failed to make a sufficient showing to establish the existence of a false statement. The court compared the article with the affidavits and found that the "gist" of the article -- that the plaintiffs were arrested on charges of child neglect and enabling child neglect in connection with their baby's death -- comports with the information included in Officer Birmingham's affidavits. The court then found that the plaintiffs presented no evidence supporting their assertion that the article contained untruthful statements relating to them and noted:

As aptly stated by Defendant, the measure of "truth" is not whether the statements in the affidavits are true -- i.e., whether Plaintiffs did indeed contribute to the death of their infant son -- but instead is whether the newspaper accurately reported the allegations made against Plaintiffs.

Ackley, slip. op. p. 4, citing (*Global Relief Foundation, Inc. v. New York Times Co.*) 390 F.3d 973, 986 (7th Cir.

(Continued on page 17)

Florida Federal Court

(Continued from page 16)

2004) (rejecting plaintiff's argument that media defendants had to prove the truth of government's charges against plaintiff before reporting on government investigation of plaintiff); *Green v. CBS*, 286 F.3d 281, 284 (5th Cir. 2002) (media defendants need not show the allegations against plaintiff are true, but must only demonstrate that the allegations were made and accurately reported).

With respect to the fault issue, the court rejected the plaintiffs' argument that the newspaper was required to verify the truth of the allegations contained in Officer Birmingham's affidavits. To the contrary, the court determined that

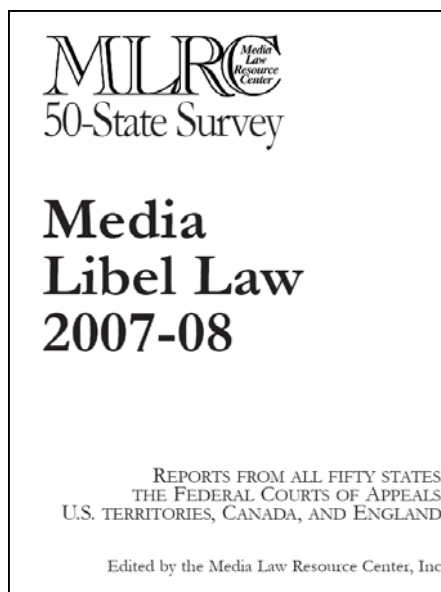
when assessing the truth of a report concerning an investigation, a defendant is under no requirement to show that the allegations against the plaintiff are true, but must only show that the allegations were made and that the allegations themselves were accurately recited. Accordingly, the court ruled that the plaintiffs did not prove that the newspaper failed to exercise the appropriate level of care.

Jon Epstein and Robert D. Nelson of Hall, Estill, Hardwick, Gable, Golden & Nelson in Oklahoma City, Oklahoma represented The Bartlesville Examiner – Enterprise. Plaintiffs were represented by Daniel E. Smolen in Tulsa, Oklahoma.



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Michigan Court Again Throws Out Privacy/Eavesdropping Case by Cops Caught On Tape Censoring Concert Performance

No Reasonable Expectation of Privacy Under the Circumstances

By Herschel P. Fink

A Michigan state judge has for a second time dismissed a 2002 lawsuit alleging that famed rap impresario Dr. Dre (Andre Young) violated the privacy rights of three City of Detroit police officials when a backstage camera crew videotaped the officials in the act of bullying concert promoters into censoring a July, 2000 rap concert in a Detroit arena. The footage was incorporated into Dr. Dre's concert DVD, which achieved multiplatinum sales.

Although the unusual case involves a concert DVD, it has implications for television news and other newsworthy uses of video shot without the consent of the subject.

The December 4, 2007 opinion of Wayne County (Michigan) Circuit Court Judge John A. Murphy (*Bowens v. Aftermath Entertainment, et al.*, Wayne County Circuit Court Civil No. 02-23351-CZ) involved allegations of violation of Michigan's eavesdropping statute. The plaintiffs claimed the camera was hidden. Defendants claimed the camera was open and obvious.

Judge Murphy, in an 18-page opinion, seemed to think none of that mattered. He found that the plaintiffs simply had no reasonable expectation of privacy when they were taped in a backstage room with an open door in which various persons were coming and going.

Judge Murphy earlier had dismissed the lawsuit in a August, 2003 opinion (*see MediaLawLetter*, Sept. 2003 at 9), also disposing of claims of commercial appropriation, false light, libel and common law invasion of privacy. On appeal (unpublished opinion 2005 WL 900603, April 19, 2005), the Michigan Court of Appeals affirmed the dismissal on all grounds except the Michigan Eavesdropping Statute claim, finding dismissal was premature as to that and ordering that plaintiffs be allowed full discovery.

A companion federal eavesdropping statute case was dismissed in 2005. (*Bowens v. Aftermath Entertainment, et al.*, 364 F.Supp.2d 641 (E.D. Mich. 2005)), also 254 F.Supp.2d (E.D. Mich. 2003).

In his 2003 dismissal opinion, Judge Murphy keyed in on the plaintiffs' lack of a reasonable expectation of privacy, explaining that, "Even if the conversation was in a

room, the locale was a concert arena filled with people, and the topic was what should be shown to the concert audience, not exactly a matter of private concern." Judge Murphy observed that the door to the room was "wide open," and "It is difficult to find reasonable expectations of privacy where the parties knew that they were being videotaped."

After discovery, the defendants again moved for summary disposition, raising "a perfect storm" of grounds, including that police officers have no reasonable expectation of privacy when videotaped while performing their official (and unconstitutional) actions. (In an earlier, related case, the current defendants, including Dr. Dre, had successfully sued the current plaintiffs for violating their First Amendment rights by censoring the performance. As part of the settlement of that suit, the mayor of Detroit issued an apology, acknowledging that the present plaintiffs' actions constituted an unconstitutional prior restraint.)

Dr. Dre and the current defendants also argued that their actions in videotaping were protected by *Bartnicki v. Vopper* (the defendants used the tape, but did not actually tape it); one-party consent under Michigan law (those who taped and the concert promoters who were part of the conversation consented); as well as several other defenses. Defendants stressed the fact that the door to the room remained open, that third persons were present and came and went, and that under such circumstances plaintiffs could not have had a reasonable expectation of privacy.

Although Judge Murphy had announced at argument on the motion on October 26, 2007 that his "inclination" was to let the case proceed to trial and to let a jury decide, he obviously had second thoughts, perhaps influenced by the oral argument, which sought to focus him back on his 2003 finding that there was no reasonable expectation of privacy.

"[T]he parties must have a reasonable expectation of privacy," he wrote. "There is no violation of the Act absent a reasonable expectation of privacy; accordingly, there is no *prima facie* case absent a reasonable expectation of privacy.... In particular, people had easy access to the room the plaintiffs were in. There cannot be a reasonable expectation of privacy in an easily accessible, heavily trafficked room. Defendants propound an 'open-door rule': If the

(Continued on page 19)

Michigan Court Again Throws Out Privacy/Eavesdropping Case by Cops Caught On Tape Censoring Concert Performance

(Continued from page 18)

door to a room is left open, there can be no expectation of privacy.

“We decline defendant’s invitation to adopt a general rule. Nevertheless, whether the door was open or not is important,”

The court went on to find “as a matter of law, plaintiffs did not have a reasonable expectation of privacy. Belief is one thing; reasonable belief another.” The court noted that the allegedly “private” conversation occurred in a room

called a “communications center,” “not a plausible setting for a private conversation,” and “(u)nder the circumstances, the plaintiffs could not have a reasonable expectation of privacy.”

The plaintiffs have announced their intention to appeal yet again.

Herschel P. Fink is a partner at Honigman Miller Schwartz and Cohn LLP, Detroit, who, with partner Brian D. Wassom, represents the Defendants.

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Lost in Transit – Iowa Court Affirms \$500,000 Verdict Stemming from Internet ‘Watchpage’

By Michael Giudicessi

Acrimony fostered by a soured deal for antiques between a California couple and an Iowa hair stylist led first to colorful accusations published on the Internet and now to a \$500,000 jury verdict recently affirmed by the Iowa Court of Appeals. *Kono v. Meeker*, No. 7-596 (Iowa, filed Dec. 12, 2007).

The verdict stemmed from publication of an Internet “watchpage” that, among other things, gave this warning about the plaintiff:

[T]his sort of slimy little weasel usually only ventures out under the cover of darkness or through the anonymity or over great distances like over the internet to do business. One can see/sense and oftentimes smell the deceit and air of the dishonesty that these types give off when you meet them in person. Beware!!

This month a three-judge appeals panel affirmed a jury award of \$250,000 in compensatory damages and \$250,000 in punitive damages to plaintiff Dana Kono. The case is a cautionary tale for bloggers and the like who bring personal disputes to cyberspace.

Background

Kono, who the Iowa Court of Appeals described as “an Iowa resident and hair stylist, whose hobbies include the collection of antique woodworking tools and scientific instruments,” sued defendants Larry and Carol Meeker. The lawsuit against the Meekers, who do business in California and on the web as PatentedAntiques.com, asserted libel, privacy and intentional infliction of emotional harm claims based on statements Larry Meeker made on the Internet after the parties’ deal unraveled.

The Meekers had agreed by telephone to obtain a surveyor’s tool called a “transit” from Kono in exchange for antique woodworking tools – specifically, as the Court of Appeals described them, “seven crank handled chisels.”

When Larry Meeker received the transit, he expressed concern that it was Japanese-made and included the name

“Sokkisha” on it. Additional e-mails between Meeker and Kono followed and soon thereafter Meeker returned the transit.

Kono refused to accept the returned item because its shipping box arrived in poor condition. He sent an e-mail to the Meekers indicating that their return of the transit without further discussion was “arrogant and inconsiderate”

and he warned the Meekers against trying to bill his credit card account.

Additional e-mails followed as the parties’ disagreement about their chisels and transit

escalated.

In one e-mail, Meeker warned Kono that he would create a page on his website “fully describing the incident, and your problems.” Mr. Meeker thereafter posted the “Dana Kono watchpage” that began with a warning that the page was published “as a service to all fellow tool collectors, tool dealers or other unsuspecting people who may have occasion to do business with this individual Dana Kono.”

The “Dana Kono watchpage” stated, among other things, that Kono:

Is an “admitted liar”

Is a “thief who stole \$700.00 worth of merchandise from me using deception and lies”

Is a “drunk” who is “in the denial stages of his problem, so beware if you are about to do business with this individual”

Has “a problem with the truth, with facts, and it seems with alcohol”

“Has no honor and I believe is the type of person that should be avoided in all manner of business dealings”

Meeker advised Kono in an e-mail sent March 24, 2003, that he had posted the “watchpage” on the web. By May

(Continued on page 21)

Lost in transit – Iowa court affirms \$500,000 verdict stemming from Internet ‘watchpage’

(Continued from page 20)

15, 2003, Kono filed his lawsuit in district court in Des Moines.

Appeals Court Decision

On appeal, the Meekers claimed their assertions were “tongue in cheek” and that the accusations on the webpage were “rhetorical hyperbole.”

The Court of Appeals, in an opinion authored by Judge Gayle Nelson Vogel, rejected these arguments by finding that “the jury was well within its fact-finding role” to conclude that the remarks were other than “tongue in cheek.”

According to Judge Vogel, “The accusations made on the webpage constitute more than mere ‘name calling’ or venting personal frustrations, and reflect the Meekers determined attempt to tarnish Kono’s reputation and his business.”

The Court of Appeals affirmed the \$250,000 compensatory damage award, finding that substantial evidence supported the verdict and that it was not excessive or duplicative.

The court noted that the evidence indicated that one long-time client of Kono testified she did a Google search on the plaintiff, came up with the Meekers’ watchpage and found it “very unsettling.” According to the court, this client “was so concerned about the Meekers’ claims about Kono’s lying, cheating, drinking and potential ‘devil worship’ that she decided to stop using Kono as her family’s hair stylist.”

The court also said Kono introduced sufficient evidence of lowered reputation in the community, including proof that he suffered a decrease in income from his salon business and that “perceived tool collectors were ‘cooler’ toward him in subsequent transactions following the publication of the watchpage.”

The court affirmed awards of compensatory damages of \$150,000 for defamation, \$50,000 for invasion of privacy and \$50,000 for intentional infliction of emotional distress.

In affirming the jury’s award of \$125,000 in punitive

damages assessed against each of the Meekers, the appeals court found that the evidence and the relationship “between the punitive damages award and the wrongful conduct of the offending party” supported the verdicts.

The Iowa Court of Appeals affirmed the punitive award without citation to defamation cases analyzing punitive damages — it instead relied on the constitutional analysis of the *BMW* and *State Farm* cases and Iowa common law, which allows “punitive damages to punish the defendant and to deter the defendant and like-minded persons from committing similar acts.

In this regard, Judge Vogel wrote:

The watchpage created by the Meekers was posted on the internet for over eight months and the record supports that it achieved its intended affect of discouraging others from doing business with Kono. The award reflects the offensive conduct and level of damage caused by the Meekers. Under these circumstances, a punitive damages award of \$125,000 against each defendant is not flagrantly excessive.

The Court of Appeals rejected other arguments raised by the Meekers by holding they had not preserved them for appellate review. The opinion does not indicate if the defendants made any challenge to the jurisdiction of the Iowa courts over the web publication made in California.

Judge Vogel’s opinion will become a final decision unless the Meekers apply for further review by the Iowa Supreme Court by December 24, 2007. The Iowa Supreme Court considers such applications under a discretionary review standard.

Michael Giudicessi is a partner with Faegre & Benson LLP in Des Moines, Iowa. Plaintiff was represented by David Phipps of Whitfield & Eddy, Des Moines. Defendant was represented by Margaret Callahan of Belin Lamson McCormick Zumbach Flynn, Des Moines.

Arizona Appeals Court Adopts Three Part Test for Revealing the Identity of an Anonymous Internet Speaker

The Court of Appeals of Arizona recently adopted a three part test to determine when to grant a plaintiff's request to discover the identity of an anonymous speaker on the internet. *Mobilisa, Inc. v. John Doe 1 and The Suggestion Box, Inc.*, 2007 WL 4167007 (Ariz. App. Div. 1) (Timmer, J.). This case marks the first time an appellate court in Arizona has considered the issue of First Amendment rights for anonymous speech on the Internet.

Background

Mobilisa is a company that provides mobile and wireless communications to a variety of customers, including government and military entities. In order to ensure confidentiality for its customers, Mobilisa has secured its email systems.

This lawsuit stems from an email sent by Mobilisa's founder and CEO Nelson Ludlow. Ludlow sent an email from his Mobilisa account to his mistress. As one can imagine, the email was of an intimate nature. Soon after Ludlow sent the email, an unknown number of individuals, including some Mobilisa employees, received the intimate email along with a message from its anonymous sender. Mobilisa filed suit against the anonymous email sender, with both federal and common law claims.

Trial Court

In the trial court, Mobilisa requested discovery of the identity of the email sender from the email provider, The Suggestion Box ("TSB"). The trial court chose to adopt a two part test for the disclosure of the identity of a speaker engaged in anonymous speech on the internet from *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). The Delaware Supreme Court had developed a two part test: (1) the party seeking to compel disclosure must make "reasonable efforts" to notify and provide "reasonable time" to respond, and (2) the party must show that their claim would overcome a summary judgment motion. *Id.* at 460-61.

Subsequently, the trial court ruled that Mobilisa had met this standard and could discover the identity of the anonymous speaker. The anonymous speaker and TSB appealed.

Court of Appeals

On appeal, plaintiff and defendant made opposite arguments.

Mobilisa argued that the trial court had applied the wrong standard but reached the right result, while Doe and TSB argued that *Cahill* was the right standard but that the trial court reached the wrong result.

Mobilisa argued that *Cahill* was wrong because different standards should apply depending on the nature of plaintiff's claim. Whereas *Cahill* was a defamation case involving free expression, Mobilisa argued it was bringing claims over unauthorized access to Mobilisa's email system. The appeals court rejected this distinction, finding the potential to chill anonymous speech the same regardless of the nature of the claim.

The appeals court declined to adopt the *Cahill* standard alone, instead choosing to retain the two steps from the *Cahill* test and add an additional step that balances the interests of the parties. The appeals court explained that the balancing step is necessary for several reasons. First is that the summary judgment step does not take into account the interests of an anonymous speaker that is not a party to the case and is of only slight importance to plaintiff's overall claim.

The court further noted that the test to disclose the identity of an anonymous speaker is similar to a preliminary injunction motion and thus should include a general balancing of interests. Finally, the court stressed that in Arizona free speech and individual privacy are important rights that garner strong protection. The appeals court agreed with the trial court that Mobilisa had met the first two steps and remanded the case back to the trial court for consideration of the third step.

The dissent argued that the majority applies the wrong standard. In situations such as this case, where the anonymous speaker is also the defendant, the dissent argued a more plaintiff-friendly standard should apply so that a plaintiff will still be able to seek relief. The dissent argued that the proper standard should involve no balancing of interests so long as plaintiff could demonstrate a genuine issue of material fact exists and has a claim that would survive First Amendment concerns.

Lewis and Roca, LLP, Randy Papetti, Robert G. Schaffer, Phoenix, Preston Gates & Ellis, LLP, David A. Linehan, Michael K. Ryan, Seattle, represented Plaintiffs. Whitten Berry, PLLC, Christopher T. Whitten, Phoenix, Law Offices of Charles Lee Mudd, Jr., Charles Lee Mudd, Jr., Chicago, represented Defendants.

Florida Court Dismisses Insurance Company's Defamation Action Against The Associated Press

By **Judith M. Mercier**

A Florida circuit court has dismissed a defamation action against The Associated Press, two attorneys and their law firm, over a statement in an article reporting on the jury's verdict in the wrongful death claim arising out of the death of a Miami judge. *United Automobile Insurance Company v. Freidin*, Case No. 06-25595-CA-08, (Fla. 11th Judicial Cir. Ct. December 3, 2007).

Plaintiff in the defamation action, United Automobile Insurance Co., had provided insurance coverage to the drunk driver who caused the fatal accident with the judge. The Associated Press reported after the jury returned its verdict that the lawyers for the judge's family, who were the wrongful death plaintiffs, said they would file a bad faith lawsuit against the insurance company for refusing to make any offer of settlement.

In dismissing the defamation claim against AP, the court found that the statement was not capable of defamatory meaning. The court issued a separate decision dismissing the claims against the other defendants on a variety of grounds.

Background

The insurance company initially sued the attorneys and their law firm over the single sentence in AP's report but did not sue AP. The article reported on the jury verdict in the civil wrongful death action brought by the survivors of the Honorable Steven D. Levine against a drunk driver, Jose Hernandez. The article recounted the jury's award of \$2.125 million to each of Judge Levine's children, that the judge in the wrongful death case had dismissed claims against the bar Hernandez had visited on the evening he collided with Judge Levine's car, and that the lawyers for the children would sue Hernandez's automobile insurance company, United Automobile Insurance Co., to try to collect the money.

The insurance company alleged that the following one sentence in the article is defamatory: "Attorneys Phillip Freidin and Robert Brown said after they will file a bad faith lawsuit against the insurance company for refusing to make any offer of settlement. Freidin and Brown, in the defamation action, denied making the statement. The children, however, did file a bad

faith lawsuit against the insurance company in the months following the jury verdict in their favor."

In pursuing the defamation claim against the lawyers, United Auto subpoenaed for deposition the reporter who wrote the story, and AP moved to quash the subpoena based on Florida's reporter's privilege. Before the court ruled on the motion to quash, the plaintiff filed an amended defamation complaint and added AP as a defendant. AP and Brown filed motions to dismiss, and defendants Freidin and the law firm filed an answer and then filed a motion for judgment on the pleadings.

In response to the motions, United Auto argued that the statement was defamatory per se because it accused the insurance company of conduct that it argued was illegal – failure to make a settlement offer. The court rejected plaintiff's argument at the threshold. Considering the entire article, the language used, and evaluating the statement as the common mind would naturally understand it – which is the test in Florida for defamatory meaning – the court found that the statement is not capable of defamatory meaning. The court also found that the statement is substantially accurate because if the allegation that the insurance company refused to make any offer of settlement were eliminated from the article, the remainder would produce no different effect as the common mind would naturally understand it.

As additional grounds for dismissal, the court found that the statement was an opinion and was covered by the litigation privilege as it was made in the context of a judicial proceeding. Further, the court held, the statements were offered to give the defendant attorneys' opinion on the collectibility of the judgment that had just been entered, and their intent to file an action against the insurance company.

United Auto has filed an appeal.

Judith M. Mercier, a partner in the Orlando office of Holland & Knight LLP, represented The Associated Press. Helen Miranda, Josephs, Jack & Miranda, represented Robert Brown. Robert M. Klein, Stephens Lynn Klein, represented Freidin and Freidin & Brown, P.A. Michael Olin, Kozyak, Tropin & Throckmorton, also represented Freidin and Freidin & Brown, P.A. Jeffrey D. Feldman, Feldman & Gale, P.A., represented plaintiff.

Texas Court Considers Online Anonymity

Adopts Summary Judgment Standard

By Thomas J. Williams

A libel plaintiff seeking the identity of an anonymous blogger must establish facts which would be sufficient to defeat a motion for summary judgment, at least as to those elements within the plaintiff's control, a Texas appeals court has held. [*In re Does 1 – 10*](#), 2007 WL 4328204 (Tex. App. – Texarkana December 12, 2007, no pet.).

Doe began when Essent PRMC, LP, an East Texas hospital, sued John Does 1-10 alleging that Doe 1 had set up a blog which defamed the hospital. Simultaneously with the filing of its Petition, the hospital filed an “*ex parte* request to non-party to disclose information” directed at SuddenLink, an internet service provider, asking the trial court to direct Sudden Link to disclose the identity of the Does. The hospital and SuddenLink agreed to an order which provided for notice to the Does and an opportunity for them to respond. An attorney appeared on behalf of the unnamed subscriber at the hearing and objected, but the trial court ordered SuddenLink to disclose the identity of its subscriber.

The unnamed subscriber then filed a petition for writ of mandamus in the Court of Appeals, which the court granted, vacating the trial court's order. Agreeing with the reasoning previously adopted by the Delaware Supreme Court in *Doe v. Cahill*, 884 A. 2d 451 (Del. 2005) and a federal district court in Arizona, *Best Western Int'l v. Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006), the Court of Appeals held that in order to discover the identity of an anonymous defendant, a defamation plaintiff must establish sufficient evidence to create a genuine issue of material fact as to all elements of the defamation claim within the plaintiff's control. If the plaintiff is a public official or public figure, however, the plaintiff would not be required to bring forth sufficient evidence of actual malice to defeat a motion for summary judgment on that issue because, reasoned the Court, “the actual malice requirement is an additional level of constitutional protection that applies only in particular circumstances for the imposition of liability, not discovery.”

Thomas J. Williams is a partner in the Fort Worth office of Haynes and Boone, LLP

New York Court of Appeals Rejects Ehrenfeld Declaratory Judgment Action

No Long Arm Jurisdiction Over Saudi Libel Plaintiff

The New York Court of Appeals has ruled that the state's long arm statute does not support the exercise of jurisdiction over a foreign libel plaintiff who had sued a New York author for libel in London. [*Ehrenfeld v. Bin Mahfouz*](#), No. 174 (Dec. 20, 2007).

As reported before, American author and researcher Rachel Ehrenfeld brought a declaratory judgment a N.Y. federal district court seeking a ruling that a UK libel judgment against her obtained by Khalid Bin Mafouz, a Saudi Arabian businessman, is unenforceable in the United States.

The district court dismissed, holding that Mafouz's multiple cease and desist letters and service of papers in connection with the UK action were insufficient to support personal jurisdiction because they did not further any business objective, as required by New York's long arm statute, CPLR § 302 (a)(1).

Earlier this year the Second Circuit Court of Appeals asked the New York Court of Appeals for guidance on the scope of the state's long arm statute. *See Ehrenfeld v. Bin Mahfouz*, No. 06-2228, 2007 WL 1662062 (2d Cir. June 8, 2007). The Second Circuit found that New York courts had not addressed whether these contacts combined with an intent to chill a New York resident's First Amendment rights could support jurisdiction. In answering the question, the New York Court of Appeals held that none of Mahfouz's contacts “invoked the privileges or protections of our State laws.” It noted the concern over “libel tourism,” but stated in a footnote that such concerns were best addressed by the state legislature.

Second Circuit Vacates Tasini Settlement

Unregistered Copyrights a Jurisdictional Bar to Class Settlement

The Second Circuit vacated a district court's approval of the post-*Tasini* settlement between publishers and freelance authors. [*In re Literary Works in Electronic Databases Copyright Litigation*](#), 2007 WL 4197413 (2d Cir. Nov. 29, 2007) (Straub, Walker, Winter, JJ.). A divided court held that courts have no jurisdiction to adjudicate claims involving unregistered copyrights.

Background

The settlement attempt stemmed from the Supreme Court's ruling that publishers needed specific authorization to reproduce a freelancer's work electronically. *New York Times v. Tasini*, 533 U.S. 483 (2001). After the *Tasini* decision, freelance writers sought damages over the use of their work in electronic archives. Eventually both sides agreed to an \$18 million settlement, and the District Court for the Southern District of New York approved it. The settlement divided the freelancers into three classes: those who had registered (Category A); those who had registered after litigation began (Category B); and those who had never registered (Category C). Category A received a flat fee, Category B a flat fee or a percentage of the price of the original work (whichever was greater) and Category C received the same as B, except that if the claims exceeded \$18 million then Category C's claims are to be reduced while A and B's remain intact.

Some members of Category C objected that they were not properly represented, given the disparity in the settlement. The district court went ahead and certified the class and approved the settlement despite these objections.

On Appeal

Objectors appealed to the Second Circuit over the adequacy of representation of the Category C claimants. However, the Second Circuit chose to focus on an entirely different issue. The court of appeals looked to whether the district court had the jurisdiction to certify a class that included those with unregistered copyrights.

Section 411(a) of the Copyright Right Act grants federal courts jurisdiction over copyright claims only if they have been registered. However, the Second Circuit had never addressed whether this applies to class actions involving copyright claims. Comparing it to other jurisdictional requirements for class actions (such as, all parties must have Article III standing) the Second

Circuit found that all members of the class must have registered their copyrights in order for the court to have jurisdiction.

The Dissent

Judge Walker dissented, stating "the fact that some of the otherwise presumably valid copyrights have not been registered is an insufficient basis for undoing this class-action settlement." He gave several reasons for reaching this conclusion. First is that he viewed the section 411(a) requirement as merely being a claim-processing rule instead of a jurisdictional bar. Thus Judge Walker viewed the registration requirement as a procedural rule that did not bar jurisdiction in the lower court.

Judge Walker pointed out that the registration requirement is a prerequisite to receiving certain damages rather than dictating jurisdiction. Also, section 411(a) creates multiple opportunities for jurisdiction without registration, such as when a registration is pending before the Copyright Office or it has yet to act on a registration. To this end, some circuits have held that injunctive relief is proper even where the claim is an unregistered copyright. Finally, Judge Walker noted that statutory standing is not necessary for class action plaintiffs, but constitutional standing is and the plaintiffs had all met that requirement.

Representing Objectors was Charles D. Chalmers, Fairfax, CA. Defendants were represented by Charles S. Sims, Stephen Rackow Kaye, Joshua W. Ruthizer, Proskauer Rose LLP, New York; Kenneth Richieri, George Freeman, The New York Times Company, New York; Henry B. Gutman, Simpson Thacher & Bartlett, New York; James F. Rittinger, Satterlee Stephens Burke & Burke, New York; Jack Weiss, Gibson Dunn & Crutcher LLP, New York; Juli Wilson Marshall, Latham & Watkins, Chicago; Ian Ballon, Greenberg Traurig LLP, Santa Monica, CA; Michael Denniston, Bradley, Arant, Rose & White, LLP, Birmingham, AL; Christopher M. Graham, Levett Rockwood P.C., Westport, CT; Raymond Castello, Fish & Richardson PC, New York. Plaintiffs were represented by Michael J. Boni, Joshua D. Snyder, Kohn Swift & Graf, P.C., Philadelphia; Diane S. Rice, Hosie MacArthur LLP, San Francisco; A.J. De Bartolomeo, Girard Gibbs & De Bartolomeo LLP, San Francisco; Gary Fergus, Fergus, A Law Firm, San Francisco.

Facebook Founder's Documents May Remain Online

Court Rejects Motion to Enjoin Further Publication

A federal court denied a preliminary injunction motion that sought to force a magazine to take down personal documents of Facebook founder Mark Zuckerberg. *ConnectU v. Facebook*, 1:07-CV-10593-DPW (D. Mass. Nov. 30, 2007) (Woodlock, J.). The documents had been obtained by the Harvard alumni magazine *02138* in connection with an article it published about Zuckerberg and his litigation over the creation of Facebook.com.

Background

Facebook.com, arguably the most popular social networking website, is often derided by its critics for its invasions of privacy. But ironically, it was its founder, former Harvard undergraduate student Mark Zuckerberg, that recently found his own privacy invaded.

Zuckerberg's troubles began in 2004, when he was sued by ConnectU, a less popular social networking website that was also founded by Harvard students. ConnectU had recruited Zuckerberg when he was a student at Harvard to perform technical work on its website. Soon after, Zuckerberg founded his own social networking site, Facebook. ConnectU then launched suit against him, accusing him of stealing its ideas and computer programming code.

As part of the *ConnectU* lawsuit, Zuckerberg had filed documents that included his Harvard application, a private email to the Harvard Administrative Board and an online diary. This fall, a writer for the Harvard alumni magazine *02138* (after the Harvard zip code) began research for an article on Zuckerberg and the *ConnectU* lawsuit. As part of his research, the writer requested and received from the court documents that had been filed in the case. It is unclear why the documents, which were under protective order, were released by a clerk.

02138 published an article on the Zuckerberg – ConnectU dispute and made the documents available on its website. Some contained personal information, such as Zuckerberg's social security number and his parent's home address. Zuckerberg sought a preliminary injunction to force *02138* to take the materials down.

Preliminary Injunction Motion

On November 30, Judge Woodlock held a hearing on Zuckerberg's motion to preliminarily enjoin further publication. The competing interests were strong: Zuckerberg's right to privacy in these personal documents versus the magazine's First Amendment right to publish newsworthy information. The judge weighed these interests against each other, which he admitted was extremely difficult, saying they are "incommensurables."

Ultimately, the judge was swayed by the First Amendment rights of the magazine. He found the information to be of great interest to the public and not a matter of private concern, as Zuckerberg's lawyers had argued. Also, he highlighted that the First Amendment and democracy are furthered by access to primary source documents for articles – and allowing individuals to form their own opinions on the matter by examining the very source of information.

Judge Woodlock was most troubled though by the publication

of the diary. On this issue, he extolled the right to privacy in one's own thoughts, especially in a diary. But Judge Woodlock found that given this country's historical aversion to prior restraints on speech, the strong First Amendment interests in free expression outweighed the invasion of personal privacy.

Looking specifically at the test for whether a preliminary

injunction should be granted, the judge found that there was no likelihood of success on the merits. He cited four reasons for this ruling. First is that the documents are "inextricably intertwined" with *02138*'s free expression right. Next is that *02138* is not a party to the underlying lawsuit and thus was not directly subject to the protective order in *ConnectU*. Third was that the documents concerned an issue of public concern. Finally, he cited his feeling that allowing readers to examine the primary documents allowed them to come to their own conclusions, a hallmark of democracy and what the First Amendment is meant to foster.

Robert P. Balin, Laura Handman and Amber Husbands, Davis, Wright & Tremaine, New York, and Elizabeth Ritvo, Brown Rudnick, Boston represented 02138.



Kansas City Star Reporters' Ordered to Testify to Grand Jury

Prosecutors Wanted Testimony to Prove Target's Waiver of Attorney Privilege

By Sam Colville

It all started simple enough: a late Friday afternoon call in March 2007 from *The Kansas City Star*. I was informed attorneys for the Kansas City (Kansas) Board of Public Utilities ("BPU") were en route to Missouri Circuit Court to obtain a TRO prohibiting *The Star* and a local weekly paper, *The Pitch*, from publishing a December 2004 confidential report from the BPU's attorneys analyzing whether the BPU was in compliance with the Federal Clean Air Act. *The Star* and *The Pitch* had received copies of this liability analysis report from an anonymous source. *The Pitch* is owned by Village Voice Media and was represented in this matter by Mark Sableman of Thompson Coburn, St. Louis.

I managed to participate in the TRO hearing by phone and, after listening to arguments and taking the matter under advisement for about an hour, the circuit judge announced she was entering the TRO because she believed publication of the attorney-client privileged report would have a "chilling effect upon the legal profession." Not chilled by this decision, Mark and I worked over the weekend and first thing Monday morning filed with the Missouri Court of Appeals a petition for writ of prohibition. On Tuesday, the appellate court entered a temporary writ of prohibition. *The Star* and *The Pitch* immediately published newspaper articles about the analysis report and published the liability analysis in its entirety on their respective Web sites. The BPU dismissed the lawsuit the following day.

A few days later, two *Star* reporters, Karen Dillon and Mark Wiebe, interviewed several BPU officials concerning the effect public knowledge of this report was likely to have upon the BPU. *The Star* published an article based on that interview the following day.

The U.S. Environmental Protection Agency (the "Government") thereafter initiated a federal grand jury investigation and issued a subpoena duces tecum to the BPU for a copy of the report and related materials. The BPU filed a motion to quash asserting its attorney-client privilege.

The magistrate judge granted the motion, ruling that the unauthorized disclosure of the report had not constituted a

waiver. The Government also claimed the BPU had waived its attorney-client privilege during the interview by *The Star* reporters. BPU provided affidavits from its officials involved, all of which denied they had waived the privilege. Dillon and Wiebe provided affidavits attesting to the accuracy of the article from their interview.

The magistrate judge found he could not determine from the article, itself, whether the privilege had been waived. In his order, the magistrate judge *sua sponte* scheduled a hearing for June 8, 2007, for the parties "to present testimony from the reporters who were present at the interview . . . on the waiver issue." (Emphasis added.)

In response, the local U.S. attorney sought permission from the U.S. Attorney General under 28 CFR § 50.10, to issue subpoenas to Wiebe and Dillon for their persons, notes and other materials related to this matter. When Attorney General permission was not immediately forthcoming, the magistrate judge directed attorneys for the BPU to subpoena Wiebe and Dillon. However, after some consideration, the BPU attorneys declined to do so. On August 6, 2007, the Attorney General granted permission for the subpoena of Wiebe and Dillon and their related notes and other materials.

Reporters filed a motion to quash based primarily on the "reporter's privilege," as recognized in the Tenth Circuit in *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437-38 (10th Cir. 1977). There, the Tenth Circuit formulated the elements of the "balancing test" as follows:

1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful.
2. Whether the information goes to the heart of the matter.
3. Whether the information is of certain relevance.
4. The type of controversy.

In a subsequent decision, the Tenth Circuit reformulated the first element of this test to require a finding as to "whether the information is available from other sources."

(Continued on page 28)

Kansas City Star Reporters' Ordered to Testify to Grand Jury

(Continued from page 27)

Grandbouche v. Clancy, 825 F.2d 1463, 1466 (10th Cir. 1987). The distinction in wording between these two versions of the test became pivotal, although not formally declared as such.

The reporters' principal argument was that all information as to what occurred during the interview was available from alternative sources, the BPU officials who participated in that interview, and the reporter's privilege required those officials to first be compelled to testify before the reporters could be subpoenaed. The magistrate judge, however, characterized the reporters' position as being "essentially that it should be virtually impossible under First Amendment precedent to enforce a subpoena against a reporter." He then proceeded to reject this argument, concluding "[t]his is a gross overstatement of the governing law." He observed that the reporters were not being asked to disclose confidential sources or information. Then, without discussing them, he found he had "duly considered the *Silkwood* standards," and concluded "that the reporters' testimony in this matter is not privileged."

The reporters filed an objection to the order of the magistrate. In the magistrate judge's order and in the subsequent order from the district judge, both courts dismissively referred to the privilege as "the so-called reporter's privilege."

The district court found that the "alternative source" element of the test had been satisfied by the affidavits from the BPU officials declaring that they had not waived the privilege during the interview. It saw no benefit to their being required to testify "[u]less the Court is to believe that these officials would recant this sworn testimony" from their affidavits. The district court also found that the "of certain relevance" element had been satisfied as it applied to the reporters' notes and other materials "to the extent that they are necessary to [the reporters'] testimony."

The reporters and *The Kansas City Star* decided not to appeal this decision. Rather, *The Star* published the reporters' notes on its Web site and Wiebe and Dillon testified at an evidentiary hearing on November 1, 2007. To my knowledge, the "reporter's privilege" opinions of our courts have not been published.

I would be remiss in not acknowledging the tremendous assistance received throughout this matter from MLRC's staff, particularly Dave Heller and Eric Robinson. We may not have had the satisfaction of winning but we truly out-briefed our opponents (excluding only the courts) at every turn.

Sam L. Colville is a partner with Holman Hansen & Colville, P.C. in Overland Park, Kansas.



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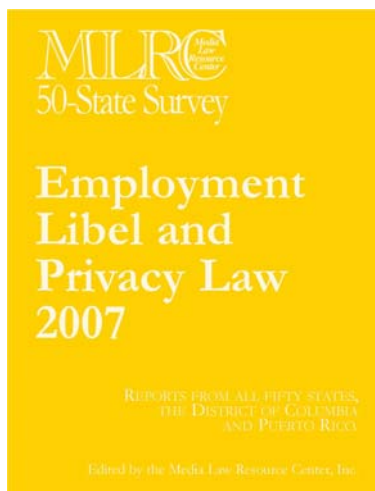
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Wisconsin Federal Court Limits Grand Jury Subpoena To Protect Privacy of Reading Choices

Government Denied Access to Names of Amazon Customers

By Laura R. Handman and David M. Shapiro

The United States District Court for the Western District of Wisconsin held, in a recently unsealed opinion, that where a grand jury subpoena seeks names and other identifying information of individuals who purchased particular books, CDs, and DVDs online, the government must make a heightened showing of need for the subpoenaed information. *In re Grand Jury Subpoena to Amazon.com*, dated August 7, 2006

The decision is a significant contribution to the jurisprudence regarding what standard should apply to grand jury subpoenas that would expose an individual's choice about what to read. Compare *In re Grand Jury Subpoena to Kramerbooks & Afterwards*, 26 Media L. Rep. 1599 (D.D.C. 1998) (applying heightened standard to grand jury subpoena) with *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229 (4th Cir. 1992) (declining to apply heightened standard to grand jury subpoena); see also *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002) (applying heightened standard to search warrant); *Lubin v. Agora, Inc.*, 882 A.2d 833 (Md. 2005) (applying heightened standard to state administrative agency subpoena).

Background

Robert D'Angelo, former director of a leading performing arts center in Madison, Wisconsin, became the target of a grand jury investigation, and has since been indicted on 39 counts, including mail fraud, wire fraud, and filing false income tax returns. During the grand jury investigation, the government issued a subpoena to Amazon, seeking records regarding D'Angelo's use of Amazon Marketplace, a feature that connects Amazon customers with third party sellers, to sell books, CDs and DVDs. The government hoped to contact such customers as potential witnesses against D'Angelo.

The subpoena would have required Amazon to produce the names and other identifying information of individuals who purchased expressive works, including potentially sensitive books such as *Mein Kampf* and *Praying with Icons*, in more than 24,000 online transactions. While complying with the subpoena to the extent it sought non-identifying information about Mr. D'Angelo's online sales, Amazon resisted producing

information that would identify the names of individuals who purchased particular expressive works. Amazon moved to quash the subpoena based on the First Amendment right of its customers to enjoy expressive works anonymously.

Decisions

The motion to quash the subpoena was heard by Magistrate Judge Stephen L. Crocker of the United States District Court for the Western District of Wisconsin. Although grand jury subpoena power is wide ranging and ordinarily subject to limited review, the Court stated in a written opinion that the First Amendment interests at stake required the government to make a heightened showing of need.

(Although the Court did not address this issue, to the extent the subpoena sought records related to DVD purchases, the Video Privacy Protection Act of 1988 also required the government to show "probable cause to believe that the records or other information sought are relevant to a legitimate law enforcement inquiry." 18 U.S.C. § 2710.)

The Court deemed it "an unsettling and un-American scenario to envision federal agents nosing through the reading lists of law-abiding citizens while hunting for evidence against somebody else." While stating that it had "no concerns about the government's good faith and intent," the Court expressed concern that word of the subpoena would "spread over the Net," would "frost keyboards across America," and "could frighten countless potential customers into canceling planned online book purchases, now and perhaps forever."

The Court then found, on the basis of an *ex parte* hearing and *ex parte* affidavit submitted by the government, that the government had shown a "bona fide investigative need" to contact at least some individuals who purchased expressive works on Amazon. While refusing to quash the subpoena outright, the Court devised a "filtering mechanism," in which Amazon would send customers a packet consisting of a letter from Amazon, a letter from the United States Attorneys Office, and a copy of an order from the Court.

Recipients would be invited to voluntarily contact the government, but "[a]nyone who wishes *not* to participate in this

(Continued on page 30)

Wisconsin Federal Court Limits Grand Jury Subpoena To Protect Privacy of Reading Choices

(Continued from page 29)

exercise, by virtue of his or her silence, will be left alone, and the government will never learn that person's identity or the titles of materials he/she purchased from D'Angelo through Amazon."

Soon after the Court outlined this voluntarily mechanism, but before it was implemented, the government moved to withdraw the subpoena, explaining its reasons for doing so in an *ex parte* affidavit. The Court responded to the government's motion to withdraw with a second Order, stating that "[t]he grand jury does not need court permission to withdraw a subpoena" but that withdrawal is "a logical and prudent decision under the circumstances."

Without revealing the reason for the withdrawal, the Court stated, "if the government had been more diligent in looking for work-arounds instead of baring its teeth when Amazon balked, it's probable that this entire First Amendment showdown could have been avoided. That said, it nevertheless appears that the government has proceeded at all times in good faith."

The Court's two orders, as well as the Amazon's and the government's papers, were filed under seal, though Amazon filed a motion to unseal along with its motion to quash the subpoena. The Court denied this initial motion to unseal. Once the grand jury returned the indictment, however, Amazon again moved to unseal its papers and the Court's orders. The Court then unsealed nearly all of Amazon's filings and its orders, and then granted the government's subsequent request to unseal some of its filings.

Laura Handman, a partner with Davis Wright Tremaine LLP in Washington, DC, was lead counsel for Amazon in this case with David Zapolsky, Vice President, Legal, Amazon.com, Inc., on the papers. Amazon was also represented by Brady Williamson and Robert Dreps, Godfrey & Kahn, S.C., and by Wendy Tannenbaum and David Shapiro, Davis Wright Tremaine LLP. The government was represented by Assistant United States Attorneys John Vaudreuil and Daniel Graber.

Judge Refuses To Subpoena Reporters For Leak Sources

By Dave Tomlin

A federal judge in the Southern District of California considered turning a defendant's motion for a new trial into a court-supervised grand jury leak investigation, complete with subpoenas of several reporters for their confidential sources. [*United States v. Wilkes*](#), 2007 WL 4258349 (S.D. Cal. Dec. 3, 2007).

"In the end, however, separation of powers constraints counsel against the Court launching its own investigation into the source of the leaks," wrote U.S. District Judge Larry Burns.

The judge expressed frustration and anger over the leaks but denied the defendant's motion to subpoena 20 potential witnesses, including four journalists and six federal prosecutors.

The December 3 ruling came in the case of Brent Roger Wilkes, a former government contractor who was among targets of a 2006 bribery investigation of U.S. Rep. Randy "Duke" Cunningham.

News stories by the *Wall Street Journal*, The Associated Press and others in late January and early February reported that a grand jury was preparing to indict Wilkes, and several days later the grand jury did return the indictments.

Following his conviction, Wilkes moved for a new trial, contending that the government's misconduct in leaking word of the indictments was grounds for setting aside the guilty verdicts.

But Judge Burns wrote that procedural rules entitled Wilkes to subpoena only those witnesses likely to have evidence that could assist his defense.

"Having been convicted by a jury, Wilkes must now show the fairness of his trial was prejudiced by the grand jury leaks," Burns wrote in his order. Yet the record showed that no juror had seen the pre-indictment articles, and the jury was carefully screened for exposure to pre-trial publicity.

"Necessarily then, eliciting testimony from witnesses that will possibly reveal who leaked information about the impending charges will simply not be relevant to any defense Wilkes might mount at this stage of the proceedings," the order concluded; Wilkes' attorney filed notice that he intended to appeal the ruling.

But Judge Burns added that in spite of the futility of the Wilkes motion, "the Court has considered the alternative of relying on its supervisor power to authorize the issuance of subpoenas, if only to vindicate the public and institutional interests of grand jury secrecy."

He said he concluded, however, that even though the Justice Department had conducted only a "slipshod" leak investigation, his authority to start his own probe was limited.

Dave Tomlin is the Assistant General Counsel to the AP

White House Visitor Lists are Public Records Under the FOIA

Secret Service Must Disclose Names

U.S. District Court Judge Royce Lamberth ruled this month that White House visitor lists are public records under the Freedom of Information Act (“FOIA”) and subject to disclosure. [*Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Homeland Security*](#), No. 06-1912 (D.D.C. Dec. 17, 2007) (“*Crew I*”). In a companion case, Judge Lamberth held that CREW lacked standing to challenge Secret Service procedures for handling the lists after they had been turned over to the White House. [*Citizens for Responsibility and Ethics in Washington v. U.S. Dep’t of Homeland Security*](#), No. 06-0883 (D.D.C. Dec. 17, 2007) (“*Crew II*”).

The lawsuit began with a FOIA record request by CREW, a nonprofit organization and government watchdog, seeking the Secret Service’s White House and Office of the Vice President (“OVP”) visitor lists. These visitor lists had been available to the public in previous administrations and were available in the Bush administration until 2006.

The visitor lists are created by the Secret Service for the purpose of conducting background checks on all visitors to the White House and the OVP. Each proposed visitor submits information to the Secret Service, including their name, date of birth, social security number, time of visit, etc. The Secret Service then uses this information to perform background checks.

In 2006, the Bush administration sought to keep these visitor lists secret. After the visits were over and the Secret Service was through using the visitor lists, the administration attempted to shield the lists from public view by having the Secret Service turn them over to the White House. President Bush then claimed executive privilege over the documents to exempt them from the FOIA. Vice President Cheney also attempted to keep his visitor lists secret by claiming national security.

CREW sought records on visits by nine Christian leaders, including James Dobson and Jerry Falwell (*Crew I*) and in a companion case also sought the visit records of disgraced former lobbyist Jack Abramoff and his associates (*Crew II*).

In *Crew I*, the Secret Service moved for summary judgment making two arguments. First, they argued that the visitor lists were not “agency records” under the FOIA and second, that the constitutional avoidance doctrine required

the court to construe the records in such a way that exempted them from the FOIA.

Judge Lamberth began by addressing the issue of whether the visitor lists were “agency records.” According to the Supreme Court, an agency record is “(1) created or obtained by the agency, and (2) under agency control at the time the FOIA request was made.” Citing *U.S. Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). The court found the first part of the test easily met. The Secret Service argued that although it does create the lists, the information comes from the White House and the OVP, and thus the lists are not truly “created” by the Secret Service.

However, Judge Lamberth found that the Secret Service creates the record when it performs the background check with the information it is given. Furthermore, these lists are created by the Secret Service for its own use in protecting the President and Vice President.

For the second part of the test, whether the records were under agency control, Judge Lamberth looked to four factors used to evaluate whether an agency has control. Citing *Burka v. U.S. Dep’t of Health & Human Serv.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (quoting *Tax Analysts v. U.S. Dep’t of Justice*, 845 F.2d 1060 (D.C. Cir. 1988)). The first factor is “the intent of the document’s creator to retain or relinquish control over the records.” On the issue of intent, the Secret Service argued, and the court agreed, that although it had control during a visit, it *intended* to give up that control once a visit is over.

The next factor is “the ability of the agency to use and dispose of the record as it sees fit.” The Secret Service argued that the White House and the OVP had control over the use and disposal but failed to explain why they did, the issue at the heart of the case, and Judge Lamberth was not convinced by this circular reasoning. Instead, he found that the Secret Service had both the ability to use and the ability to dispose of the visitor lists, since until 2006 it was regularly destroying the daily lists and it currently destroys requests for access.

Judge Lamberth next examined “the extent to which agency personnel have read or relied upon the document.” Since the purpose of visitor lists is to protect the president and vice president, it would seem obvious that the Secret

(Continued on page 32)

White House Visitor Lists are Public Records Under the FOIA

(Continued from page 31)

Service both reads and relies on the lists extensively. The Secret Service attempted to argue that although it does read and rely on the lists, they only do so briefly. The court failed to see the merit in this brevity argument and found that the Secret Service failed to counter this factor.

Finally, Judge Lamberth analyzed “the degree to which the document was integrated into the agency’s record system or files.” Here, the court found that the White House visitor list was integrated into the Secret Service system, finding unconvincing the Secret Service’s argument that because the records were deleted every 30 to 60 days, they were not truly integrated into its system. However, the court was unable to determine whether or not the OVP visitor lists were integrated.

Balancing all the factors, Judge Lamberth found that the Secret Service’s intent that the records be under the control of the White House and the OVP was outweighed by its actions, as reflected in the other factors.

Judge Lamberth was also unconvinced by the Secret Service’s constitutional avoidance argument. The Secret Service argued that the court should avoid finding that the visitor lists were public records because that would create a

separation of powers problem by not allowing the president and vice president to privately confer with individuals about policy issues. The court disagreed with this argument. First, the constitutional avoidance doctrine only applies when a statute is ambiguous, which Judge Lamberth did not find the FOIA to be.

Second, the court was not persuaded by the Secret Service’s argument that private, policy-sensitive information would be revealed by these lists. Most visitors, Judge Lamberth pointed out, are not there to conduct policy discussions. Even for those who are there to discuss policy, lists of names without other information does not reveal what those discussions would concern. If the President or Vice President feel there is a particular name that must remain secret, they can still use Exemption 5 of the FOIA. This allows the government to withhold records from disclosure on matters ranging from attorney client privilege to the state secrets privilege.

In *Crew II*, where CREW was seeking records related to Abramoff and his associates, the court found that it lacked standing to bring suit to prevent the Secret Service from destroying records after it had transferred them to the White House. However, the National Archivist still must grant permission before the Secret Service can destroy records.

Bulletin 2007 No. 3 (Feb. 2007):

MLRC 2007 REPORT ON PUBLISHING IN THE GLOBAL ENVIRONMENT

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The Other Side of the Pond: UK & European Law Update

Media not bound to disclose draft articles before publications

By David Hooper

With the increasing number of aggressively pursued applications for privacy injunctions, the ruling of Mr Justice Eady in *Thomas Cook Tour Operations Limited -v- Telegraph Media Group Limited* (2007) EWHC 2560 is of some importance. The travel company, Thomas Cook, had secured an interim injunction at an earlier hearing before Mr Justice Beatson initially in defamation relating to an account of potential criminal proceedings in Greece. Subsequently, a claim was made in privacy to protect the identity of the employee under investigation following the deaths of children in a hotel accident. The newspaper had been criticised at the earlier hearing for not disclosing the draft of the article but Mr Justice Eady firmly rejected such criticism. He referred to the decision of the Court of Appeal in *Leary v BBC* on September 29, 1989 when the court pointed out that it was not appropriate to require a media defendant to reveal a draft article. They might wish to do so but that was entirely for them. They should not be pressed to do so against their wishes nor should they be penalised for not doing so. Mr Justice Eady pointed out it is not for the court to lay down the text which shall be published because that would be to fall foul of the principle that the court should not become a censor.

The case is a helpful reminder that media Defendants need not succumb to pressure to produce the article they are proposing to publish. In doing so they could well be providing the Claimant with ammunition to use against them. Usually the media Defendant is best advised not to produce the material but to require the Claimant to specify what their concerns are and then to consider - without showing the article to the Claimant - what changes, if any it would be prudent to make to the article prior to publication.

Is Jerry Springer a Blasphemer?

An evangelical outfit called Christian Voice has been trying to prosecute the BBC for its broadcast of *Jerry Springer- The Opera*. They were trying to emulate the success of Mary Whitehouse, an old battle-axe committed to protecting what she perceived to be the moral vir-

tues of middle England in *Whitehouse -v- Lemon* (1978) 68 CR.APP.R.381, where Gay News has been successfully prosecuted for some metaphorically attributed homosexual acts to Jesus Christ. However, the District Judge's decision refusing to allow Christian Voice to bring such a prosecution was upheld by the Divisional Court, which ruled that there must be contemptuous, reviling, scurrilous or ludicrous material relating to the Christian religion and that there must be a risk serious breach of the peace.

As *Jerry Springer- The Opera* had been playing for some time in the theatre without noticeable civil unrest, the prosecution was bound to fail. Furthermore, in their enthusiasm to protect the Christian religion, Christian Voice had paid insufficient weight to the fact that under the Theatres Act 1968 and the Broadcasting Act 1990 such prosecutions were not possible. The court did, however, certify that a point of public interest sufficient for the attention of the House of Lords was involved, although they did not give permission for such an appeal to take place.

Christian Voice appear determined to secure eternal damnation of this production, so it is possible the matter may end up in the House of Lords. The interest would be whether the House of Lords will effectively abolish the crime of blasphemy, which has been criticised on many grounds, not least because it protects only the Church of England and not other religions.

Privacy and Long-Lens Photography

Settlement of a claim by former Prime Minister Tony Blair and his wife Cherie against Associated Newspapers Limited regarding the publication of long-lens photographs taken of them when they were on holiday at Sir Cliff Richards' villa in Barbados has recently been announced. Claims by persons including public figures in respect of photographs of their everyday life in private locations seem likely to increase, particularly when taken surreptitiously and/or with long lenses. The real issue is likely to be whether they can assert privacy in respect of their everyday activities in public places - the issue in the

(Continued on page 34)

Second Circuit Clarifies False Advertising Law

(Continued from page 33)

JK Rowling case (please cross-refer to my article in the October issue of the *MLRC MediaLawLetter*).

Perjury and Libel Actions

Jeffrey Archer and Jonathan Aitken know to their cost (4 years and 18 months respectively) the dangers of giving false evidence in libel actions. A former member of the Scottish Parliament, Tommy Sheridan recently had his collar felt by the police following his successful libel action in Scotland when he obtained £200,000 damages against the *News of the World* in respect of allegations of sexual shenanigans. He has not, however, been charged. He was simply arrested and questioned following a rather dramatic arrest by police waiting outside the radio station where he broadcast his programme “Citizen Tommy.” Exactly how the police can obtain evidence that the witnesses were engaged in sexual activity when they asserted on oath that they were not remains unclear. Before any prosecution could be brought the Procurator Fiscal (the independent prosecuting authority) would have to be satisfied there was sufficient evidence for a case to be brought. All that one can say therefore at present is that recent events are a salutary reminder that the media have shown themselves determined to pursue libel claimants when they consider them to have obtained libel awards by false evidence.

Jameel and Reynolds Defences- The Claimants are Winning Again

On 23 November 2007 Mr Justice Eady ruled in [Prince Radu of Hohenzollern v Houston](#) (2007) EWHC 2735, on which he had made earlier preliminary rulings commented by me in the *MLRC MediaLawLetter* Oct. 2007 at 39. This was a claim by the husband of Princess Margarita of Romania over an article published in *Royalty Monthly* entitled “Scandal in Romania as Princess Margarita’s husband is branded an impostor.” Prince Margarita had been previously known to British people as the companion of the youthful Gordon Brown, now our Prime Minister, before walking out on him after five years of understandably complaining about his obsession

with politics.

Here, however, attempts to establish that the article was simply reportage of a press conference where these fiercely disputed allegations were made along the lines of *Roberts v Gable* failed, principally because criticisms of Radu were included which had not been mentioned at the press conference. Furthermore, the judge took the view that the allegations against Radu had in some measure been adopted. Nor was the defendant assisted by the *Reynolds* defense as most recently considered in the *Sharman* case (see the *MLRC MediaLawLetter* of Oct. 2007 p.39).

The decision was of some interest as the approach of Mr Justice Eady to *Reynolds* cases had been the subject of some trenchant criticism in the House of Lords in *Jameel*. However, the case is a salutary reminder that although the *Jameel* decision is extremely helpful to media defendants, success is by no means guaranteed. Mr Justice Eady recognized that failure to meet all the *Reynolds* tests would not operate as a hurdle which should cause the defendant to trip over.

However, the allegations had to be looked at “in the round.” The defendants had had plenty of time to put the allegations to Radu but they had not done so and this was principally where their claim of responsible journalism floundered. The defendant sought to justify the allegations and that was how the case would have to be defended. The Judge considered Radu’s reputation was attacked on several fronts without giving him a chance to respond and the magazine had gone some way to adopting the allegations against him. The Judge felt that it was of particular significance that a number of false allegations against Radu had been put in circulation without giving him any opportunity to put his side of the story, namely that he had forged a document relating to his title, that he was a former member of the Romanian secret police and that he had falsely claimed to have been adopted by the Romanian royal family.

The Judge accepted the importance of editorial judgment but he was firmly of the view that the failure to give Radu any opportunity of rebutting the allegations deprived the Defendants of a defence of responsible journalism.

Editors’ Code

(Continued on page 35)

The Other Side of the Pond: UK & European Law Update

(Continued from page 34)

The Editors' Code Book approved by the Newspaper Publishers Association, the Newspaper Society and the Periodical Publishers Association and their Scottish equivalents, which sets out the Code of Practice under which journalists operate and in respect of which they are accountable to the Press Complaints Commission, is now being published online at <http://www.editorscode.org.uk>

Conditional Fees

The real theme which should be of concern to media defendants is that the costs in CFA proceedings are out of control. The British media organisations have recently submitted their proposals to the Department of Justice concerning Conditional Fee Agreements in publication proceedings. The likelihood is that whether one likes it or not, Conditional Fee Agreements are here to stay, as they are the basis for people with limited means being able to bring proceedings in, for example, personal injury cases, where previously they would have received state-funded Legal Aid. There is, therefore, an element of politics about the CFA regime. What is quite clear is that the present system is a scandal reminiscent of the 18th century cartoon of the litigation cow being happily milked by portly lawyers. A link is also included in this note to an excellent article by Joshua Rozenberg in the London Evening Standard of 18 December 2007. [Libel Law is Out of Control](#).

What is of particular concern is the level of costs that can be run up under a Conditional Fee Agreement - and remember that the only element of restraint is the self-imposed restraint of the plaintiff's lawyer who is not in any real sense accountable to his client for the level of fees - before the claim is even intimated to the defendant. At the very least one needs a system whereby claims can be resolved at an early stage without incurring a success fee. Furthermore the success fee itself when payable should accurately reflect the level of risk at that stage of the proceedings. One of the dangers inherent in the system which, no doubt, all plaintiff lawyers assiduously avoid is the temptation to talk up the risk of the claim, as the higher the risk, the higher the success fee. No reasonably sane person would in normal circumstances

bring a costly libel action, if the risk really was 50/50.

Unhappily, under the CFA regime they have nothing to lose except possibly the smile on their lawyer's face if the case turns out to be successfully defended. The lawyer, however tends to keep smiling, as he normally stands to recover a 100% success fee — \$1500 an hour for often not very taxing work.

Injunctions and Confidential Information

In an interesting decision of Mr Justice Tugendhat on 16, November (2007) EWHC 2677 [Northern Rock plc v The Financial Times Limited and Telegraph Media Group Limited](#), a number of newspapers had received a confidential memorandum prepared by Merrill Lynch providing financial information for potential acquirers of the troubled bank Northern Rock. The Judge took the view that it would be futile to injunct the further publication of the resume of that briefing memorandum which had appeared in the mass media. Different considerations applied to the *Financial Times* website where the entire contents of over ten pages of the memorandum were published. This was considered by the court to contain detailed financial information which was commercially sensitive and although it had been publicly accessible on the website, it had not received the same degree of publication. The Judge therefore ordered that confidential information to be removed.

Strange Goings On in Europe

On 11 December 2007 the Grand Chamber of the European Court of Human Rights, by a majority of 12 to 5, reversed the earlier majority decision of a Chamber Court in favour of the journalist Martin Stoll, in the case of [Stoll v Switzerland](#), application No. 69688/01. The Swiss journalist Martin Stoll had been investigating the lamentable conduct of Switzerland in relation to the assets of Holocaust victims. A report by the Swiss Ambassador to the United States had come his way, which clearly had not greatly impressed Stoll, judging by the headline: "Ambassador Jagmetti insults the Jews". Predictably, the secretive and sanctimonious Swiss had fined Stoll for publishing "secret official deliberations". The

(Continued on page 36)

The Other Side of the Pond: UK & European Law Update

(Continued from page 35)

European Court, however, agreed that it was vital to the functioning of diplomatic relations that such information should be kept confidential and found fault with the tone and misleading nature of Stoll's report and therefore concluded that there was no breach of Article 10 and upheld the fine.

A mirror image case of *Pfeifer v Austria*, 15 November Application No, 12556/03, provided a result which many would consider more just but troubling for different reasons. Carl Pfeifer was an Austrian freelance journalist who was the editor of the official magazine of the Vienna Jewish community. He had locked horns with a university professor who had written in neo-Nazi terms. Eventually proceedings were taken against the professor under the National Socialism Prohibition Act, which resulted in the professor committing suicide. This caused a right-wing publication, *Zur Zeit*, to accuse Pfeifer and others as being part of a hunting society which had pursued the professor to his death. Pfeifer, who, one might have thought as a journalist was able to look after himself, chose to sue the magazine. The Austrian courts, which have in the past been somewhat flakey in matters concerning neo-Nazis, took the not unsensible view that there was no basis for this claim as the offending statement was a value judgement relying on a sufficient factual basis.

Step in the European Court of Human Rights, with its fondness for the merits and ensuring that the meritorious prevail over the unmeritorious, and they awarded Pfeifer €5,000 plus €10,000 for his costs because his Article 8 privacy rights had been infringed and he should have been entitled, notwithstanding the provisions of Article 10, to bring a libel action. Out of the window it seems went the idea of the margin of appreciation permitted to a state like Austria in deciding whether there was defamation in this case where there does appear to have been an element of give and take. More alarming are the implications of the Court's ruling. This goes far beyond actions of the state which might infringe Articles 8 or 10. It now extends, it seems, to requiring the state to protect an applicant like Pfeifer against excessive criticism. The Court reiterated that although the object of Article 8 is

essentially that of protecting the individual against arbitrary interference by public authorities, it does not merely compel the state to abstain from such interference: in addition to this primary negative undertaking, there may, the court said, be positive obligations inherent in effective respect for private and family life. Applying the appropriate balancing exercise between articles 8 and 10, the European Court of Human Rights superimposed its own view of the merits of FIFA's libel action and decided that the statements were not value judgments and that the allegations against Pfeifer were facts which should be susceptible of proof but in their view were not proved. There is therefore a route to Strasbourg for disappointed libel plaintiffs who may be able to persuade the 17 judges that they should in effect receive their libel damages.

Premium Phone Lines and Television Companies

On 20 December 2007, the regulatory body Ofcom fined Channel 4 £1.5 million for the way in which they had run premium phone lines where members of the public were encouraged at considerable expense to telephone the station in the hope of winning a quiz prize. On occasions there was not a fair or realistic prospect of success in the competitions. The television companies were generating considerable revenue from these programmes. Channel 4 was only one of a number of television companies disciplined in this way. GMTV had earlier been fined £2 million. The rules for such programmes are now changing. A new body, PhonepayPlus, will deal with the regulation of such programmes, which takes over from ICTSIS. It published a formal framework agreement between Ofcom and PhonepayPlus on 5 December 2007, which it is hoped will avoid such scandals. It has been a deeply embarrassing episode for the various television companies who have made abject apologies and substantial donations to charities.

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

The Reporting of Criminal Convictions Under UK Law

Libel, Contempt & Data Protection Issues

By Robin Shaw and Zoë Norden

For media lawyers and their publisher clients it will often be the case that an individual that comes to the public's attention has a past involving criminal behaviour which may be considered newsworthy. The extent to which publishers need to be mindful of any applicable legal framework that imposes any restrictions on such reporting will depend on the circumstances of publication and the offense itself.

Rehabilitation of Offenders Act

Legislation under English Law provides details of the conditions under which certain information in relation to previous criminal convictions should and should not be referred to with reference to rehabilitation and spent convictions (See Section 5 of the Rehabilitation of Offenders Act 1974, which sets out the rehabilitation period for a number of offences upon which the conviction will then become 'spent'). Broadly speaking it only applies to convictions leading to a sentence passed of no more than 30 months imprisonment.

The Rehabilitation of Offenders Act 1974 (the "1974 Act") (Section 4(1), Rehabilitation of Offenders Act 1974) provides that, subject to certain limitations (Section 4(7) and Section 4(8), Rehabilitation of Offenders Act 1974), a person who has become a rehabilitated person for the purposes of the 1974 Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction.

The consequence of this is two-fold: that no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction to prove that such a person has been convicted or sentenced for an offence which is the subject of a spent conviction; and any person in any proceedings should not be asked, but in any event, is not required to answer questions related to their past which cannot be answered without reference to the spent convictions.

The Act also applies to convictions outside England (Section 1(4)(a), Rehabilitation of Offenders Act 1974) so that a person may become a rehabilitated person for the pur-

poses of the Act.

There are however special provisions (Section 4, Rehabilitation of Offenders Act 1974) in the 1974 Act relating to defamation without which there would have been no defense of justification available in relation to a publication involving an allegation of a conviction which was spent. The 1974 Act provides that nothing shall prevent a defendant in an action to which the section applies from relying on any defense of justification or fair comment or of absolute or qualified privilege which is available to him, or restrict the matters he may establish in support of any such defense, unless the publication is proved to have been made with malice. (*Herbage v Pressdram* [1984] 1 W.L.R 160, seems to make clear the burden of proving malice in a Rehabilitation of Offenders case rests on the claimant). Any publication that is complained of that took place before the conviction became spent is not affected by the 1974 Act (Section 8(2), Rehabilitation of Offenders Act 1974.)

By virtue of the special provisions in the 1974 Act, it would appear therefore that there would be a defense to a libel action which involved the publication of details of a spent conviction.

Contempt of Court

Publishers should also be aware of the provisions of the Contempt of Court Act 1981 (the "1981 Act") when looking to exploit their back catalogue online. In particular, back catalogues in the case, say, of newspapers, will inevitably contain details of criminal convictions which may or may not have subsequently become spent. In theory, at any rate, the availability of such details may have consequences if the criminal whose details are contained in the archive in question becomes the subject of further criminal proceedings.

This is because under English law details of any previous convictions of a criminal defendant are generally withheld from the jury on the grounds that if they were to hear about them the jury could be unfairly biased against the defendant.

Accordingly, newspapers and the media in general are prohibited from publishing such details in the lead up to and

(Continued on page 38)

The Reporting of Criminal Convictions Under UK Law

(Continued from page 37)

during the course of the criminal trial. If such details were readily available from an archive, the publisher would be at risk of liability under the strict liability rule in the 1981 Act, which applies where its conduct interferes with legal proceedings (regardless of the intent to do so).

It would appear unlikely that the mere existence of such an archive would be held to create a sufficiently serious risk to give rise to proceedings for contempt.

Data Protection

A further area of consideration worth noting is a recent development in the area of data protection, in relation to the retention of information held by the police regarding details of criminal convictions. On 1 November 2007, the Information Commissioner's Office announced that it had issued enforcement notices against four police forces for holding information about criminal convictions that was in breach

of the third and fifth data protection principles.

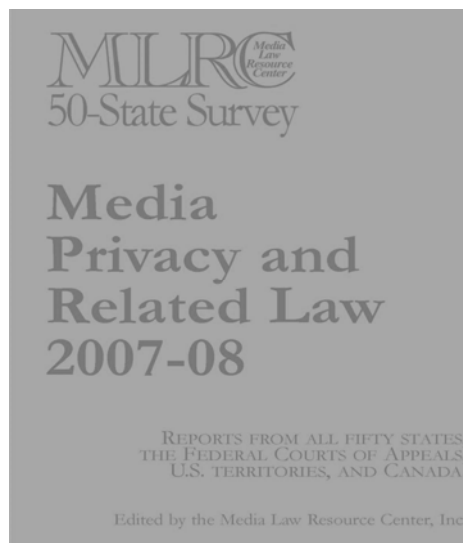
These principles require that personal data processed for any purpose should be adequate, relevant and not excessive, and should not be kept for longer than is necessary for that purpose. Records that were ordered to be deleted related to individuals who had been convicted or cautioned on one occasion in relation to non-custodial offences and had not been convicted of any other offences.

The Commissioner considered "the continued retention of the data, which was causing harm and distress to the individuals involved, was not necessary for policing purposes". The relevant police forces are appealing to the Information Tribunal and will retain the relevant information until the outcome of the appeal, which is due to be heard in early 2008.

Robin Shaw and Zoë Norden are lawyers with Davenport Lyons in London.



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Entertainment Law

Court Finds That Co-Producer of Documentary is Joint Author for Copyright in Absence of Written Contract

By Michael D. Steger

In an apparent case of first impression, the United States District Court for the Eastern District of Virginia recently ruled that, in the absence of a written contract, a producer of a documentary film was a joint author under copyright law based on the parties' intent and her contributions to the project both as it was envisioned and as it was released. After a trial in the Alexandria Division of the "Rocket Docket," Judge T.S. Ellis, III relied on the jury's findings that Maura Flynn, a producer of the film "Your Mommy Kills Animals" ("YMKA") had made independently copyrightable contributions to the film and that she and Curt Johnson, the director and co-producer, had intended to be co-authors of the documentary. [*Richard Berman, Maura Flynn and Speakeasy Video, LLC v. Curt Johnson and Indie Genius Productions*](#), (E.D. Va, Case No. 1:07cv39, Oct. 19, 2006).

The Film Treatment

In the summer of 2005, Johnson approached Flynn with a book treatment he had received for an insider's expose of People for the Ethical Treatment of Animals (PETA). Flynn took the book treatment and wrote an eleven-page film treatment, or outline, for a documentary film designed to expose excesses of the animal rights movement, including PETA, the Humane Society of the United States (HSUS) and Stop Huntingdon Animal Cruelty (SHAC). Flynn's treatment included descriptions of specific topics and suggested specific footage to include and certain individuals to interview for the film.

Trial testimony revealed that Johnson and Flynn agreed to co-produce the film, to exercise joint control over its making and to divide profits evenly, but they never put their agreement in writing. Flynn and Johnson then used the treatment to solicit a \$300,000 investment in the film from Richard Berman, a Washington lobbyist who represents the restaurant and food industries. Berman and Flynn signed a deal memo wherein Johnson and Flynn agreed that the documentary would have the same viewpoint as the treatment, namely exposing the poor record of PETA and other animal rights organizations in protecting animals and some of the crimes their members have committed or supported, with a heavy anti-PETA emphasis.

During production of the film, Flynn conducted several interviews, provided questions for other interviews and provided substantial information about groups and individuals featured in YMKA, including those individuals and topics listed in the treatment. As filming progressed, Johnson instructed Flynn to stay off the road because he thought interview subjects might associate Flynn with Berman, as her husband worked for Berman's public relations firm.

During the summer of 2006 the parties began to disagree over the content of the film, with Berman contending that the documentary diverged significantly from the viewpoint set forth in the treatment and adopted by the deal memo. Johnson incorporated some editorial suggestions made by Flynn, but rejected others. The completed version of YMKA focused heavily on SHAC and its leadership, who were indicted and convicted of federal terrorism charges, portraying them as free speech champions prosecuted by an overzealous government. Johnson eventually ceased communication with Flynn and Berman and began screening the film publicly, including at legal defense fundraisers for seven animal rights defendants, known as the "SHAC 7," convicted in March 2006 of terrorism and Internet stalking.

The Results

In January 2007, the plaintiffs sued Johnson and his production company for breach of contract, fraud, constructive fraud and a declaration that Flynn owned the copyright in the film. Johnson filed several counterclaims, all of which were dismissed except for a defamation claim against Flynn. At trial, the jury found for Berman and Flynn on their breach of contract and constructive fraud claims, and for Berman on his fraud claim, awarding Berman a total of \$370,000 and nominal damages to Flynn.

On Flynn's copyright claim, Judge Ellis submitted interrogatories to the jury asking if they found (1) that Flynn and Johnson intended that they be joint authors of the film, and (2) that Flynn's contributions to YMKA were independently copyrightable. The jury answered both questions affirmatively.

In post-trial motions, Johnson argued that Flynn was not an "author" of YMKA under the Copyright Act, relying on the

(Continued on page 40)

Entertainment Law

(Continued from page 39)

Ninth Circuit's decision in *Aalmuhammed v. Lee*, 202 F.3d 1227 (2000). *Aalmuhammed* held that a party claiming joint authorship must (1) make an independently copyrightable contribution and (2) establish "authorship" by showing (a) control over the work, (b) objective manifestations of a shared intent to be "coauthors," and (c) audience appeal based on each contributor's contribution. 202 F.3d at 1232.

Judge Ellis rejected the Ninth Circuit test, holding instead that a simpler test set forth by the Second and Seventh Circuits should apply, where an author must establish (1) that she made independently copyrightable contributions to the work, and (2) that the parties fully intended to be co-authors. *Thompson v. Larson*, 147 F.3d 195, 200 (2nd Cir. 1998); *Erickson v. Trinity Theater, Inc.*, 13 F.3d 1061, 1068-71 (7th Cir. 1994). The Court found that the Second and Seventh Circuit test is the better rule because, in cases like this one, the Ninth Circuit test can be manipulated by an unscrupulous actor. Where, as here, a party prevents his putative co-author from exercising control – even where she was contractually entitled to such control – that party could claim sole authorship of the work just by wrongfully preventing the other author from exercising her rights.

The Fourth Circuit has not weighed in on the test for joint authorship, and this appears to be a case of first impression in the Eastern District of Virginia. Across the country, there are few reported decisions applying a joint authorship test to a documentary film. This case most resembles *Baker v. Robert I. Lappin Charitable Foundation*, 415 F.Supp.2d 473 (S.D.N.Y. 2006), where the producers of the film had also drafted treatments, made changes to the script and made other revisions to the actual film, providing the grounds for finding that, in the absence of a written contract, they were joint authors of the documentary at issue there.

The final cause of action, Johnson's defamation claim, relied on statements by Flynn that Johnson had stolen money and equipment belonging to Speakeasy, Flynn's production company. Flynn's statements were part of her email reply to a Better Business Bureau complaint that Johnson had filed against Flynn, accusing her of committing fraud. The jury found that Flynn's statements were not defamatory per se.

Berman has filed a notice of appeal of the court's ruling that his rights to promote and distribute YMKA were extinguished by the jury's verdict. Despite Berman's claim, YMKA has been released on home video.

Michael D. Steger is a solo practitioner in New York City. He represented Maura Flynn and Speakeasy Video at trial.

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2007 in Review: Single Publication Rule and the Internet

By Carolyn Conway

The single publication rule traditionally holds that the statute of limitations begins to run at the time of first publication of a book, newspaper or periodical – no matter how many times this initial print run is distributed. As information is increasingly published online, courts have been considering how the single publication rule should apply to online material, if it at all.

One issue is whether a posting on the Internet is “republished” each time it is accessed, such that effectively there would be no statute of limitations. Another issue is whether a third-party’s republication can restart the statute of limitations. If the single publication rule does apply, what sort of alteration or revision to the Internet material would constitute a republication? And if identical hard copy and online material is read by separate audiences, are they separate publications for purposes of the single publication rule?

Several courts have addressed the first issue, holding that the single publication rule applies to the Internet and the statute of limitations begins tolling the day the material is posted, not each time it is accessed. These jurisdictions include Arizona, California, Colorado (federal court), Florida, Georgia, Kentucky (federal court), Massachusetts, Mississippi (federal court), New Jersey, New York, North Dakota (federal court), Texas (federal court) and the Ninth and District of Columbia circuits. See accompanying sidebar.

2007 Cases & Issues

This year three more jurisdictions dealt with the application of the single publication rule to the Internet, considering some of the more nuanced issues.

In an interesting non-media case involving allegations made by the International Crisis Group (“ICG”) against a Serbian businessman and his companies, the D.C. Circuit ruled that the single publication rule applies to the Internet. *Jankovic v. International Crisis Group*, 494 F.3d 1080 (D.C. Cir. July 24, 2007).

The ICG is a non-profit organization aimed at preventing and ending deadly conflict. At issue were two reports issued by the ICG concerning reforms in Serbia after Prime Minister Zoran Djindjić was assassinated and an email along the same lines. All three contained references to the

plaintiff as being involved with Slobodan Milosevic and other nefarious activities, including weapon running. Plaintiff brought suit more than one year after the email and one of the reports were published, and the district court held the complaint was untimely as to them.

To attempt to defeat the statute of limitations defense, the plaintiff argued that one of the reports was republished on the Internet by a third-party. The D.C. Circuit noted that while many courts have applied the single publication rule to allegations of defamation on the Internet, the issue of third-party republication appeared to be one of first impression. Noting the purpose of the single publication rule, the court held that the rule still applied here. “In the print media world, the copying of an article by a reader—even for wide distribution—does not constitute a new publication. The equivalent occurrence should be treated no differently on the Internet.” *Id.* at 1087.

In Florida this year, an appeals court affirmed without opinion a 2006 decision that held the single publication rule applied to the Internet and foreclosed a claim on statute of limitations grounds. *Holt v. Tampa Bay Television, Inc.*, No. 03-11189 (Fla. Cir. Ct. 2006), *aff’d per curiam*, No. 2D06-1815 (Fla. 2d Dist. Ct. App. May 11, 2007). On appeal, plaintiff had argued that, contrary to the majority of published opinions on the issue, the single publication rule did not apply to the Internet. The defendant countered this position by pointing out that such a ruling would negate any statute of limitations as they would continually toll any time a user viewed the Internet posting.

In a non-media case involving a claim under the federal Privacy Act, a Florida federal district court echoed the *Holt* decision. *Mudd v. U.S. Army*, 2007 WL 2028832 (M.D. Fla. July 10, 2007). There the court stated that it was “satisfied that the single publication rule applies in internet situations.” *Id.* at *4.

The Fifth Circuit agreed with a lower court finding that Texas would apply the single publication rule to the internet. *Nationwide Bi-Weekly Administration v. Belo Corp.*, 2007 WL 4465124 (5th Cir. Dec. 21, 2007), *aff’g* No. 3:06-CV-0600-N (N.D. Tex. 2006). Plaintiff had argued that there is republication each time an individual accesses an article online. The court found this argument unpersuasive, citing other courts that have struck down similar arguments. *Id.*

A federal court in South Carolina produced a muddled response to the issue. *Taub v. McClatchy Newspapers*,

(Continued on page 42)

2007 in Review: Single Publication Rule and the Internet

(Continued from page 41)

Inc., 2007 WL 2302503 (D.S.C. Aug. 7, 2007). The case concerned an article that accused the plaintiff David Taub, a former mayor of Beaufort, South Carolina, of pleading guilty to illegally importing monkeys. The article was published in the hard copy and online versions of the *Beaufort Gazette*. The Associated Press (“AP”) changed the article and put the new version on its wires, which was automatically republished to the *Beaufort Gazette’s* website. It turned out that the plea agreement over the illegal importation of monkeys was between the former mayor’s company and did not involve Taub personally. Taub then brought suit against both the newspaper and the AP for defamation.

The court granted summary judgment for defendants on the original *Beaufort Gazette* article, both in print and online, and on the original AP article, but denied the *Beaufort Gazette’s* summary judgment motion for the archived AP article, which had remained on the newspapers website. Although the article in question was well within the statute of limitations, the court addressed the single publication rule in the context of continuous publication.

The court speculated that if South Carolina courts were faced with the question, they might not apply the single publication rule at all. *Id.* at 78 n.5 (“[T]he Court does not find that South Carolina follows the single publication rule.”). Thus the court considered the archived article to be continuously published. To reach this decision, the court relied on a state appeals case involving personal jurisdiction over an out-of-state book publisher where, in dicta, the court referred to a book being checked out of a library as a “new publication.” *Id.* at 79 (citing *Moosally v. Norton*, 394 S.E.2d 878 (S.C. App. 2004)).

The federal court was therefore uncertain whether South Carolina would apply the single publication rule in any context. As the court acknowledged, the *Moosally* decision seems to negate the need for South Carolina’s statute of limitations on defamation claims. *Id.* at 79 n.6. Yet, “the Court is bound to follow the law of South Carolina, and at this juncture, the Court cannot find that South Carolina follows or will follow the single publication rule.” *Id.*

Are Print and Online Editions Separate Publications?

A New York trial court recently addressed the applica-

tion of the single publication rule to a newspaper’s hard copy and online version. *Rivera v. NYP Holdings, Inc.*, 2007 WL 2284607 (N.Y. Sup. Aug. 2, 2007). At issue were news reports discussing a judge’s possible role in a corruption scandal. The judge brought separate counts of defamation over an article that appeared in hard copy and on a newspaper’s website. Although the news content was identical in the print and online versions, the court held that they were separate publications because they were intended for separate audiences. *Id.* at *2.

The court cited to the New York Court of Appeals decision in *Firth v. State*, 98 N.Y.2d 365 (2002) which was one of the first decisions to consider this area of law. In *Firth*, the plaintiff argued that each day a report about him appeared on a government website it was republished for statute of limitations purposes. New York’s highest court disagreed, and held that the single publication rule applies to online content and begins tolling when the information was posted. *See also Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375 (N.Y. Sup. 2006) (holding that the statute of limitations begins tolling when comments are posted to a pay website, not each time the material is accessed by a paying user).

But the court in *Rivera* cited a portion of the *Firth* decision discussing the traditional rule that morning and evening editions of a newspaper are intended for separate audiences and constitute separate publications. Applying that rationale, the court in *Rivera* concluded that “Similarly, the website publication is also a separate publication inasmuch as it is clearly targeted at a different audience that obtains its news through the internet.” *Rivera*, 2007 WL 2284607 at *3.

Changes to a Website

Both the Ninth Circuit and a federal court in California this year affirmed previous decisions holding the single publication rule applicable to the Internet. In a non-media case in a federal California court based on California law, the plaintiff argued that either the single publication rule does not apply to the internet, or alternatively, that even if it does apply, the statements in question were republished when the website header was altered within the statute of limitations period. *Sundance Image Tech. Inc. v. Cone*

(Continued on page 43)

2007 in Review: Single Publication Rule and the Internet*(Continued from page 42)*

Editions Press Ltd., 35 Med. L. Rep. 2451 (S.D. Cal. Mar. 7, 2007).

The court first briefly responded to plaintiff's argument that the single publication rule did not apply by citing *Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392 (2004), which held that the rule does apply to the Internet. *Id.* at 2457. Next the court addressed plaintiff's allegation that the web information was republished.

The first allegation was that the number of visitors to a website has bearing on republication. The court disputed this argument, calling evidence of website visitors "irrelevant." *Id.* Next the court rejected the contention that providing a link to material previously published on the web constituted republication. *Id.* The plaintiff's next allegation, that a header change constituted republication akin to a new edition of a book, received favorable attention from the court. The court acknowledged that such a header change could constitute republication, but in this case made no difference because the change was not within the statute of limitations. *Id.* at 2458.

The Ninth Circuit, similar to its previous decision in *Oja v. U.S. Army Corps of Engineers*, 2006 WL 618915 (9th Cir. 2006) and also in a non-media case based on federal law, ruled that the single publication rule applied to material on the web. *Canatella v. Van De Kamp*, 486 F.3d 1128, 1133 (9th Cir. May 3, 2007). The *Canatella* court stated that once a plaintiff was aware or reasonably should have been aware of the injury, the single publication rule mandated there be only one cause of action. *Id.*

Going Forward

To date, most of the cases have involved failed attempts by plaintiffs to treat publication on the Internet as continuous. Courts have held that online publication is generally no different than traditional hard copy publication for purposes of the single publication rule. But new questions will continue to arise to test how the rule applies to the dynamic online world of websites, social networking sites, and blogs.

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The single publication rule has been applied to the internet under the law of the following jurisdictions:

D.C. Cir.: *Jankovic v. International Crisis Group*, 494 F.3d 1080 (D.C.Cir. July 24, 2007)

9th Cir.: *Canatella v. Van De Kamp*, 486 F.3d 1128 (9th Cir. May 3, 2007); *Oja v. U.S. Army Corps of Engineers*, 2006 WL 618915 (9th Cir. 2006)

Arizona: *Simon v. Ariz. Bd. of Regents*, 28 Med. L. Rep. 1240 (Ariz. Super. 1999)

California: *Sundance Image Tech. Inc. v. Cone Editions Press Ltd.*, (S.D. Cal. Mar. 7, 2007); *Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392 (2004)

Colorado: *Bloom v. Goodyear Tire & Rubber Co.*, 2006 WL 2331135 (D. Colo. Aug 10, 2006)

Florida: *Mudd v. U.S. Army*, 2007 WL 2028832 (M.D. Fla. July 10, 2007) *Holt v. Tampa Bay Television, Inc.*, No. 03-11189 (Fla. Cir. Ct. Mar. 17, 2006), *aff'd per curiam*, No. 2D06-1815 (Fla. 2d Dist. Ct. App. May 11, 2007)

Georgia: *McCandliss v. Cox Enter., Inc.*, 265 Ga. App. 377 (2004)

Kentucky: *In re Davis*, 347 B.R. 607 (W.D. Ky. 2006); *Mitan v. Davis*, 243 F. Supp. 2d 719 (W.D. Ky. 2003)

Massachusetts: *Abate v. Me. Antique Digest*, 2004 WL 293903 (Mass. Super. 2004)

Mississippi: *Lane v. Strang Communications Co.*, 297 F. Supp. 2d 897 (N.D. Miss. 2003)

New Jersey: *Churchill v. State*, 378 N.J. Super. 471 (N.J. App. 2005)

New York: *Rivera v. NYP Holdings, Inc.*, 2007 WL 2284607 (N.Y. Sup. Aug. 2, 2007); *Albert Furst von Thurn und Taxis v. Karl Prince von Thurn und Taxis*, 2006 WL 2289847 (S.D.N.Y. 2006); *Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, 822 N.Y.S.2d 375 (N.Y. Sup. 2006); *Van Buskirk v. N.Y. Times Co.*, 325 F.3d 87 (2d. Cir. 2003); *Firth v. State*, 98 N.Y.2d 365 (2002)

North Dakota: *Atkinson v. McLaughlin*, 2006 WL 3409130 (D.N.D. 2006)

Texas: *Nationwide Bi-Weekly Administration v. Belo Corp.*, 2007 WL 4465124 (5th Cir. Dec. 21, 2007); *Hamad v. Center for the Study of Popular Culture*, No. A-06-CA-285-SS (W.D. Tex. 2006)

Arizona Right of Publicity Statute for Soldiers Trumped by First Amendment

By Thomas W. Brooke

Peace activist and Arizona resident Dan Frazier has succeeded in his injunction action challenging a recently enacted state statute prohibiting the use of the name of any soldier, alive or deceased, on any item for sale without permission of the soldier or a legal representative. The law imposes civil and criminal penalties for using the names of American soldiers. A federal judge in Arizona, however, enjoined its enforcement against Frazier for marketing t-shirts with anti-war messages. [*Frazier v. Boomsma*](#), No. CV 07-

08040-PHX-NVW (D. Ariz. Sept. 27, 2007). The ruling casts into doubt the enforceability of similar laws passed in Florida, Louisiana, Oklahoma, and Texas.

Frazier owns and operates a website where he sells t-shirts featuring messages such as “Bush Lied-They Died” printed over a background consisting of the names of the thousands of soldiers killed in Iraq. A dozen or so family members of these soldiers expressed anger over use of their loved ones' names. As a result of these complaints, in May 2007, Arizona enacted this right of publicity statute designed to allow soldiers and their heirs to control the use of individual soldier's name, portrait or picture.

Following its passage, Flagstaff police notified Frazier that they were preparing to bring a case against him to the city attorney. Frazier brought a lawsuit and moved for a preliminary injunction against enforcement of the law against him.

The Arizona federal district court, after finding that Frazier had standing to bring the lawsuit because he had sufficient threat of injury, rejected the state's argument that the regulation was entitled to a deferential review. The court held that Frazier's t-shirts and web advertisements were not commercial speech, but instead were political speech entitled to heightened First Amendment protection.

“The mere fact that Frazier sells the t-shirts does not transform them into less-protected commercial speech. The political and commercial dimensions of the speech cannot be separated because the mode of expression has a cost.”

The court also rejected the state's assertion that the restriction was content neutral, noting that law enforcement, before enforcing the law against someone, would need to know the content of the

person's expression included the name of the dead soldiers.

The court examined the interests advanced by the state and found that none constituted the compelling state interest required to overcome the strict scrutiny analysis that applies to content-based restrictions like Arizona's statute.

The state's goal of establishing a common-law right of publicity for a soldier or soldier's family was insufficient where the soldier's name was integral to a political message, as in this case. Because a

focal point of Frazier's critique of the Iraq war is the magnitude of the personal loss that it has produced, the individual identities of the de-

ceased American soldiers are not only reasonably related to his message, but integral to it. The court also noted that, unlike actors or sports figures, the soldiers did not earn their livings from their names, and that the statute therefore loses much of its economic justification.

The court similarly rebuffed the state's argument that the statute was necessary “to prevent a misleading impression that a soldier has endorsed a particular point of view when he or she has not.” The court found that there is no credible risk of misunderstanding in this case because there is no suggestion that the troops endorse the opinions expressed.

Finally, the court held that the statute was not narrowly tailored. It contains no temporal restraint nor is it focused on soldiers whose families are grieving. While the court acknowledged the families of deceased soldiers suffer pain, and that pain may be compounded by associations with the anti-war cause a soldier did not support, the court wrote, “But we each have our own convictions of the worth of our political values and of the service we choose to give. In our diverse and democratic society, that worth is not diminished by the disagreement of others.”

After finding that Frazier had a probability of succeeding on the merits of the First Amendment question, the court also found that he had shown sufficient likelihood of irreparable harm. The choice Frazier had faced – cease an activity entitled to First Amendment protection, or face prosecution for continuing that activity – constituted sufficient potential harm to warrant a preliminary injunction, the court held.

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‘Tis the Season: Congress’s Attention Turns to Media Issues as the 2007 Session Comes to a Close

By Kathleen A. Kirby and Shawn A. Bone

The close of the 2007 session of the 110th Congress has been characterized by a flurry of activity on media issues. Prompted both by actions at the Federal Communications Commission and by Congress’s longstanding interest in media-related public policy, legislation addressing many vital issues has been advanced. The sparse number of legislative days left this year, however, suggests that many of these issues will linger into the new year.

Of the media policy issues that have captured Congress’s attention this year, the most significant have been the federal shield law, FOIA/open government, media ownership, the DTV transition, cameras in the courtroom and photography on public lands. An overarching concern that has arisen in recent months, however, has been the operations of the FCC. It has become clear that Congress has serious questions about transparency and accountability at the Commission – questions that will probably remain into next year. Significant Congressional oversight of the FCC is likely to continue, focusing both on substantive policy and the Commission’s operations.

The 2008 Presidential election will probably limit the work of Congress in the coming year. Presidential politics tends to dominate Congress’s schedule, a reality that probably will be exacerbated by the fact that so many Presidential candidates are members of Congress. That said, expect media issues to remain on the front burner for Congress, particularly as both Democrats and Republicans stake out policy positions in anticipation of the new Administration in 2009.

Federal Shield Legislation

As discussed in the May 2007 *MLRC MediaLawLetter*, both the House and the Senate have addressed federal reporter shield legislation this Congress. Both bills would provide reporters with a qualified privilege as to their sources and information, with specific guidelines as to when a court can compel disclosure of such information. The House “Free Flow of Information Act,” H.R. 2102, was debated by the House Judiciary Committee on August 1 and approved by voice vote. On October 16, that same bill was debated on the House floor, where it was adopted by an overwhelming majority on a vote of 398 to 21.

The Senate has moved less quickly on its version of the Free Flow of Information Act. After much internal discussion amongst the members of the Senate Judiciary Committee, Senator Specter (R-PA) introduced his proposed federal shield legislation, S. 2035, which was debated by the Committee on September 27 and October 4, 2007. The bill was finally approved by the Committee on October 4, but it has languished on the Senate calendar since that time.

The overall effort to pass a federal shield law in this Congress has run up against several snags. Most importantly, Congress has yet to finally resolve whether and to what extent bloggers will be covered by the proposed shield. The two bills have also had to address the national security implications of the proposed law, including the level of protection to be provided to a reporter who releases classified information and whether terrorist organizations should be covered by the shield.

Although the House and Senate bills are quite similar in scope, should the Senate act on its version of the Free Flow of Information Act before the session ends (an unlikely event given the legislative calendar), a conference committee would have to be convened to iron out the differences between the bills. It is more likely that the federal shield law will be addressed next year.

(Continued on page 46)

(Continued from page 45)

FOIA/Open Government

Congress has advanced several pieces of legislation this session to refine and speed up the FOIA process, although none of the bills have been signed by the President at this point. These bills were discussed in the May 2007 *MLRC MediaLawLetter*, but in general they would provide more accountability and transparency in the FOIA process, would facilitate some FOIA requests by news media, and would provide increased opportunities for the recovery of attorneys fees should someone have to go to court to compel disclosure of documents from a federal agency.

The “Freedom of Information Act Amendments of 2007,” H.R. 1309, proposed by Representatives Clay, Platts, and Waxman has continued to await Senate action since its House passage in March of this year.

The Senate, in the meantime, has acted on the “OPEN Government Act of 2007,” S. 849, passing that bill on August 3, 2007. The bill has been held at the desk in the House, indicating that a move may be underway to reconcile that bill with H.R. 1309.

The length of time that has passed since Congressional action on either bill indicates that further action is unlikely this year. Should the two Houses decide to convene a conference committee to reconcile H.R. 1309 and S. 849, that committee could begin its work early next year.

Media Ownership

The announcement by FCC Chairman Martin of his intention to reform the newspaper/broadcast cross-ownership rule on December 18 led to a flurry of Capitol Hill activity on media ownership this fall. The Chairman has proposed new standards for deciding when a newspaper/broadcast combination is appropriate in a given market, retaining a case-by-case review of each proposed combination. In the Top 20 markets, the presumption would favor a combination if (1) the combination is between one newspaper and one broadcast station; (2) there would be at least eight independent voices remaining in the market after the combination is approved; and (3) if the broadcast outlet is a TV station, it is not one of the top four stations in the market. The proposal would also define the factors the Commission will consider if a waiver is sought for other combinations not addressed by this presumption.

The House and Senate Commerce Committees have held hearings on the issue, and the House Judiciary Committee has scheduled a hearing in January. Members of the Committees have been mixed in their reaction to the proposal, and several members have questioned why Chairman Martin pushed for a vote on his proposal in December of this year.

Senators Dorgan and Lott have introduced, and the Senate Commerce Committee has approved, legislation (S. 2332) that would put certain procedural restraints on the ability of the FCC to approve new media ownership rules. Specifically, the bill would require the Commission to complete its proceeding on localism and release any rules on localism for a 60-day public comment period no less than 90 days before a final vote on those rules. Once that proceeding is complete, then the Commission must release its final media ownership rules for a 60-day public comment period no less than 90 days before they are adopted. Senator Dorgan is pressing for passage of this bill as soon as possible, and may be looking at including its language as an amendment to other bills in the final days of the session.

Representative Stearns has introduced H.R. 4167 that would direct the FCC to repeal the newspaper/broadcast cross-ownership ban.

DTV Transition

As expected, the Congress has taken significant interest in the preparations taken by the federal government, specifically the FCC and the National Telecommunications and Information Administration, to prepare for the digital television transition scheduled for February 17, 2009. While legislation has not been forthcoming, several oversight hearings have been held in the House and Senate exploring the challenges posed by the transition.

(Continued on page 47)

(Continued from page 46)

These hearings have revealed serious concerns held by Members about the approaching transition, and led (in part) to the departure of the head of NTIA, Assistant Secretary John Kneuer. Members of Congress remain convinced that the government is not devoting enough public money to educating consumers about the transition. They are also worried about the effectiveness of the proposed digital television converter box program, particularly in light of the announcement from NTIA that the program will not begin until February of next year at the earliest. These concerns have been exacerbated by a recent report released by the Government Accountability Office questioning the leadership of these agencies when it comes to the transition and the lack of a comprehensive plan to ensure the transition's success.

Although Members continue to voice support for keeping the transition date firm, they are expected to continue to examine the effectiveness of the converter box program and the education efforts being undertaken by the federal government and private parties. It is likely that oversight hearings will continue next year, and legislation may become a priority should problems with the conversion arise.

Cameras in the Courtroom

Both the House and the Senate have dealt with the question of allowing television cameras in federal courtrooms in recent months.

The House "Sunshine in the Courtroom Act of 2007," H.R. 2128 (introduced by Representative Chabot), was passed by the House Judiciary Committee on October 24 by a vote of 17-11. In general terms, the bill permits the presiding judge of any federal district or appellate court, including the Supreme Court, to permit television camera coverage of a particular federal court's proceedings. It includes certain protections for the due process rights of defendants, as well as provisions permitting witnesses to be obscured and protecting the anonymity of jurors. The bill now awaits consideration by the full House.

The Senate Judiciary Committee is still debating S. 352 (its almost-identical version of the "Sunshine in the Courtroom Act of 2007"). S. 344, which would require the televising of Supreme Court oral arguments unless the Justices determine, by a majority vote, that such televising would violate due process, has been reported out of committee. The debate is likely to continue into January. An identical House companion to S. 344, H.R. 1299, has yet to be addressed.

Commercial Photography in National Parks

In 2000, Congress authorized the Department of the Interior to assess fees and to recover costs associated with commercial photography in the nation's parks, wilderness areas and federal lands. Since the passage of Public Law 106-206, a hodgepodge of disparate policies have been implemented to regulate commercial photography in and on the lands managed by the Department of the Interior (DOI) through its Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service. In August 2007, the DOI proposed a new set of regulations that attempts to standardize the fee and permit policies across its bureaus and services.

Although they would not require photography permits for still or video photography deemed "news coverage," this phrase is not defined. The proposed regulations thus leave journalists with scant guidance on whether activities, such as filming a documentary or an interview with a public official, would constitute "news coverage" or "commercial photography." In addition, the proposed regulations would permit park and land administrators to subject "news coverage" to an amorphous set of "time, place, and manner" restrictions that could either encourage park administrators to unify media policies across the Department's constituent services or could provide sufficient leeway to retain existing policies.

Currently, journalists face an array of divergent policies governing their ability to gather footage on public lands without first seeking a permit and paying the associated fees. Some parks have taken a relatively hands-off, credentials-based approach. For example, the Florida Everglades' policy exempts "news photographers and television crews" from the permitting process, provided that they do not use sets or props in their coverage. Other parks have adopted more intrusive policies. For example, the administrators of Yosemite National Park do not require permits to cover "breaking news" (which they define as an event that can-

(Continued on page 48)

(Continued from page 47)

not be filmed at another time or place), but require that journalists obtain a permit to cover non-“breaking” stories. Yosemite’s policies go on to allow park administrators to condition the grant of a permit on their own determination “that the park would benefit from the increased public awareness” from the coverage.

On December 12, 2007, the House Committee on Natural Resources conducted an oversight hearing on the proposed regulations and the existing policies related to the fee and permit processes for commercial photography on public lands. The Committee heard testimony from two representatives of the DOI as well as from representatives of the Society of Environmental Journalists, the Radio-Television News Directors Association, the National Press Photographers Association, the Professional Outdoor Media Association, and the American Society of Media Photographers. Media representatives questioned the Department’s perceived intrusion on journalists’ newsgathering abilities and editorial discretion.

Other Updates

The House Energy and Commerce Committee has opened an oversight investigation into the operations of the FCC. In a letter to Chairman Martin in November, Representative John Dingell, Chairman of the Committee, indicated displeasure with the operations of the agency, pointing to allegations that Commissioners are being given inadequate time to review issues and orders before they are asked to vote on them and the refusal of the Commission to release proposed rules for public comment. Chairman Martin was questioned at length about these allegations during an oversight hearing convened by the Subcommittee on Telecommunications and the Internet on December 5, 2007, and it is expected that the Committee’s Subcommittee on Oversight and Investigation will convene a hearing on the allegations contained in the letter next year.

As discussed in the May 2007 issue of *MediaLawLetter*, in May and June of this year, Congress considered legislation that would have severely restricted the ability of drug companies to advertise newly-approved drugs directly to consumers. As mentioned at that time, the move to ban such ads for a new drug for up to two years had faltered due to questions of the ban’s constitutional validity. Congress eventually passed and the President signed a bill, H.R. 3500, that permits the FDA to pre-review direct-to-consumer television ads and recommend changes to them. The bill also increases the fines for disseminating false and misleading ads to consumers.

With the release of the test results in August by the FCC, where it determined that the agency could not be assured that mobile devices veiling unused bits of radio spectrum between licensed television stations, known as “white spaces,” would not cause interference, Congress has been silent on the issue. Congress seems willing to trust the Commission to do more testing on “white space devices” before passing legislation to authorize their use.

The decision by the Second Circuit in the “fleeting expletives” case led to a flurry of legislative activity earlier this year. The Senate Commerce Committee passed S. 1780, proposed by Senator Rockefeller, which would overturn the Second Circuit decision and permit the Commission to fine broadcasters for fleeting expletives. The bill awaits further action by the Senate. In the House, Representative Lipinski has introduced a bill, H.R. 2738, that would apply the current FCC rules on indecency to multichannel video program distributors who refuse to offer consumers a family tier or the ability to block certain individual channels at their discretion. On a related note, Senator Rockefeller has yet to introduce his promised legislation regulating violence on television.

Representative Ed Markey, Chair of the House Subcommittee on Telecommunications and the Internet, has indicated that he would like to revisit the question of net neutrality early next year. The move comes on the heels of allegations that Verizon Wireless and Comcast have degraded or prohibited the transmission of certain types of content over their networks. Senators Dorgan and Snowe have introduced a bill in the Senate, S. 215 (the “Internet Freedom Preservation Act”), that would regulate the ability of network operators to block or degrade content on their networks. The Senate has seemed reluctant to address the issue.

The House and Senate Judiciary Committees and the Permanent Select Committee on Intelligence have continued to address the fall-out from the CIA wiretapping scandal this year. Congress is still debating proposed reforms to the Foreign Intelligence Surveillance Act, including whether telecommunications carriers should be provided immunity from suits for their compliance with the wiretapping program. That debate will likely continue next year.

Ethics Corner: Florida Leads the Way to Regulate Attorney Websites

By David M. Snyder & Erin L. Buchanan

Technology has been quickly incorporated into the practice of law. Ethical rules governing lawyer use of emerging technologies have been slower to follow. Neither ABA Ethics Opinions nor the Model Rules of Professional Conduct comprehensively address legal advertising on the Internet, so such regulation has fallen to the states (Connor Mullin, *Regulating Legal Advertising on the Internet: Blogs, Google and Super Lawyers*, 20 Geo. J. Legal Ethics 835, 836 (2007)). The Florida Bar's proposed advertising rules place it at the forefront of website regulation in the country.

The Florida Rules

After nearly four years of consideration and review of its attorney advertising rules, the Florida Bar Board of Governors approved an advertising rule amendment regulating lawyer and law firm websites. The rule now must be formally presented to the Supreme Court of Florida, with further notice and opportunity to be heard, before it is finally approved and becomes effective.

The rule requires the home page or opening page of an attorney or law firm website to comply with all Bar advertising rules, except the requirement that it be submitted to the Bar for review. Interior pages will be afforded some key advertising regulation exceptions.

Provided viewers have to take definitive and affirmative steps to reach the interior pages—setting up a username and password on the Website or clicking on a button to request access to additional information, such viewer action can be deemed a request for further information from a prospective client. Accordingly, interior pages are granted three significant exceptions from advertising regulations to allow common types of information lawyers include on their sites: references to past results, client testimonials, and statements characterizing the quality of services. Such statements, as long as they are not dishonest or misleading, are allowed in information provided at the request of a prospective client, but not in unsolicited advertising contacts, such as Yellow Pages, television commercials, and direct mail letters.

Thus, under the proposed rule, on interior website pages, lawyers could include factually verifiable information about past results and client testimonials that would otherwise be prohibited by the advertising rules, as long as they also dis-

play a disclaimer. Lawyers would also be allowed to make objectively accurate characterizations about the quality of their legal services on pages other than the homepage. The rule does not provide the text of the required disclaimers, but rather provides guidelines to give lawyers flexibility when they draw up their websites (Gary Blankenship, *Board Approves Lawyer Website Rules*, Fla. Bar News, Apr. 15, 2007).

FTC Disapproval

The Federal Trade Commission (FTC) voiced its disapproval of the proposed rule making websites subject to advertising Rule 4-7.2, when responding to inquiries from Florida lawyers who opposed website regulation. In a letter written to the Florida Bar, the FTC expressed its concern that the proposed rule's "overly broad restrictions that prevent the communication of truthful and non-misleading information that some consumers value is likely to inhibit competition and frustrate informed consumer choice." (Letter from Federal Trade Commission to Elizabeth Clark Tarbert, Esq., Ethics Counsel, The Florida Bar, at 2 (Mar. 23, 2007))

The FTC is especially concerned about the additional disclaimers and exceptions for certain factually verifiable statements regarding past results, testimonials, and quality of service. In the FTC's view,

"[t]o the extent that the Proposed Rule's broad restrictions might be based on a concern that unsubstantiated comparisons and descriptions could mislead consumers, the concern would be better addressed by a rule requiring that advertising claims that consumers would normally expect to be substantiated, must be substantiated."

(*Alexander v. Cahill*, No. 5:07-cv-00117-FJS-GHL, (2007 U.S. Dist. LEXIS 53602) (N.D.N.Y. (July 20, 2007)))

The FTC is also concerned that past successes which are ripe for postings as announcements, press releases or even blogs, are not allowed to be posted on homepages, despite the fact that "such communication may be truthful and non-misleading and can help consumers in assessing the caliber or personal style of a lawyer or law firm."

(Continued on page 50)

Ethics Corner: Florida Leads the Way to Regulate Attorney Websites

(Continued from page 49)

Additionally, the FTC took a much more liberal position on client testimonials, stating:

“Testimonials and information about previous representations can convey valuable information to consumers and help spur competition. Accordingly, the FTC Staff recommends that they be prohibited only if the endorsement, testimonial or other information deceives consumers.”

(Public Citizen Consumer Law & Policy Blog. *New York's Attorney Advertising Rules Held Unconstitutional*. (7/23/07) *Blankenship, supra*)

Concern that regulation of lawyer advertising can be too restrictive is not limited to the FTC, however. Recent court decisions, like that of the [U.S. District Court for the Northern District of New York](#) in July 2007 (*Mullin, supra*, at 838), have found that certain amended rules on attorney advertising were unconstitutional because they violated the First Amendment right to free speech. The New York court agreed with Plaintiffs' arguments and held that the state failed to show that the rules were necessary to help consumers and were narrowly tailored to the state's asserted purpose of ensuring attorney advertisements are not misleading. In fact, the rules restricted truthful advertising that would benefit consumers (Adam Liptak, *Competing for Clients, and Paying by the Click*, N.Y. Times, Oct. 15, 2007).

Despite its critics and the ever-present possibility of legal challenges, the Florida Bar Board of Governors has expressed its confidence in the proposed rule in that it represents diverse input from Bar members and staff and places the Bar at the forefront of website regulation in the country.

Opportunities for legal advertising on the Internet go well beyond attorney websites. Advertising with search engines like Google remains a highly efficient marketing device for lawyers, who sign up to have their advertisement appear in a list of “sponsored links” to the right side of search engine results and pay top dollar each time someone clicks on their link. While Florida's proposed rule has given new treatment to lawyer and law firm websites, other attorney advertising on the Internet remains under the traditional lawyer advertising rules. Comments to the proposed rule indicate that “communications advertising or promoting a lawyer's services that are posted on search engine screens or elsewhere by the lawyer, or at the lawyer's behest, with the hope that they will be seen by prospective clients are simply a form of lawyer advertising and are treated as such by the rules.” (*The proposed attorney Website advertising rule: Rule 4-7.6: Computer Accessed Communications*, Fla. Bar News, Feb. 15, 2007)

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