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MLRC Media Law Resource Center

MEDIALAWLETTER

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Thank you, Kelli Sager, Defense Counsel Section President

Kelli Sager

By Sandra Baron

On behalf of all of us I want to thank Kelli Sager for her terrific leadership of the Defense Counsel Section this year. Kelli's term as President ends this month, but fortunately for all of us, she remains on the DCS Executive Committee as emeritus for another year. Anyone who has been involved with MLRC knows that Kelli is a powerhouse. She has been active in the organization for as long as I can remember and her efforts and seemingly endless energy have benefited all of us immeasurably. Kelli is a giant in litigation, with respect to access, libel, for privacy – indeed, any media law related issue you can imagine. Her depth of knowledge of the substance and the practice is simply extraordinary.

But Kelli goes well beyond legal expertise in her engagement with the media law community. She has put countless hours into MLRC projects and service. She helped us imagine and create the Cal Chapter, and continues to serve as its liaison to the DCS Executive Committee. She has been engaged with our Conference at Southwestern Law, but also with our Conferences in Virginia and London. She has written innumerable articles and chaired committees. She is one of those rare people who make virtually all ideas for community good seem possible.

My deepest personal gratitude and appreciation to Kelli. Of course, the fact that her tenure as President is coming to a close does not mean that she will engage any less in service to MLRC – or at least that is all of our fervent hope.

Thank you, Kelli!

MLRC Media Law Resource Center

2010 Upcoming Events

Our 30th Anniversary

2010 Media Law Resource Center/Southwestern Law School Conference
"Charting the Unknowns: Digital Entertainment, Content Regulation and Crisis Management"
January 14, 2010 | Southwestern Law School, Los Angeles, CA
For more information, click here.

2010 MLRC/Stanford Digital Media Conference
May 6-7, 2010 | Stanford University, Palo Alto, CA
For more information, click here.

NAA/NAB/MLRC Media Law Conference 2010
September 29-October 1 | Chantilly, VA
For more information, click here.

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Federal Shield Law Bill Passes Senate Committee

The Senate Judiciary Committee passed the "Free Flow of Information Act of 2009" (S. 448) on December 10, 2009, by a vote of 14-5. The bill, introduced by Sen. Chuck Schumer (D-NY) and Sen. Arlen Specter (D-PA), among others, provides a qualified privilege against disclosure of confidential sources and information received in confidence. It provides varying degrees of protection – by virtue of the tests and balances applied – for criminal and civil matters, and for cases involving national security materials.

The bill before the committee reflected compromise language agreed upon by the sponsors and the Obama Administration in late October, ending years of opposition from the Department of Justice on the scope of the bill. The agreement with the White House did not ensure passage by the committee, which considered 17 amendments to the bill. While most failed to be adopted, three amendments passed.

The second amendment, offered by Sen. Dianne Feinstein (D-CA) and Sen. Dick Durbin (D-IL), would have narrowed the definition of "covered person." The Senators expressed concern that neo-Nazis and Twitter users could claim the privilege.

The most troubling amendment adopted by the committee was offered by Sen. Jon Kyl (R-AZ). As drafted, the bill requires that in criminal cases, a federal court determine that "there are reasonable grounds to believe" that the subpoenaed information (defined as "protection information") "is essential to the investigation or prosecution or to the defense against the prosecution, ***particularly with reference to directly establishing guilt or innocence***." Sen. Kyl's amendment deletes the highlighted language. The language had been taken from the Department of Justice Guidelines concerning the issuance of subpoenas to the media and was part of the compromise language agreed upon with the White House.

In addition to Sen. Kyl's amendment, two amendments passed that create additional exceptions to the qualified privilege. The first, offered by Sen. Orrin Hatch (R-UT), provides that the privilege would not apply to information reasonably necessary to prevent sex crimes against children (see Section 4(4)). The second, offered by Sen. Kyl, provides that the privilege would not apply to information reasonably necessary to prevent destruction of critical infrastructure (see Section 4(5)).

During a mark-up of the bill on December 3, Sen. Kyl convinced the committee to adopt an amendment that requires the Inspector General of the DOJ to conduct an audit examining use of the statute, including cases where it failed to compel disclosure and whether it "has created any procedural impediments that have had a detrimental operational impact on the activities of the Federal Bureau of Investigation"(see Section 10).

The substance of two additional amendments that failed to pass the committee on December 10 are likely to reappear as the bill moves forward. The first, again offered by Sen. Kyl, would have added to the exception for national security by including weapons of mass destruction as threats to national security. Senator Schumer expressed support for the amendment, but noted that it was overbroad as drafted and agreed to work with Sen. Kyl on language.

The second, offered by Sen. Dianne Feinstein (D-CA) and Sen. Dick Durbin (D-IL), would have narrowed the definition of "covered person." The Senators expressed concern that neo-Nazis and Twitter users could claim the privilege. The bill currently defines "covered person" as a person who (Section 11(2)(A)):

> "(i) with the primary intent to investigate events and procure material in order to disseminate to the public news or information concerning local, national, or international events or other matters of public interest, regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes on such matters by (I) conducting interviews; (II) making direct observation of events; or (III) collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs,

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recordings, tapes, materials, data, or other information whether in paper, electronic, or other form;"

"(ii) has such intent at the inception of the process of gathering the news or information sought; and"

"(iii) obtains the news or information sought in order to disseminate it by means of print (including, but not limited to, newspapers, books, wire services, news agencies, or magazines), broadcasting (including, but not limited to, dissemination through networks, cable, satellite carriers, broadcast stations, or a channel or programming service for any such media), mechanical, photographic, electronic, or other means."

The amendment would have added that a "covered person" is a person who "for substantial professional gain" performs the functions outlined in (i) - (iii) above, thereby adding "professionalism" into the definition. It defined "substantial professional gain" to mean that a person:

"(A) was an employee, contractor, or agent of an entity disseminating news or information through a means described in paragraph (2)(A)(iii)

(i) on the date on which the information alleged to be protected information was disclosed to the person; or

(ii) for any 6-month period during the 2-year period ending on the date on which the information alleged to be protected information was disclosed to the person; or

(B) was a student participating in a journalistic publication at an institution of higher education (as defined in section 102 of the Higher Education Act of 1965 (20 U.S.C. 1002)) on the date on which the information alleged to be protected information was disclosed to the person.

The definition would potentially exclude book authors without a contract and some freelancers.

The amendment would have deleted subsection (III) above, those "collecting, reviewing, or analyzing original writings, statements, communications, reports, memoranda, records, transcripts, documents, photographs, recordings, tapes, materials, data, or other information whether in paper, electronic, or other form," thus potentially excluding columnists and investigative journalists who review documents such as FOIA documents or archives.

The amendment would have replaced (iii) above with the following: "obtains the news or information sought in order to disseminate the news or information by means of newspaper, non-fiction book, wire service, news agency, magazine, news website, or other periodical, whether in print or electronic for mat, television or radio broadcast, or motion picture for public showing."

The amendment would have explicitly excluded an individual who gathers or disseminates the subpoenaed information anonymously or under a pseudonym. After discussion, Sen. Durbin agreed to abandon this part of the amendment, in exchange for clarification that the covered media be "news" outlets.

The bill needs to be put to a vote before the full Senate, and then reconciled with the bill passed by the House of Representatives in March 2009 (H.R. 985). The House bill covers both confidential sources and unpublished information.

Any developments other MLRC members should know about?

Let us know.

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Pending Bills in House and Senate Would Loosen Pleading Standards for Defamation Suits

By Cliff Sloan, John Beisner and Jessica Miller

Congress is considering legislation that could substantially raise the bar for defendants who move to dismiss civil lawsuits under Federal Rule of Civil Procedure 12, including suits for defamation. Introduced by Sen. Arlen Specter (D.-Pa.) in the Senate and Rep. Jerry Nadler (D.-N.Y.) in the House, S. 1504 (The Notice Pleading Restoration Act of 2009) and H.R. 4115 (The Open Access to Courts Act of 2009) would prohibit federal judges from dismissing a case under Rule 12 unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief."

Although the two bills differ in several respects, the key language in both is borrowed from a 50-year-old case, *Conley v. Gibson*, 355 U.S. 41 (1957), which has been heavily criticized over the last five decades and has never been strictly followed by federal courts. *See, e.g.*, *Kyle v. Morton High Sch.*, 144 F.3d 448, 455 (7th Cir. 1998) (per curiam) (the "no set of facts" language "has never been taken literally"); *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (explaining that *Conley* "unfortunately provided conflicting guideposts"); *Gen-Probe, Inc. v. Amoco Corp.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996) (noting that *Conley's* "no set of facts" language is not to be "taken literally").

Although the two bills differ in several respects, the key language in both is borrowed from a 50-year-old case, *Conley v. Gibson* which has been heavily criticized over the last five decades and has never been strictly followed by federal courts.

The bills are being pushed strongly by the plaintiffs' bar as a reaction to two recent U.S. Supreme Court decisions – *Bell Atlantic Corp. v. Twombly*, 550 U.S. 244 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) – which held that a plaintiff must allege sufficient facts to show that his or her claim is *plausible* on its face to survive a motion to dismiss. Although proponents of the bills say that they would simply return the law to a pre-*Twombly/Iqbal* state, they also seek to abolish heightened pleading standards that have traditionally applied to fraud and defamation suits. If these bills become law, they could affect defamation suits in two significant ways:

First, the legislation would appear to abrogate the requirement – adopted by most federal courts – that plaintiffs who sue for defamation must include a description of the allegedly defamatory statement in a complaint. "Although special pleading requirements have not been set out in the federal rules" for such actions, "the historically unfavored nature of this type of action, the First Amendment implications of many of these cases, and the desire to discourage what some believe to be all too frequently vexatious litigation" have led courts to demand particularity in the defamation context. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1245, at 429 (3d ed. 2004). Indeed, many courts have gone so far as to require that plaintiffs recite the exact language used in allegedly defamatory statements.

In *Hoffman v. Hill & Knowlton, Inc.*, for example, the court dismissed a claim for defamation by a former employee who sued his employer after he was asked to resign. 777 F. Supp. 1003 (D.D.C. 1991). The employee believed he was being discriminated against because of his advanced age. He alleged that his employer "falsely accused him of injuring the company's interests" and speculated that the employer "must have communicated its false reason for demanding his resignation to its employees and to potential employers." *Id.* at 1005. But he did not allege any particular statement made by the employer.

The court dismissed the claim, explaining that "knowledge of the exact language used is necessary to form

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responsive pleadings." *Id.* (citation and internal quotation marks omitted). *See also McNeil v. Kennecott Utah Copper Corp.*, No. 2:08-CV-41-DAK-SA, 2009 U.S. Dist. LEXIS 729989 (D. Utah July 20, 2009) (dismissing defamation claim because plaintiff did not describe the allegedly defamatory statement; "[w]ithout identifying the defamatory statements, the court is unable to examine the nature of the allegation"); *Steinmetz v. Gen. Elec. Co.*, No. 08CV1635 JM (AJB), 2009 U.S. Dist. LEXIS 59712 (S.D. Cal. July 13, 2009) (dismissing suit where plaintiff failed to "identify any particular allegedly defamatory statement made by Citibank regarding Plaintiff"); *Stevenson v. Bank of N.Y. Co.*, No. 06-cv-04268, 2009 U.S. Dist. LEXIS 32540 (S.D.N.Y. Mar. 26, 2009) (dismissing suit where plaintiff did not allege what specific defamatory statements were made by defendant in letter to Swiss financial institutions).

Under the proposed legislation, a claim for defamation could be allowed to proceed as long as the court could imagine some set of facts under which the plaintiff might conceivably prevail – whether or not those facts were stated in the complaint. Defendants could thus be required to respond and engage in discovery without even having notice of the allegedly defamatory statement. Such a rule would open the door to frivolous and vexatious litigation by disgruntled employees and others.

The bills are being pushed strongly by the plaintiffs' bar as a reaction to two recent U.S. Supreme Court decisions – *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* – which held that a plaintiff must allege sufficient facts to show that his or her claim is *plausible* on its face to survive a motion to dismiss.

Second, the proposed legislation would appear to nullify the requirement that plaintiffs plead facts supporting the "actual malice" requirement of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Under *Sullivan*, a public figure who sues over an allegedly defamatory statement must prove that the statement was made with "actual malice." An allegedly defamatory statement is made with actual malice if it is made with knowledge of falsity or reckless disregard for its truth. Courts both before – and since – the Supreme Court's *Iqbal* ruling have dismissed complaints where the plaintiffs did not allege facts to support the malice requirement.

For example, in *ACLU v. Tarek ibn Ziyad Academy*, the defendant charter school brought a counterclaim against the ACLU alleging defamation based on comments made by the ACLU's executive director that the defendant was essentially a private, religious school inappropriately receiving state and federal funds. No. 09-138, 2009 U.S. Dist. LEXIS 114738, at *2-3, *14 (D. Minn. Dec. 9, 2009). The only factual allegation that the school offered to prove actual malice was that the ACLU had investigated the school the year before and therefore knew that it was not a religious school. *Id.* at *14. The court rejected this argument, pointing out that the allegations in the ACLU's complaint mirrored the executive's allegedly defamatory statements. *Id.* at *15. It was evident to the court that the ACLU initiated the suit because it believed that the charter school was operating like a private school. *Id.* Without any facts to show that the ACLU knew the statements were false or that it recklessly disregarded the truth, the school failed to state a viable defamation claim. *Id.*

Similarly, in *Sanders v. Hearst Corp. DBA San Francisco Examiner*, No. C 98-04554 MMC, plaintiff, former Lead Congressional Liaison Officer for FEMA, brought a libel suit against the defendant newspaper. 1999 U.S. Dist. LEXIS 23354 (N.D. Cal. Feb. 22, 1999). The court granted the defendant's motion to dismiss in part because the plaintiff merely alleged that the defendant published the allegedly defamatory article without calling plaintiff to verify the accuracy of the story. *Id.* at *4-5. Plaintiff also alleged that defendant failed to conduct an investigation. *Id.* The court found that these allegations were insufficient to "plead actual malice." *Id.* at *5.

Since the *Twombly* and *Iqbal* decisions, courts have also relied on those cases to dismiss defamation cases where actual malice was not properly pled. For example, in *Diario El Pais, S.L. v. Nielsen Co., (US)*, No. 07-CV-11295, 2008 U.S. Dist. LEXIS 92987, at *20 (S.D.N.Y. Nov. 6, 2008), the plaintiffs alleged that the defendant media company knowingly published erroneous estimates of the number of visitors

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to the plaintiff's website in 2007. *Id.* at *2. The court dismissed plaintiffs' libel claim because they did not "allege facts that render 'plausible' the actual malice element of trade libel, let alone a set [of] facts that satisfy the heightened pleading requirements for actual malice." *Id.* at *22 (citing *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007)). *See also Rutherford v. Katonah-Lewisboro Sch. Dist.*, No. 08-Civ.-10486, 2009 U.S. Dist. LEXIS 105872, at *28 (S.D.N.Y. Nov. 3, 2009) ("Plaintiff asserts that Defendants' conduct was 'malicious.' But that buzzword is, after *Twombly* and *Iqbal*, insufficient; it must be backed up with allegations of fact from which malice can be fairly inferred.

Unfortunately for Plaintiff, her pleading contains not a single allegation of fact that would support her conclusory allegation of malice.") (internal citations omitted).

Whether courts demand real allegations of malice with direct reference to *Twombly* and *Iqbal* or under older, judicially developed pleading standards for libel, those requirements appear to be abrogated by the pending legislation. Instead, under the current language of the bills, a court would be prohibited from granting a motion to dismiss as long as there was any possibility that the defendant might prove "actual malice."

Such a rule would be particularly burdensome for newspapers and other media outlets, which are commonly the defendants in defamation cases brought by public figures. Reporters, editors, and publishers would be subject to invasive and cumbersome discovery requests propounded by public figures who respond to criticism with harassing lawsuits.

The cost of defending against this kind of vexatious litigation would inevitably lead to various degrees of self-censorship. Many believe that the imposition of these kinds of burdens is at odds with the reasoning in *Sullivan*, which cited the "constitutional guarantees" of free speech and a free press in crafting the "actual malice" requirement. 376 U.S. at 279. Because of the press of other business, neither bill is expected to reach the floor during 2009.

However, it is possible that the bills could receive full committee consideration and advance to floor debate in both houses during the first quarter of 2010.

Cliff Sloan, John Beisner and Jessica Miller are litigation partners at Skadden, Arps, Slate, Meagher & Flom in Washington, D.C.

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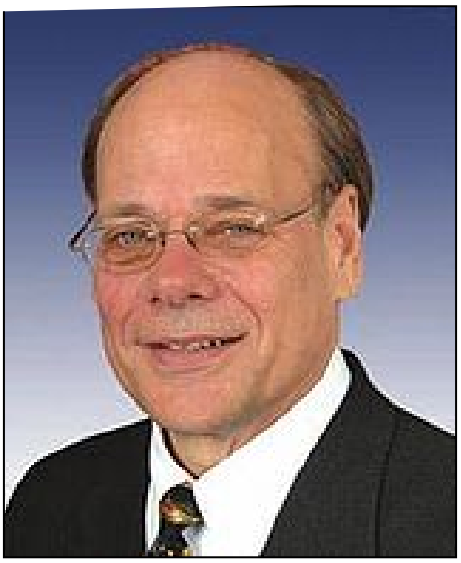
Federal Anti-SLAPP Bill Introduced in Congress

Bill Would Protect Speech and Conduct on Issues of Public Interest

On December 15, Congressman Steve Cohen (D-TN) introduced a federal anti-SLAPP bill in Congress. The "Citizen Participation Act," H.R. 4364, would not only protect petitioning activity, such as statements connected to executive or legislative action, but would also apply broadly to protect speech or conduct in connection with an issue of public interest – along the lines of California's broad anti-SLAPP statute. The bill was supported by a wide range of public advocacy groups and several press associations, including the California Newspaper Publishers Association, and the Arizona, Illinois, Maine, Nebraska, Utah and Wisconsin press associations.



Introduced by Congressman Steve Cohen, right, H.R. 4364 would not only protect petitioning activity, such as statements connected to executive or legislative action, but apply broadly to protect speech or conduct in connection with an issue of public interest – similar to California's broad anti-SLAPP statute.

The federal bill provides for an expedited motion to dismiss a claim, a stay of discovery and recovery of attorney fees. Notable features of the federal bill include a federal removal provision which would allow defendants sued in state court to remove the action to federal court for purposes of hearing the motion to dismiss; and a provision that anti-SLAPP fee awards under federal – or state law – are not dischargeable under the Bankruptcy Code, The bill also protects anonymous speech by creating a special motion to quash subpoenas and discovery orders.

Summary of the Citizen Participation Act

In addition to noting the strong interest in protecting petitioning activity and speech and conduct on matters of public interest, the finding section of the bill cites the uneven protections provided by state anti-SLAPP statutes as justification for a federal law.

The bill provides that: "Any act in furtherance of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act." The term "act in furtherance of the right of free speech" includes but is not limited to:

> (1) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;
>
> (2) any written or oral statement made in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (3) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with an issue of public interest.

Public interesting is defined as including:

> an issue related to health or safety; environmental, economic or community well-being; the government; a public figure; or a good, product or service in the market place. 'Issue of public interest' shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's business interests rather than toward commenting on or sharing information about a matter of public significance.

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A party filing an expedited special motion to dismiss under the Act must make a prima facie showing that the claim at issue arises from an act in furtherance of the constitutional right of petition or free speech. If the moving party meets this burden, the burden shifts to the responding party to demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment. Under the removal section of the bill, civil actions commenced in state court can be removed to U.S. district court by a litigant who asserts the protections of the bill. Frivolous removals can be punished by an award of costs and attorneys fees.

The bill also creates a special motion to quash subpoenas and discovery orders seeking "personally identifying information" in connection with an action pending in Federal court arising from an act in furtherance of the constitutional right of petition or free speech. If the speech falls within the scope of the bill, the burden "shifts to the plaintiff in the underlying action to demonstrate that the underlying claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment."

Finally, the bill provides that any award of fees or costs pursuant to the Act or any state anti-SLAPP statute is not dischargeable in bankruptcy.

The bill was referred to the House Judiciary Committee.

FTC Issues Final Guides on the Use of Endorsements and Testimonials in Advertising

By Scott D. Dailard

The Federal Trade Commission's revised Guides Concerning the Use of Endorsements and Testimonials in Advertising (the "Endorsement Guides") went into effect on December 1, 2009. Like all FTC Guides, the revised Endorsement Guides are advisory in nature and do not operate with the force of law. Nonetheless, they articulate standards that the FTC Staff will use to evaluate whether advertising practices are deceptive in violation of Section 5 of the FTC Act. To varying degrees, the Endorsement Guides also influence courts and state attorneys general when they interpret parallel state consumer protection statutes. Accordingly, counselors for advertisers and endorsers should take note of several important changes to the Endorsement Guides, most of which involve testimonials that publicize extraordinary results achieved by using an advertiser's product, endorsers who use blogs, social networking sites or other "consumer-generated media" to publish reviews, and celebrities who endorse products on talk shows or other "unconventional" advertising formats. The following summarizes the key provisions of the revised Endorsement Guides.

Elimination of "Results Not Typical" Safe Harbor

The revised Endorsement Guides eliminated a "safe harbor" that previously permitted testimonials promoting extraordinary results obtained from using an advertiser's product as long as they were accompanied by a "results not typical" disclaimer. Under the new Endorsement Guides, a testimonial describing results that a consumer obtained using an advertised product generally will be deemed to convey an "implied typicality" claim. In other words, the FTC will interpret the testimonial as a claim that the endorser's experience represents the results that consumers can generally expect to achieve when using the advertised product in the depicted circumstances.

According to the revised Guides, a disclaimer stating that the endorser's "results are not typical" is no longer sufficient to avoid deception. Instead, if the endorser's experience with the advertiser's product or service is non-typical, the testimonial advertisement must also disclose the results that consumers can generally expect to achieve. For example, if an ad features "before" and "after" pictures of a woman who claims to have lost 50 pounds in 6 months using the advertiser's diet plan, the ad must also disclose how much weight most women can expect to lose in the depicted circumstances – e.g., "most women who follow our plan for 6 months lost at least 15 pounds." The "generally expected results" disclosure must be substantiated by data obtained from valid, well-controlled clinical studies or other objectively reasonable evidence.

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Disclosure of "Material Connections" Between Advertisers and Endorsers in Consumer-Generated Media

The FTC has long required testimonial advertisements to disclose any "material connections" between an advertiser and an endorser – typically the provision of free products or monetary compensation in exchange for a product review – if consumers would not otherwise expect the connection. The revised Endorsement Guides expressly extend this principle to relationships that arise when advertisers use "consumer-generated media" to promote their products, and they discuss various circumstances in which messages conveyed by bloggers and users of social media platforms such as Facebook and Twitter will be regulated as commercial endorsements. If an advertiser pays someone to blog about a product or service or tout its attributes a message board or a social media site, the review clearly will be considered an endorsement, and the reviewer will be required to disclose his or her relationship with the advertiser. (The same is true if the blogger is paid by a third party acting on behalf of an advertiser).

The reviewer's obligations are more difficult to determine if the only incentive he or she receives is the value of a free product sample that accompanies a marketer's request for a review. In these situations, the FTC will evaluate the need for a disclosure on a case-by-case basis using a test that focuses on whether the receipt of the merchandise could affect the weight or credibility of the reviewer's statements, and whether the connection between the marketer and the reviewer would be reasonably expected by consumers. According to the FTC, the fundamental question is whether, viewed objectively, the relationship between the advertiser and the speaker is such that the speaker's statement can be considered "sponsored" by the advertiser and therefore an "advertising message." In this context, the FTC distinguishes between critics who work for traditional media outlets and consumer endorsers who receive free products as incentives to publish favorable reviews. The revised Endorsement Guides generally do not require disclosures from reviewers working for traditional media companies because the FTC reasons that consumers generally expect that professional critics may have received, for example, the books they review, or saw the movies they critique, for free. The FTC also stated that it in "usual circumstances," it does not consider reviews published by traditional media outlets "with independent editorial responsibility" to be sponsored advertisements because the weight that consumers give to statements that appear in such reviews would not be affected by knowing whether the media publisher paid for the product in question. By contrast, when reviews appear in social media, the FTC reasons that it is much more difficult for consumers to distinguish independent editorial opinion from endorsements that have been procured (directly or indirectly) by an advertiser. Accordingly, under the revised Guides, reviewers who receive free products from an advertiser and then blog about their opinions on a social media site should disclose their relationship to the advertiser if: (i) the product or service has substantial value, or (ii) the product or service is provided to the consumer as part of a network marketing program, or (iii) the reviewer frequently receives free products and services from the advertiser (or similar advertisers) because he or she has an established blog readership or following within a particular field or demographic.

In the event that a material connection exists between an advertiser and an endorser, both the advertiser *and* the endorser (e.g., the blogger or word-of-mouth marketer) can be subject to liability for false or deceptive statements made in the testimonial. The fact that an advertiser may have no knowledge of, or control over, the endorser's statements before they are published will not protect the advertiser from liability. The FTC stated, however, that in deciding whether to bring an enforcement action, it will consider an advertiser's efforts to advise endorsers of their responsibilities and to monitor their reviews for inaccurate statements. Accordingly, advertisers that provide free products to consumer endorsers would be well advised to establish procedures to advise endorsers of their disclosure obligations, provide them with accurate product information and monitor their reviews so that the advertiser can promptly identify and try to correct any exaggerated or unsubstantiated representations.

The FTC's approach to endorsements in consumer-generated media provoked heated commentary in both the blogosphere and the traditional press. Critics of the revised Guides accused the FTC of holding new media to a different standard than old media, or of holding individuals to a stricter standard than large corporations. Mary Engle, Director of the FTC's Division of Advertising Practices, responded to these charges by noting that more robust disclosure requirements are necessary to avoid deception in contexts that blur the lin- between advertising and editorial content. Engle also emphasized that the Endorsement Guides hold social media market-

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ers to the same standards as marketers who use other media: "Social media marketing is here to stay," she said, "and we have enough respect for advertising on the Internet and the important role of the blogosphere as a marketplace for public opinion to hold it to the same standard we apply to advertising in any other medium." Engle also made it clear that the FTC does not plan to make individual bloggers an enforcement priority. Instead, she stated that the FTC's principal "concern is with advertisers who pay consumers to talk up their products and make it look like independent consumer opinion."

Requirements for Disclosure of "Material Connections" in Celebrity Endorsements

The revised Endorsement Guides clarify that celebrities who are paid to endorse an advertiser's products have a duty to disclose their relationship with the advertiser if the endorsement is made outside of a conventional advertising context. As a general rule, a celebrity endorser who appears in a "traditional" advertisement, such as a television commercial, need not disclose that he is being paid by the advertiser, because consumers typically assume that celebrities are compensated for their appearances in ads. The same is not true, however, of talk show appearances, statements made by celebrities in social media, or during news interviews. In such non-traditional advertising contexts, the celebrity must disclose his or her connection to an advertiser, because consumers might not otherwise realize that the celebrity is a paid endorser, rather than just a satisfied customer.

The FTC will assign liability in this context in the same manner as in the consumer-generated media context, discussed above, with the result being that both celebrity endorsers and advertisers can be liable for a celebrity endorser's false or deceptive statements or omissions about the endorsed product. Although the advertiser will not have control over what the celebrity endorser actually says on a talk show, or how the show is edited, it may nonetheless be held liable if the endorser fails to make the required disclosure or makes false statements about the advertiser's product. The FTC stated that it will give significant weight in deciding whether to bring an action to evidence that an advertiser advised the celebrity in advance about what he or she should and should not say, and about the need to disclose the relationship with the advertiser.

Scott D. Dailard is a partner with Dow Lohnes PLLC in Washington, D.C.

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2010 Media Law Resource Center/Southwestern Law School Conference

"Charting the Unknowns: Digital Entertainment, Content Regulation and Crisis Management"

January 14, 2010, Southwestern Law School, Los Angeles, CA

Click Here to Register

The New Frontier in Digital Entertainment

Developments in digital entertainment have raised a host of issues for studios, networks and talent. This panel will look at three types that are popular today - webisodes, video games and viral video marketing - from both a guild and deal-making perspective. It will explore:

* What should talent expect in webisode negotiations?
* What are the pitfalls in making a video game based on an existing audiovisual work?
* After YouTube and Facebook, what is the next frontier for viral marketing?
* What is the responsibility of studios/networks with respect to user generated viral marketing?

Moderator: David Halberstadter, Katten Muchin Rosenman
Panelists: Allison Binder, Stone, Meyer, Genow, Smelkinson & Binder; Leon Schulzinger, Senior Vice President, Labor Relations, CBS; Anthony Segall, Rothner, Segall, Greenstone and Leheny

Sex, Minors and Videotape

The Bush administration aggressively pushed the regulatory envelope on so-called profane and indecent speech, as well as with respect to adult content and its promotion and advertising. But, what direction will the new Administration take? This panel will discuss developments in these areas of content regulation by the FCC, FTC, and Congress, including:

* What is the aftermath of recent FCC cases (fleeting expletives and Janet Jackson's wardrobe malfunction)?
* What is the most realistic perspective on the standards for sanctioning profanity and indecent speech for broadcast and cable programming?
* How will online advertising displaying adult content be regulated?
* What are the new record-keeping requirements for simulated sexual conduct?

Moderator: Jonathan Anschell, Executive Vice President and General Counsel, CBS Television Panelists: Elizabeth Casey, Senior Vice President, Business & Legal Affairs, Standards & Practices, Fox Cable Networks; Jim Dietle, Senior Vice President, Business & Legal Affairs, Playboy Entertainment Group; Alan Simpson, Vice President of Policy, Common Sense Media

Catastrophes: Case Studies - Can Attorneys Work Well with Others to Manage and Survive Big Problems?

There have been several high-profile crises impacting studios, networks and production companies on individual productions and projects in the last few years. This panel will look back in time to analyze some of these past incidents and what lessons can be applied to future problems:

* Use of fictitious critic quotes.
* When there are threats of violence against your actors.
* When your promotion results in calls to the bomb squad.
* When your program results in a ban by a foreign government.

Moderator: Alonzo Wickers, Davis Wright Tremaine
Panelists: Hope J. Boonshaft, Executive Vice President and General Manager, Hill & Knowlton; Karen Magid, Executive Vice President, Litigation, Paramount Pictures; Vincent Chieffo, Greenberg Traurig

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Supreme Court Asked to Review Right of Publicity Case

11th Cir. Ruled "Notorious Death" Not "Carte Blanche" to Publish Old Photos

The publisher of Hustler magazine this month filed a petition for certiorari to the U.S. Supreme Court asking the Court to review an Eleventh Circuit decision reinstating a right of publicity lawsuit over the publication of old nude modeling photographs in an article about the life and murder of the model. *Toffoloni v. LFP Publishing Inc., d/b/a Hustler Magazine*, 572 F.3d 1201 (11th Cir. 2009).

At issue are photographs of former model and female wrestling star Nancy Benoit. Benoit was murdered by her husband in a tragic double-murder suicide that received substantial press attention.

In March 2008, Hustler magazine published an article on the life and murder of Benoit, illustrated with 20-year old nude modeling photographs of her.

Last year a Georgia federal district court dismissed a right of publicity lawsuit filed by Benoit's estate for failure to state a claim. *See* No. 1:08 CV 421, 2008 WL 4559866 (N.D. Ga. Oct. 6, 2008). The court held that the photos concerned a matter of public interest – her murder – and publication was protected by the First Amendment, notwithstanding the court's personal view that publication was "distasteful and offensive."

This year the Eleventh Circuit reinstated the lawsuit, in a troubling decision that drew largely on concepts from the private facts tort.

The court agreed that the magazine article "in and of itself, certainly falls within the newsworthiness exception," but then went on to question "whether a brief biographical piece can ratchet otherwise protected, personal photographs into the newsworthiness exception."

The panel cautioned that "someone's notorious death" is not "carte blanche for the publication of any and all images of that person during his or her life," finding that the photographs "were in no conceivable way related to the 'incident of public concern' or current 'drama'– Benoit's death."

The Eleventh Circuit concluded:

> On these facts, were we to hold otherwise, LFP would be free to publish any nude photographs of almost anyone without their permission, simply because the fact that they were caught nude on camera strikes someone as "newsworthy." Surely that debases the very concept of a right to privacy.

The publisher's petition for certiorari asks the U.S. Supreme Court to consider the following questions:

> 1. Whether the Eleventh Circuit erred in refusing to hold as a matter of law that the Freedom of the Press Clause of the First Amendment insulates Petitioner publisher from liability on Respondent Estate Administrator's claim alleging that non-obscene nude photographs of her public figure Decedent, in an article in Petitioner's national magazine on Decedent's life and death, violated the Georgia common law posthumous right of publicity, where Decedent's murder was a national news story of great public interest.
>
> 2. Is publication of nude, non-obscene photographs of a murdered public figure as part of a national magazine article on her life and death to be deemed "newsworthy" and insulated from liability by the First Amendment right of freedom of the press, where Decedent's murder by her public figure husband was a national news story?

The publisher's petition argues that while the Eleventh Circuit recognized the "newsworthiness" defense in principle, it "went terribly wrong" in applying the relevant law and precedent.

Among other things, the petition argues that publication of otherwise lawful, non-obscene photographs of a public figure is protected by the First Amendment.

LFP Publishing Group is represented by Paul J. Cambria, Jr., Lipsitz Green Scime Cambria, LLP, Buffalo, NY. Plaintiff is represented by Richard Paul Decker, Decker Hallman Barber & Briggs, Atlanta, GA.

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2nd Circuit: No Claim for *Prima Facie* Tort Based on a Defendant's Expression

By Rachel F. Strom

Earlier this month, the United States Court of Appeals for the Second Circuit made clear that a claim for *prima facie* tort has no place in the editorial context. In *McKenzie v. Dow Jones & Company, Inc.*, (2d Cir. Dec. 9, 2009), the Second Circuit affirmed the dismissal of a *prima facie* tort lawsuit brought by an alleged sexual abuse victim Brett McKenzie against Dow Jones & Company, Inc., the publisher of *The Wall Street Journal*.

The court held that the claim failed as a matter of law because plaintiff was essentially attempting to assert a defamation claim, which was time-barred. The court further held that a defendant cannot, as a matter of law, act with disinterested malevolence, an essential element of a *prima facie* tort claim, if the defendant was publishing editorial material, such as an opinion article. And Dow Jones was doing just that.

The court held that a defendant cannot, as a matter of law, act with disinterested malevolence, an essential element of a *prima facie* tort claim, if the defendant was publishing editorial material, such as an opinion article.

Background

In 2003, plaintiff Brett McKenzie and others brought, on an anonymous basis, a sexual abuse case against the Roman Catholic Diocese of Manchester, New Hampshire. In that suit, plaintiff alleged that he had been sexually abused by Father Gordon MacRae, a Roman Catholic Priest and Catholic school teacher, when he was a student at the Sacred Heart School in the Parish of Our Lady of Miraculous Medals. Plaintiff's lawsuit against the Diocese ended in a confidential settlement.

Wall Street Journal Column and Complaint

On April 27, 2005, Dow Jones published in *The Wall Street Journal* a column entitled, "A Priest's Story" written by *Wall Street Journal* editorial board member Dorothy Rabinowitz. The column identified the plaintiff as an alleged victim of sexual abuse and discussed plaintiff's sexual abuse case. The column also commented on the treatment Father MacRae received from the police department in Keene, New Hampshire and from the Diocese of Manchester in the face of several allegations of sexual abuse. After the column was published, Rabinowitz was quoted in the *New Hampshire Union Leader* as stating that she wrote the column because she "wanted to illustrate one of the driving forces of miscarriages of justice, and I think more and more people, not just me, have noticed that personal injury lawyers are driving many cases … that would not be brought otherwise." She was also quoted as saying that she named plaintiff in the column, even though he chose to proceed on his sexual abuse case anonymously, because "the cloak of anonymity is the worst encouragement for the false abuse climate; that is the problem."

On April 15, 2008, nearly three years after Dow Jones published the column, plaintiff filed a complaint in the Southern District of New York against Dow Jones. The complaint asserted a single cause of action for *prima facie* tort arising out of the publication of the column. Plaintiff alleged that he suffered great mental pain as a result of the column's identification of him as an individual who claimed that he was sexually abused by a priest. Plaintiff also asserted that the column falsely implied that he had fabricated the claim of sexual assault. Plaintiff sought compensatory, exemplary and punitive damages in the round figure amount of $7,700,000.

On May 21, 2008, Dow Jones moved to dismiss the complaint on the grounds that the action was time-barred by New York's one-year statute of limitations for *prima facie* tort claims or, in the alternative, because plaintiff could not make out the elements of a *prima facie* tort claim. Specifically, Dow Jones argued that plaintiff had not plead special damages with sufficient particularity, which is a critical element

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of a *prima facie* tort claim.

Further, Dow Jones agued that plaintiff had not – and could not – allege that Dow Jones acted with disinterested malevolence, an essential element to his claim. Here, Dow Jones argued that even assuming that in publishing the column it had an intent to harm plaintiff, it was also motivated by an intention to inform its readers about the circumstances surrounding the sexual abuse allegations brought against Father Gordon MacRae. Further, Dow Jones pointed out that plaintiff's *own* allegations in the complaint established that Rabinowitz and Dow Jones did not publish plaintiff's name in the column with the *sole intent* to harm him. Instead, Rabinowitz simply referred to plaintiff to further her legitimate goal of expressing her opinion about a court system that allows alleged sexual abuse victims to receive financial settlements anonymously.

For example, in the complaint, plaintiff cites Rabinowitz as stating that, in drafting and publishing the column, her primary motive was to shed light on "the problem" of allowing victims of sexual abuse to bring their claims under "the cloak of anonymity."

Moreover, plaintiff cited Rabinowitz's statements to the *New Hampshire Union Leader* in which she says that she published the column, and McKenzie's name in the column, because she "wanted to illustrate one of the driving forces of miscarriages of justice …." Rabinowitz used plaintiff's name to "illustrate" the problem – as she saw it – of allowing "anonymous accusers to receive financial settlements for allegations of sexual abuse against priests." This is quite different than intending to harm plaintiff simply for the sake of harming him.

Lower Court Decision

In a Decision and Order dated July 22, 2008, Judge Shira A. Scheindlin of the United States District Court for the Southern District of New York granted Dow Jones' motion to dismiss in its entirety and held that plaintiff's claim was time-barred and that plaintiff could not make out the elements of a *prima facie* tort claim. *McKenzie v. Dow Jones & Company, Inc.*, 2008 WL 2856337 (S.D.N.Y. Jul. 22, 2008).

In dismissing the *prima facie* tort claim on statute of limitations grounds, the court determined that plaintiff's "claim is governed by the one-year statute of limitation that applies to defamation [actions]" because "[t]he factual allegations in the Complaint indicate that [plaintiff's] prima facie tort claim is no more than a thinly-veiled defamation claim." In so holding, the court noted that New York's "one-year statute of limitations applicable to the intentional torts . . . applies to other causes of action which allege that defendant intentionally caused injury to plaintiff's reputation." (citations omitted). The court went on to note that "where[] a plaintiff alleges prima facie tort in order to overcome the strictures of a less favorable statute of limitations, courts do not hesitate to dismiss the claim." (citations and quotations omitted).

The court reasoned that:

> McKenzie asserts that he brought a claim for prima facie tort because the facts of the case did not allow him to plead a traditional tort of defamation. Noting that truth is a complete defense to a defamation claim, McKenzie points out that he does not allege that the statements in the Article are false. McKenzie argues that because he does not dispute the truthfulness of the Article's content, he cannot avail himself of traditional tort remedies.
>
> The Article's factual statements, however, are not at the heart of McKenzie's claim. Rather, McKenzie takes issue with the allegedly false impression created by the Article that his claim of sexual abuse by a priest was a fraud perpetrated to extract money. . . . McKenzie contends that these false implications are "reasonably susceptible of a *defamatory* connotation" and were known by Dow Jones to be false when the Article was published.

As such, the court concluded that "it is apparent that McKenzie's action sounds in defamation" and is governed by New York's one-year statute of limitations for intentional torts. Accordingly, because plaintiff brought suit nearly three years after the column was published, the court determined that plaintiff's complaint was time-barred.

The court also held that even if plaintiff's claim were

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timely, "Dow Jones' motion to dismiss his claim for prima facie tort would still be granted" because plaintiff did not adequately plead special damages. The court noted that "McKenzie merely states that he 'is entitled to an award of exemplary and punitive damages in the amount of $7,700,000, an amount that is sufficient to deter . . . Dow Jones . . . and others[ ] from such conduct in the future.'" And, the court held that "a damage allegation consisting entirely of round figures and lump sums, without any explanation of how plaintiff arrived at such figures" is insufficient to" plead special damages under New York law. (citations and quotations omitted).

The court concluded its Decision and Order by denying plaintiff leave to replead his claim because "McKenzie's claim is barred by the statute of limitation no matter how the claim is pleaded." As such, the court reaffirmed New York's principle that a plaintiff may not circumvent New York's one-year statue of limitations for intentional torts, such as defamation, by labeling his claim as one for *prima facie* tort. Plaintiff then appealed to the Second Circuit and raised the same arguments to the Court of Appeals as he made to the District Court.

Second Circuit Decision

On December 9, 2009, the Second Circuit unanimously affirmed the District Court's dismissal of plaintiff's *prima facie* tort claim. In so holding, the court noted that "New York courts have generally been wary about the over-extension of prima facie tort as a cause of action." The court then went on to hold that plaintiff's claim failed for two reasons.

First, the court noted that, under New York law, "where '[t]he factual allegations underlying [the prima facie tort] cause of action relate to the dissemination of allegedly defamatory materials,' that cause of action 'must fail.'" (quoting *Butler v. Delaware Otsego Corp.*, 610 N.Y.S.2d 664, 665 (3rd Dep't 1994)).

In this case, the court "agree[d] with the district court that McKenzie's complaint, which repeatedly avails itself of the terminology of defamation, cannot properly be considered to raise a claim of prima facie tort. (*Citing Morrison v. Nat'l Broad. Co.*, 19 N.Y.2d 453, 458-59, 280 N.Y.S.2d 641, 644 (1967) ("unlike most torts, defamation is defined in terms of the injury, damage to reputation, and not in terms of the manner in which the injury is accomplished," and that where plaintiff alleges that "defendants' conduct 'brought an idea' that [plaintiff] was dishonest 'to the perception' of the general public ... [plaintiff's] cause of action must be deemed to fall within the ambit of tortious injury which sounds in defamation")).

Second, the court held that "it appears that New York courts have been very strict in holding that a cause of action for prima facie tort will not lie unless the actions complained of can be plausibly said to have been motivated solely by malice towards the plaintiff. In the context of cases involving acts of expression, *wherever a defendant's actions can be seen, at least in part, as having been motivated by the desire to express some opinion, a cause of action for prima facie tort will fail.* This is so even if the actions complained of were motivated in part by a desire to injure the plaintiff." (emphasis added).

Here, the court held that "[e]ven assuming arguendo that Rabinowitz was motivated by some desire to harm McKenzie, it is not possible to disregard the fact that her column is aimed at advancing her view that vexatious litigation, especially in claims involving child abuse, is a problem of which the public should take notice.

Indeed, McKenzie himself argues that Rabinowitz and Dow Jones 'didn't care about the harm they would cause [him], because they had a larger agenda. As Rabinowitz made clear in her statements to The New Hampshire Union Leader, she named McKenzie in order to have a larger chilling effect over the ability of lawyers and judges to fashion confidential settlements in future cases of sexual abuse, because she views confidential settlements as 'the worst encouragement to a false abuse climate.'"

Finally, the Second Circuit held that "[t]o the extent plaintiff's complaint raises a claim for independent emotional damages, that claim is essentially one for invasion of privacy, a tort that is severely limited in New York and is, in any event, subject to the one-year statute of limitations in CPLR 215(3). … Plaintiff may not plead this time-barred claim as a prima facie tort to avoid the one year statute of limitations." Thus, the court affirmed the limited nature of *prima facie* tort claims and affirmed the district court's dismissal of plaintiff's complaint without leave to replead his claims.

Defendant Dow Jones & Company, Inc. was represented by Slade R. Metcalf and Rachel F. Strom of Hogan & Hartson LLP, New York City. Brett McKenzie was represented by Moshe Mortner, Esq., of New York City.

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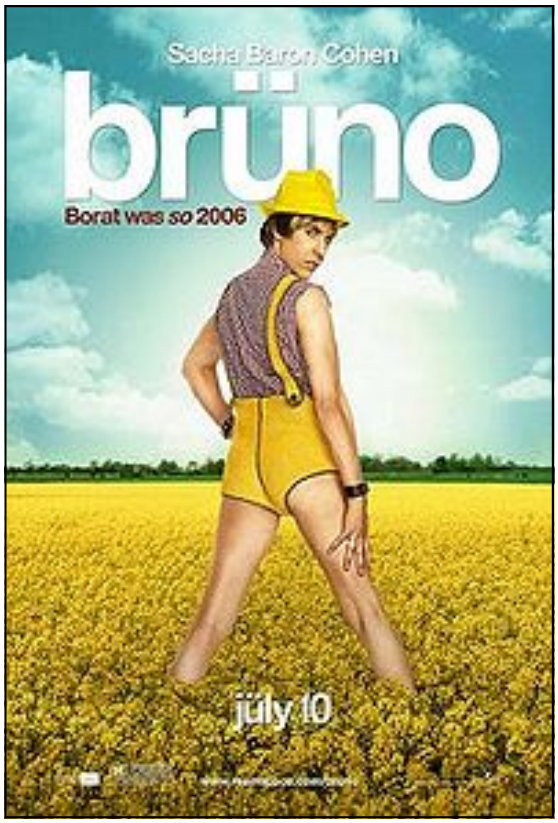
Lawsuit Against Sasha Baron Cohen and Producers of "Brüno" Movie Dismissed

Women in Bingo Hall Scene Claimed Distress and Physical Injuries

In the first decided case involving the movie Brüno, a Los Angeles Superior Court granted an anti-SLAPP motion to strike a lawsuit by a women who was filmed in one of the movie's scenes and brought negligence, emotional distress, fraud and related claims. *Olson v. Cohen, et al.*, No. MC 020465 (Cal. Sup. Ct. Nov. 24, 2009) (Rogers, J.).

The trial court first had no trouble concluding that the movie fit comfortably within the scope of the anti-SLAPP statute as speech on a matter of public interest. Second, the court held that plaintiff had no chance of prevailing on her claims which were supported only by her allegations and amateur video taken of the event. The edited video did not support her allegations and was contradicted by the movie and outtakes. Therefore the court had no reason to consider the alternative ground for dismissal based on a signed release to appear in the movie.



The trial court first had no trouble concluding that the movie fit comfortably within the scope of the anti-SLAPP statute as speech on a matter of public interest.

Background

The movie *Brüno* was released in July 2009 and stars actor and comedian Sasha Baron Cohen, as a fictional flamboyant gay Austrian fashion reporter. Based on a character Baron-Cohen had developed on British television, the movie portrayed in documentary-style, Brüno's travels through the United States to revive his career and become "the biggest Austrian superstar since Hitler."

At issue in the lawsuit was a scene filmed at a charity bingo tournament. The organizers had accepted an invitation from the producers of the movie to have a "celebrity" call a game. Baron-Cohen in character as *Brüno* called games "while telling ribald stories about his former gay lover." Plaintiff, Richelle Olsen, who was supervising the event, alleged that she asked Bruno to leave the stage and was then confronted by the movie's cameramen to capture her "emotional and humiliating" reaction to actions instigated by defendants. The alleged that because of the distress, she later lost consciousness, collapsed, suffered a brain injury and is now confined to a wheelchair and walker.

In June 2009, prior to the release of the movie, she sued Baron-Cohen and the producers. She originally included claims of assault and battery, but later amended her complaint to claims of negligence, intentional and negligent infliction of emotional distress, conspiracy to defraud, intentional concealment, false promise, fraudulent misrepresentation and loss of consortium.

In September 2009, defendants filed a motion to strike the complaint under the California anti-SLAPP statute, Cal. Civ. Code Sec. 425.16.

Anti-SLAPP Dismissal

The trial court first held that the causes of action arose from speech or conduct on a matter of public interest, within the meaning of the anti-SLAPP statute. The court first noted

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that Baron-Cohen is a public figure and that a high degree of public interest attaches to his work, even in the guise of fictional persona. Second the court found that the subject matter of the movie involved a clear matter of public interest. The movie, according to the court, "presents a satirical perspective on homosexuality, gay culture and same sex marriage, all of which are hot-button topics, particularly in this state." Thus, by "interacting with Cohen as the cameras were rolling, Richelle Olsen interjected herself into an issue of public interest."

Turning to the second prong of the anti-SLAPP statute, whether plaintiff has a probability of prevailing, the court found a complete lack of evidence to support the complaint. The plaintiff had offered a one minute amateur video shot at the event showing plaintiff walking toward a room, then cutting to a shot of plaintiff lying on the floor. The edited video failed to support any of her claims, especially when compared to actual scenes from the movie and outtakes. These showed that plaintiff confronted Baron-Cohen, called him an "it" and "faggot" and had him escorted out of the hall.

Finding that plaintiff had failed to provide any evidence in support of her claims, the court concluded that it was not necessary to analyze whether she had stated a claim for any of the causes of action or whether those claims were separately barred by the release she signed.

The defendants were represented by Russell Smith, Smith-Dehn, LLP. Plaintiff was represented by Kyle K. Madison.

2d Cir: Not Defamatory to Say Prisoner Will Give Evidence for Prosecution

Noting that defamatory meaning is to be determined by "right-thinking" members of the community, the Second Circuit Court of Appeals held that it is not defamatory to report that a prisoner was planning to cooperate with prosecutors and testify against a suspected organized crime member. *Michtavi v. New York Daily News*, No. 08-2111 (2d Cir. Nov. 23, 2009) (Jacobs, Gardephe, Kearse, JJ.).

The pro se plaintiff, Shemtov Michtavi, is serving a 20 year prison sentence for drug trafficking. He sued the New York Daily News and a Polish language newspaper for defamation and intentional infliction of emotional distress over a March 2006 Daily News article that identified plaintiff as a "key lieutenant" in an Israeli organized crime gang who was planning to give evidence against one of his arrested colleagues. Plaintiff alleged he was subjected to abuse and threats in prison for being a "mob rat."

Last year the district court dismissed for failure to state a claim, citing to New York case law holding that it is not defamatory to identify a person as a government informant. *See* 2008 WL 754694, at *2 (S.D.N.Y. Mar. 12, 2008) ("New York Courts have held that a statement identifying a person as a government informant cannot form the basis for a defamation suit, whether accurate or not). The district court also held that the description of plaintiff as a "key lieutenant" in the mob was protected as a fair report of a Department of Justice press release.

Affirming dismissal, the Second Circuit noted that under New York law, a statement is defamatory only if it would expose an individual to shame "in the minds of right-thinking persons." The fact that a statement may "prejudice a plaintiff in the eyes of even a substantial group is not enough to make the statement defamatory if the group is one whose standards are so anti-social that it is not proper for the courts to recognize them." Citing Restatement (Second) Torts § 559, cmt. e (1977). "The population of right-thinking persons," the Court concluded, " unambiguously excludes those who would think ill of one who legitimately cooperates with law enforcement."

The media defendants were represented by Laura Handman, Davis, Wright Tremaine, LLP; Anne B. Carroll, Daily News L.P.; Marion Bachrachm, Dana Moskowitz, DePetris & Bachrach, LLP, New York.

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Libel Lawsuit Against Dixie Chicks Dismissed on Summary Judgment

An Arkansas federal district court this month granted summary judgment dismissing a libel suit against the lead singer and members of the country music group the Dixie Chicks over a letter to fans posted on the group's website and MySpace page. *Hobbs v. Pasdar*, No. 4:09-CV-0008 BSM (E.D. Ark. Dec. 1, 2009). The letter urged fans to support a campaign to free three young men convicted of murder.

The decision reaffirms a number of important points, including the proposition that the commission and prosecution of crimes, and related judicial proceedings, are events of legitimate concern to the public (first stated in C*ox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 492 (1975)). The case also distinguishes *Hutchinson v. Proxmire*'s holding that libel defendants cannot, "by their own conduct, create their own defense by making the claimant a public figure," 443 U.S. 111, 134 (1979); here, the court held that the plaintiff was a limited purpose public figure because he had access to the media prior to the alleged defamation and his role was not limited to defending himself.

An Arkansas federal district court this month granted summary judgment dismissing a libel suit against the lead singer and members of the country music group the Dixie Chicks, above, over a letter to fans posted on the group's website and MySpace page. The letter urged fans to support a campaign to free three young men convicted of murder.

Background

The case stems from tragedy: In 1993, three eight-year-old boys were found murdered. Three teenage boys (dubbed by the press the "West Memphis 3," or "WM3") were arrested and convicted of murder; one of the convicted, Damien Echols, sits on death row. A movement has arisen – based in part on new DNA evidence – to "Free the West Memphis Three."

In October 2007, Echols's defense distributed a press release – approved by the defense attorneys – summarizing new evidence they planned to present in support of the habeas filing at the federal habeas hearing (which had not yet occurred as of Dec. 1, 2009). The press release generated more than 300 interview requests and press references.

One of the most vocal supporters of the WM3 movement has been Natalie Maines Pasdar, the lead singer for the group the Dixie Chicks. She first got involved in May 2007, when she saw two HBO documentaries, *Paradise Lost: The Child Murders at Robin Hood Hills* (which first aired in 1996) and *Paradise Lost 2: Revelations* (which first aired in 2000). In November 2007, she copied large portions of the statements released by Echols' defense team in October in a letter to Dixie Chicks fans, urging them to donate money to the WM3 cause. Pasdar cited scientific evidence that showed "that a hair belonging to Terry Hobbs, the step-father of one of the victims, was found in the ligature of one of the victims," as well as tests that "match a hair at the crime scene to a friend of Hobbs that was

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with him that day."

Her letter also reported that Pam Hobbs (the ex-wife of Terry Hobbs and the mother of one of the murder victims) had sworn in an affidavit that she found a knife her son "carried with him at all times" in her ex-husband's drawer; the letter also cited other "new information implicating Terry Hobbs." Pasdar rejected her manager's attempt to edit the letter, explaining in an e-mail that "all of the legal stuff is copied directly from the court filing and legal papers that were written by the defense team. I don't want to put any of that in my own words." (Pasdar did not read the habeas petition or the habeas memo filed by Echols before posting her letter.) The letter was posted on the Dixie Chicks' website and MySpace page. When Hobbs learned of the letters, he took no action to contact Pasdar or the Dixie Chicks and/or to seek a retraction.

Pasdar also appeared at a rally in Dec. 2007. Although she did not mention Hobbs by name, she stated "[i]t's about science . . . . it's hard for people to open their mouths or debate something that has now been scientifically proven." Shortly thereafter, Hobbs's attorney issued a press release that Hobbs had nothing to do with the murders. Hobbs brought suit in November 2008 against Pasdar individually, as well as against the Dixie Chicks; he sought compensatory and punitive damages. In August 2009, the defendants filed a motion for summary judgment, arguing that Hobbs was a limited purpose public figure and could not prove Pasdar or the other defendants acted with actual malice.

Trial Court Decision

First, the court rejected Hobbs's argument that no matter of public concern was implicated, noting that "whether the WM3 were appropriately convicted of the murders . . . is clearly a matter of public concern or controversy." Second, the court surveyed the extensive record of print and television interviews given by Hobbs and his family and found that he was a limited purpose public figure "because he voluntarily injected himself into the forefront of the public controversy at issue in order to influence the resolution of issues involved." (The district court noted that "at least forty articles" published between July 2007 and November 2007 specifically mentioned that a hair at the crime scene potentially belonged to Terry Hobbs, the step-father of one of the murdered boys, and the court cited 16 quotes from articles in which Hobbs had been interviewed about the hair.)

The court noted that he had not just defended himself in the media, but rather had "clearly taken advantage of his role . . . by selling the rights to the life stories of himself and [his step-son] to a film company in 2006 and by attempting to sell his journal as a book." Next, the court looked at Pasdar's actions, noting the word-for-word copying of the press release, and her e-mail to her manager rejecting changes so as to avoid putting anything in her "own" words – and found that no reasonable jury could find that she made the statements at issue (both in print and at the rally) with knowledge that the statements were false or with reckless disregard.

Accordingly, the court dismissed the case on summary judgment. (Although there was a question as to choice of law, the court held that it was a moot point, given that summary judgment was appropriate under both Arkansas and Tennessee law.)

Pasdar was represented by D'Lesli M. Davis and Dan D. Davidson of Fulbright & Jaworski in Dallas, as well as John E. Moore of Huckabay, Munson, Rowlett & Moore, P.A. in Little Rock; the other two Dixie Chicks were represented by Robert B. Wellenberger of Thompson, Coe, Cousins & Irons, L.L.P. of Dallas. Hobbs was represented by James Cody Hiland of Hiland, Davies & Thomas, PLLC in Arkansas.

Any developments other MLRC members should know about?

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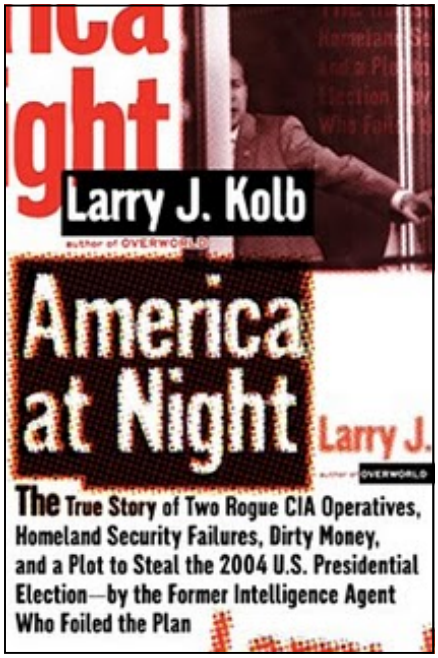
Touching a Hot Stove, Twice: Florida Court Dismisses Putative Defamation Action

By Matthew J. Feeley, Mark R. Hornak, and Kathleen Jones Goldman

On November 4, 2009, Judge Thomas H. Barkdull, III of the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida granted motions to dismiss the defamation action brought by convicted felons Joseph Serian (Serian) and Robert Sensi (Sensi) attacking the content of the book, *America at Night: The True Story of Two Rogue CIA Operatives, Homeland Security Failures, Dirty Money, and a Plot to Steal the 2004 U.S. Presidential Election -- by the Former Intelligence Agent Who Foiled the Plan (America at Night). Robert Sensi and Joseph Serian v. Engin K. Yesil, et al, 50 2009 CA 003672 AO.* Judge Barkdull's decision is the most recent chapter in Serian and Sensi's legal efforts against the author and publisher of *America at Night*. The August 2009 edition of this publication included a report detailing the dismissal of an earlier and related defamation litigation brought by Serian in the United States District Court for the Northern District of West Virginia.



Background

America at Night was written by Larry Jackson Kolb (Kolb) and was published by Penguin Group (USA) Inc. (Penguin Group). In *America at Night*, Kolb recounts that he was recruited by the Department of Homeland Security to help investigate two convicted white collar criminals, Sensi and Richard Hirschfeld (Hirschfeld), each with connections to the CIA, and that his investigation led him to discover and foil a conspiracy to defeat and smear the John Kerry 2004 presidential campaign by charging the campaign with false links to Al Qaeda. (Kolb is also the author of *Overworld: The Life and Times of a Reluctant Spy* (New York: Riverhead Books, 2004). Prior to his career as an author, Kolb worked closely with Muhammad Ali and Adnan Khashoggi and as an intelligence operative along side Miles Copeland, who was involved in the formation of the CIA).

Serian, like a number of individuals acquainted with Sensi and Hirschfeld, is mentioned several times throughout *America at Night.* As recounted in the book, Serian was described by others as "very crazy," "a glib liar," "a bad businessman," and "a crook."

The West Virginia Federal Case

As reported here in August 2009, Serian filed a *pro se* lawsuit, on behalf of himself and Sensi, against Kolb and Penguin Group in the U.S. District Court for the Northern District of West Virginia. *Serian v. Penguin Group (USA), Inc. et al*, 1:08-cv.74 (the West Virginia Case). Serian brought claims for defamation and for the illegal disclosure of the identity of a covert agent under 50 U.S.C. §§ 421-26. Chief Judge Irene Keeley, *sua sponte*, dismissed the claims brought on behalf of Sensi because Serian, as a *pro se* litigant, did not have standing to represent Sensi and dismissed the 50 U.S.C §§ 421-26 claim because the statute does not provide a private right of action. Thereafter, Kolb and Penguin Group filed a motion to dismiss the lawsuit. On July 23, 2009, Chief Judge Keeley dismissed the West Virginia Case. 2009 WL 2225412 (N.D.W.Va. July 23, 2009).

In dismissing the West Virginia Case, Chief Judge Keeley took judicial notice of the various federal judgments of conviction against Serian for obstruction of justice, conspiracy, mail fraud, wire fraud, fraud of financial institutions, delivery of misbranded devices as well as a civil judgment expressly finding that Serian lied to a court. In recognizing these judgments, Chief Judge Keeley held Serian could not possibly prove a claim for defamation because the statements that he was a "crook" and a "glib liar" were conclusively true. Chief

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Judge Keeley also found that the characterizations of Serian as "very crazy" and a "bad businessman" were non-actionable subjective opinion.

The Florida State Court Action

Perhaps sensing that he was on the verge of dismissal in the West Virginia Case, on January 27, 2009, Serian, this time with Sensi's full involvement, attempted to move the fight to Florida and filed a *pro se* lawsuit against Engin Yesil (Yesil), Eial "Yali" Golan (Golan), Kolb and Penguin Group in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida. Serian and Sensi named Yesil and Golan under the theory that they encouraged and facilitated Kolb's publication of *America at Night* to bolster their own images at the expense of Serian and Sensi. Serian and Sensi brought a claim for "Emotional Distress Resulting from Defamation of Character" against all the defendants. In addition, Sensi brought a claim for violation of 50 U.S.C. §§ 421-26, alleging that the book had unlawfully "outed" him as a CIA operative, and asserting a private right of action under that statute.

Motion to Dismiss in Florida

Penguin Group and Kolb filed an immediate motion to dismiss, asserting that no relief could be granted because, *inter alia*, Serian and Sensi were guilty of blatant forum shopping as they only filed the Florida action subsequent to receiving several preliminary negative rulings in the West Virginia Case. Penguin Group and Kolb argued that because the West Virginia Case was dismissed Serian and Sensi's instant claims were barred by the doctrines of *res judicata* and *collateral estoppel*.

Penguin Group and Kolb also argued that the subject statements in *America at Night* were either conclusively true or non-actionable opinion. Penguin Group and Kolb also contended that Sensi's claim under 50 U.S.C. §§ 421-26 failed as a matter of law because the statute did not provide a private right of action.

Yesil filed a separate motion to dismiss and argued, *inter alia*, that Serian and Sensi failed to alleged that Yesil made any publication and that 50 U.S.C. §§ 421-26 failed to provide a private right of action.

Decision of the Florida Court

After hearing oral argument, on November 4, 2009, Judge Barkdull issued a brief but strongly worded Final Order granting the defendants' motions to dismiss. Judge Barkdull expressly held that Sensi and Serian attempted to engage in inappropriate forum shopping in that they previously filed the same claims in the West Virginia Case. The Court held that Serian's claims for "emotional distress" based on defamation were in reality defamation claims and were precluded by *res judicata* and *collateral estoppel* and that any defamation claim Sensi now wished to pursue could only be heard, if at all, in federal district court in West Virginia. Judge Barkdull also held that 50 U.S.C. §§ 421-26 did not provide a private right of action and did not allow a private attorney general appointment to prosecute such a claim.

Judge Barkdull's decision is particularly valuable in that it endorses Chief Judge Keeley's decision in the West Virginia Case to take judicial notice of Serian's felony convictions even though they were outside the "four corners" of the complaint. This concept is particularly important in the defamation context as it allows defendants to challenge the plausibility of allegations under *Ascroft v. Iqbal*, 129 S.Ct. 1037, 1055 (2009) with reference to conclusively established facts from unrelated proceedings. In dismissing Serian's claims with prejudice, Judge Barkdull relied on Serian having had a full opportunity to litigate his claims in the West Virginia Case. Judge Barkdull's treatment of Sensi is likewise notable; although Judge Barkdull did not foreclose Sensi from attempting to pursue potential defamation claims, Judge Barkdull ordered that any such claims by Sensi had to be brought only in the Northern District of West Virginia, as Sensi had consented to Serian's efforts to bring claims on his behalf in the West Virginia Case. The final import of Judge Barkdull's decision is its clear intolerance for forum-shopping plaintiffs that attempt to hedge their bets with the filing of multiple claims in different jurisdictions based on the same operative facts and legal theories, even when both state and federal forums have been invoked.

Matthew J. Feeley (Miami) Mark R. Hornak and Kathleen Jones Goldman (Pittsburgh) of Buchanan Ingersoll & Rooney PC represented Larry Jackson Kolb and Penguin Group USA, Inc. Larry A. Stumpf, Jared Lopez and Jenifer J. Soulikias of Black, Srebnick, Kornspan, & Stumpf, P.A. represented Engin K. Yesil. Plaintiffs Joseph Serian and Robert Sensi appeared pro se.

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Libel Suit by Topless Bar Owner and Dancers Against News Source Dismissed

Statement Was Not "Of and Concerning" Plaintiffs

A Tennessee appellate court affirmed dismissal of a libel suit against a news source, holding that plaintiffs failed to plead that the complained of statement was "of and concerning" them. *Steele v. Ritz*, No. W2008-02125-COA-R3-CV, 2009 WL 4825183 (Tenn. App. Dec., 16 2009).

Plaintiffs, the owner of a topless bar and three female employees, sued a local official who was quoted in a May 2007 newspaper article in the Commercial Appeal about a proposed Memphis ordinance to prohibit sales and consumption of alcohol in topless bars and other adult entertainment businesses.

The sponsor of the bill, Memphis area Commissioner Michael Ritz was quoted as follows:

> Frankly, if you care about the true victims, the girls (who dance at topless clubs), you've got to do this," Ritz said. "Almost without exception, these girls were sexually abused by a family member ... and have an addiction to drugs or alcohol. These clubs feed on that. It's a vicious cycle."

The trial dismissed the complaint, finding that under the group libel doctrine "Statements that are used broadly concerning the members of a class or group, absent other circumstances specifically pointing to a particular member, are not a sufficient basis for one member to have a cause of action for libel or slander."

The court also found that the statement constituted a protected expression of opinion.

Affirming dismissal, the appellate court noted that the group libel and opinion issues presented interesting doctrinal questions. However, the court did not need to review these determinations because the complaint failed on narrower grounds because plaintiffs failed to plead that the statement was "of and concerning" them. Although their complaint contains an alleged defamatory statement, it failed to allege that the statement referred to them by reasonable implication.

> The plaintiffs do not allege that "these girls" and "these clubs" referenced in the statement are or include the plaintiffs, nor is there an allegation that the statement referred to adult entertainment businesses in Shelby County or the female employees thereof. Equally absent from the complaint are allegations that the Commissioner intended the statement to refer to the plaintiffs, that a reasonable person hearing the statement would believe it referred to the plaintiffs, or that extrinsic facts existed to show that the statement referred to the plaintiffs. The plaintiffs' complaint fails to offer so much as a conclusory allegation that a connection existed between the alleged statement and the plaintiffs, their profession, or adult establishments generally.

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Kentucky Federal Court Analyzes Single Publication Rule and the Internet

A Kentucky federal district court ruled that hyperlinks and other references to an alleged defamatory article on the web is not a republication to restart the statute of limitations. *Salyer v. The Southern Poverty Law Center, Inc.*, No. 3:09-CV-44-H, 2009 WL 4758736 W.D. Ky. Dec. 7, 2009) (Heyburn, J.).

In a detailed review of web publication and the single publication rule, the court concluded that a reference to a previously published article is not a republication because while the reference brings the original article to the attention of a new audience, "it does not present the defamatory contents of the article to that audience." Applying the same logic to the issue of hyperlinks, the court concluded that a hyperlink is simply a new means of accessing an article and not a republication.

Background

At issue in the case is an article published by the Southern Poverty Law Center (SPLC), an Alabama-based civil rights organization that monitors and reports on extremist groups in the United States. SPLC publishes a quarterly *Intelligence Report.* The July 2006 online issue contained an article entitled "A Few Bad Men," which named plaintiff as a member of an extremist group. The article was also published in hard copy format in August 2006. The online version of the article was referred to and linked to in other publications by SPLC. Plaintiff objected to the article in July 2008 and SPLC removed his name from the online article. In December 2008, plaintiff filed a defamation suit against SPLC.

Last year the district court denied summary judgment to SPLC. *See* 2009 WL 1036907 (W.D. Ky. Aug. 17, 2009). The court readily accepted that the single publication rule applies online, but allowed plaintiff additional discovery to examine whether substantial modifications were made to the online article to restart the statute of limitations.

Decision

Although the complaint was filed well past Kentucky's one year statute of limitations for defamation, plaintiff argued on a renewed motion for summary judgment that other SPLC articles hyperlinked or referred to the original article and thus created actionable republications.

The district court noted that very little case law directly addresses this issue but granted defendant's motion by analyzing 1) the basic purpose of the single publication rule; and 2) applying analogous examples from traditional republication law.

With regard to references in other articles to the original article, the court stated:

> It appears that the common thread of traditional republication is that it presents the material, in its entirety, before a new audience. A mere reference to a previously published article does not do that. While it may call the *existence* of the article to the attention of a new audience, it does not present the *defamatory contents* of the article to that audience. Therefore, a reference, without more, is not properly a republication.

On the issue of hyperlinks, the court stated that there was "some logical appeal" to plaintiff's argument since the "purpose of the hyperlink was certainly to entice new readers who had not previously read "A Few Bad Men" to click on the link and be directed to the article." However, the "critical feature of republication is that the original text of the article was changed or the contents of the article presented directly to a new audience." Absent that, a hyperlink "is simply a new means of accessing the referenced article."

Moreover, the court added that finding republication by hyperlink would undermine the purposes of applying the single publication rule to the Internet.

> As discussed, the single publication rule is designed to prevent stale claims and to ensure the legislature's intent in passing statutes of limitations is met. By enacting a statute of limitations, the legislature clearly

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The Single Publication Rule Online: When Does Updating a Website Constitute Republication?

By Gabrielle Russell

In July of 2002, a decision of the New York Court of Appeals helped usher defamation jurisprudence into the digital era. *Firth v. State*, 98 N.Y.2d 365 (N.Y. App. 2002). At issue in that case was a report that the State Education Department had posted on its website, which criticized certain managerial decisions made by former government employee George Firth. Because Firth filed his defamation complaint over a year after the State first posted the report, the State argued that the one-year statute of limitations for defamation had lapsed, barring Firth's claim.

Firth contended that his claim was still timely because the limitations period had re-started each time the report was accessed. Firth argued in the alternative that even if the single publication rule were held to apply to online publications, the court should find that changes the State had made to its website had in effect created a new edition of it, republishing its allegedly defamatory contents.

The court rejected Firth's first argument by upholding the application of the single publication rule to the internet. As a result of this rule, the State could only be held liable for its single posting of the report, and not for every individual viewing of it, as Firth had proposed. In consideration of Firth's second argument, the court found that the only change made to the State's website was the addition of an unrelated report about the DMV. Such a modification, it held, was insufficient to effect republication. It reasoned that "the justification for the republication exception [to the single publication rule] has no application at all to the addition of unrelated material on a Web site, for it is not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate defamatory information to a new audience."

Since *Firth*, a number of courts have grappled with the

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> demonstrates a desire to require lawsuits be brought within a specified time of initial publication. Websites are frequently, if not constantly, updated. Methods of access to portions of the website can change on a regular basis and links to previous posts on a website are constantly added and taken away from sites. Therefore, to find that a new link to an unchanged article posted long ago on a website republishes that article would result in a continual retriggering of the limitations period.

Finally, the court disposed of two more traditional issues. Plaintiff argued that SPLC republished the article by mailing a hard copy of the article to a researcher. The court held this was not a republication under long-standing case law and was identical to selling a stock copy of a book or newspaper. *Citing, e.g., Wolfson v. Syracuse Newspapers*, 4 N.Y.S.2d 640 (N.Y. App.1938) (no republication where defendant newspaper publisher, upon request of a third party, made a previously published defamatory article available to that third party). Last the court denied plaintiff's motion to add a claim for false light under a general tort statute of limitations of five years. The court held that any false light or privacy claim would be governed by the one year statute of limitations for defamation and thus amendment would be futile.

The Southern Poverty Law Center was represented by Jon L. Fleischaker, James L. Adams, Dinsmore & Shohl LLP, Louisville, KY; Kimberly Bessiere Martin, Michael P. Huff, Russell B. Morgan, Bradley Arant Boult Cummings LLP, Huntsville, AL and Nashville, TN. Plaintiff was represented by Thomas E. Carroll, Carroll & Turner, PSC, Monticello, KY.

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question of what website modifications are sufficient to constitute republication. Although this question is, as some courts have pointed out, fact-intensive, the cases that have directly addressed it post-*Firth* provide some useful guidance. These cases have been grouped below according to result.

Changes That May Constitute Republication

Woodhull v. Meinel, 145 N.M. 533 (N.M. 2008)

Plaintiff sued website operator for two allegedly defamatory postings, arguing that the second posting qualified for the republication exception to the single publication rule. The first posting, made by defendant in a section of her website entitled "It Sucks to Be Me," consisted of an email from plaintiff asking defendant to contact her about a job offering, followed by defendant's comments claiming that the "job" turned out to involve hacking into a news website. Approximately two years later, in a section entitled "The Worst of 'It Sucks to Be Me'," defendant posted a recap of the incident, adding that even after she informed plaintiff that the requested activity was illegal, plaintiff persisted. That posting also included an email exchange between defendant and a member of a student newspaper discussing embarrassing incidents involving the plaintiff. The court denied summary judgment for the defendant, finding that the later posting, for which the statute of limitations had not yet lapsed, was sufficiently different from the earlier one that a reasonable jury could consider it a republication.

Sundance Image Technology v. Cone Editions Press, 2007 WL 935703 (S.D. Ca. 2007)

Plaintiffs argued that a modification of the header of the website where allegedly defamatory materials were posted was a republication, reasoning that a "header change evidences a 'new edition' of the website." Finding that the header was changed from "PiezographyBW" to "Piezography Bwicc" in order to promote the company's new product, "BW ICC", the court concluded that "[a] rational trier of fact could find that the header change . . . could constitute a new edition of the website," and thus a republication of the defamatory statements, "since it appears the change was made deliberately and for a substantive purpose."

In re Davis, 347 B.R. 607 (W.D.Ky 2006)

When the Mitan family first sued the Davis family for making allegedly defamatory statements about the Mitans on their website, the court dismissed all but one of their libel claims for exceeding the statute of limitations. After the dismissal, the Davises updated their website to add "Breaking News!" and "Update!" sections in which they made additional accusations about the Mitans. The court found that this later posting was a republication because it contained "substantive information" related to the Mitan family, and thus held the Davises liable for defamation.

Changes Insufficient to Constitute Republication

Salyer v. Southern Poverty Law Center, 2009 WL 4758736 (W.D. Ky. Dec. 7, 2009)

The court held that hyperlinks to an article or other references to an article are not "republications" within the meaning of the single publication rule. Even if the links are intended to bring the article to the attention of a new audience, it does not directly present the original article to a new audience. See also Salyer v. Southern Poverty Law Center, 2009 WL 1036907 (W.D. Ky. Apr. 17, 2009) (While there was no evidence that the allegedly defamatory statements themselves had been edited within the statute of limitations period, the court noted that further discovery would have to be conducted to determine whether there were other changes made to the website on which the statements were posted which reached the level of "substantial modification" sufficient for republication.).

Admissions Consultants, Inc. v. Google, Inc., No. 115190/07 (N.Y. Sup. Ct. Dec. 1, 2008)

Court held that each reply message posted to a thread does not republish all previous posts, even where those replies were posted for the sole purpose of keeping the thread active and prominently displayed on the host website. Quoting *Firth*, the court said that holding otherwise, i.e. that "a single modification of an Internet website" is sufficient for republication, would have a "serious inhibitory effect" on internet communication.

Canatella v. Van De Kamp, 486 F.3d 1128 (9th Cir. 2007).

Attorney Canatella claimed that the California Bar's posting of a summary of the disciplinary proceedings against him violated his due process and privacy rights. Though the statute of limitations had run since the original posting of the summary on the website, Canatella contended that the Bar's later addition of the summary to his member search page—located at a slightly different URL from the original post-

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ing—was a republication. The court held that the Bar's duplication of this material did not restart the statute of limitations, as the later-posted material was identical to that first posted, and appeared on the same website.

Atkinson v. McLaughlin, 2006 WL 3409130 (D.N.D. 2006)

The only change defendants made to their allegedly defamatory website within the statutory period was an update of the names and addresses of the Board of Directors for their organization. The court held that while this "was arguably more than a technical change to the website, it clearly does not rise to the level of a substantive change," and therefore did not constitute republication.

Bloom v. Goodyear Tire & Rubber Co., 2006 WL 2331135 (D.Colo. 2006)

Court found that any alterations to Goodyear's website since the initial publication of the allegedly defamatory statements have not altered the substance of those statements, and thus do not constitute "subsequent publications" (i.e., republications).

Churchill v. State, 378 N.J. Super. 471 (N.J. App. 2005)

Plaintiffs argued that the following modifications to the website of the Commission of Investigation effected republication: (1) the website's menu bar was moved, highlighted in bright yellow, and updated to include a section entitled "Investigative Reports," through which visitors could access the report containing the statements at issue.

The court concluded that these changes were "merely technical": although they "altered the means by which website visitors could access the report . . . they in no way altered the substance or form of the report" and were thus insufficient for republication.

Gabrielle Russell is MLRC's 2009-2010 Legal Fellow.

Promissory Estoppel Claim Stated Against Yahoo

The Oregon federal district court this month denied Yahoo's motion to dismiss a promissory estoppel claim over its failure to promptly remove a false online profile of the plaintiff. *Barnes v. Yahoo!*, No. 05-926 (D. Ore. Dec. 11, 2009). The court held that plaintiff pled sufficient facts to show that she relied to her detriment on Yahoo's promise.

Last year the Ninth Circuit held that Section 230 of the Communications Decency Act did not immunize Yahoo from a promissory estoppel claim over failure to remove material from its site. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096 (9th Cir. June 22, 2009). The plaintiff had sued Yahoo! for negligence and promissory estoppel. The Ninth Circuit held that Section 230 barred the negligence claim but not the promissory estoppel claim because that claim focused on Yahoo's conduct as a potential party to a promissory contract, rather than as a publisher.

In December 2004, plaintiff's ex-boyfriend posted a false dating profile and nude photographs of plaintiff, together with her work address, stating she was interested in casual sexual encounters.

Plaintiff alleged that from January 2005 to March of 2005 she repeatedly requested that the profile be removed but received no response from Yahoo. The issue came to the attention of a local television reporter who contacted Yahoo for comment about the situation.

Plaintiff alleged that after the reporter's call to Yahoo she was contacted by Yahoo's Director of Communications who promised to "personally walk" the request to the division responsible for removing unauthorized profiles and have it removed. Plaintiff reported this promise to the reporter who took no further action on the story. According to the complaint, the profile nevertheless remained online until plaintiff filed a lawsuit in May 2005.

Promissory Estoppel Claim

On remand to the district court, Yahoo! challenged the sufficiency of the complaint arguing that plaintiff did not allege reasonable reliance to support a promissory estoppel claim. The district court disagreed.

Although plaintiff's complaint did not specifically use the term "reliance," the court held that the logical inference of the facts pled was that Yahoo sought to diffuse a potentially negative television news story about its response to plaintiff's situation.

The plaintiff relied on Yahoo's promise to remove the material and called the television reporter off the story. Despite Yahoo's promise to remove the material it remained on the web several months longer than they would have absent plaintiff's reliance.

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Supreme Court of Canada Creates Defense of Public Interest Responsible Communication

Landmark Ruling Increases Protection for Free Expression

By Paul Schabas and Erin Houlton

In what is perhaps the most significant development in Canadian defamation law, the Supreme Court of Canada has created a new defence of "public interest responsible communication". In *Grant v. Torstar Corporation*, 2009 SCC 61 (December 22, 2009), the Supreme Court at last recognized that the common law of defamation is out of step with the modern recognition of the importance of freedom of expression.

It held, clearly, that "the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression." The Court found that the traditional common law of defamation too greatly favors protection of reputation, stating that "defamation lawsuits, real or threatened, should not be a weapon by which the wealthy and privileged stifle the information and debate essential to a free society."

In establishing the new defence, the Court considered the responsible journalism defence established in England in *Reynolds* and *Jameel*, as well as similar developments in Australia, New Zealand and South Africa. The Court confirmed its previous rejection of the *New York Times Co. v. Sullivan* approach, and established what it views as a "middle road" between the traditional strict liability regime and the American actual malice standard.

However, the Court did not simply adopt the English approach, expressing concern about some of the *Reynolds* factors (e.g., "tone"), and in holding that, once the existence of a public interest has been determined by a judge, the rest of the defence is to be decided as a question of fact by a jury, whereas in England the entire defence appears to be treated as a question of law for a judge. As well, by naming it the "responsible *communication*" defence, the Court acknowledged that the defence is not simply for journalists, but can apply to anyone who meets the test, including bloggers. In addition, though not necessary for the decision, the Court also specifically recognized a "reportage" defence.

Background

Peter Grant had sued the *Toronto Star* over an investigative article about his proposed private golf course development on Crown land by a lake in northern Ontario. The article discussed concerns of neighbors, environmental and regulatory issues, Grant's economic power in the area (his lumber company was one of the largest employers in the region), Grant's financial support of the governing party in the province, and his friendship with the then Premier of Ontario, Mike Harris.

Following a three-week jury trial in Grant's hometown in northern Ontario, the judge refused to apply the *Reynolds* defence and sent the case to the jury, which rejected the defences of truth and fair comment, and awarded $1.475 million, including $1,000,000 in punitive damages.

In November 2008, the Ontario Court of Appeal overturned the jury's decision and ordered a new trial, finding that the judge had erred in his consideration of the potential *Reynolds* defence, and in his charge to the jury on fair comment. On the *Reynolds* issue, however, the Court of Appeal said that the jury would need to determine the meaning of the words before a judge could apply the defence. For further discussion of the Court of Appeal's decision, see the December 2008 MLRC MediaLawLetter (Paul Schabas, "Responsible Journalism Defence Applied in Canada: Large Jury Award Against Toronto Star is Overturned").

The plaintiffs appealed to the Supreme Court, asking that the Court restore the jury's verdict. The *Toronto Star* cross-appealed on the question of whether the jury should have any role in the determining the responsible journalism defence. The appeal was expedited and heard several weeks after *Cusson v. Quan*, another Ontario case in which the existence of the defence had been recognized by the Court of Appeal, but not applied in that case as it had not been raised at trial.

On December 22, 2009, the Supreme Court released its judgments in both cases – and in both ordered new trials.

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The reasons in *Grant*, a unanimous decision by Chief Justice Beverley McLachlin, address the recognition of the new defence (Abella J. wrote short reasons agreeing with the development of the defence, but differing on the role of the jury).

Defence of Public Interest Responsible Communication

The Supreme Court reviewed the common law and developments in England and elsewhere that, recently, have recognized a new defence to lessen the recognized "chilling effect" of the common law. As McLachlin C.J. put it: "The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed….Information that is reliable and in the public's interest to know may never see the light of day." More fundamentally, she noted that "the traditional test fails to protect reliable statements that are connected to the democratic discourse and truth-finding rationales for freedom of expression." And as a result, she concluded as follows:

> Having considered the arguments on both sides of the debate from the perspective of principle, I conclude that the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law — in effect a regime of strict liability — is not justifiable. The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above — democratic discourse and truth-finding — and therefore require some protection within the law of defamation. When proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.

Like the English defence of responsible journalism, the responsible communication defence will protect defamatory statements of fact on matters of public interest where the defendant cannot prove the statements published were true, provided the defendant can "show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances." The Court agreed with Lord Hoffman in *Jameel* that the defence is available not just to the press but "to anyone who publishes material of public interest in any medium", and named the defence "public interest responsible communication" to reflect that fact. McLachlin C.J. also acknowledged that they were creating a new defence (a new "jurisprudential creature", the English might say) and not simply expanding the law of qualified privilege which is "grounded not in free expression values but in the social utility of protecting particular communicative occasions from civil liability."

The Supreme Court adopted a broad view as to what will constitute a matter of public interest, drawing on existing fair comment jurisprudence. A subject matter of public interest is "'one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached'". A matter of public interest is "not synonymous with what interests the public." Matters of public interest are not confined to political matters, but can range from topics such as "science and the arts to the environment, religion and morality." Nor is the defence confined to reports regarding "public figures". The Court noted, however, that "[p]ublic interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough."

The Chief Justice also noted that the publication as a whole must be considered: "if the publication read broadly and as a whole relates to a matter of public interest, the judge should leave the defence to the jury on the publication as a whole, and not editorially excise particular statements from the defence on the ground that they were not necessary to

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communicating on the matter of public interest." However, it is open to the jury, in considering the balance of the defence, whether the defendant acted responsibly in including particular statements.

Once it has been determined that the subject matter of the report as a whole concerns a matter of public interest, the analysis shifts to whether the "publisher was diligent in trying to verify the allegation". While drawing on the *Reynolds* factors, the Court articulated the test differently. In particular, the main question is whether the publisher was "diligent in trying to verify the allegation, having regard to:

> (a) the seriousness of the allegation;
> (b) the public importance of the matter;
> (c) the urgency of the matter;
> (d) the status and reliability of the source;
> (e) whether the plaintiff's side of the story was sought and accurately reported;
> (f) whether the inclusion of the defamatory statement was justifiable;
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
> (h) any other relevant circumstances."

The Supreme Court has therefore focused on examining the diligence of the speaker or publisher in verifying and reporting the information. Whether, in practice, this will lead to a difference in approach from that found in *Reynolds*, of course, remains to be seen.

The Court noted that not all factors should be treated equally. Significantly, the Court downplayed the importance of the ninth *Reynolds* factor - the "tone" of the article - stating that:

> While distortion or sensationalism in the manner of presentation will undercut the extent to which a defendant can plausibly claim to have been communicating responsibly in the public interest, the defence of responsible communication ought not to hold writers to a standard of stylistic blandness: see *Roberts*, at para. 74, *per* Sedley LJ. Neither should the law encourage the fiction that fairness and responsibility lies in disavowing or concealing one's point of view. The best investigative reporting often takes a trenchant or adversarial position on pressing issues of the day. An otherwise responsible article should not be denied the protection of the defence simply because of its critical tone.

The Court also expressly stated that it may be responsible, in appropriate circumstances, for journalists to rely on confidential sources.

Notable too was the Court's adoption of the view that the single meaning rule has a diminished role in the responsible communication defence. The trier of fact need not settle on a single meaning as a preliminary matter, but can consider the range of meanings the words are reasonably capable of bearing – including the defendant's intended meaning.

Roles of Judge and Jury

Unlike in England, the Supreme Court held (8-1 on this issue) that while the judge must decide the preliminary question of whether the publication is on a matter of public interest, it is the jury that must assess whether the publication was responsible having regard to all the relevant factors.

In another unique feature of the Canadian approach, the jury will consider whether the inclusion of the defamatory statement was "necessary to communicating on a matter of public interest" in its overall assessment of whether the publication was responsible, rather than that question being determined as a separate inquiry as contemplated in *Jameel*. When making that determination "the jury should take into account that the decision to include a particular statement may involve a variety of considerations and engage editorial choice, which should be granted generous scope."

The Court held that preserving a role for the jury in libel actions was consistent with the Canadian tradition and statutory enactments.

It will be interesting to see how the law develops as a result of the role of the jury. Although many libel cases in Canada are tried by judges alone, a significant number still go to juries where there is very little opportunity to question or vet the jury when it is selected. Courts will now have to develop appropriate instructions to juries on this new de-

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fence, which departs from other elements of the law of defamation in a number of ways.

For example, where a defendant is advancing the three defences of justification (likely on lesser meanings), fair comment and responsible communication (as is the case in *Grant*), the jury will have to be instructed on, among other things: the single meaning rule and the differences in its application in the responsible communication defence; how evidence of the defendant's intended meaning may be used; how evidence of malice is to be considered, if at all, with respect to the available defences (the Supreme Court held that there is no need for a separate inquiry for malice in the responsible communication defence); and the "nature and importance of the *Charter* values of free expression and protection of reputation".

Perhaps some of these issues can be addressed in well-crafted special verdict forms guiding the jury in its analysis of the numerous defences, which received the Court's endorsement in the *Cusson* decision released at the same time as *Grant*, but there will no doubt be much confusion as this law develops.

In *Cusson*, for example, Chief Justice McLachlin suggested that "where, as here, the publication arguably includes statements of both fact and opinion, the trial judge may deem it necessary to isolate individual statements for the jury's consideration so it can decide in turn on the applicability of fair comment and responsible communication." On the other hand, she said, juries must also be given the option to render a general verdict to comply with Ontario's *Libel and Slander Act*.

In this regard, it is unfortunate that the views of Abella J. were not shared by others. As she wrote, there is "very little conceptual difference between deciding whether a communication is in the public interest and whether it is responsibly made", and both are "predominantly legal issues."

Indeed, she noted that "[t]he exercise as a whole involves balancing freedom of expression, freedom of the press, the protection of reputation, privacy concerns, and the public interest", each of which is a "complex value protected" by the *Canadian Charter of Rights and Freedoms.*

"Weighing these often competing constitutional interests is a legal determination", she held, that ought to be done by a judge.

Adoption of the "Reportage" Defense

Drawing from several recent English decisions, the Court also took the opportunity to endorse the existence of the so-called reportage defence, or the reporting of allegations, as an exception to the repetition rule. This defence, which appears to be a subspecies of the responsible communication defence, will protect reports of statements made on matters of public interest and in the course of public debate, even if the publisher cannot prove the truth of the allegations, where the "public interest lies in the fact that [the statements] were made rather than in their truth or falsity."

To avail one's self of this defence, a publisher must show that:

> (1) the report attributes the statement to a person, preferably identified, thereby avoiding total unaccountability;
> (2) the report indicates, expressly or implicitly, that its truth has not been verified;
> (3) the report sets out both sides of the dispute fairly; and
> (4) the report provides the context in which the statements were made.

Paul Schabas, Erin Hoult and Iris Fischer of Blake, Cassels & Graydon LLP in Toronto represented the Toronto Star. Plaintiffs were represented by Peter Downard, Catherine Wiley and Dawn Robertson of Fasken Martineau DuMoulin LLP.

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European Court of Human Rights Rules for Media in Source Protection Case

Disclosure of Sources Only Appropriate in "Exceptional Circumstances"

By Michael Smyth

The European Court of Human Rights (ECHR) this month unanimously confirmed the importance of the protection of journalists' sources as part of the media's right to freedom of expression. Financial Times and ors v United Kingdom (Application no 821/03 Dec. 15, 2009) ("Interbrew Case").

Background

The case started in 2001, when journalists at five media organisations received copies of a document about brewer Interbrew, and its apparent plan to buy a competitor. Approached for comment, the company claimed that the document must have been leaked by an employee or adviser, and asked for the return of the copies, so that it could try and determine where they had come from.

The media companies – The Financial Times Limited, Independent News & Media Limited, Guardian Newspapers Limited, Times Newspapers Limited and Reuters Group plc – refused. Interbrew obtained an order from the High Court in London requiring the document to be returned – an order confirmed on appeal. After the House of Lords refused to consider the case, the companies appealed to the ECHR in Strasbourg. One of their arguments was that that their right to freedom of expression under Article 10 of the European Convention on Human Rights had been infringed by the order.

There was no real dispute before the ECHR that the order constituted an interference with the applicants' Article 10 rights. The issue for the ECHR was whether it was justified under Article 10(2). For an interference to be justified, it must:

be "prescribed by law"

In this case, there was common law precedent for such orders, and also section 10 of the Contempt of Court Act 1981.

have a "legitimate aim"

The ECHR considered that the interference was intended to protect the rights of others and to prevent the disclosure of information received in confidence, and that both of those were legitimate aims.

be "necessary in a democratic society"

The ECHR noted that freedom of expression is one of the essential foundations of a democratic society and that the safeguards guaranteed to the press are particularly important. "Necessity" must be convincingly established, and limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court.

The arguments on the necessity point included:

The source was acting for a harmful purpose

The company had argued that the source must have been acting for some harmful purpose (and indeed Sedley LJ, one of the Appeal Court judges, said that the source's purpose was *"on any view a maleficent one, calculated to do harm whether for profit or for spite"*). However, the ECHR held that the conduct of the source could not determine whether an order should be made. It is merely one factor to take into account. In this case, the source's purpose could not be ascertained with the necessary degree of certainty.

The documents were not authentic

The company had also argued that the document received by the applicants had been altered. However, the ECHR held that it had not been established with the necessary degree of certainty that the leaked document was not authentic, so this could not be seen as an important factor.

The source must be identified so further leaks could be stopped

The company had argued that it needed the document to try and identify the source so that it could stop further leaks of confidential material. But the ECHR noted that this was not the only way in which the company could have stopped confidential information being disseminated. It could have sought an injunction against publication of the material, which it had not done.

An order for disclosure to prevent further leaks would only be justified in "*exceptional circumstances where no rea-*

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sonable and less invasive alternative means of averting the risk posed are available and where the risk threatened is sufficiently serious and defined to render such an order necessary within the meaning of Article 10(2)."

Delivering up documents is not the same as naming a source

The company had argued that handing over the document was different from the naming of a source, but the ECHR said that *"a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."*

The ECHR therefore found that the company's interests in eliminating, by proceedings against the source, the threat of damage from future dissemination of confidential information and in obtaining damages for past breaches of confidence were insufficient to outweigh the public interest in the protection of journalists' sources.

The decision means that the protection of sources should only be removed on public interest grounds where very clear evidence of necessity exists, and it did not in this case.

Of course, the court may not be the only arbiter in a matter such as this. Journalists may also face demands from regulators for information about their sources. When news of the leaked document became known in this matter, the Financial Services Authority, the UK's securities regulator, started an investigation into the possible misleading of the market by the leaking of the allegedly inaccurate document.

The FSA wanted copies of the document so that it too could try to identify the source, and decide whether the source was responsible for criminal offences relating to market manipulation.

Once again, the media companies resisted disclosure, and the investigation was eventually dropped, but failure to comply with a statutory request made by the FSA is a criminal offence, and the companies were therefore potentially at risk of another set of proceedings in relation to the document.

Conclusion

Much has been written, not least in this journal, about the more quixotic aspects of English libel law. This European decision is perhaps a reminder that the UK's source protection regime has, by contrast, traditionally been more mindful of journalistic concerns than that in other countries, including the US. Following the Strasbourg decision, the outlook, already helpful, has just got better.

Michael Smyth of Clifford Chance LLP in London acted for the media companies at Strasbourg, together with associates Kelwin Nicholls and Sarah Bishop. He instructed Richard Parkes QC and Professor Tony Smith of 5 Raymond Buildings.

California Court Of Appeal Affirms Summary Judgment On Idea Submission Case

Substantial Similarity Analysis Applied to Plaintiff's And Defendant's Works

By Daniel Mayeda

In an unpublished ruling, the California Court of Appeal unanimously affirmed summary judgment for the defendant in an idea submission case involving the motion picture YEAR OF THE DOG. *Kightlinger v. White*, Case No. B 210802 (Cal. App. Nov. 23, 2009) (Chaney, Mallano, Rothschild, JJ.).

Factual Background

Plaintiff Kightlinger and defendant White were friends as well as fellow actors, writers and animal lovers. Kightlinger wrote a screenplay called "We're All Animals" centering on a female protagonist involved in cat rescue work.

In 2002, Kightlinger asked White to read her 112-page screenplay saying, "Let's do this" or "Let's make this sucker." Plaintiff later claimed she was hoping White would agree: (1) to produce a film based on ideas in the screenplay; and (2) to act one of the roles in the resulting film. White did agree to act in the film if plaintiff could get it made but Kightlinger eventually abandoned the project.

White later wrote and sold a screenplay about a woman whose grief from losing a beloved pet to an accidental poisoning leads her to become an animal rights activist. The screenplay was made into the Paramount motion picture YEAR OF THE DOG ("YOTD").

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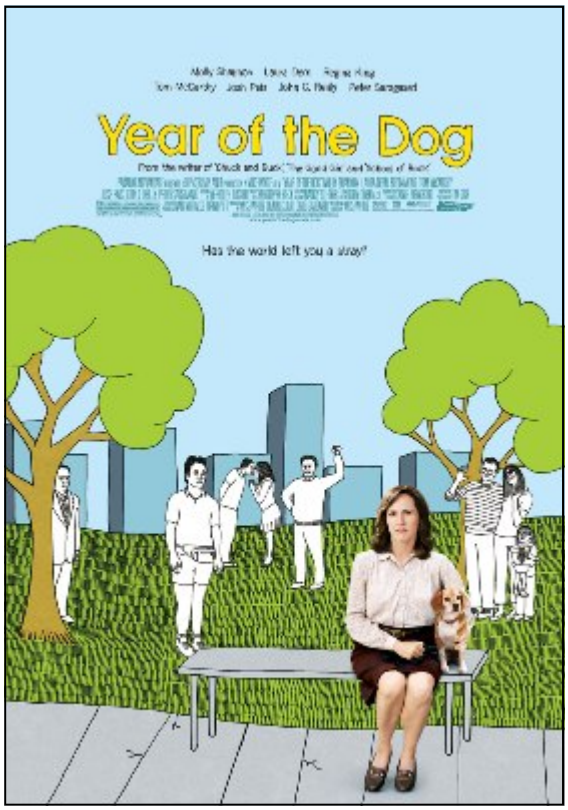
After learning of YOTD, Kightlinger retained counsel who sent cease and desist letters threatening a copyright infringement suit. But apparently after obtaining and reading a copy of White's screenplay, Kightlinger ignored her potential copyright claim and chose to file suit in state court for breach of implied-in-fact contract and breach of confidence.

Summary Judgment Granted in Superior Court

In the trial court, defendant moved for and secured summary judgment on two grounds. First, the court found that plaintiff gave her screenplay to defendant to interest him in acting in and/or producing the film, not to sell him any ideas in the screenplay: In effect, because Kightlinger had never pitched, highlighted or mentioned any ideas in "We're All Animals" to White before asking him to read the screenplay, White could not be deemed to have understood that Kightlinger was attempting to bind him from ever in the future creating a film that incorporated any abstract idea that might be contained in her screenplay.



Therefore, the circumstances were not present whereby a promise by White to pay Kightlinger for any ideas in her screenplay could be inferred.

Second, the court found that the only similarities in "We're All Animals" and YOTD are insubstantial, isolated, abstract and/or stock elements. Because Kightlinger could not establish that White made a substantial use of her ideas, Kightlinger could not prove a breach of any implied-in-fact contract or confidence.

Court of Appeal Ruling

Because summary judgments are reviewed *de novo*, the Court of Appeal independently reviewed the record, including Kightlinger's screenplay, White's script and a DVD of the completed motion picture. Instead of ruling on whether the conditions were present to imply a promise by defendant to pay plaintiff for her ideas, the three justice panel chose to focus on whether defendant "used" plaintiff's ideas rather than his own ideas or ideas from other sources. The opinion noted that substantial "use" is a requisite element for both the breach of implied contract and breach of confidence causes of action. Slip Opinion at 5.

The court found that to establish "use" where there is no direct evidence of defendant's copying, plaintiff can raise an inference of use by showing defendant had access to her ideas and that plaintiff's and defendant's works "are substantially similar" in their ideas. The opinion noted that this test was parallel to the test to establish copying in a copyright infringement action except that in copyright cases, the plaintiff must show substantial similarity in both unprotected ideas and protected expression. *Id.* at 6 n.2.

While "[t]here is no bright line test for determining whether the works were substantially similar," the opinion found that "courts consider a combination of various aspects of the works at issue, including plot, themes, subject matter, sequences, characterization, motivation, milieu and dramatic gimmicks." *Id.* at 5. The court cautioned that "the similarities must be material and that the degree of similarity required is high." *Id.* at 6.

The panel then proceeded to conduct a literary analysis of Kightlinger's screenplay and White's script, as well as the YOTD motion picture. *Id.* at 6-14. It found that the plaintiff's and defendant's works were very different beyond their abstract animal themes and that plaintiff cannot satisfy the

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"high standard" of proving "substantial similarity." *Id.* at 15 (emphasis in original). Because the panel concluded that "no reasonable juror could find that defendant used a substantial portion of plaintiff's material," summary judgment was proper. *Id.* at 15.

In the alternative, the court held that White demonstrated through uncontroverted evidence that he wrote and created YOTD independent of Kightlinger's "We Are All Animals." White's evidence consisted of a declaration detailing his creative process (cross-referenced to attached pages from his composition notebooks) and explaining how substantial and material elements of YOTD parallel his life. Defendant also submitted declarations from third parties attesting to the fact that YOTD mirrored events in White's life. *Id.* at 15.

Both the trial and appellate courts also appeared to be particularly persuaded by a declaration of actress Alicia Silverstone, a fellow animal lover, who told White about her experience of adopting 11 dogs at once from an animal shelter to save them from being euthanized, and who later gave White permission to use that scenario in the script that became YOTD. *Id.*

Although evidence of a defendant's independent creation can rebut an inference of use as a matter of law, plaintiff argued this principle applied only where the defendant had no access to the plaintiff's work or where the independent creation took place before the defendant obtained access to plaintiff's work. *Id.* at 16. The opinion acknowledged that this was the typical situation but rejected plaintiff's insistence on a flat rule. The panel held that where defendant's evidence of independent creation is "clear, positive, uncontradicted and of such nature that it cannot rationally be disbelieved," it rebuts an inference of use, even if the defendant had prior access to plaintiff's work. *Id.* at 16-18. Because plaintiff could not raise a triable issue as to defendant's substantial use of plaintiff's ideas or to defendant's independent creation of his work, summary judgment was affirmed.

Louis P. Petrich and Daniel M. Mayeda (argued) of Leopold, Petrich & Smith represented defendant Mike White; Dale F. Kinsella and Jennifer J. McGrath (argued) of Kinsella Weitzman Iser Kump & Aldisert represented plaintiff Laura Kightlinger.

Coda To The End Of The Twilight Series: Dismissal Of Copyright Action

By Christopher Robinson

On November 20, 2009, the much-anticipated second movie based on Stephenie Meyer's *Twilight* Series – New Moon – opened in theaters across the United States to the largest single day domestic gross in history -- $72.7 million. Four days later, Ms. Meyer got more good news. Judge Otis Wright III of the Central District of California dismissed a copyright infringement suit brought by author Jordan Scott against Ms. Meyer, her publisher Hachette, and various of its divisions. *Scott v. Meyer, et al.*, No. CV 09-6076 (C.D. Cal. Nov. 24, 2009).

The lawsuit had sought enhanced damages, attorneys' fees and an order enjoining the further distribution of the fourth book in the *Twilight* Series, *Breaking Dawn* which was published in 2008. Scott claimed that *Breaking Dawn* was substantially similar in its protected expression to her fantasy novel, *The Nocturne*. The Court, however, found that any similarities between the two works were no more than unprotectable ideas or scenes a faire and that they were vastly different in their expression.

Background

Breaking Dawn is the fourth and last novel in Stephenie Meyers blockbuster, the *Twilight* series of books.

The novel, set in the present day Pacific Northwest, continues the story of Edward, an eternally young vampire, Bella, the girl who loves him, and Jacob, a shape-shifting werewolf who vies for Bella's affection. As the book begins, Bella and Edward have decided to marry and Bella plans to let Edward

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transform her into a vampire so they can be together forever. After the wedding, they depart for their honeymoon where the marriage is consummated. Bella conceives a strange baby whose accelerated growth threatens to kill her when she decides to bring the baby to term. In childbirth, Bella is saved only by transformation into a vampire.

The child, Renesmee, continues her unnaturally rapid growth and Edward's clan of vampires is forced to fend off a rival clan intent on destroying her.

The book ends with Edward and Bella reveling in the prospect of eternity together.

Scott's novel, *The Nocturne*, is a fantasy set in medieval France. Rainier, a sorcerer unaware that he is destined for great things, brings back to life a beautiful maiden named Annora who had fallen into a well.

They fall in love, but local superstition forces Rainier to leave on a voyage of self-discovery. He meets his long-lost brothers and uses his magic for good in the surrounding villages.

Called to save a baron's son, he instead is forced to kill him when he reveals himself as a werewolf. The baron takes revenge, locking him in his dungeon and killing Annora when she comes to plead for Rainier's release.

The dying and pregnant Annora pleads with Rainier to save the child she is carrying. Rainier, distraught, is turned into a vampire by a mysterious visitor, and Rainier embarks on a life terrorizing and killing the local villagers. Finally, he is convinced by a group of winged wolves that he is to fulfill an ancient prophecy by combating the forces of evil. As the book closes, he vows to do so.

Scott claimed that *Breaking Dawn* was substantially similar in its protected expression to her fantasy novel, *The Nocturne*. The Court, however, found that any similarities between the two works were no more than unprotectable ideas or scenes a faire and that they were vastly different in their expression.

Decision

In its decision granting defendants motion to dismiss, Judge Wright noted that, although defendants denied they had ever seen Ms. Scott's work before she filed suit, for purposes of the motion only defendants were prepared to concede that they had access to *The Nocturne*. Because a copyright infringement plaintiff must ultimately prove both access and substantial similarity to prevail at trial, the court went on to determine whether the complaint should be dismissed because, as a matter of law, the two novels were not substantially similar in their protected expression.

The court went through the traditional extrinsic analysis of substantial similarity of literary works of fiction, comparing their plots and themes, settings and characters, pace and sequence of events, and mood and dialogue. In none of these elements were the two novels similar, let alone substantially similar. And any similarities, if they existed at all, were unprotectable ideas, staples of the fantasy/vampire/love story genre, or unoriginal to the author.

In contrast to the fully realized world of vampires and werewolves presented in *Breaking Dawn*, the Court found that *The Nocturne* was a journey of self-discovery where the male protagonist went through many incarnations before he was changed to a vampire only toward the end of the book. The love story in *Breaking Dawn* was the culmination of a four volume saga, whereas the brief, tragic love affair in *The Nocturne* appears to end with her death.

The settings of the two novels – contemporary United States and medieval France, with their appropriate props and

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locations – were entirely different. Further, the main protagonists in each story were only similar ("dashing young men tormented by their powers") in ways that were unprotectable under copyright law but their differences were overwhelming. Edward was a committed vampire, comfortable in his skin, while Rainier underwent many changes throughout the book. The outspoken Bella was quite different from fair Annora, and the supporting characters were no more alike than the principals.

The pace and sequence of events were also dissimilar. *The Nocturne* shifted radically in pace, reflected by the change of narrators from one chapter to the next, whereas *Breaking Dawn* maintained a steady tone. In terms of sequence, it was telling that *Breaking Dawn* was the culmination of a several volume story resolving happily for the protagonists; *The Nocturne* on the other hand was the first in a trilogy, setting up the struggle between good and evil that will presumably occupy future volumes. And the mood and dialogue were similarly not alike, *The Nocturne* much darker than *Breaking Dawn*, and the mixture of archaic and modern language in *The Nocturne* contrasted with the consistently modern, fresh tone of *Breaking Dawn*.

In her papers, Scott had focused on three specific scenes which she alleged were so similar that they constituted unauthorized copying – a wedding, a subsequent consummation of the marriage on a beach, and a later childbirth. But as the court noted, these were stock ideas: "With the exception of shotgun weddings, any love story would usually include this sequence of events." In their details too, the scenes were similar only to the extent that they incorporated unprotectable ideas or scenes a faire. Such alleged similarities as braided hair, flowers at the wedding, the recitation of wedding vows, the language of intimacy on a honeymoon or the pain and distress of a difficult childbirth, were stock elements of such scenes. In fact, read in their entirety, these scenes were very dissimilar in expression.

In conducting this analysis, the court chided plaintiff for cherry-picking random similarities of ideas or insignificant details and ignoring the mass of expression which was clearly very different. More seriously, the court admonished plaintiff for her blatant misrepresentation of the two books to create the appearance that the books were much more similar than they in fact were. As defendants pointed out in their reply papers, Scott assembled groups of random quotes from multiple pages of each book, sometimes dozens or even hundreds of pages apart, and set them down as single blocks of text, without page citations or ellipses to indicate their true relationship. In one case, some of the cited text referred without any acknowledgement to a completely different event involving a completely different character. As the Court commented "Counsel is hereby reminded that, while zealous representation is highly admirable, misrepresentation is equally sanctionable."

Finding no substantial similarity as a matter of law, the court granted defendants motion to dismiss the complaint with prejudice. Defendants intend to seek their attorneys' fees as the prevailing party under the Copyright statute.

Defendants Stephenie Meyer, Little Brown & Company and Hachette Book Group were represented by Elizabeth McNamara, AJ Thomas and Christopher Robinson of Davis Wright Tremaine LLP. Plaintiff Jordan Scott was represented by J. Craig Williams of Sedgwick, Detert, Moran & Arnold LLP of Los Angeles.

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The Ethics of Journalism During Disasters and the Implications for Media Lawyers

By Peter Bartlett

This article addresses the need for media lawyers to develop an understanding of ethical issues faced by journalists when covering disasters or traumatic events. A report recently published by the Centre for Advanced Journalism at the University of Melbourne (the Report) examined these ethical issues by interviewing 28 media representatives from commercial television to local newspapers and radio in the context of the Australian bushfires. On 7 February 2009, dubbed Black Saturday, hundreds of bushfires burned across the south-eastern state of Victoria facilitated by extraordinarily dry conditions, temperatures of up to 45 degrees Celsius and 120km/h winds. Within hours, some 170 people died and a number of small towns were completely wiped out. Thousands of homes were destroyed, some just a short distance from the city of Melbourne. The fires were the worst peace-time disaster the country has ever faced.

After analysing the behaviour of media representatives covering the fires, the Report concluded that there were no agreed professional standards to which all media representatives adhered to. The main ethical issues considered were gaining access to the disaster scene, treatment of survivors and victims, and decisions about whether or not to publish certain images and stories. The fact that many journalists were working within an 'ethical vacuum' is of particular relevance to media lawyers, who need to understand the pressures journalists face in order to provide complete and adequate legal advice.

Access to the Disaster Scene

During the aftermath of the bushfires, the police and emergency services set up various roadblocks to keep people out of the affected areas, but there were no consensual ethical standards for how journalists should act when faced with such situations. Serious ethical concerns were raised by journalists attempting to bypass roadblocks, going onto and filming private property and disrespecting the integrity of a crime scene. The Report notes that in most instances, journalists acted in good faith, but this was not enough to guard against serious lapses in judgment and ethics. For instance, many journalists felt that it was unethical to pretend to be someone else (such as a homeowner in the devastation zone) in order to gain access to the area. Others found it perfectly legitimate to take part in active deception.

Once a journalist got inside the disaster region, the approach to private property was also varied. A major issue was whether the media should have access to these areas before the landowners themselves or without their permission. Some journalists stayed out of private property altogether whilst others went inside the boundaries but stayed away from the house. Another view was that it was acceptable to go anywhere on the property until they were told by the occupant to leave (the fact that there was no occupant on-site did not appear to affect this approach).

Ethical standards or codes of conduct to guide behaviour when accessing disaster sites are predictably vague. The Australian Press Council advocates the principle that information obtained by dishonest or unfair means should not be published unless there is an over-riding public interest. Obviously the importance of obtaining news fairly and honestly is endorsed, but subjecting this requirement to an over-riding public interest results in a myriad of interpretations.

The journalists interviewed for the Report presented a wide range of attitudes to accessing disaster sites, showing a disquieting lack of professional consensus. The problem with the principle above is that it is, at best, abstract and vague and provides very little guidance as to how media representatives should actually behave. As a result, the ethics of journalism are left to the 'unguided judgment' of those working under extraordinarily intense pressure.

Treatment of Survivors and Victims

Treatment of survivors and victims is another ethical dilemma media representatives face during disasters. The Code of Ethics from the Media, Entertainment and Arts Alliance

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(MEAA Code) requires journalists to respect private grief and personal privacy and to never exploit a person's vulnerability. Applying this provision to the reality of approaching victims or survivors that are obviously traumatised and in a state of shock is not an easy task, but this generally did not prevent journalists from making the approach. Most media representatives asked for consent before they started filming or interviewing people and accepted the answer when it was no.

The Report found that, unlike access to disaster areas, an informal consensus did exist on how to deal with victims and survivors. Consent for interviews and images of individuals was an absolute requirement, any refusal of consent for an interview implied refusal of consent for the use of an image of an individual, and it was necessary to recognise the vulnerability of people who were not used to dealing with the media and who were experiencing trauma. Despite their shock, most of the media felt that victims and survivors were still able to decide whether or not to consent to an interview.

There were two major stages that victims and survivors went through in the aftermath of the fires: shock accompanied by a willingness to talk, followed by grief and a rejection of the media. Media representatives should be aware of these stages and be careful not to exploit victims' and survivors' vulnerabilities during the early stage of shock and to avoid intruding on their privacy during the later stage of grief.

There was also consensus among respondents that some degree of intrusion was inevitable but should be minimised. Under the MEAA Code, journalists have the right to resist the compulsion to intrude, but often in reality it appears as though they do not feel it is their decision to make. This was particularly evident where there were groups of reporters all filming the same thing. Pack mentality and the competitive nature of reporting changed the way media representatives dealt with certain situations.

The presence of other journalists at the scene meant that they had less discretion about whether or not to pursue the story/interview/image and less freedom to choose what to cover. So certain ethical or moral considerations that might stop a media representative from pursuing a story or acting in a particular manner, may not be so strong in stopping behaviour when other media representatives are acting to the contrary.

Whether or Not to Publish

Reporters and editors often use their intuition when it comes to deciding what to publish and what not to publish. The Australian Press Council stipulates in its ethical principles that publications have a wide discretion in publishing material, but they should balance the public interest with the sensibilities of their readers, particularly when the material could reasonably be expected to cause offence.

Again we have this vague reference to the public interest which contributes to a whole range of interpretive analyses. The "public interest" as opposed to the "public curiosity" test was applied in the majority of cases during the bushfires, but not all. The media generally kept away from publishing detailed accounts of death and injury, mainly because it was not necessary in order to tell the story.

When reporting on a disaster, there is also a need for sensitivity and recognition of the effect reports have on victims and survivors. Most respondents said that if they were asked not to publish certain information by a victim or survivor, then they would concede to that request. The closeness of the event was a major consideration for the Australian media and many reporters acknowledged the overlap of those who were directly affected by the fires and the media audience.

Particular care was taken by most respondents to not inadvertently break tragic news to people, for example, by filming the remains of an identifiable property protected by police tape, the inference being that there are dead bodies inside the home. If people recognise the property then they are essentially being informed of the deaths of loved ones through the media.

A lot of material about the bushfires was not published for very good reasons: to spare the feelings of survivors, to spare the sensibilities of the public and to preserve the dignity of the dead. The most common method of deciding whether or not to publish was the "need to know" test: can the story be told without putting in this detail? Often the answer was yes and the material was omitted.

The MEAA Code requires journalists to report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Verifying the names of the dead was a particular difficulty during the bushfires and several respondents discussed the importance of withholding unconfirmed infor-

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mation. The pressure to get a story and the impact that had on reporting unverified facts was described by one journalist who wrote that up to 100 people had died in a certain area of the fires. This journalist was very concerned about publishing the figure because it was impossible to verify it at the time, but rather than waiting for verification, the paper went ahead and published. The actual death toll was later put at 38.

Of particular concern, is the lower standard of verification required for online reporting compared to other print, radio or television reports. With conventional reporting, the facts are verified before they are published, but with internet reports verification seems to occur more often *after* publication. Several respondents discussed how easy it was to get swept up with online reporting and publish something that was later found to be incorrect. The pressure to be first is much greater than the pressure to be right and verification of facts was generally threadbare when it came to internet reports.

The Role of Lawyers

Overall, the reaction to media coverage of the Australian bushfires was positive and even admired. However, there were some instances of outrageously bad conduct which was glossed over in the Report. The demands of a 24 hour news cycle and the fight for the most newsworthy material meant that some media representatives crossed that line, even though it was not sufficiently clear where that line was drawn. Some media representatives did enter people's houses, abandoned or not, they did enter crime scenes, they filmed victims and survivors who were clearly not consenting, they published names of the dead before their families had been verified and they included gruesome details as to how people died.

Actions like these have the potential to cause great distress and anger among survivors and victims of a disaster. At some point, these people may endeavour to hold journalists to account and this may not only harm an agency's reputation, it may also have serious legal ramifications.

The ethical issues media representatives face during disasters are indeed complex. Although ethical standards for media representatives exist, the Report shows how varied the interpretations of these principles are. There is little guidance for journalists on how to act in certain situations and where the lines should be drawn when it comes to the major ethical issues of intrusion, deception and verification of facts.

While most of the media representatives during the Australian bushfires abided by general standards of decency, the urgency of the matter, the need to report immediately and the overwhelming lack of preparation to cover such a disaster meant that many ethical issues were not given adequate consideration. More detailed guidelines need to be established so when journalists do find themselves in such situations, they will have a better understanding of what is expected of them, despite the possibility of being pressured to act differently from superiors and colleagues.

As long as these guidelines are lacking, media lawyers need to be aware of this gap in journalists' ethics in order to provide appropriate advice to their media clients. Media lawyers not only deal with existing legal issues, they also have a responsibility to ensure their clients avoid future legal problems. Specifically, lawyers should advise media clients about the need to improve the standard of verification for online reporting so it is just as high as other forms of media.

More generally, it is also important for lawyers to understand the intense pressures journalists face during a disaster. These include demands from editors, competition from media rivals, requirements imposed by authorities and the reactions of victims and survivors.

Journalists must be adequately prepared to make decisions when faced with such pressures. Lawyers should advise their media clients about the need for disaster specific ethical awareness and training. Training and guidance will assist media representatives to make their ethical decisions about how to pursue a story, what to publish and how to manage pressure from different sources.

By understanding the issues outlined above, lawyers will be better placed to advise media clients about the ethical dilemmas which arise during a disaster, and to encourage them to take action *before* the disaster occurs. By doing this, lawyers are minimising later risks that their clients may face and will also help to improve the image and reputation of the agency itself.

Note: Peter lost a first cousin, his cousin's wife and 7 year old daughter in the fires. A 12 year old daughter survived, with very severe burns.

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