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LIBELLETTER

February 1996

Ohio Adopts Produce Disparagement Statute

Ohio has enacted a statute making disparagement of a perishable agricultural or acquacultural product actionable in tort. The legislation, SB 173, was sponsored by Senators Gaeth, Cupp, Gillmor and Drake. The statute affords a cause of action to "any person who grows, raises, produces, markets or sells a perishable agricultural product or any association representing such persons" against a person who falsely communicates that the plaintiff's product is adulterated or otherwise unsafe for human consumption. The definition of "false information" is remarkably broad: "[A]ny information that is totally or substantially inaccurate, that is not based on verifiable fact or on scientific or other reliable data or evidence, and that directly or indirectly indicates that a perishable agricultural product s adulterated or otherwise unsafe for human consumption."

(Continued on page 9)

Telecommunications Act Intended to Overrule *Stratton Oakmont*

— Page 3 —

New LDRC Study Reports Significant Increase In Size of Damage Awards in Media Trials in 1994-95

The results of the 1994-95 Damages Study have just been released in the LDRC BULLETIN (1996:1). The principal findings of the new survey may be summarized as follows: a decrease in the number of media libel and privacy trials but also a decrease in the percentage of trials won by the media; a significant increase in the size of damage awards in comparison with every prior study, with the exception of the record results reported in 1990-91, but fewer cases in which punitive damages were awarded; and a decrease in the media's success in modifying unfavorable judgments on appeal.

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LDRC On-Line: A Follow-Up

***e-mail: sbaron00 [zero, zero] @ counsel.com**
*** Counsel Connect**

Many of you have already visited LDRC's private bulletin board on Lexis Counsel Connect or used our e-mail address to communicate with LDRC. We urge all members who are already Counsel Connect subscribers to join us on-line.

As noted in the January *LDRC LibelLetter* (at p. 2), you access the board by clicking on the "private" button and then selecting "LDRC Discussion Group." (By the time you read this, all LDRC members who belong to LCC should have been given access to the bulletin board. If you do not see the LDRC Discussion

(Continued on page 2)

A "Breathless & Kaleidoscopic" Important New Win in the D.C. Circuit

by Bruce W. Sanford

The D.C. Circuit -- the so-called "second most important court in the land" – issued its newest libel pronouncement on January 30 with an acidic flourish that could spark envy in the media-slashing pen of Jim Fallows, author of *Breaking the News: How the News Media is Destroying American Democracy.*

True, the Court of Appeals handed *Esquire* magazine and its owner The Hearst Corporation a unanimous victory in the long-running, hotly-contested litigation with Robert "Bud" McFarlane, the Iran-Contra figure and national security advisor to President Reagan. But the affirmance of District Court Judge Thomas Flannery's dismissal of the libel case came so grudgingly, that the tone and undercurrent in the decision seem almost as remarkable as the strong and useful new legal precedents the opinion offers.

(Continued on page 6)

NY Court Dismisses Tortious Interference and Defamation Claims

by Alisa Shudofsky

In a recent opinion, Justice Stuart Cohen of the New York Supreme Court granted the media defendants motion to dismiss an action which sought $80 million in damages for alleged defamation and tortious interference with a confidentiality contract. *Huggins and Thomas v. National Broadcasting Company, Inc. and Sue Simmons*, Index No. 119272/95 (N.Y.S. Ct. N.Y. Co.,

(Continued on page 10)

UPDATES

N.Y Appellate Court Reverses Trial Court On Cancer as Libel Per Se Question

The New York Appellate Division, First Department has granted summary judgment in *Sam v. Enquirer/Star Group, Inc.*, reversing the trial court's determination that reporting a diagnosis of cancer is libelous per se. *Sam v. Enquirer/Star Group, Inc.*, (N.Y. App. Div., 1st Dep't Jan. 4, 1996) In the earlier ruling the New York Supreme Court denied the defendant's motion for summary judgment on the grounds that a statement alleging that the plaintiff, Chen Sam, a noted public relations professional and sole owner of her own firm, had cancer could adversely affect her trade and business. *Sam v. Enquirer/Star Group, Inc.*, 23 Media L. Rep. 1574 (N.Y. Sup. Ct. Feb. 9, 1995), *see also LDRC LibelLetter*, March 1995, at p. 2.

Despite plaintiffs' arguments that cancer is a loathsome disease which is viewed by society as a sexually transmitted disease, the court simply held that "cancer is not a loathsome disease." *Slip op.* at 1, *citing Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265, 1280-82 (3rd Cir. 1979). Further, the court stated, "'there is no authority for classifying [cancer] among the diseases of which false imputations are defamatory.'" *Slip op.* at 1, *citing Cruz v. Latin News Impacto Newspaper*, __ A.D.2d __, 627 N.Y.S.2d 388, 390 (holding statement that plaintiff had TB is not defamatory). The court went on to point out, under the plaintiffs' analysis, "pneumonia or colds would fall into the same category because of their association with AIDS." *Slip op.* at 1.

In ruling that the complained of statements are simply not defamatory the court also dismissed the claims brought by Chen's corporation.

Mark Jackson of Squadron, Ellenoff, Plesent & Sheinfeld, LLP, argued the case at the Appellate Division for Enquirer/Star Group,

Religious Technoology Center V. Lerma: Summary Judgment Entered Against Lerma on Copyright Claim

In a one-page order, Judge Brinkema, of the Eastern District of Virginia, ordered summary judgment in favor of the Church of Scientology on its copyright claim in *Religious Technology Center v. Lerma*, Civ. Action No. 95-1107-A (E.D. Va.). Judge Brinkema had previously entered summary judgment in Lerma's favor on the trade secrets claim, granting dismissal on the grounds that the documents alleged to be trade secrets were effectively in the public domain, having been part of an unsealed court file in another case. *See LDRC LibelLetter*(December 1995, at 14).

The order provides neither a rationale for the decision nor an indication of whether the summary judgment applies to all of the various infringement claims or whether the fair use defense might apply to some of them. A memorandum opinion setting forth her rationale is expected shortly, and will reported in the next *LDRC LibelLetter*.

LDRC ON-LINE

(Continued from page 1)

Group when you click on private, please contact Mike Cantwell at LDRC or Joseph Whitten at LCC.)

In addition to providing on-line access to the *LDRC LibelLetter* and other material of interest that will be posted on a regular basis, and serving as a forum for the discussion of new and important issues, the bulletin board allows LDRC to reach members quickly and efficiently with messages of importance.

For example, currently posted on the board is a request to all members for help in identifying new expert witnesses in the broadcast area on the issue of standard of care. Also posted is a call for volunteers wishing to join the effort in opposition to the proposed change to Federal Rule of Civil Procedure 26(c), which would eliminate the requirement for a judicial determination of "good cause" before allowing the entry of protective orders for discovery.

You will be receiving a mailing from Counsel Connect in the near term about the LDRC bulletin board. Over time, LDRC will be looking for other on-line means to facilitate communications with members.

PLEASE NOTE
LDRC ANNUAL DINNER AND BREAKFAST

This year the days of the Annual Dinner and DCS Breakfast are moved back to Wednesday night and Thursday morning respectively.

MARK YOUR CALENDARS!!

LDRC ANNUAL DINNER:
Wedneday, November 6, 1996, 8:00 p.m., The Sky Club

DCS BREAKFAST:
Thursday, November 7, 1996, 7:00 a.m., Crowne Plaza

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New Federal Telecommunications Act May Eliminate *Stratton Oakmont* Holding

by Bruce E. H. Johnson

The phenomenal growth of the Internet, including the World Wide Web, and of commercial on-line services such as America Online, CompuServe, and Prodigy, has prompted commentators to raise questions about who, if anyone, would be deemed to be a "publisher" of the information that is transmitted between computer users and, therefore, could be held liable under state defamation laws for cyberspace libel claims. At least one recent trial court case had suggested that efforts to monitor content or exercise editorial control would result in the on-line service becoming a "publisher" -- or, more accurately, a "republisher" -- of the information, and therefore bearing substantial risk of defamation liability for statements transmitted on their systems by others.

In May 1995, in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. Nassau Co. 1995), Justice Stuart L. Ain of the New York Supreme Court for Nassau County ruled that Prodigy's past efforts to exercise some editorial control over the content of its computerized bulletin boards had transformed the company -- as a matter of law -- into a "publisher" of the bulletin board messages under state defamation laws. (See *LDRC LibelLetter*, Dec. 1995 at p.1) The court rejected Prodigy's argument that it was merely a "distributor" of the allegedly defamatory bulletin board information and could not be held liable as a publisher or, more precisely, republisher.

(At common law, according to the Restatement (Second) of Torts § 581(1), a "distributor" -- such as bookstores, libraries, and telegraph operators -- who "only delivers or transmits" the publications of others has no duty to investigate "defamatory matter" in any such publication unless he or she "knows or has reason to know of its defamatory character." Absent a recognized privilege, a publisher generally must investigate what it transmits -- whether measured by the constitutional malice, gross irresponsibility, negligence, or other standards -- and a distributor does not.)

On December 11, 1995, after Prodigy and Stratton Oakmont had settled, Justice Ain refused the parties' request that he reconsider his decision, "the only existing New York precedent in this area," because he believed that there was "a real need for some precedent" on this legal issue, whether wrong or right.

It appears, however, that Justice Ain's *Stratton Oakmont* precedent may be short-lived after all. Apparently, the 1996 Telecommunications Act, which was recently passed by Congress and signed by President Clinton, has in effect granted Prodigy's reconsideration motion and given the commercial on-line services and Internet access providers a right to exercise some degree of editorial control over the content of information that they transmit from others without thereby becoming liable as a "publisher" of that information.

Section 509 of the Act, the "Online Family Empowerment" section of the statute that will be codified as 47 U.S.C. § 230, is specifically designed "to remove disincentives" to any efforts by commercial on-line and other interactive computer services to restrict or limit "children's access to objectionable or inappropriate online material."

As part of that goal, the Congress has also recognized that the risk of *Stratton Oakmont* liability prevents effective content policing by the major on-line systems. Indeed, if the new statute is construed to mean what it says, Congress has now created a broad exemption from defamation (and other state law) liability resulting from efforts by Internet access providers and on-line services to exercise editorial control over the content carried on their systems. The Act apparently allows such activities without, as in *Stratton Oakmont*, making the system operators

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New Federal Telecommunications Act May Eliminate *Stratton Oakmont* Holding

(Continued from page 3)

liable under state defamation laws as "publishers" for any defamatory information that is created by others.

Thus, Section 509(c)(2) of the Act grants a broad exemption for the type of activity that prompted Justice Ain to hold that Prodigy was a publisher of the offending statements posted by an anonymous user in one of its bulletin board services.

That section prohibits imposing any liability on a "provider or user" of an "interactive computer service" (which is defined in Section 509(e)(2) as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet") because it took "action voluntarily . . . in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected," or "any action . . . to enable or make available to information content providers or others the technical means to restrict access to [such] material. . . ."

But the statutory exemption, apparently, is much broader and may in fact eliminate any republication liability under state defamation laws for the providers and users of information that is generated by others but is available to users through the Internet or another "interactive computer service." Thus, Section 509(c)(1) of the Act states, seemingly without any qualification, that:

> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(An "information content provider" is defined in Section 509(e)(3) as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.")

Furthermore, the Act specifically eliminates any claims that providers and users of interactive computer services should be liable under state defamation law as publishers for carrying or disseminating information created or developed by others. This is because Section 509(d)(3) of the Act states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Henceforth, Section 509 will permit the defendant to raise a unique federal defense to state law liability claims that are brought against a computer on-line service. (Whether the statute creates a right of removal, however, is more doubtful.)

If the statute means what it says, however, Congress has overruled *Stratton Oakmont* completely. Indeed, the Conference Committee Report states this conclusion explicitly: "One of the specific purposes of this section is to overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material."

The Conference Report suggests that federal law, aided by the Supremacy Clause, has now provided to commercial on-line services and Internet access systems what Justice Ain had refused to give them -- limited rights of editorial control and monitoring, without the publisher's duties and liabilities that have historically accompanied such rights. Whether Congress has endowed cyberspace information carriers with broad powers of editorial control and censorship, however, while simultaneously allowing them to invoke the limited liabilities of mere "distributors" will be an issue that the courts will eventually decide.

The Act may result in significant litigation defining the scope of these statutory protections, especially in relation to the development and use of Web sites and other interactive information products that are created and developed by several parties. Presumably, the courts will develop case law explaining what actions mean that a defendant was "responsible, in whole or in part, for the creation or development" of particular defamatory information.

But it may also be that as plaintiffs search for "deep pocket" defendants in cyberspace, they will put unanticipated pressure on the apparent exemption given to the "provider or user" in this Act and lead to further development of the law of distributorship liability.

Bruce E. H. Johnson is with the firm of Davis Wright Tremaine in Seattle, Washington.

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Decision May Bolster Commercial Defamation Claim

By Bruce S. Rosen and Peter Skolnik

The New Jersey Supreme Court has refused to reconsider a state appellate court decision that may make it easier for businesses and business people to succeed in suits for commercial defamation in New Jersey.

A three-judge appellate panel ruled in August 1995 that commercial entities defending against "garden-variety commercial defamation claims" cannot invoke the First Amendment actual malice protections that make it difficult to win such suits, reasoning that such protections were not meant for allegedly defamatory material not involving the news media or the "public interest." (which in a commerical context New Jersey courts have defined to include health concerns, businesses under heavy government regulation, shoddy business practices and consumer fraud). The court did require the plaintiff to prove negligence as the appropriate accommodation between the right to reputation and free speech principles.

The opinion in *Van Sciver, et al. v. Ocean National Bank, et al.* (A-5039-93T August 24, 1995) has not been approved by the Courts for "publication", at which time it becomes binding on all trial courts previous decisions of the United States Supreme Court.

A key point of divergence from previous New Jersey cases is the appellate court's insistence that cases involving the news media should be treated differently than those between commercial entities. The result is that rather than having to satisfy an "actual malice standard" -- which forces plaintiffs to prove knowing falsehood or a reckless disregard for the truth -- commercial defamation plaintiffs will only have to prove that the statement was false and that it was made negligently if the matter published is not held to be one of public concern.

The United States Supreme Court, in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985) ruled in a plurality decision that where there is no "public issue," "speech on matters of purely private concern is of less First Amendment concern," and thus the role of the constitution is far more limited. However, New Jersey's Supreme Court has usually invoked the highest protection for defamation defendants and has previously blurred any distinction between media and non-media defendants.

In *Van Sciver*, an aggressive high-end real estate brokerage and its two principals claimed that their former banker, the banks' agents and a sister corporation spread false rumors in the Ocean County business community that their company was "bankrupt." The plaintiffs alleged that the defendants were motivated to destroy their business reputation because of community resentment of the broker's non-traditional marketing and sales campaigns. Plaintiffs further contended that the false rumors cost them customers, listings and commissions.

The two Van Sciver brothers presented the Court with purported proof of their company's solvency at the time. They also alleged that the bank tortiously interfered with their prospective business by undervaluing their properties in an attempt to thwart their reorganizations, as well as breach of fiduciary duty. The defendants denied all of the allegations.

The trial court ruled that the Van Scivers had thrust themselves into the public eye through their advertising, becoming a "public entity" and thus they would have to prove their allegations subject to the actual malice test. The Appellate Division panel reversed the lower court, stating that the defamation claim did not arise in the "usual public interest context, where a person or a political figure sues media defendants, or their agents, over the contents of an article or broadcast on a subject of public interest." The panel cited previous decisions of the New Jersey Supreme Court, including last March's decision in *Turf Lawnmower v. Bergen Record Corp.*, 139N.J. 392 (1995), wherein the court said that not every business allegedly defamed, even if it advertises and sells to the public, should "be required to prove "actual malice". In *Turf*, which involved a "mom and pop" business, the court held that actual malice would be required if the publication or broadcast in question contained evidence of consumer fraud as defined by the state statute.

According to the Van Sciver court, "[i]f plaintiffs' claim is at all true, the defendants' agents were guilty of unjustified careless or malicious gossip about their customer, hardly a constitutional matter. The First Amendment was not designed for such trivial tasks. Robust media and public interest debate standards do not apply to such claims of slander against banking or other commercial institutions. We conclude that no conditional or limited constitutional privilege is here implicated."

The Appellate Division said that even though real estate agents are regulated by the state, the allegedly defamatory subject matter had nothing to do with that regulation. "No consumer fraud or other illegal activity by plaintiffs was claimed here. No health or safety threat is implicated. The asserted 'bankrupt' status of Van Sciver Company was not discovered or developed by the media's investigative reporting geared to protect the public."

The court concluded that, "[i]n such a private-interest situation, the Bank can not be allowed to crouch behind the constitutional shield erected to guarantee robust public and media debate about public affairs and matters of public interest. . . .".

Bruce S. Rosen and Peter Skolnik are with DCS member firm Lowenstein Sandler Kohl Fisher & Boylan in Roseland, New Jersey.

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A "Breathless & Kaleidoscopic" Important New Win in the D.C. Circuit

(Continued from page 1)

The case arose out of an *Esquire* article published in October, 1991 that assessed the mounting allegations of an "October Surprise," a scheme by members of the 1980 Reagan-Bush campaign to delay release of Iran's American hostages until after the presidential election. Eventually, two Congressional investigations rejected the conspiracy theories. But, in 1991, freelance writer Craig Unger sifted through the then-extant evidence to conclude that there might just have been a clandestine plot.

One does not have to read very far into the Court of Appeals decision by Judge Steven Williams (writing for himself and Judges Ginsburg and Randolph) to sense that Judge Williams may not be a regular reader of *Esquire*. He describes Unger's article as "lurid." The offending passage is "a breathless and kaleidoscopic account rivaling an Oliver Stone movie."

Actually, the allegedly defamatory passage was only one paragraph in a ten page *Esquire* article. The passage reported the accusation of Ari Ben-Menashe, a former Israeli intelligence operative and controversial source for the "October Surprise" allegations:

> "In February 1980, Ben-Menashe says, Robert "Bud" McFarlane, then an aide to Senator John Tower, and Earl Brian, a businessman who had been secretary of health in Reagan's California cabinet, met highly placed Iranian officials in Teheran. In a sworn affidavit submitted by Elliott [sic] Richardson on behalf of one of his clients, a computer-software company called Inslaw, Ben-Menashe states that both McFarlane and Brian had a "special relationship" with Israeli intelligence, McFarlane having been recruited by Rafi Eitan, a legendary Israeli agent who was the model for a leading character in John LeCarre's *Little Drummer Girl*. **"McFarlane was the famous Mr. X in the Pollard case,"** adds Ben-Menashe, referring to the trial of Jonathan Pollard, an American convicted of spying for Israel. In Pollard's case there were persistent allegations **about another, unnamed American who secretly worked for the Israelis.**
>
> Both McFarlane and Brian have declined comment."

(Emphasis added by the Court, except for *Little Drummer Girl*).

Unger's article deals explicitly with Ben-Menashe's dubious credibility as a source. He quotes intelligence officials and journalists as saying he failed a lie detector test for ABC News and was a "fake," a "liar," a "con man," and a "nasty fuck." Yet, because he was clearly knowledgeable, the article suggested "it's almost impossible to dismiss him."

It is this careful and candid treatment in the *Esquire* article of the source's reliability that becomes critical for the Court of Appeals. In finding a lack of evidence of actual malice, Judge Williams writes, "[F]ull (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one."

The Court's extensive analysis of the supposed evidence of actual malice becomes the D.C. Circuit's fullest discussion of this issue since its *en banc* decision in *Tavoulareas v. Piro*, 817 F2d 762 (1987), with the court detailing a series of alleged acts and omissions by *Esquire* editors, and errors in the text, that neither individually nor collectively were deemed sufficient to constitute actual malice.

There is extensive analysis of the doctrine of vicarious liability in libel cases and the question of whether evidence of a freelance author's state of mind can be imputed to a publisher. This task is undertaken because the Court feels (without ever really explaining) that "McFarlane's quest for vindication would more easily be satisfied (as we shall see) in a suit against Unger than against *Esquire* because of Unger's far greater awareness of the reasons to doubt the truth of the article's claims." The defense consistently maintained in the case that neither author nor the publisher's editors had any subjective awareness of probable falsity.

In any event, the Court affirms the trial court's dismissal of Unger for lack of personal jurisdiction and then concludes that any evidence of the author's actual malice cannot be attributed to *Esquire*:

> Because we doubt that actual malice can be imputed except under *respondeat superior*, and because in any case McFarlane presents no evidence showing Esquire's supervision of the *process* by which Unger turned raw data into finished article (as distinct from control over his final product), cf. Restatement of Agency 2d § 14 N cmt. b, we conclude that McFarlane may show Esquire's malice only through evidence of the information available to, and conduct of, its employees.

The opinion concludes with an edge. The Court seems to bemoan the fact that "McFarlane has been accused of espionage . . . and has as yet had no opportunity to secure vindication." It then refers to the *Sharon v. Time* libel trial in 1985 and notes that a special jury verdict was used in that case that permitted a finding of falsity separate from a finding that libel had been published with actual malice. "We must affirm," the Court says, and seems to want to add, but we don't pretend to like it.

Bruce W. Sanford, a partner in the Washington office of Baker & Hostetler, represented Craig Unger and Esquire magazine in McFarlane v. Esquire.

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No Cameras Allowed in Mass. Abortion Murder Case Despite "Strong Presumption"

The decision of the trial judge to disallow cameras at the murder trial of John Salvi has been affirmed by a single justice of the Supreme Judicial Court of Massachusetts. *The Hearst Corporation, et al. v. Justices of the Superior Court*, No. SJ 96-0047 (Sup. Jud. Ct., Suffolk Co. February 1, 1996). Salvi shot two workers at a Massachusetts clinic where abortions were performed.

Associate Justice Wilkins, in affirming the decision, started from the premise that cameras could be excluded only upon a finding of substantial likelihood of harm or harmful consequences. To close the entire trial such a finding would have to be made with respect to the entire proceeding. He states that there is a "strong presumption" that no media are to be excluded from the courtroom and that if media are to be excluded the court must make findings of fact that support the exception from the rule.

The justice rejected the possibility of juror taint as a reason for excluding the cameras. He concluded that juror instructions should be adequate. He also commented that watching the testimony that the jurors had seen during the day was unlikely to interfere with the jurors' thinking on the case and that commentary and analysis, which might taint them in some fashion, could not be controlled by the court whether cameras were in the courtroom or not.

He did allow that "special circumstances" in this case existed that supported a camera ban. One was the proven propensity of the defendant to act in a disruptive manner, behavior which the presence of cameras might encourage.

In addition, the judge expressed concern about the safety of material witnesses in the highly charged atmosphere of this trial and the abortion issues that it raised. The affirming justice agreed that this was a valid concern supported by the evidence in this case.

(Continued on page 8)

Post OJ: Two Legislative Initiatives To Limit Cameras

Bills have been introduced in two state legislatures since the first of the year that would in one instance ban and in the other severely limit the access by television cameras to courtroom proceedings.

In California, after the Governor announced last year that he would like to see television cameras banned from courtrooms, he turned the issue over to the state's Judicial Conference, the advisory and governing body of judges in the state. The Conference, in turn, appointed a task force to study the issue and to report back. Hearings were held last week and a report is due out in May.

In the meantime, however, the California State Legislature may not

(Continued on page 8)

CAMERAS IN COURTROOMS

Tennessee Adopts Camera In Court Experiment

Noting that there is strong opposition to cameras in the courtroom, the Supreme Court of Tennessee adopted a new rule allowing for a one year experiment with cameras commencing January 1,1996. *Order: In Re: Media Coverage - Supreme Court Rule 30* (Sup. Ct. Tenn. December 14, 1995)

"This court is convinced that it is in the best interest of the public to be fully and accurately informed of the operation of the judicial system, and that this interest can be compatible with the fair administration of justice."

(Continued on page 8)

And in Another Mass. Case: Cameras Limited Because of Witness Sequestration

A Massachusetts Superior Court justice recently upheld a trial judge's order banning cameras during testimony in a murder trial, for fear that broadcast of witness' testimony might ruin the effectiveness of sequestration of witnesses, thus having "a substantial likelihood of a harmful consequence." *Commonwealth v. Clark*, No. 96-0076 (Sup. Ct. Mass. Feb. 12, 1996.) The defendant, David Clark, is accused of killing a state trooper during a routine traffic stop.

The Hearst Corporation and lawyers for local television stations have appealed the issue to the Supreme Judicial Court for Suffolk County and will be heard on February 26.

Television cameras and recording devices will be permitted in the courtroom during opening and closing statements, charge, verdict, and sentencing. During testimony, a still pool camera will be allowed in the courtroom. There are no restrictions on print, TV or radio reporters.

In doing so, the judge stated that he was balancing the Constitutional due process rights of the defendant with the "limited license" given the media to broadcast trials. *Slip op.* at p. 4.

Massachusetts rules allow a judge to limit media coverage "only to the extent necessary to eliminate a substantial likelihood of a harmful consequence." The judge here adopts a tone decidedly less forthcoming or positive regarding coverage than Justice Wilkins in the *Salvi* case. *See above.*

The justice noted that credibility of witnesses was a key factor in Clark's defense and that witnesses had been sequestered to prevent them from tailoring their testimony to the testimony of prior witnesses. Allowing cameras in the courtroom would allow witnesses to view the testimony of others and nullify the sequestration order. *Slip op.* at p. 3.

"Electronic media coverage has a substantial likelihood of having a negative impact on the sequestration order and the quality of the testimony before the jury," Justice Robert

(Continued on page 8)

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No Cameras Allowed in Mass. Abortion Murder Case

(Continued from page 7)

While the rule under which camera coverage is permitted in Massachusetts courts does not specifically provide that a judge is to adopt the least restrictive means of achieving the protection of the integrity of the trial and witnesses, the justice concluded that the rule "implicitly" allows limitations "only to the extent necessary to eliminate the substantial likelihood of harm or other serious consequences." *Slip op.* at 4.

Cameras Limited Because of Witness Sequestration

(Continued from page 7)

Steadman wrote in his opinion. *Slip op.* at p. 3-4.

Justice Steadman acknowledged some of the points made in a recent, related Massachusetts decision excluding cameras in the murder trial of John Salvi. He agreed that fears of influence on jurors could be cured by instructions not to watch news coverage of the trial.

Justice Steadman also acknowledged the value of television coverage in educating the public about the judicial system. Were this a "real issue" in the request for cameras, Steadman said he would modify his order and allow TV cameras to film testimony, provided it would not be aired until after the conclusion of the trial. This would "serve the dual function of enhancing the public's awareness of the skill and dignity with which justice is administered in the courts of the Commonwealth while at the same time preserving the integrity of the judicial proceedings in the instant case." *Slip op.* at 4-5.

The justice also wrote that in a balancing test between the defendant's liberty rights and the media's economic rights, a test seemingly suggested by the criminal defendant, the defendant's rights are superior.

Post OJ: Two Legislative Initiatives To Limit Cameras

(Continued from page 7)

wait for the Judicial Conference to act. A bill was introduced in early January in the California Assembly that would ban cameras outright.

And in Georgia, the most powerful legislator in the State, House Speaker Tom Murphy, has introduced a bill that would allow any party in the court proceeding to veto camera coverage. Another legislator has introduced a bill that would allow coverage, but purports to allow the televising of the footage for no more than five minutes during any given half-hour – a "sound-bite" bill.

Tennessee Adopts Camera In Court Experiment

(Continued from page 7)

Order at p. 2.

While Tennessee has had a rule for a number of years allowing camera coverage, the rule allowed any party to bar coverage.

The new rule suggests a presumption of access and does not require the parties' consent. Like many other such state provisions, it gives discretion to the trial judge, but only in "certain circumstances." (Supreme Court Rule 30 - Media Guidelines,"Commentary" at p. 8.) The rule prohibits coverage of minors except when being tried as an adult for criminal offenses, jury selection and jurors, and closed proceedings. There are limitations on juvenile proceedings generally, bench conferences, and other situations in a manner not dissimilar from other state court camera provisions.

LDRC 1996-97 50-STATE SURVEYS: Privacy and Libel

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Preparation for both the **Privacy and Related Law** and **Libel** volumes of the LDRC 50-State Surveys for 1996-97 are underway.

The publication date for **Media Privacy and Related Law** is June 1996.

The publication date for the **Media Libel Law** volume is October 1996.

Please look for order forms for both books which will be distributed this week. The price for the volumes is the same as last year.

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Tort Reform Gears Up Again

Ohio House Passes Reform Bill

In Ohio, the House passed HB 350 by a 54-44 margin on February 7. Of particular importance to our membership are the limitations placed upon the recovery of damage awards.

The bill creates a two-tier limitation on noneconomic damages in tort actions, allowing a plaintiff whose noneconomic damages are attributable to more severe injuries to be awarded a larger amount for noneconomic damages. Except for cases involving permanent and severe pain and suffering resulting from permanent physical injury or the permanent loss of physical functions, the bill limits noneconomic damages to the greater of $250,000 or four times the amount of economic damages to a maximum of $500,000. In the personal injury cases described above the limit for noneconomic damages is set at $1,000,000.

In addition the bill also makes changes in the way punitive damages are to be awarded. The bill (1) provides that the court shall not submit the issue of punitive damages to a jury until the court determines by clear and convincing evidence, after a hearing, that there is a reasonable basis to believe that there has been "malice, or aggravated or egregious fraud on the part of the defendant"; (2) provides for a bifurcated trial with the issue of punitive damages presented only after a jury has determined that the plaintiff is entitled to compensatory damages; (3) limits the amount of punitive damages recoverable to no more than three times the amount of compensatory damages (economic and noneconomic) awarded to the plaintiff or $250,000, whichever is greater; (4) allows the court to increase the amount of punitive damages awarded up to six times the amount of compensatory damages; (5) limits the imposition of multiple punitive damage awards based on the same act or course of conduct; and (6) eliminates "oppression" as a standard for the award of punitive damages.

Employee references:

Increasing concern for the potential liability of employers resulting from libel actions brought by former or current employees over allegedly defamatory references has led three states to begin considering reforms to limit such actions.

In Iowa, HF 61 passed out of the House Labor Committee on January 31 by a 13-8 margin. The measure would limit the liability for an employer who provides a reference for a current or former employee by presuming that an employer was acting in good faith unless it is proven that the information disclosed was knowingly false, deliberately misleading, disclosed for a malicious purpose, or in violation of a civil right of the employee. The measure would also require that an employer would have to send a copy of the reference to the employee.

Wisconsin's Assembly Labor and Employment Committee has also passed AB 860 to limit employer liability for providing employee references by a 12-2 margin. Wisconsin's measure would create a presumption that the employer acted in good faith which would apply unless the plaintiff rebutted by a showing of clear and convincing evidence.

Finally, in Maryland the House Judiciary Committee has held hearings on HB 597, a similar measure which would protect employers from liability when giving employee references.

Ohio Disparagement Statute

(Continued from page 1)

The plaintiff has the burden of proving, by a preponderance of the evidence, that it sustained harm as a proximate result of the disparagement but "harm" too is defined broadly to include, but not be limited to "direct, incidental, or consequential economic and noneconomic loss.

The plaintiff also has the burden by a preponderance to show that defendant published "intentionally" or with actual malice — suggesting a significant ambiguity in the fault standard.

The statute awards compensatory damages, reasonable attorney's fees, and the costs of bringing the action to the plaintiff regardless of whether "malice" is shown.

The statute does not offer a definition of malice in this context.

If malice is established, punitive or exemplary damages three times the amount of compensatory damages shall also be awarded by the trier of fact.

The statute of limitations is two years.

The law applies prospectively only, and the plaintiff must bring the action no later than two years after the last disparagement of the perishable agricultural product occurs.

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NY Court Dismisses Tortious Interference and Defamation Claims

(Continued from page 1)
Feb. 7, 1996.)

The case arose out of an August 1994 interview with Melba Moore on "Live at Five," a weekday news and information show broadcast by NBC's New York station, WNBC-TV. Moore is an actress and singer who achieved fame in the 1960s and 1970s for starring roles in the Broadway productions of "Hair" and "Purlie" and a series of successful record albums. She had fallen in recent years on hard times, ultimately ending up on welfare. For nearly two years prior to the Broadcast, Moore -- in television talk show appearances and statements to the print media -- had been publicly blaming her ex-husband and former manager, Charles Huggins, and his business associate, Anne Thomas, for her financial ruin and professional downfall.

When she appeared on "Live at Five", Moore stated, among other things, that Huggins was a "professional con artist"; that he and Thomas were engaged in "conspiracy"; that she had "been actively blackballed" and that this was possible because Huggins' "contacts were with all the people that would hire you -- all record companies, all the promoters, all the agents."

Huggins and Thomas sued NBC and the "Live at Five" interviewer (collectively, "NBC") in August 1995, just before the statute of limitations ran out. Plaintiffs claimed, first, that they had been defamed by the above-quoted statements (among others). Second, Huggins claimed that by broadcasting the interview with Moore, NBC had tortiously interfered with, and induced breach of, a confidentiality agreement between Moore and Huggins which barred public discussion of their marriage.

NBC moved to dismiss the complaint. On the defamation claim, NBC argued, relying on a long line of opinion cases, that a reasonable viewer would have understood Moore's colorful statements to be expressions of opinion -- the statements of someone who had suffered through a painful divorce, bankruptcy and professional backslide and who bitterly blamed her misfortunes on her ex-husband. As such, those statements were protected speech under the New York and United States Constitutions. Plaintiffs' lawyer countered that these statements were factual in nature, and thus could not be protected opinion.

On the tortious interference claims, NBC argued that Moore, who had -- in Huggins' own words in the divorce proceedings -- voluntarily embarked on a wide-ranging publicity "campaign" to vilify him, was in no way induced by NBC to breach her confidentiality agreement with Huggins. Moreover, those claims could not survive in light of the overriding First Amendment interests protecting the media's role in publishing newsworthy stories. Huggins argued that NBC "knowingly facilitated" Moore's breach of her contract, and that its "titillating reportage" of "the marital difficulties of extremely wealthy individuals" was "not worthy of the full panoply of protection afforded by the First Amendment."

The Court, in a decision entered on February 7, granted NBC's motion to dismiss in full. It held, first, that the context of the broadcast -- its "loose structure and conversational tone" and Simmons' introduction about Moore's "roller-coaster life" -- signaled to viewers that they would be hearing Moore's subjective beliefs on her personal saga. "Viewed in this framework," the Court held, the terms "con artist", "blackballed", and "conspiracy" could not have reasonably been understood as conveying facts about the plaintiffs. Therefore, those statements were "an expression of personal opinion which is not actionable on a claim of defamation." Several other statements to which plaintiffs had objected were held either not defamatory or not "of and concerning" plaintiffs.

Second, the Court held that the tortious interference claims were insufficient because "no facts are alleged to show that defendants intentionally or unjustifiably interfered with the confidentiality agreement between Moore and Huggins," as required to state a claim for tortious interference with existing contractual relations. Citing *Dukas v. D.H. Sawyer & Associates, Ltd.*, 137 Misc. 2d 218,222 (Sup. Ct. NY Co. 1987), the Court further ruled that "Any interference that occurred was merely incidental to defendants' exercise of their constitutional right to broadcast newsworthy information about the life of Melba Moore, a public figure," and that "Defendants' purpose was a legitimate one and did not involve an intent to unjustifiably interfere with the confidentiality agreement."

In accordance with these rulings, the Court dismissed the complaint in its entirety.

Alisa Shudofsky is Litigation Counsel with National Broadcasting Company, Inc. and she represented the defendant in this matter.

LDRC wishes to acknowledge spring interns John Maltbie, Christine O'Donnell, Jennifer Hampton and William Schreiner for their contributions to this month's *LDRC LibelLetter*

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New LDRC Study Reports Significant Increase In Size of Damage Awards in Media Trials in 1994-95

(Continued from page 1)

In more detail, the key findings of the LDRC study were the following:

- For the most recent two-year period (1994-95) there were 21 new libel or related media trials, all but 2 of which were tried before juries. This is the lowest number of trials reported for a two-year study period in the sixteen years that LDRC has been tracking these data. By contrast, 34 trials were reported in the last LDRC study, which covered 1992-93, and 42 trials were reported in 1990-91.
- Excluding one hung jury, 6 of the remaining 20 trials during the period were won by the media defendant, for an overall success rate of 30%, the lowest reported by LDRC to date. By contrast, in the 1992-93 study media defendants prevailed in 46.9% of trials, in 1990-91 media defendants prevailed in 38.1% of trials, and in the decade of the 1980s media defendants prevailed in 34.6% of trials. The 27.8% success rate before juries in 1994-95 was approximately the same as for the 1980s (27.4%), but lower than in either the 1993-94 (44.8%) or 1990-91 (33.3%) periods.
- The average total damage award in the 13 jury verdicts entered for the plaintiff was nearly $1.5 million in 1994-95 ($1,463,250), an increase of more than 50% above the 1992-93 average of $929,422. This average was slightly less than the $1,530,718 average for the 1980s and significantly below the $7,852,582 average in 1990-91.
- On the other hand, the median jury award in 1994-95 was $500,000, or three times the $167,000 median reported in the 1992-93 study and approaching the record-high $622,102 median reported in the 1994-95 study. Aggregated over the 1980s, the median award was $200,000.
- Four of the thirteen jury awards in 1994-95 exceeded $1 million (30.8%) and one award exceeded $10 million (7.7%). By contrast, in the 1992-93 study, no jury awarded in excess of $10 million and there were only three jury awards in excess of $1 million (18.8%). Again, however, the 1994-95 study results are lower than those reported for 1990-91, in which 11 of the 24 awards (45.8%) exceeded $1

(Continued on page 12)

A Cautionary Tale: Digitization May Not Be Enough

Despite the fact that a plaintiff's face was digitized and his name was not mentioned, a U.S. District Court denied a media defendant's motion to dismiss libel, privacy and emotional distress claims, finding that identification is a jury question and a report can be "of and concerning" plaintiff even if he is not directly identified. *Willinghan v. Hearst Corporation*, Civil Action No. WMN-94-3167 (D. Md. Nov. 30, 1995).

WBAL-TV, a Hearst-owned station, ran a story entitled "The Pretenders," about workers' compensation fraud. As part of the story, the station used a videotape of the plaintiff at a battle re-enactment with a group called "The Highlanders." The tape was made by a private investigator hired by Willinghan's employer and Willinghan's face was digitized. The report said Willinghan had filed a claim for permanent disability from a work-related injury. It implied that his benefits had been cut off after the videotape was used at a disability hearing.

The plaintiff claimed that, despite the digitization, he was identified by two acquaintances. As to falsity, Willinghan also asserted that he had made claim for a partial permanent disability and that his benefits had actually been increased at the hearing.

The plaintiff's two acquaintances claimed they recognized him from both "his shape" and the distinctive Scottish uniform and *sporran*, or pouch, that he wore at the videotaped re-enactment.

In its motion, Hearst said it was not reasonable to conclude that the plaintiff was identified. They noted his face and head were digitized, the portion of the videotape used in the broadcast was brief and filmed from a considerable distance, and all the Highlanders wore similar uniforms.

"The Court cannot, as a matter of law, find that it is unreasonable to conclude that Plaintiff could be identified from the broadcast when he was, in fact, identified by two acquaintances," Judge Nickerson wrote. A news report does not need to expressly identify an individual to satisfy the "of and concerning" requirement. When the plaintiff is not named, identification is an issue of fact and is for the jury to decide, the court said.

Because "of and concerning" is also required for an invasion of privacy claim, Willinghan's second claim was also not dismissed.

The court also allowed the claim for intentional infliction of emotional distress, but noted it was "highly unlikely" that the station had engaged in the "extreme and outrageous" conduct required. The court noted that the station reasonably tried to prevent the plaintiff's identification by digitizing his face, and used "what should have been a reasonably reliable source, the attorney for the insurance company." Nevertheless, the court allowed the claim so the plaintiff could take discovery.

As lawyers, we know that, at least as to libel claims, publication need only be to one individual other than the plaintiff. And we know the dangers of assuming that digitization, blue dots, or even voice modification is sufficient to mask the identity of an individual from his family and friends. The *sporran* case just serves as a reminder. Some of you may wish to hang it on a few edit room walls.

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New LDRC Study Reports Significant Increase In Size of Damage Awards in Media Trials in 1994-95

(Continued from page 11)
million and six awards (25%) exceeded $10 million.

◦ The average compensatory damages awarded in jury trials during the 1994-95 period was itself more than $1 million ($1,363,250), up more than 70% from the average reported for 1992-93 ($801,234).

Moreover, the median compensatory award of $300,000 was the highest ever reported by LDRC, up from the $160,000 reported in 1992-93 and from $200,000 in the 1980s and higher even than the $262,500 median in the otherwise record-setting 1990-91 period.

◦ On the other hand, punitive damages were awarded in only three of thirteen (23.1%) jury trials during the most recent period. This is the lowest incidence of punitive damages reported to date by LDRC. By contrast, punitive damages were awarded in 37.5% of plaintiff's verdicts in 1992-93 and 62.5% of plaintiff's verdicts in 1990-91 and 57.3% in the decade of the 1980s.

The average punitive award in the new study was $433,333, up from the $341,833 reported in 1992-93 but significantly below the over $8 million reported in 1990-91 ($8,732,33). The median punitive award was $500,000, again up from the 1992-93 period ($108,000) but a small fraction of the $3 million median reported in 1990-91.

◦ Although data on posttrial motions necessarily remain incomplete at this juncture, based on currently known information media defendants were less successful in modifying unfavorable trial results in 1994-95 than in any period previously reported by LDRC. Only two of fourteen awards (14.3%) from 1994-95 were modified as a result of a posttrial motion, with one award remitted and the other reversed by a grant of judgment notwithstanding the verdict. By contrast, nearly thirty percent (29.4%) of awards from the 1992-93 period were modified, 23.1% of the 1990-91 awards were modified, and 26.3% of awards from the 1980s were modified.

◦ Appellate data are even sketchier given the lead time necessary for the resolution of appeals. Again, however, defendants appear to have fared somewhat worse in the recent period than in any prior study, obtaining appellate modifications in only two of fourteen cases (14.3%), with one reversal and one remittitur. By contrast, 17.6% of awards from 1992-93 were modified on appeal, 23.1% of 1990-91 awards were modified on appeal, and fully half of the awards from the decade of the 1980s were modified on appeal.

◦ Particularly disturbing were appellate affirmances of two mega-verdicts in the 1994-95 study. In 1995, an intermediate level appellate court in New York affirmed $11 million of an $11.5 million jury verdict, reversing only the $500,000 punitive damages award. And the Pennsylvania Supreme Court recently declined to review a $24 million jury verdict (including a punitive award of $21.5 million). Although the defendants have not exhausted their appeals in these cases, if either award is left to stand it will grossly exceed the $3 million verdict that had been, in 16 years of compiling these data, the highest finally affirmed award ever reported by LDRC.

* * * * * *

In addition to presentation and analysis of the key findings summarized above, the Damages BULLETIN includes 15 tables reporting overall results of media libel trials in 1980-95 as well as results based on variables such as trier of fact, venue, plaintiff status, and media type.

The tables compare two-year periods in the 1990s and aggregated data for the decade of the 1980s as well as the 1990s to date.

Also provided are line graphs of certain key parameters, such as frequency of trials and defense verdicts, average and median jury awards, average and median jury punitive awards, and frequency of punitive damages, on an annual basis in the 1990s and in aggregate for the decade of the 1980s. Finally, two appendices provide full case information on trials in the 1994-95 period as well as updates of trials reported in prior studies.

* * * * * *

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Subsequent issues in the 1996 volume of the LDRC BULLETIN will include a 10-year update of the LDRC study on the disposition of **motions to dismiss**, an update of the 1994 **LDRC independent appellate review study**, a review of the 1995-96 Supreme Court term, and a summary of new legal developments from the last year.

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Texas Federal Court Applies Reporters Privilege

In *Lenhart v. Thomas*, No. 4:96-CV-0072 (S.D. Tex. Jan. 23, 1996), the U.S. District Court for the Southern District of Texas, Houston Division, held a First Amendment-based reporter's privilege applied and granted a writ of habeus corpus to a reporter held in contempt for refusing to reveal the identity of sources who spoke to her in possible violation of grand jury secrecy laws.

Lenhart wrote an article about a grand jury's failure to indict a police officer for the fatal shooting of a seventeen-year-old burglary suspect. The article included statements from two unnamed jurors who expressed their regret over the issuance of a no bill.

The article sparked an investigation by the district attorney's office to determine whether grand jury secrecy laws had been violated. Pursuant to this investigation, Lenhart was subpoenaed to give testimony identifying the confidential sources in her article. At the hearing, Lenhart submitted an affidavit stating that two grand jurors had approached her and, on the condition of anonymity, discussed why they felt the decision not to indict was unjust.

In her refusal to disclose her sources, Lenhart invoked her Fifth Amendment privilege against self-incrimination and the First Amendment privilige not to disclose confidential sources. The lower court granted her immunity from prosecution, but refused to recognize Lenhart's reportorial privilege and held her in contempt. When her petition for writ of habeus corpus was denied by the Texas Court of Criminal Appeals and her state remedies exhausted, this district court action followed.

The court cited Fifth Circuit precedent in reaching its decision to recognize Lenhart's reportorial privilege and grant her a writ of habeus corpus. The respondents had the burden of proving this case satisfied the conditions set forth in *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir.), *modified on rehearing*, 628 F.2d 932 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), 101 S.Ct. 1759, 68 L.Ed.2d 238 (1981), necessary to compel disclosure of a reporter's sources: (1) that the testimony at issue is highly material and relevant; (2) that it is necessary or critical to the maintenance of the claim or defense; and (3) that it is not obtainable from other sources.

The court found respondents failed to meet the requirements of the test's third prong by not fulfilling its obligation to exhaust alternative sources of the information--even if it is feared to be time-consuming, costly and unproductive. *See, e.g. Zerelli v. Smith* 656 F.2d 705, 14 (D.C. Cir. 1981). Citing *Blum v. Schlegel*, 150 F.R.D. 42, 46 (W.D.N.Y. 1993), the court asserted that "[w]here a potential source of information is known and can be deposed, the source must be pursued prior to forcing the reporter to reveal her confidential source." *Slip op*. at 13.

In the instant case, a potential alternative source of information was known to exist; the district attorney's office had received a "tip" from another grand juror who knew the identity of one of the reporter's sources, and two other potential witnesses had been uncovered. The district attorney's investigation into alternative sources prior to this revelation was found to be merely perfunctory.

The court held "[i]t is not constitutionally permissible to hold Lenhart in contempt for not disclosing information covered by a qualified privilege while respondent determines whether it can obtain that same information from another source." *Slip op.* at 15. Because the First Amendment afforded Lenhart a qualified reportorial privilege and the repondents did not meet the requisite burden of proof to overcome the privilege, the court held the adjudication of contempt to be unconstitutional.

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