



LIBELLETTER

February 1997

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California Court of Appeal Reverses ABC Telepsychic Verdict

Federal District Court Grants ABC Summary Judgment in Related Case

Holding that the jury's finding that the plaintiffs "lacked an objectively reasonable expectation of privacy" barred recovery for an invasion of privacy claim, the California Court of Appeal, in a 2-1 decision, has reversed a \$1.2 million invasion of privacy verdict against ABC. *Sanders v. ABC, Inc.*, 97 CDOS 803, No. B094245 (Cal. Ct. App. Jan. 31, 1997).

And in a related case, a California federal district court granted ABC summary judgment, dismissing fraud
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Wolfson v. Inside Edition Settled

Stake-Out of Husband/Wife U.S. Healthcare Officials Led to Claims that Crew Invaded Their Family's Privacy

On January 24, just days before scheduled oral argument to the Third Circuit U.S. Court of Appeals, the parties settled the lawsuit brought by two U.S. Healthcare officials, Nancy and Richard Wolfson, against King World journalists charging them with invasions of privacy
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NBA v. Motorola and STATS, Inc.: At the Buzzer

By Andrew Deutsch

On January 30, 1997, the United States Court of Appeals for the Second Circuit reversed the injunction imposed by U.S. District Judge Loretta Preska barring distribution by defendants — Motorola and STATS — of certain NBA game statistics on a real-time basis, and dismissed the NBA's misappropriation claim upon which it was based.

The Second Circuit's opinion, authored by Circuit Judge Ralph Winter with typical wit and clarity, does much in 33 pages: it explains why sports statistics, or any other facts, cannot be "owned" once made public, prevents the use of state misappropriation law to evade Congress's clear intention that such facts be in the public domain; and provides the clearest explanation in almost 80 years of the rationale for the so-called "hot-news" doctrine of *International News Service v. Associated Press*, 248 U.S. 215 (1918) ("INS").

Lawyers will not be the only ones to find this decision interesting. Media entrepreneurs, sports leagues, and even sports fans will soon feel the effects of the ruling. The Second Circuit's reasoning provides a zone of protection within which businesses using new technologies, such as pagers and the Internet, can compete to bring news and information to the consumer as rapidly as possible. The Second Circuit has also restored INS to its original role as a pro-competitive economic principle, not a broad moral rule forbidding businessmen from "reaping where they have not sown." Its decision makes clear that INS provides a remedy only where one infor-

*Wolfson v.
Inside Edition Settled*

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arising from newsgathering efforts. Mrs. Wolfson is the daughter of Leonard Abramson, founder of U.S. Healthcare.

The journalists were engaged in producing a report for King World's *Inside Edition* on the high salaries and consequent lifestyles of executives in the health care industry at a time of benefit reductions. With video/audio equipment they briefly camped outside the Wolfsons' home and U.S. Healthcare offices in the Philadelphia area, followed the Wolfsons to work, and sat off-shore her father's home in Florida during a visit by the Wolfsons.

The trial court judge, sitting in a federal district court in Philadelphia, had clearly been outraged by the conduct of the crew — who he believed also followed the Wolfson's child a brief way to school and was upsetting the health of the then-pregnant Mrs. Wolfson, among other things — and entered a broadly drafted preliminary injunction that included barring the journalists from "harassing, hounding, following, intruding, frightening, terrorizing or ambushing" Plaintiffs or their children.

The settlement of the suit did not call for payment of money by the defendants, but they did agree not to follow the Wolfsons for a period of time. The preliminary injunction that had been issued by the federal district court was dissolved. King World had already broadcast portions of the footage of the Wolfsons on *Inside Edition*, and the settlement did not restrict either the use or reuse of the footage or the previously broadcast report. °

LDRC "Damages" Bulletin Released, Showing a Clustering of Very Large and Very Small Awards in 1996

LDRC has now published our Damages Survey, contained in the January issue of the LDRC BULLETIN, covering media libel and related trials in 1996 and offering data on media trials back to 1980. Highlights of the survey include:

- ◊ LDRC found 14 media trials in 1996, 13 jury and 1 bench, less than the yearly averages from 1980 through 1993, but consistent with 1994-95.
- ◊ Two trials focused on newsgathering issues exclusively.
- ◊ Media success at trial was very low — the media won 4 jury trials (winning one as a directed verdict), losing 9 jury and the one bench trial — similar percentage-wise to 1994-95, but otherwise a lower success rate than any other reporting period.
- ◊ Average and median total damage awards were high, and
- ◊ Punitive damages returned as a significant percentage of the overall damage awards, after declining during the 1992-93 and 1994-95 periods.
- ◊ Public figure/public official plaintiffs outnumber private figure plaintiffs in the 1990s, a change from the 1980s.
- ◊ Media are losing a higher percentage of public plaintiff cases than private figure cases in the 1990s, with media losing all four public plaintiff trials in 1996 while winning half of the eight private figure cases at trial.
- ◊ And while it is too early to speculate about 1996 trials, a larger percentage of cases, and a larger number overall, of cases lost by the media at trial from 1990-96 have either settled or not been appealed than in 1980-89.

One of the most unusual features of 1996 trial awards was a clustering of extremely low and extremely high damage awards. Of the ten verdicts against the media in 1996, five awards were \$2,380,000 or higher and the other five were \$125,000 or lower.

Total Awards

The average award in 1996 of nearly three million dollars (\$2,822,716) was more than double the average reported during the 1994-95 period, and substantially larger than the average total award for any LDRC reporting period back to 1980, other than the all-around record-setting 1990-91 period. The median award of \$1,252,500 was the highest ever reported by LDRC.

There was only one "mega-verdict" (\$10 million or over) in 1996 as compared to one such verdict in 1994-95, none in 1992-93, but 6 megaverdicts (out of 27 total) in 1990-91. Only 4 "mega-verdicts" were recorded for the 1980s. The percentage of million-dollar awards was the highest ever reported in an LDRC survey, with five of the ten awards (50%) over \$1 million and three awards exceeding \$4.5 million. Overall, the percentage of million dollar plus verdicts has been higher for the 1990s than for the 1980s — 35.1% for 1990-96 versus 22.6% for 1980-89.

The Punitive Problem

The increase in 1996 awards was fueled largely by the reemergence of punitive damages as a significant factor in the total damages awarded, one of the more disturbing findings of the new survey. After two consecutive study periods (covering 1992-1995) in which punitive damages contributed less than one fifth of the total award (8.7% in 1994-95 and 19.1% in 1992-93), in 1996 punitive damages accounted for more than three fifths (60.6%) of the total dollars

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LDRC "Damages" Bulletin Released, Showing a Clustering of Very Large and Very Small Awards in 1996

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awarded.

The average punitive award in 1996 was over 9 times larger than the average in 1994-95, and 12 times larger than the 1992-93 average. It was twice as large as during 1980-89. Still on top is the all-around record-setting 1990-91 period in which punitives contributed 69.5% of total damages and averaged almost \$8.2 million.

The past year also saw two trials arising from newsgathering as opposed to publication. Both trials ended in victories for the plaintiff but had strikingly different results as to damages. In the well-publicized *Food Lion v. ABC, Inc.* trial, after nearly a week of deliberations, the jury returned a punitive damages award of over \$5.5 million to accompany \$1402 in compensatory damages for trespass, breach of loyalty, and fraud. By contrast, in *Copeland v. Hubbard Broadcasting*, the only bench trial in 1996, the plaintiff recovered \$1 in damages for trespass. In *Copeland*, unlike *Food Lion*, the plaintiff was not the target of the newsgathering.

Post Trial

It is obviously too early to predict whether the high awards seen in 1996 will stand up on appeal. Data collected during the 1980-96 period have repeatedly shown that plaintiffs overall end up with far lower awards than the initial verdicts would suggest, as a result of post-trial motions and appeals.

Indeed, the new survey reports the reversal of the \$1 million verdict in *Kersis v. Capital Cities/ABC Inc.* (rev'd sub nom., *Sanders v. ABC*, see this LDRC LibelLetter at 1), a 1994 case that was based on newsgathering and involved facts not dissimilar from *Food Lion*. And the 1996 verdict in *Turner v. Dolcefino* has already been reduced on post-trial motion from \$5.5 million to \$2,750,000 as a result of a Texas statute limiting punitive damages to four times the compensatory damage

award.

In two other 1996 cases the ratio of punitive to compensatory damages — 4,500,000 to 1 in *Merco Joint Venture v. Tristar Television* and 4000 to 1 in *Food Lion v. ABC, Inc.* — appear exceptionally vulnerable to constitutional attack, in addition to challenges on liability.

On the other hand, 1996 saw settlements in two mega-verdicts from prior years, after each was affirmed by state appeals courts but prior to review by the U.S. Supreme Court. In one case, *Prozeralik v. Capital Cities/ABC, Inc.*, an \$11.5 million verdict in New York from 1994 was reduced to \$11 million on appeal, and in the other, the seemingly endless suit against the Philadelphia Inquirer, *Sprague v. Walter*, the Pennsylvania Supreme Court declined to review a \$34 million verdict from 1990 that had been reduced by an intermediate appellate court to \$24 million.

Key Findings

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

- There were 14 trials (13 jury trials and 1 bench trial) in 1996. This is up slightly from the record low 1994-95 period (in which there was an average of 12.5 trials per year, with only 8 trials in 1995). While the annual number of trials has sometimes varied widely through the 1990s (with 19 trials in 1990, 25 in 1991, 13 in 1992, 26 in 1993, 17 in 1994, 8 in 1995, and 14 in 1996), the average of 17.4 trials per year over the decade to date is significantly lower than the average of 25.8 trials per year during the 1980s.

- Defendants won only 4 of the year's 12 jury trials (one by directed verdict), and lost the single bench trial. The overall defense success rate in 1996 of 28.6% is the lowest re-

ported for any period to date, but only slightly down from the previous record of 29.2% in the 1994-95 period. It is considerably lower, however, than the 45.9% and 38.6% reported in 1992-93 and 1990-91, respectively. The defense success rate in jury trials of 25.0% in 1996 is up, but again only slightly, from the record low rate in the 1994-95 period of 23.8%. In comparison, the defense success rate before juries was 44.1% in 1992-93, 32.4% in 1990-91, and 27.8% in the 1980s. Because the number of bench trials each year is so low, no truly meaningful win-loss statistics can be drawn.

- The median award of \$2,380,000 in jury trials in 1996 was the highest ever recorded and the average award of \$3,136,351 was higher than in any period other than 1990-91. If the single bench trial is included, the median award of \$1,252,500 for all trials was again the highest ever reported and the average award of \$2,822,716 for all trials was exceeded only by the 1990-91 period.

- Half of all the awards reported in 1996 (five of the ten cases), and more than half of the jury awards (55.5%), exceeded \$1 million. This represents the highest percentage of million-dollar awards reported for any period by LDRC. By contrast, in the 1980s there were million dollar awards in 22.6% of jury trials and for the entire 1990s 37.7% of jury awards have exceeded one million dollars.

- On the other hand, in terms both of the absolute numbers of million-dollar awards and the size of these awards, the 1996 figures fall considerably short of the 1990-91 period, in which there were 11 awards greater than \$1 million (44% of all jury awards) and 6 awards greater than \$10 million (24% of all jury awards).

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LDRC "Damages" Bulletin Released, Showing a Clustering of Very Large and Very Small Awards in 1996

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• The average compensatory award in 1996 was over \$1.2 million in jury trials and over \$1.1 million in all trials. These figures are essentially unchanged from those reported for 1994-95, but are higher than any other period except the record-setting 1990-91 period. However, due to a clustering of very low and very high awards, the median compensatory awards in 1996 of \$50,000 in jury trials and \$35,000 in all trials were the lowest recorded to date by LDRC.

• The average punitive award in 1996 of \$3,419,550 was up dramatically from the 1994-95 period and, with the exception of the record-setting 1990-91 period, was the highest ever recorded by LDRC. At \$4.5 million the median punitive award is the highest ever reported.

Punitive damages were awarded in 55.6% of jury trials and 50% of all trials, up substantially from the 1994-95 period but consistent with all prior periods. The percentage of all damages represented by punitive damages was also up dramatically from the two prior periods, although below the high levels experienced in 1990-91 and the decade of the 1980s.

• In the 1980s private plaintiffs outnumbered public plaintiffs, while the reverse has been true thus far in the 1990s. Moreover, while the media won only slightly more of its public plaintiff cases in the 1980s than private, in the 1990s media win 41.7% of private versus 34% of public plaintiff cases.

Damage awards, both average and median, for public plaintiffs in the 1990s are more than twice as high as the corresponding figures in private figure trials. In the 1980s the median was higher, but the average

was lower for public plaintiffs.

• 1996 was a bad year for broadcast defendants. Unlike prior reporting periods, there were as many broadcast cases as there were print. That is reasonably consistent with 1994-95, but in past reporting periods back to 1980, print cases have significantly outnumbered broadcast cases. Moreover, in 1996, broadcasters lost all but one of their cases, while print won three of theirs. In the 1980s, broadcasters won more of their seven cases than print defendants did, a pattern that has been jagged at best in the 1990s.

• A high percentage of appeals are still pending from 1992-96 trials, but preliminary data suggest that damages finally paid in the 1990s will continue to be lower than the amounts initially awarded.

• While trial courts in the 1990s have granted a smaller percentage of defendants' motions to reverse adverse verdicts as compared with the 1980s, defendants appear to have become more successful in obtaining new trials. Available data on posttrial motions in 1996 trials remain incomplete at this time. Thus far, however, the only motion for a JNOV was denied. On the other hand, two of the nine jury awards from 1996 have been modified, one by grant of a new trial and one by entry of a remittitur.

• Appellate data are not yet available for 1996 trials and a high percentage of appeals are still pending from 1992-95. However, data from earlier periods show an increase in the percentage of judgments that are either being settled or not appealed in the 1990s as compared with the prior decade. That is, only 6.6% of plaintiffs' verdicts were paid without appeal in the 1980s versus 16.7% thus far in the 1990s, and only 8.1% of plaintiffs' verdicts were settled in the 1980s versus a settlement

rate of 19.4% to date in the 1990s.

In those cases where defendants have appealed there has been a decline since the 1980s in the overall rate at which initial judgments are in some fashion disturbed (reversed, remanded, or remitted), with 61.8% of awards disturbed in the 1980s versus only 23.6% thus far in the 1990s. However, there are some signs that the disturbance rate on appeal may be rising somewhat as the 1990s have progressed, with a 37.5% disturbance rate for the 1994-95 period to date.

• Finally, the 1996 survey offers a comparison of results in defamation and related trials to the results in products liability and medical malpractice trials over the period 1990-95. The data suggest that defendants in libel, privacy, and related claims prevail significantly less often at trial and are subject to punitive damages significantly more often than are defendants in products liability and medical malpractice suits. Conclusions regarding the size of the total damages awarded are somewhat more tentative because neither of the published studies used for comparison presented data in an analogous manner to the LDRC data. ◦

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Single issues the LDRC BULLETIN are available from LDRC at the cost of \$35.00 per issue.

Subscriptions for all four issues of the 1997 LDRC BULLETIN are available for \$110 and include a looseleaf binder for archival storage of this year's issues.

COULD YOU HAVE MISSED IT?? RICHARD A. JEWELL SUES THE ATLANTA JOURNAL-CONSTITUTION

*** CNN FOLLOWS NBC IN SETTLEMENT WITH JEWELL**

*** JEWELL'S COUNSEL THREATENS MANY MANY MORE CLAIMS**

As had been promised by Richard Jewell's counsel, Jewell has filed a lawsuit against *The Atlanta Journal-Constitution* and various of its employees alleging libel based upon its coverage of the once suspect in the Atlanta Centennial Olympic Park bombing. Jewell, the one-time security guard and overnight media sensation first as hero then as suspected bomber, is asserting that he was a private figure at the time of the defamatory publications. And with the newspaper stating that it believes that the charges in the complaint "are without foundation" and that it has no intention of settling the suit, Jewell's counsel was probably correct when he was quoted as predicting "a long and hard fought battle" over the claims. The Atlanta newspaper was the first news organization to identify Jewell as a suspect. At issue in the complaint are a number of news stories from July 30th through August 1, and an opinion column on August 1.

Also named in the suit was Jewell's former employer, Piedmont College, its president and its spokesman, alleged to have made false and defamatory statements about Jewell's employment with the college prior to his employment with Olympic security.

The suit seeks unspecified damages, both compensatory and punitive.

IT'S AN INTERESTING COMPLAINT

While much about the 44-page complaint is interesting, a few items stand out. First, of course, is Jewell's contention that despite all of the interviews he gave in his heroic phase, which was prior to the coverage that is alleged to be defamatory, he was a private figure. His complaint states that he did the initial interviews with reluctance and only at the request of AT&T, which employed the security forces which in turn employed him.

Second, he concedes in the complaint that the newspaper had both FBI and Atlanta Police Department sources, although unidentified. He asserts that *The Atlanta Journal-Constitution* "failed to employ reasonable procedures to investigate why unnamed law enforcement officials were willing to leak Mr. Jewell's name" when no search warrant had been sought, no arrest was imminent, and the officials would not go on the record to confirm that Jewell was a suspect. Other allegedly false statements are also contended to have been made without reasonable investigation on the part of the newspaper-defendants.

While Jewell's counsel was quoted as saying that it was immaterial to the litigation whether Jewell was a private or public figure — the reporting "is so bad, it won't matter," he told the *Fulton County Daily Report*, 1/29/97 at 2 — and there are general allegations of recklessness, a fair reading of the complaint suggests otherwise.

Third, Jewell takes on a column that appeared in the newspaper, even naming the columnist as a defendant, that likened the search of his residence to that of Wayne Williams, an Atlanta mass child murderer. While undeniably harsh — characterized in the complaint (Para. 137) as "yellow journalism of the worst kind" — the column as quoted in the complaint suggests a relatively straight-forward case of opinion.

Fourth, the complaint contends that the president of Piedmont college, W. Ray Cleere, who was quoted in various articles and who is named in the complaint as a defendant, on November 26 of 1996 signed a 261-page statement under oath for Jewell's counsel in which he denied making the various defamatory or unflattering statements attributed to him, admitted that they were false, and if made would constitute an invasion of Jewell's privacy with respect to

his employment at Piedmont. A copy of this extraordinary document, however, was not attached to the complaint. Presumably it will be made available in the first round of discovery.

President Cleere, according to the complaint, not only granted more than one interview to the media (which should make his current denials a bit easier to cross-check), but called the FBI after seeing Jewell-as-hero on television to suggest that the FBI take a look at the former Piedmont employee. According to the reports, Cleere told the FBI and the media, among other things, that Jewell in his role as campus cop was over-zealous, immature, erratic, enjoyed the limelight, had been told to resign or be fired, and should be looked at more closely in connection with the Olympic bombing.

Cleere, according to the complaint, left his last job under a cloud and "has been described as having a personal history which evidences inappropriate jealousy and vindictiveness as well as a desire to elevate himself into the limelight." (Complaint at Para. 150)

Thus we have a complaint that suggests some of the most interesting and challenging issues in libel law, with a cast of characters — the newspaper-defendants aside — who promise to be novel, at the very least.

AND CNN SETTLES...

As *The Journal-Constitution* geared up for the lawsuit, CNN announced that it had settled with Jewell and his mother. Neither the amount paid (and Jewell's counsel indicated that there was money paid to Jewell and his mother) nor any of the terms were announced. CNN was reported as stating its continued belief that its coverage was fair and accurate. CNN had previously issued an apology for statements made on a Crossfire program. *

ABC Telepsychic Verdict Reversed

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claims brought by a different group of plaintiffs, but arising out of the same news report. *Sussman v. ABC, Inc.*, No. 94-8524 JMI (C.D. Cal., Feb. 13, 1997).

The *Sanders* suit, which was consolidated at trial with *Kersis v. Capital Cities/ABC, Inc.*, arose out of a 1993 ABC *PrimeTime Live* hidden camera investigation into the telepsychic industry. Like the recent *Food Lion* case, the telepsychic report included hidden camera footage obtained by an ABC reporter who obtained employment with a California telepsychic operation.

During the course of the undercover work, ABC recorded conversations with two telepsychic operators, Mike Sanders and Narsis Kersis (a.k.a. Paul Highland). Sanders was recorded on two occasions talking to ABC reporter Stacey Lescht, who had been hired by the operation as a telepsychic operator and wore a hidden camera concealed in her hat. One of the conversations was recorded at Lescht's cubicle and the other at Sanders'.

Kersis was filmed by ABC cameraman Steve Bell, who entered the site posing as Lescht's boyfriend and talked with Kersis in the employee lunchroom. Following the *PrimeTime Live* broadcast, which included a six second portion of the conversations with Sanders and nine seconds of the conversation with Kersis, both Sanders and Kersis filed suit against ABC alleging unlawful eavesdropping, intrusion, public disclosure of private facts, false light, intentional and negligent infliction of emotional distress, and violation of the California constitutional right to privacy. Prior to trial the court threw out the "broadcast" claims—false light and private facts—but left the claim for invasion of privacy by surreptitious photography intact.

Jury: No Reasonable Expectation Of Privacy

Despite the fact that the jury found that the communications between

Lescht and Sanders and those between Bell and Kersis were not protected by an objectively reasonable expectation that the conversations were confidential, the trial court at that point instructed the jury *sua sponte* that it could find ABC liable for a "sub-tort" of "the right to be free of photographic invasion." The jury then did just that, assessing ABC over \$1 million in compensatory and punitive damages. Before the jury completed its deliberations, however, Kersis died of alcohol poisoning and the jury award in his favor died with him. (His parents have filed a wrongful death claim against the network which was recently upheld by the Ninth Circuit against ABC's motion to dismiss. See *LDRC LibelLetter* January 1997 at p. 5.)

The Appeal

On appeal, ABC argued that the trial court's sub-tort of invasion of the right to be free of photographic invasion simply did not exist. Rather, ABC contended that because the jury had found that Sanders did not have a reasonable expectation of privacy in the recorded conversations, he was barred from recovering on any theory alleging invasion of privacy. To support its argument that non-confidential communications cannot give rise to an invasion of privacy claim, ABC cited numerous non-California cases discussing "workplace privacy" including, *Kemp v. Block*, 607 F.Supp. 1262 (D.Nev. 1985) and *PETA v. Bobby Berosini, Ltd.*, 895 P.2d 1269 (Nev. 1995), as well as California's state electronic eavesdropping law which excludes objectively non-confidential communications from its coverage.

Sanders, for his part, argued that a claim for invasion by surreptitious photography exists "if the person photographed does not subjectively intend that his communication be photographed, even if the communication occurs without an objectively reasonable expectation of privacy."

In reaching its decision the California Court of Appeal first noted that "in general, the invasion of privacy tort requires an invasion into a secluded area

where one has an objectively reasonable expectation of privacy." Quoting *Hill v. NCAA*, 7 Cal.4th 1 (1994), the court stated that in order to state a claim for invasion of privacy a plaintiff must establish "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy."

In the court's words, "Sanders' real argument is that reporters (or anyone else) cannot secretly photograph (or its more modern cousin, videotape) someone without the subject's consent, even where the photography occurs under circumstances where the person photographed lacks an objectively reasonable confidentiality expectation." The court found, however, that none of the cases cited by Sanders supported his argument. Rather, the court noted all the cases cited by Sanders "unquestionably involve unauthorized invasions into private areas." In these cases, the court continued, the "situations involve private areas where the subjects unquestionably, objectively and reasonably expected their conversations to be private and confidential." Further, the court stated that many of the cases Sanders cited also "involve trespass and fraud, not invasion of privacy."

Concluding the court stated, "we decline to extend tort protection under an invasion of privacy, as opposed to a trespass or fraud, cause of action, to those secretly photographed who lack an objectively reasonable expectation of privacy."

The Dissent

In dissent, Judge Spencer argued that there are two distinct privacy interests which the law seeks to protect. The first is "informational privacy," which "prevents the improper collection and dissemination of private information." The second interest is "autonomy privacy," which "prevents unwarranted interference with, intervention into or observation of private matters." Thus,

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Doe v. Daily News: "Rape Hoax" Case Dismissed

In a decision that applies New York's fair report privilege to informal dialogue between a reporter and his law enforcement sources, New York State Supreme Court Judge Charles Edward Ramos has dismissed the widely publicized claims of an anonymous plaintiff against the *New York Daily News*. *Doe v. Daily News*, No. 119461/94 (N.Y. Sup. Ct. Feb. 5, 1997). The dismissal, which was actually reached in two separate opinions, one addressing constitutional defenses, the other common law privileges, marks the end of the latest

chapter in a case that has involved confidential police sources, an anonymous public figure plaintiff, John Milton's *Areopagitica*, and the ghost of Justice Hugo Black.

The plaintiff, who had been granted permission by the court to proceed with her libel claim under the assumed name "Jane Doe," claimed in early 1994 to have been raped in Brooklyn's Prospect Park. Relying upon high level confidential sources inside the New York City Police Department (at least one of whom, it was revealed dur-

ing discovery, was then Police Department spokesman, John Miller) for the factual basis of his stories, New York Daily News columnist Mike MacAlary wrote three articles reporting that police officials believed that the plaintiff had in fact not been raped, but instead filed a false police report to bring public attention to bear on the problems of violence against women and to enhance her stature as a activist.

After MacAlary's first article appeared, however, the Police Depart-

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Telepsychic Verdict Reversed

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Judge Spencer continued, while Sanders may not have had an "informational privacy" interest in the conversations with Lescht, "he may have retained an 'autonomy privacy' interest."

Under Judge Spencer's view, Sanders "had an interest in being free from unwarranted, i.e., public, observation of his work place performance and conversation." Likening the case to *Shulman v. Group W Productions*, 1996 WL 718183 (Cal. Ct. App. Dec. 13, 1996), a recent California Court of Appeal case reversing a grant of summary judgment on an invasion of privacy claim for portions of a broadcast shot inside a rescue helicopter, Judge Spencer contended that the "plaintiff had a reasonable expectation that the public would not rubberneck as he performed his tasks or discussed their performance." See *LDRC LibelLetter* January 1997 at p. 1.

In Judge Spencer's view, the trial court's sub-tort of freedom from photographic intrusion, while not strictly accurate "was, under the facts and circumstances of this case, accurate enough in presenting the jury with a theory of autonomy privacy."

Sussman v. American Broadcasting Cos., Inc.

After *Kersis* and *Sanders* won their verdicts, a number of their co-

workers of the Psychic Marketing Group, the company which provided telepsychic services that were under investigation in the *Prime Time Live* report, filed suit against ABC which was removed to the federal district court for the Central District of California. The district court judge, two weeks after the decision in *Sanders*, granted ABC's motion for summary judgment, dismissing plaintiffs' claims of fraud and conspiracy to commit fraud, unlawful eavesdropping under the California and federal statutes, and spoliation of evidence. *Sussman v. American Broadcasting Companies, Inc.*, CV 94-8524 JMI (C.D. Cal. Feb. 13, 1997).

The court dismissed the fraud claims first because he found plaintiffs had failed to prove the damages necessary to the claim. He had previously held that the plaintiffs were time-barred under the Uniform Publication Act from seeking any damages arising from the broadcast itself. But in reviewing the evidence, he determined that plaintiffs had utterly failed to substantiate any damages other than those that arose from the broadcast.

He also found that the claims were, in essence, privacy claims and time-barred by the statute of limitations for privacy. While "wrapped in the rubric of fraud, Plaintiffs' claims more accurately assert personal privacy interests." Slip op. at 5.

Also barred by the statute of

limitations were the state eavesdropping claims.

The federal eavesdropping statute, the Electronic Communications Privacy Act of 1986, allows for one party consent for taping unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State." 18 U.S.C. Section 2511(2)(d). The court found clearly that the legislative history of the Act indicated that a journalist taping conversations to which he/she was a party for newsgathering purposes is not criminal or tortious conduct under the Act. He found that the 1986 amendment to the Act was enacted specifically to protect such conduct from civil liability and prevent chilling First Amendment rights of the press which civil suits would engender.

The judge leaves a footnote suggesting that the fraud claims dismissed earlier in his opinion would also run afoul of the First Amendment and would suffer dismissal for that reason, had they not been otherwise dismissible.

With all of the substantive claims disposed of, the court dismissed the spoliation of evidence claim as well. *

Doe v. Daily News: "Rape Hoax" Libel Case Dismissed

(Continued from page 7)

ment appeared publicly, at least, to reverse its position refuting MacAlary's claim that there was no evidence that a rape had occurred. In fact, then Police Commissioner William Bratton issued a public apology to the plaintiff for any conduct on the part of the police department that might have cast doubt on her account of the crime.

The Common Law Privilege

In a somewhat unusual move, perhaps to lessen the chance of reversal on appeal, in addition to his sweeping federal and state constitutional based opinion, Judge Ramos also issued an opinion limited to the common law privileges and New York's Civil Rights Law.

Noting that "the common law privilege of fair comment is akin to the statutory privilege accorded the press pursuant to New York's Civil Rights Law § 74," Judge Ramos stated that "an action for libel is barred if the press article in question was a fair and true report of 'official information.'" *Slip op.* at 2.

The judge stated that the privilege can be defeated if the plaintiff can "show that the conduct of the defendants was irresponsible in not reporting accurately." *Slip op.* at 2. Considering the facts of the case, Judge Ramos noted that "[r]eliance upon reputable sources of information, whether official or simply a reliable newspaper, if unrefuted, is sufficient to disprove a claim of recklessness." *Slip op.* at 6.

While Judge Ramos recognized that "it is uncontroverted that some statements contained in the three articles were not accurate descriptions of events that occurred in Prospect Park," he distinguished those inaccuracies because the standard was not whether MacAlary fairly and accurately reported on those events but whether MacAlary fairly and accurately reported what his police sources told him. In the words of the court, "for the purposes of reporting in the press, 'the truth' is what was said by the police, not whether what the police said was true." *Slip op.* at 6.

Thus, Judge Ramos concluded that because "MacAlary was given information by the police that was inaccurate,

but that he reported that misinformation accurately and drew reasonable inferences from it [t]he articles are non-actionable." *Slip op.* at 7.

A Call for ADR

Noting that the friction between the Constitutional safeguards protecting the press and the need for a remedy "for those who suffer at the hands of the press," has not given rise to acceptable solution, Judge Ramos continued to suggest that "a form of Alternative Dispute Resolution be adopted for the adjudication of claims such as the one presently before us." *Slip op.* at 9-10.

Under such a system Judge Ramos contended, "[a] tribunal of press professionals and others would provide for a non-governmental forum that would permit reputations to be defended and the ethics of the press to be examined without great expense and without the threat to the free flow of opinion and information." *Slip op.* at 10. Because the government would not be involved, "constitutional considerations would not exist," and "[i]t would be the responsibility of the press to legitimize and empower a libel ADR." *Slip op.* at 10.

The Constitutional Defense

In the constitutional defense opinion released by Judge Ramos, he wrote that "the adoption of the Fourteenth Amendment was part of a constitutional revolution that effected a wholesale amendment of all state constitutions, not only ending slavery, but denying the states any further power to control religion, speech or the press." *Slip op.* at 20.

Judge Ramos cited back to an earlier opinion he had written in the case in which he traced "the historical argument for freedom of expression . . . from Euripides through Milton and the framers to Anthony Lewis." *Slip op.* at 6. In that decision, Judge Ramos criticized the actual malice doctrine suggesting that the Federal and New York State constitutions provided absolute immunity to the press for even "libelous and malicious reports." *Doe v. Daily News*, 167 Misc.2d 1, 632 N.Y.S.2d 750 (1995), see also *LDRC LibelLetter* August 1995 at p. 5. •

Missouri Increases Evidentiary Burden of Proof in Order to Recover Punitive Damages

By Joseph E. Martineau

In *Rodriguez v. Suzuki Motors Corp.* Mo.Sup.Ct. No. 78539 (Dec. 17, 1996), the Missouri Supreme Court issued an opinion overruling previous cases holding that punitive damages could be recovered if plaintiff proved by a preponderance of the evidence that defendant's conduct was "outrageous because of defendant's evil motive or reckless indifference to the rights of others." The Court declared that punitive damages would be available henceforth only where the plaintiff proved entitlement to same by "clear and convincing evidence." The Court said:

Because punitive damages are extraordinary and harsh, this Court concludes that a higher standard of proof is required: For common law punitive damage claims, the evidence must meet the clear and convincing standard of proof.

The decision is prospective and applicable to all cases tried after February 1, 1997 and "all pending cases in which a proper objection has been preserved."

The decision did not alter the substantive requirements for recovery of punitive damages as set forth in Missouri Approved Instruction 10.01. See also *Burnett v. Griffith*, 769 S.W.2d 780 (Mo. 1989). •

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DEFAMATORY MEANING STRETCHED IN SDNY

By Charles J. Glasser, Jr.

In an unusual opinion for anyone expecting clarity from the federal bench, Judge Kevin Duffy of the Southern District of New York recently interpreted defamatory meaning in a creative manner, allowing statements not connected with a plaintiff's profession to be viewed as defamatory per se because if believed, they could relate to one's profession by extension. *Whitney Houston v. New York Post*, 1996 U.S. Dist. LEXIS 19705 (S.D.N.Y., January 10, 1997.).

In 1993, the *Post* ran an article erroneously reporting that Houston, a popular singer/actress, had "overdosed on prescription diet pills" in an attempt to reduce her pregnancy weight gain. The *Post's* reporter, on receiving the tip that Houston had been hospitalized, attempted to contact the singer's agent, who refused to return calls. The reporter was finally able to confirm the report through a phone conversation with one of Houston's former publicists. According to Judge Duffy's opinion, on the night Houston reportedly overdosed, she was performing a concert in Washington, DC. She in fact was in Miami rehearsing for a performance in D.C. the next night. In deposition, Houston's former publicist denied corroborating the story.

The *Post* moved for summary judgment on a lack of defamatory meaning. The article never alleged that the overdose was intentional or suicidal, a contention Judge Duffy accepted. In the opinion, Judge Duffy enumerated the black-letter elements of defamatory meaning as accusation of criminal act; attribution of loathsome disease; allegation of unchastity; or a tendency to injure an individual in their profession. *Id.* at *3. Duffy quickly disposed of the first three categories, but held that the statement was nonetheless defamatory per se because "although the acts concern the plaintiff's private conduct, they do involve characteristics that would prevent her from performing competently as an entertainer."

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Filmmakers Not Liable for Copycat Crime Sprees

Concluding that "the law simply does not recognize a cause of action such as that presented in Plaintiff's petition," Louisiana State Judge Robert H. Morrison, III dismissed a \$20 million negligence action filed against Time Warner and Oliver Stone, among others, for injuries caused by a crime spree that was allegedly inspired by the Oliver Stone film *Natural Born Killers*. *Byers v. Edmondson, et al*, No. 95-02213 (La. 21st Judicial District Court, Jan. 23, 1997), *slip op.* at 2.

The decision marks the second dismissal of a lawsuit arising out of the 1994 film, which chronicled the 52 murder crime spree and ensuing celebrity of Mickey and Mallory Knox beginning with the murder of Mallory's parents and culminating in a violent prison riot.

Byers v. Edmondson

In her action, plaintiff Patsy Ann Byers, who was shot and perma-

nently paralyzed by Benjamin Darrus and Sarah Edmondson, alleged that "[a]ll of the Hollywood defendants are liable . . . for distributing a film which they knew or should have known would cause and inspire people such as defendants . . . to commit crimes such as the shooting of Patsy Ann Byers, and for producing and distributing a film which glorified the type of violence defendants committed against Patsy Ann Byers by treating individuals who commit such violence as celebrities and heroes, as well as for such other negligence as will be learned during discovery and shown at trial of this matter." *Slip op.* at 1.

In March 1995, Edmondson and Darrus allegedly went on a crime spree across the South and are accused of murdering Mississippian Bill Savage, and shooting and paralyzing Ms. Byers, a Louisiana convenience store

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Texas Judge Denies Injunction in TV Movie Case NBC Affiliate Voluntarily Chooses Not to Show Film

In a case that attracted a fair amount of national press coverage, Texas State Court Judge Joe Drago III denied a petition for injunction filed by a criminal defendant whose alleged crimes were to be the subject of an NBC Monday night movie. *Zamora v. Adams*, No. S-5082, (Tex. Crim. Dist. Ct. Feb. 4, 1997).

The plaintiff, Diane Michelle Zamora, sought the injunction to prevent KXAS, the NBC affiliate in Dallas/Fort Worth, the market where the trial will be held, from broadcasting "Love's Deadly Triangle: The Texas Cadet Murder." The film was based largely on a confession signed by Zamora's fiancée, David Graham, an Air Force Academy student. According to the Graham's confession Zamora, an Annapolis cadet, insisted he atone for having had sex with Adrienne Jones by killing her. The confession continues to state that Zamora was an active participant in the murder, hitting the girl over the head with a dumbbell before

Graham shot her. Attorneys for Graham contend that the confession was illegally obtained and are fighting to have it dismissed.

Despite the fact that the pair have not yet been tried for the murder, the film portrays the couple committing the crime. Zamora's petition alleged that her right to a fair trial would be harmed if KXAS was to broadcast the film.

In the opinion Judge Drago relied upon *Hunt v. NBC*, 872 F.2d 289 (9th Cir. 1989) (denying an injunction in a case involving a defendant who had been tried on one murder charge and was awaiting trial on another, with respect to an NBC movie portraying the defendant committing both murders), in denying Zamora's petition. While Judge Drago's decision was clearly in accordance with the treatment courts have traditionally given attempts at prior restraints, it was also clear that he disapproved of the scheduled broadcast by KXAS. Judge

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DEFAMATORY MEANING STRETCHED IN SDNY

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Id. at 7. Although the *Post* article never mentioned her ability to perform or any affect that the overdose might have on her career or talent, Judge Duffy stretched defamatory to allow a claim to lie where a statement, although not addressing one's profession, by extension could affect it. He states that the article "suggest[s]" incapacity to perform by stating that she had a cardiac problem, depression and a weight problem.

An additional irony in the case is that in discovery, the Plaintiff admitted that she had suffered no damages to her professional interests as a result of the article apart from disputed expenses for "damage control." And Judge Duffy refused to apply New York's single instance rule -- "a statement that relates to a single act of business or professional malfeasance is not actionable, absent special damages" *Id.* at 9-10 -- because the rule has never been applied to a non-business mistake that affects business competency or "a characteristic" of plaintiff. The *Post* won their motion to preclude punitive damages, however, based on New York's requirement of common-law malice as well as actual malice under *Prozeralik v. Capital Cities/ABC Inc.* The *Post* was represented by Slade Metcalf and Dori Ann Hanswirth of DCS member firm Squadron, Ellenoff, Plesent & Sheinfeld, L.L.P. °

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Filmmakers Not Liable for Copycat Crime Sprees

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clerk. Edmondson has told authorities that Darras shot Savage and then, the next day, coaxed her into shooting Byers, the same way Mickey coaxed Mallory in the film.

The controversy over the film, which has allegedly given rise to copycats in Utah, Georgia and as far away as Paris, gained wider attention in the summer of 1996 when novelist John Grisham publicly criticized Stone for making the film. Grisham, who was a friend of Savage, stated at the time that, "The 'artist' should be required to share the responsibility along with the nut who actually pulled the trigger." Grisham also wrote that the movie "glamorized casual mayhem and bloodlust. . . . One large verdict against the likes of Oliver Stone, and his production company, and perhaps the screenwriter, and the studio itself, and then the party will be over."

While Judge Morrison sympathized with the "personal tragedy" suffered by the plaintiffs in the case and stated that he "cannot personally condone much of what is depicted in motion pictures, television and the like," the court recognized that "similar contentions have been almost universally rejected as stating causes of action in the courts of this country." *Slip op.* at 1. Thus, the court concluded that "the law simply does not recognize [Ms. Byers'] cause of action." *Slip op.* at 2.

Miller v. Warner Brothers, Inc.

On December 3, 1996, Georgia State Court Judge Melvin K. Westmoreland also dismissed claims against Warner Brothers, Time Warner, and Oliver Stone arising out of the production

and distribution of *Natural Born Killers*. *Miller v. Warner Brothers, Inc., et al.*, No. 96VS0117599-F (Ga. Fulton County, Dec. 3, 1996).

In *Miller*, the plaintiff Margo Miller brought a wrongful death and product liability action following the murder of her husband by Ronnie Beasley and Angela Crosby. The complaint alleged that the pair's 1995 crime spree, which included car-jacking, theft, kidnapping and murder, was inspired by the movie which they had watched 19 consecutive times. In particular, the complaint alleged that inclusion of subliminal flash frame stimuli in the film was intended to promote random, senseless violence. Citing *Vance v. Judas Priest*, 1990 WL 130920 (Nev. Dist. Ct. Aug. 24, 1990), which held that the First Amendment does not protect audio subliminal communications, the plaintiff argued that the film's subliminal communications "exacerbate, if not create homicidal tendencies."

In a three paragraph opinion Judge Westmoreland dismissed the claim stating that the "lawsuit, as a matter of law, cannot meet the requirements found in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which protects statements except direct incitement to imminent unlawful actions." *Slip op.* at 1. As for the subliminal flash frame stimuli claim, Judge Westmoreland noted that the plaintiff alleged "only that Defendants used them to intentionally entice individuals to view the movie more than once so as to be more profitable and to increase the effect of the movie's message." The judge continued to state that "[n]either of these results, even if proven at trial, is actionable." *Slip op.* at 2. °

Texas TV Movie Injunction Denied

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Drago stated that "it may well be that upon voir dire we cannot find a fair and impartial jury and the case will have to be moved at great and increased expense to the taxpayers of this county and to the victim's family. KXAS should share in the responsi-

bility for creating such a situation." *Slip op.* at 3.

And, he continued, "regardless of my decision today, I would strongly urge KXAS as a responsible citizen of this community to consider voluntarily preempting or not showing this film in Tarrant County. Perhaps this is wishful

thinking on my part, but I would feel certain that KXAS would want the defendants, the State of Texas and the family of the deceased all to have a fair trial." *Slip op.* at 4.

KXAS subsequently chose not to air the film. °

New York Court Upholds Anti-SLAPP Action Against Libel Plaintiffs' Motion to Dismiss Applies Protections to Statements to the Press

In what has the potential to become the first case to apply the protections available to libel defendants under the New York State SLAPP statute, a trial court recently denied a motion by the plaintiffs in a libel suit to dismiss the defendants' SLAPP counterclaim. *Adelphi University v. Committee to Save Adelphi* (N.Y. Sup. Ct. Nassau Co.), N.Y.L.J., February 6, 1997, p. 33, col. 2.

The underlying suit arose from a longstanding, acrimonious, and well-publicized debate over the operation of the plaintiff University which pitted Adelphi's president and board of trustees against an ad hoc committee of faculty, students, and alumni ("Committee to Save Adelphi"). At issue in the suit, brought by the Adelphi trustees against the Committee, were statements made by the defendants to New York State higher education authorities and the Attorney General's Office, as well as to various media. None of the media entities that published the Committee's statements were sued.

By its terms the New York State SLAPP statute (N.Y. Civ. Rights Law §§ 70-a, 76-a) applies to lawsuits brought by a "public applicant or permittee" (defined as "any person who has applied for or obtained" permission from a governmental) that are "materially related" to the efforts of the defendant "to report on, comment on, rule on, challenge or oppose" the plaintiff's application or permission.

In analyzing the proper scope of the statute, Justice Levitt held that it applies to lawsuits brought by plaintiffs with existing as well as pending applications before governmental bodies and to statements made to the press to create public interest in the controversy and induce government action as well as to statements made directly to government agencies.

Purpose, Scope, and Provisions of the New York SLAPP Statute

In order to claim protection under the New York State SLAPP statute, the defendant must establish that the underlying lawsuit is "an action involving public petition and participation." N.Y. Civ. Rights Law § 70-a(1). This requires a showing (1) that the plaintiff in the underlying suit is a "public applicant or permittee," defined as one who "has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body"; and (2) that the lawsuit was "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." N.Y. Civ. Rights Law § 76-a(1)(a), (1)(b).

As a prelude to his discussion of the applicability of the New York SLAPP statute, Justice Levitt noted that the purpose of the statute is to "prevent well-heeled public permit holders (or those seeking such permits) from using the threat of personal damages and litigation costs . . . as a means of harassing, intimidating, or punishing individuals, unincorporated associations . . . and others who have involved themselves in public affairs' by opposing them." *Id.* at col. 2. (citing Citizen Participation Act, 1992 Consol. Laws, chap. 767, § 1). He then went on to observe:

It is the opinion of this Court that plaintiffs' defamation lawsuit, brought against an ad hoc group of University professors, students, and alumni who have spoken against plaintiffs' alleged improper management of the University, calls out for the Statute's protection.

The New York SLAPP statute

offers a wide range of protection to defendants in SLAPP suits. Costs and attorneys' fees are recoverable if the suit "was commenced or continued without a substantial basis in fact and law, and could not be supported by a substantial argument for the extension, modification, or reversal of existing law." N.Y. Civ. Rights Law § 70-a(1)(a). Compensatory damages may also be recovered if the action "was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights." N.Y. Civ. Rights Law § 70-a(1)(b). Finally, punitive damages may be recovered on a showing that the plaintiff's sole purpose in bringing the suit was to inhibit free speech or association rights. N.Y. Civ. Rights Law § 70-a(1)(c).

NY SLAPP Statute Applies to Existing As Well As Pending Permits

Justice Levitt found that Adelphi is a "public permittee" because its operation of the university and its ability to award degrees are dependent upon a grant from the State of New York under the state Education Law. Moreover, he noted, Adelphi remained subject to continued state oversight. Slip op. at col. 3.

The Trustees argued that under the New York statute a "public permittee" is limited to those seeking to obtain a license or permit and that because Adelphi had no applications currently pending before the state the statute did not apply. Justice Levitt rejected this argument, noting that under its terms the statute "applies to those who have 'obtained' a permit or license as well as those seeking one." *Id.*

NY SLAPP Statute Applies to Statements Made to the Media

Justice Levitt also rejected the argument that the New York SLAPP statute is limited to suits arising from

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New York Court Upholds Anti-SLAPP Action

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statements made directly to government agencies and does not extend to statements made to the press. Not only would such a reading essentially eviscerate the statute, he concluded, but it was contrary to both the plain meaning of the law and the legislative intent.

Thus, he noted that by its terms the SLAPP statute extends to any statements that are "materially related" to the defendant's opposition to an application or permission. The Committee's statements to the media were "materially related" because they "were calculated to elicit public interest in Adelphi's alleged wrongful activities and pressure state regulators to act." *Id.* at col. 3.

Moreover, the legislative history of the statute made clear that its purpose was to "cover any lawsuit intended to chill the free speech rights of participants in a public debate regarding a public permit or application, whatever form that debate takes." He warned that to limit the statute to statements made directly to governmental agencies would "render it virtually useless since almost every hotly contested public debate receives press coverage, and the ability of

the participants in the debate to influence that coverage often determines the outcome." *Id.*

Finally, Justice Levitt held open the possibility that the Committee might be able to recover punitive damages from the Trustees, holding that the allegation that the Trustees had brought the lawsuit "for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition and association rights" was "more than adequate" to survive a motion to dismiss. *Id.*

Less than one week after the decision in *Adelphi University*, the N.Y. State Regents removed 18 of the 19 Adelphi trustees, stating that they had overpaid the president and failed to keep track of his compensation or to review his job performance, and that, in addition, two trustees had improperly benefited from doing business with the university and had failed to disclose these dealings. See *N.Y. State Regents Oust 18 Adelphi University Trustees*, N.Y. TIMES, February 11, 1997. Although the trustees initially obtained a court order blocking their

removal, they subsequently resigned their positions. See *18 Adelphi Regents Resign*, N.Y. TIMES, February 14, 1997.

Although decided only in the context of a motion to dismiss, *Adelphi University* is the first decision to at least contemplate the possibility of awarding damages under the New York State SLAPP statute. Prior decisions addressing the statute had either found it inapplicable because the underlying suit was not a SLAPP suit or had declined to award attorneys' fees and costs under the statute. See, e.g., *Harfenes v. Sea Gate*, 1995 N.Y. Misc. LEXIS 522 (N.Y. Sup. Ct., N.Y. Co., August 10, 1995) (statute does not apply because underlying suit was not a SLAPP suit); *In the Matter of West Branch Conservation Association, Inc., v. Planning Board of Town of Clarkston*, 636 N.Y.S.2d 61 (2d Dep't 1995) (refusal of trial court to award costs and attorneys' fees was not an abuse of discretion); *Rambo v. Genovese*, No. 95-15344 (N.Y. Sup. Ct., Suffolk Co. September 17, 1996) (statute not applicable because underlying malicious prosecution claim was not frivolous). °

Supreme Court Update:

Tilton v. Capital Cities/ABC Inc., 95 F.3d 32 (10th Cir., 1995), cert. denied, 65 U.S.L.W. 3563 (2/18/97, No. 96-817)

The U.S. Supreme Court has denied televangelist Robert Tilton's petition for certiorari letting stand an Oklahoma federal district court grant of summary judgment and subsequent affirmation by the Court of Appeals for the Tenth Circuit in favor of ABC. Tilton, angered over a 1991 *PrimeTime Live* broadcast which alleged that the minister led an extravagant lifestyle and made false promises to his followers, sued the network for libel and false light invasion of privacy. The district court's grant of summary judgment was based in part on the issues of falsity, opinion and substantial truth, but the actual malice standard provided the

touchstone as the court concluded that Tilton simply did not show that with convincing clarity that ABC knew or had serious doubts as to the truth of the report. See *LDRC LibelLetter*, September 1996 at p. 1.

Tilton's petition, which also sought an injunction against rebroadcast, presented the following questions: (1) Is the plaintiff's Seventh Amendment right to a trial by jury violated by the district court's grant of summary judgment? (2) If a libel plaintiff proves that statements and implications in a broadcast concerning him are false, is he then entitled to an injunction preventing rebroadcast of those same state-

ments and implications, regardless of whether they were uttered with knowledge of their falsity in the first instance?

Tilton's ministry, the Word of Faith World Outreach Center Church, also has a petition for certiorari before the U.S. Supreme Court. In that case, arising out of the same broadcast, the church alleged RICO violations and conspiracy. The suit was also dismissed at the district court level and subsequently affirmed by the Court of Appeals for the Fifth Circuit. *Word of Faith World Outreach Church v. Sawyer, et al*, 90 F.3d 118 (5th Cir., 1996), cert. filed, 65 U.S.L.W. 3524 (1/28/97, No. No. 96-1056). °

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mation gatherer so free-rides on the timely information gathered by a competitor as to threaten the very existence of the competitor's product or service.

The Pre-Game Show

The case was played to an apparent conclusion in less than a year.¹ It has been closely followed in the press.²

STATS set up a series of reporter networks to collect "real-time" scores for professional sports events, including NBA basketball games. Reporters in the network watch or listen to games on a (copyrighted) NBA television or radio broadcast and enter observed scoring events on a personal computer. This data is sent to STATS' computer which creates a data feed of the changing score of on-going games, and can be used to create running box scores and other in-game statistics. STATS provides this data feed to subscribers to its own on-line service and to users of a site on America Online.

In early 1996, STATS began to provide a subset of this data to SportsTrax, a pager device developed and marketed by Motorola. This \$200 device, promoted as ideal for the fan who cannot go to the game or watch it on TV, provides the scores of all NBA games in progress, along with basic half-time and end-of-game statistics. The score changes follow game events by about two to three minutes and update every two to three minutes.

The First Half

In March 1996, the NBA sued both STATS and Motorola, asserting that SportsTrax violated its rights of "ownership" of NBA game scores and other game statistics generated in NBA games.³ Its complaint asserted that SportsTrax and STATS' other activities infringed the NBA's copyright in NBA game broadcasts, as well as a claimed copyright in NBA games themselves.

It also claimed that defendants were committing misappropriation under New York law because the games existed

due to the NBA's expenditure of effort and money, to which the defendants made no contribution; the defendants were trying to "reap where they have not sown" when they reported NBA game scores and statistics. The New York Times, the AP, and America Online filed amicus briefs on behalf of the defendants and the other major sports leagues supported the NBA's position.

After trial, Judge Preska dismissed the NBA's copyright infringement claim but found that SportsTrax misappropriated "the excitement and entertainment of [an NBA] game in progress" and enjoined defendants from reporting any NBA game information during the game by any means.⁴ Because defendants copied only facts from NBA broadcasts, she held the infringement claim barred by the Supreme Court's decision in *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, which rejected any notion of copyright adhering to facts.⁵ The trial court also rejected the argument that sports games and other events were within the subject matter of copyright.

The defendants contended that the NBA's misappropriation claim was preempted under section 301 of the Copyright Act; Judge Preska agreed insofar as the claim addressed copying from broadcasts, but held that a claim addressing misappropriation of NBA games themselves survived preemption, since the games were not within copyright's subject matter. She dubbed this distinction, for which no precedent was cited, "partial preemption."

Judge Preska then held that the defendants' activity with SportsTrax "commercially immoral" behavior, as they were profiting from the NBA's investment in its games without contributing to those efforts. She relied primarily on a series of old New York cases enjoining copying and redistribution of radio sportscasts — cases decided well before Congress, in the 1976 Copyright Act, brought simultaneously recorded live broadcasts within the scope of copyright protection, and provided for broad

preemption of state law equivalent to copyright.

The Second Half

Defendants took an expedited appeal. On appeal, the NBA spent little time defending Judge Preska's "partial preemption" rationale. Instead, the NBA argued that it had proven an *INS* "hot-news" claim, a cause of action not preempted by the Copyright Act. Judge Winter expressed a skeptical view of this contention at oral argument, which carried through to his opinion.

Because the central issue was the scope of copyright preemption, the opinion began by reviewing and approving the district court's dismissal of the NBA's copyright infringement claim. The ruling shows that the Court is interested in protecting competition on the sports field as well as in the marketplace. The opinion denies copyright protection for basketball games or other events because they do not constitute "original works" of authorship under 17 U.S.C. § 102(a). Unlike the literary and creative works entitled to protection, "[s]ports events are not 'authored' in any common sense of the word."⁶ Games are competitive because the outcome of every play can be changed by unforeseen or random events; "athletic events have no underlying script."⁷ Moreover, allowing games or sports moves or plays to be copyrighted would destroy the competitive aspects of most sports. "A claim of being the only athlete to perform a feat doesn't mean much if no one else is allowed to try."⁸

"Partial Preemption" Rejected

Turning to the question of whether the misappropriation claim was preempted, the Second Circuit forcefully rejected the district court's concept of "partial preemption." This concept was found incompatible with the broad scope of section 301 of the Copyright Act, by which Congress in-

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tended that state law misappropriation claims addressing any material contained within copyrightable works (even if, those works contained uncopyrightable elements such as facts) be preempted.⁹

The opinion found that a partial preemption doctrine "would expand significantly the reach of state law claims and render the preemption intended by Congress unworkable."¹⁰ Partial preemption would violate Congress' intention that events — as opposed to the broadcasts of those events — remain in the public domain. The Court also emphasized the difficulty inherent in separating the copyrightable work from the uncopyrightable facts or events.

The Court next considered whether the NBA's misappropriation claim addressed an infringement of rights generally equivalent to the exclusive rights granted under copyright law. The Court held that the variety of misappropriation found by the district court, the "broad and flexible" doctrine of "commercial immorality" under New York law, was plainly of a type preempted under existing Circuit precedent. "Commercial immorality" was "virtually synonymous for wrongful copying and ... in no meaningful fashion distinguishable from infringement of a copyright."¹¹ The Court termed the old radio broadcast cases on which Judge Preska had relied "simply not good law," in light of the amendments to the Copyright Act extending protection to simultaneously-recorded broadcasts and preempting the misappropriation theory on which those old decisions were based.¹²

INS Construed

The Court then held that the only misappropriation claim that may possibly survive preemption is an *INS* hot-news claim so narrowly construed as to require close conformity to *INS*' facts.¹³ A true hot-news claim requires proof of a number of elements to escape

preemption: (a) generation or collection of information by the plaintiff at a cost; (b) the information is highly time-sensitive; (c) defendant uses this information to free-ride on plaintiff's costly efforts without incurring costs of its own, (d) defendant's product or service is in direct competition with the plaintiff's product or service; and (e) were others allowed to free-ride in this manner, the plaintiff's incentive would be so reduced that the quality or even existence of the plaintiff's service would be "substantially threatened."¹⁴

Judge Winter emphasized that "*INS* is not about ethics," but about preservation of a marketplace in which competing news gatherers will retain a profit incentive to engage in their business.¹⁵ Ultimately, *INS* is intended to protect the public, for without its limited protection, no one would go into the "hot-news" business.

The Court found that the NBA failed to prove at least two key elements of an *INS* claim. First, because STATS gathered the information carried on SportsTrax at a cost, it was thus not free-riding on the NBA's own statistics-gathering efforts. In addition, SportsTrax's transmission of "real-time" scores was held to be an entirely different "informational product" from the NBA's games and live game broadcasts. The Court found the obvious to be true: Sportstrax was not a substitute for attending or watching an NBA game and had no competitive impact on the NBA's business. Because the NBA retained the incentive to enter the market with its own "real-time" pager service and compete with Sportstrax, "[t]his is obviously not the situation against which *INS* was intended to prevent."¹⁶ Accordingly, the misappropriation claim was dismissed as preempted.

The Post-Game Analysis

The Second Circuit's decision has something of interest for everyone; sports leagues, sports fans, the media, entrepreneurs in new information technologies, and even intellectual property

lawyers.

The other three major professional sports leagues filed amicus briefs supporting the NBA for a good reason. All the leagues are headquartered in New York, and the Second Circuit is their "home court". They foresaw that a Second Circuit decision rejecting the NBA's claims would bind them as well. Indeed, as long as sports games are broadcast live, the Court's opinion will foreclose the leagues from asserting a monopoly over real-time game information through misappropriation or any other state-law theory.¹⁷

Even before the NBA's lawsuit, at least one of the leagues had aggressively threatened media organizations with an injunction if they reported "real-time" and even post-game data without obtaining a license. The Second Circuit's decision dooms this strategy. The leagues have no choice but to accept the decision's encouragement of open competition in the field of sports statistics. They will most likely respond by gathering and licensing "official" real-time data (complete with use of league trademarks) to preferred conduits, who will retransmit the information to the public via pagers and other means.¹⁸ The true winner of this competition is likely to be the avid sports fan, who, if Judge Winter is right, will enjoy ever more rapid, comprehensive and cheaper sources of sports statistics.

The decision also has ramifications for other areas of business. Sports is not the only field in which real-time data is valuable. Another obvious example is financial data.¹⁹ Stock market prices are traditionally made available with a 15 or 20-minute delay. However, a variety of providers are now making low-fee real-time stock quotes and charts available to the public via the Internet, and the New York and American Stock Exchanges have now started to make a non-delayed data stream publicly available through CNNfn. While the direct users of Internet live stock

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quotes may be contractually prohibited from redisseminating the information, the Second Circuit's decision would seem to permit persons not bound by a such an agreement (such as observers of the CNNfn data stream) to make immediate commercial use of these facts.

More generally, the Second Circuit's decision provides a zone of protection in which entrepreneurs in a variety of new information technologies — Internet, pagers, and yet-to-be devised means — can compete to bring information to consumers without confronting a claim of proprietary rights in the facts. By applying copyright preemption broadly while reaffirming the traditional narrow view of *INS*, the Second Circuit has done a great service for those who collect and commercialize information obtained from public sources.

For many years the New York courts misread *INS* as a rule allowing them to intervene whenever they adjudged a competitor's conduct "immoral" or "unethical". The courts used this rule to create an "equitable copyright" and prohibit use of publicly available facts despite the federal policy placing facts in the public domain.

This law had fallen into desuetude since enactment of the 1976 Copyright Act, but was broadly revived by Judge Preska's decision in a way that threatened not just businesses selling "real-time" information, but also those trading in "historical" factual data. The Second Circuit's ruling sweeps this obsolete law from the books. It ensures that information gatherers can continue to use facts gleaned from all public sources, including "real-time" information.

The Second Circuit decision also ensures that *INS*'s hot-new doctrine will be applied as the Supreme Court originally intended: as a principle of competitive economics, not morality. *INS* is not intended to forbid copying of facts. It exists for a precise purpose: to prevent competitors from

free-riding on another's time-sensitive information product when this threatens "the very existence" of the product. Such parasitism is quite uncommon, as witnessed by the paucity of successful "hot news" claims in the law. Outside of this limited area of prohibition, competition, not lawsuits, will determine which information provider prevails in the market.

The Second Circuit's decision also provides useful guidance to the intellectual property bar. The opinion makes clear that games and events are not copyrightable events. It quashes the unworkable concept of "partial preemption," and establishes that an action for infringement is the sole remedy for unauthorized use of a broadcast of a live event. It confirms that our Circuit remains hostile to plaintiffs who try to evade *Feist* by dressing their claims of copyright in facts in state-law clothing.

The Second Circuit left open at least one interesting question: whether an *INS* injunction against the redissemination of pure facts can be reconciled with modern concepts of the First Amendment.²⁰ However, it made that question largely academic by emphasizing the original narrow definition of the hot-news tort. Given the difficulty of proving that a defendant is free-riding so as to threaten "the very existence" of a competitive product, few plaintiffs will succeed in making out an *INS* claim. As a result, the constitutionality of the hot-news doctrine may never be squarely presented for appellate review. *

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Endnotes

1 The NBA has recently petitioned the Second Circuit for a rehearing, and STATS and Motorola have moved for an award of attorney's fees and costs.

2 See, e.g., "NBA Sues to Keep Scores in Its Court," *New York Times*, March 21, 1996; 3/31/96; "The NBA vs. AOL: You Gotta Pay to Play," *Business Week*, September 16, 1996; "The NBA Fouls Free Speech," *New York Times*, October 22, 1996; M. Conrad, "The Impact of NBA's SportsTrax Victory," *NYLJ*, November 1 and 8, 1996; "But Is It Good For The News?," *The New Yorker*, November 18, 1996.

3 The NBA asserted in its moving papers that it "own[s] and control[s] the creation and dissemination of information and statistics relating to NBA Games."

4 939 F. Supp. 1071, 1106 (S.D.N.Y. 1996)

5 499 U.S. 340 (1991)

6 Slip. op. at 1453.

7 *Id.*

8 Slip op. at 1454. Since this issue was not raised on appeal by the NBA, it appears that Judge Winter was reaching out to reject recent speculation that sports moves or plays are copyrightable. See R. Kunstadt, F. Kieff and R. Kramer, "Are Sports Moves Next in IP Law?," *The National Law Journal*, May 20, 1996, p. C1.

9 Another recent example of this principle is *United States of America ex rel. Berge v. Board of Trustees of the University of Alabama*, No. 95-2811 (4th Cir., January 22, 1997), which found a claim for conversion of intellec-

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tual property under Alabama law to be preempted. The Fourth Circuit rejected plaintiff's attempt to claim that the "ideas and methods" within her copyrighted dissertation were outside copyright's scope, ruling that "scope and protection are not synonyms...[T]he shadow actually cast by the Act's preemption is notably broader than the wing of its protection."

10 Slip op. at 1461.

11 Slip. op. at 1465.

12 *Id.* at 1467.

13 The Court made pointed allusion to the many decisions of Judge Learned Hand opposing a broad reading of *INS*, which Judge Hand considered to be an improper "common-law patent or copyright for reasons of justice." Slip op. at 1468 n.7, quoting *Cheney Bros.*

v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929), *cert. denied*, 281 U.S. 728 (1930).

14 Slip op. at 1469

15 *Id.*

16 Slip op. at 1473.

17 The theories had of late grown quite exotic. One commentator recently argued that Judge Preska erred by relying on misappropriation theory. According to the writer, who relied on the much-criticized *Vanna White* case, the Court should have ruled that SportsTrax somehow violated the NBA's players' state-law rights of publicity, or, alternatively, violated the "moral rights" of sports broadcasters by failing to credit their efforts. R. Kunstadt, "Misappropriation" Theory Scores Game Point in *NBA v. Motorola* But Will It Count?, *NYLJ*, January 21,

1997. The Second Circuit's ruling should discourage further speculative efforts to discover a "hidden" non-preempted cause of action.

18 A week after the Second Circuit's decision was handed down, it was announced that the NBA had reached a deal with a competitor of STATS, Sports-Ticker, to carry real-time statistics gathered by the NBA and to sue the title "Authorized Real-Time Statistics Distributor of the NBA."

19 On appeal, the Chicago Mercantile Exchange filed an amicus brief supporting the NBA.

20 M. and D. Nimmer, *Nimmer on Copyright* (1996), § 1.01[B][2][b]. Indeed, *INS* may be the only remaining Supreme Court decision in which the First Amendment views of Justices Brandeis and Holmes (who dissented) did not eventually prevail. °

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VIRTUAL UNCERTAINTY: UNRESOLVED ISSUES OF PERSONAL JURISDICTION OVER INTERNET DEFAMATIONS

By Alexander Gigante

Several federal District Court decisions in the last ten months addressed the issue of personal jurisdiction over defendants allegedly committing torts via the Internet.¹ Although these decisions -- six involving trademark infringement and one defamation -- cumulatively begin to define the limits of long-arm jurisdiction over Internet-mediated torts, some key issues are still unresolved. In particular, uncertainty remains as to the extent due-process considerations will allow a forum to exercise personal jurisdiction over a foreign defendant disseminating a defamation on the Internet from a so-called "passive" site. The resolution of this issue almost certainly will affect the Internet's development as a national communications medium, and, in the process, may also produce new concepts of personal jurisdiction as courts try to strike a balance between traditional, territorially based due-process principles and the Internet's inherent extraterritoriality.

A. Due Process Basics

In determining whether it may exercise personal jurisdiction over a foreign defendant, a court undertakes a two-step inquiry. Initially, it must ascertain whether the defendant's acts fall under an applicable provision of the forum state's long-arm statute. See, e.g., *Sculptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 626 (11th Cir. 1996); *Stover v. O'Connell Associates, Inc.*, 84 F.3d 132, 134-35 (4th Cir.), cert. denied, 117 S.Ct. 437 (1996). If the long-arm statute applies, the court must then satisfy itself that exercising personal jurisdiction over the foreign defendant would not violate due process. See, e.g., *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 470-72 (1985).

A court may exercise personal jurisdiction over a foreign defendant, consistent with due process, if the defendant has "minimum contacts" with the forum state, *International Shoe Co. v. State of Washington*, 376 U.S. 310, 316 (1945), and if, under all the circumstances, requiring the defendant to litigate there would not be unfair or unreasonable. See *Burger King, supra*, 471 U.S. at 476-77. "Minimum contacts," the touchstone of due-process analysis, is a notoriously vague, fact-driven concept. *Kulko v. Superior Court of California*, 436 U.S. 84, 92 (1978) ("the minimum contacts' test of *International Shoe* is not susceptible of mechanical application; rather the facts of each case must be weighed . . ."). A physical presence in the forum state is not necessary to establish "minimum contacts." "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State

in which business is conducted." *Burger King, supra*, 471 U.S. at 476.

Although a physical presence is not necessary, "minimum contacts" requires a showing that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 297 (1980) (citations omitted). In that regard, the court must find that "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant does not purposefully avail itself of the privilege of conducting activities in the forum state merely because the defendant's actions may have foreseeable consequences there. See *World-Wide Volkswagen, supra*, 444 U.S. at 295 ("foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause"). In particular, contact with the forum state initiated through the unilateral acts of third parties -- though foreseeable by the defendant -- cannot establish the defendant's "minimum contacts" with the forum state. See *id.* at 298-99 (automobile sold in New York, later used in Oklahoma by downstream purchaser); *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 108-16 (1987) (plurality opinion) (automobile part sold by Japanese manufacturer in Taiwan, later implicated as cause of car accident in California). Instead, due process requires a showing that the defendant's own acts purposefully projected it into the forum state, i.e., that the defendant itself initiated the contacts with the forum. See *Burger King, supra*, 471 U.S. at 472-73, 475; *World-Wide Volkswagen, supra*, 444 U.S. at 297-98.

B. The District Court Decisions

Six of the District Court decisions concerned personal jurisdiction over defendants allegedly engaging in trademark infringement on the Internet. The first case, *Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996), involved a dispute arising out of the defendant's registration of an Internet domain name similar to the plaintiff's registered trademark. The plaintiff sued for infringement in Connecticut federal court and the defendant, a Massachusetts-based company having no physical presence in the forum, moved to dismiss for lack of personal jurisdiction.

In denying the motion to dismiss, the District Court found that the defendant's Internet site amounted to a form of continuous advertising in Connecticut because it was accessible to at least the 10,000 computers in that state known to be Internet-connected. The Court held that this "advertising," coupled with the defendant's toll-free number available to all

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Net surfers, including Connecticut residents, constituted solicitation of business within the State, satisfying Connecticut's long-arm statute (937 F.Supp. at 164), as well as establishing "minimum contacts" for due-process purposes:

In the present case, [defendant] has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. [Defendant] has therefore, purposefully availed itself of the privilege of doing business within Connecticut.

Id. at 165.

A few months after the decision in *Inset Systems*, the jurisdiction issue arose again in *Maritz, Inc. v. Cybergold, Inc.*, 1996 WL 714240 (E.D. Mo. 1996). The defendant there maintained its Internet site on a server in California that, naturally, was accessible to Net surfers in Missouri. Although not operational at the time of suit, the defendant intended to use its site to register interested surfers and to provide them with requested advertiser information. The plaintiff sued the defendant in Missouri federal court, claiming trademark infringement causing injury to the plaintiff in that state.

Ruling on the defendant's motion to dismiss for lack of personal jurisdiction, the Court found that the defendant's activities fell under one of the tort provisions of Missouri's long-arm statute. Turning to the due-process inquiry, the District Court acknowledged that "[w]hether sufficient minimum contacts to obtain personal jurisdiction over a defendant can be established solely through the use of computers and electronic communications is a new issue under due process jurisprudence." *Id.* at *6. In holding that the exercise of personal jurisdiction would not offend due process, the Court focused on the defendant's intent to use its site to register Net surfers — including those in Missouri — and provide them with information via the Internet, and on records showing that the defendant's site had received 131 "hits" from computers in Missouri. *Id.* These facts, the Court concluded, belied the plaintiff's argument that it was maintaining a "passive website." *Id.*

In *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), the plaintiff owner and operator of "The Blue Note" jazz club in New York City charged that the

defendant, which ran a jazz club in Missouri also called "The Blue Note," infringed the plaintiff's federally registered marks. The defendant advertised itself with an Internet site on a server in Missouri. The site provided a telephone number for ordering tickets, but anyone purchasing tickets by telephone had to retrieve them at the club in Missouri. The plaintiff sued in New York federal court, contending that the defendant's Internet site — readily accessible to anyone in New York State — alone constituted a tortious act in New York sufficient to exercise personal jurisdiction over the defendant there.

On the defendant's motion to dismiss for lack of personal jurisdiction, the Court first concluded that the defendant's activities did not fall under either of the two arguably applicable provisions of the New York long-arm statute.² In what was in effect dictum, the Court then addressed the due-process issues raised by the defendant's motion to dismiss:

[The defendant], like numerous others, simply created a Web site and permitted anyone who could find it to access it. Creating a site, like placing a product into the stream of commerce, may be felt nationwide—or even worldwide—but, without more, it is not an act purposefully directed toward the forum state. See *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112, 107 S.Ct. 1026, 1032, 94 L.Ed.2d 92 (1992) (plurality opinion). There are no allegations that [the defendant] actively sought to encourage New Yorkers to access [its] site, or that [it] conducted any business—let alone a continuous and systematic part of its business—in New York. There is in fact no suggestion that [the defendant] has any presence of any kind in New York other than the Web site that can be accessed worldwide. Bensusan's argument that [the defendant] should have foreseen that users could access the site in New York and be confused as to the relationship of the two Blue Note clubs is insufficient to satisfy due process.

937 F.Supp. at 300 .

In *Heroes, Inc. v. Heroes Foundation*, 2 BNA Elec. Info. Pol'y & L. Rep 81 (D.D.C. 1996),³ another Internet trademark case, the defendant charity's Internet site — accessible in the forum — invited users to correspond by e-mail and provided an 800 number for making donations. The defendant also placed an advertisement in a local newspaper, which likewise provided the toll-free number. Relying on *Inset Systems* and *Cybergold*, the District Court denied the defendant's motion to dismiss for lack of personal jurisdiction, holding

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that the combination of the newspaper advertisement and the Internet presence was sufficient for due-process purposes:

Because the defendant's home page is not the only contact before the Court, . . . the Court need not decide whether the defendant's home page by itself subjects the defendant to personal jurisdiction in the District. In weighing the importance of this particular contact, however, the Court notes that the defendant's home page explicitly solicits contributions, and provides a toll-free telephone number for that purpose And the home page is certainly a sustained contact with the District; it has been possible for a District resident to gain access to it at any time since it was first posted.

In *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 1997 WL 37657 (E.D. Pa. 1997), the California defendant used ZIPPO.COM as a domain name to promote an Internet news service for subscribers accessing the site with passwords provided by the defendant. Approximately 3,000 such subscribers (representing 2% of all subscribers) were located in Pennsylvania. The plaintiff, a Pennsylvania corporation that manufactures the well-known ZIPPO cigarette lighters, sued there for trademark infringement.

In denying the defendant's motion to dismiss for lack of personal jurisdiction, the Court concluded that the defendant's Internet activities exceeded the level of contact with the forum deemed sufficient in *Inset Systems* and *Cybergold*:

First, we note that this is not an Internet advertising case in the line of *Inset Systems* and *Bensusan*, supra. [Defendant] Dot Com has not just posted information on a Web site that is accessible to Pennsylvania residents who are connected to the Internet. This is not even an interactivity case in the line of *Maritz* [v. *Cybergold*], supra. Dot Com has done more than create an interactive Web site through which it exchanges information with Pennsylvania residents in hopes of using that information for commercial gain later. We are not being asked to determine whether Dot Com's Web site alone constitutes the purposeful avilment of doing business in Pennsylvania. This is a "doing business over the Internet" case

1997 WL 37657 at *6.

The Court also provided an interesting analysis of the interplay between the Internet and the concept of "fortuitous" contacts under *World-Wide Volkswagen*:

Here, [defendant] Dot Com argues that its contacts with Pennsylvania residents are fortuitous because Pennsylvanians happened to find its Web site or heard about its news service elsewhere and decided to subscribe. This argument misconstrues the concept of fortuitous contacts embodied in *World Wide Volkswagen*. Dot Com's contacts with Pennsylvania would be fortuitous within the meaning of *World Wide Volkswagen* if it had no Pennsylvania subscribers and an Ohio subscriber forwarded a copy of a file he obtained from Dot Com to a friend in Pennsylvania or an Ohio subscriber brought his computer along on a trip to Pennsylvania and used it to access Dot Com's service. That is not the situation here. Dot Com repeatedly and consciously chose to process Pennsylvania residents' applications and to assign them passwords. Dot Com knew that the result of these contracts would be the transmission of electronic messages into Pennsylvania. The transmission of these files was entirely within its control. Dot Com cannot maintain that these contracts are "fortuitous" or "coincidental" within the meaning of *World Wide Volkswagen*. When a defendant makes a conscious choice to conduct business with the residents of a forum state, "it has clear notice that it is subject to suit there." *World Wide Volkswagen*, 444 U.S. at 297.

1997 WL 37657 at *7.⁴

Panavision International, L.P. v. Toeppen, 938 F.Supp. 616 (C.D. Cal. 1996), involved the infamous "cybersquatter" Dennis Toeppen, who had set up a PANAVISION.COM Internet site, notwithstanding that the plaintiff was the registered owner of the PANAVISION trademark.⁵ Panavision sued in California for both infringement and dilution of its well-known trademark. In denying Toeppen's motion to dismiss for lack of personal jurisdiction, the District Court adopted a due-process approach not used in *Inset Systems*, *Cybergold*, *Bensusan*, *Heroes* or *Zippo*. Specifically, the Court held (938 F.Supp. at 620-21) that Panavision's claims charged Toeppen with conduct more properly viewed as tortious rather than commercial, that the due-process analysis in tort cases differs from that applicable to commercial suits because of the "effects test" stated in *Calder v. Jones*, 465 U.S. 783 (1984), and that under that test, Toeppen had the necessary minimum contacts with the forum:

Under the "effects doctrine," Toeppen is subject to personal jurisdiction in California. Toeppen allegedly registered Panavision's trademarks as domain names with the knowledge that the names belonged to Panavi-

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sion and with the intent to interfere with Panavision's business. Toeppen expressly aimed his conduct at California. Finally, Toeppen has harmed Panavision, the brunt of which Panavision has borne in California, which Toeppen knew would likely happen because Panavision's principal place of business and the heart of the theatrical motion picture and television camera and photographic equipment business are in California.

938 F.Supp. at 621-22.

In addition to these six trademark cases, *EDIAS Software International, L.L.C. v. Basis International Ltd.*, 947 F.Supp. 413 (D. Ariz. 1996), addressed the Internet jurisdiction issue in the context of a defamation claim. The Arizona-based plaintiff in *EDIAS* alleged that the New Mexico defendant not only breached their contract, but also defamed the plaintiff by e-mail sent to the plaintiff's customers in Arizona and in messages posted on the defendant's Compuserve Web site and forum.⁶ In denying the defendant's motion to dismiss for lack of personal jurisdiction, the District Court used the same reasoning as *Panavision*, holding that the e-mail, Web site and forum messages were not only "'contacts' under the minimum contacts analysis, but additionally confer jurisdiction in Arizona under the 'effects test.'" 947 F.Supp. at 420. Significantly for the current discussion, the Court found that the Web page itself represented a purposeful direction of the alleged defamation into Arizona because the defendant could foresee that the plaintiff would suffer injury there:

[The defendant] directed the e-mail, Web page, and forum message at Arizona because Arizona is [the plaintiff's] principle [*sic*] place of business. [The plaintiff] allegedly felt the economic effects of the defamatory statements in Arizona. . . . Thus, if [the defendant] could foresee that the result of the statements might be to deter potential [plaintiff] customers, then [the defendant] could also foresee that the injury might be felt in Arizona.

*Id.*⁷

C. *Calder v. Jones*

Inset Systems, *Cybergold*, *Bensusan*, *Zippo* and *Heroes* all used a due-process analysis that hinged on the presence (albeit at least in part makeweight) of some "plus" factor that, when added to the defendant's Internet activities, evinced the requisite purposeful projection of the defendant into the forum state.⁸ In the three cases upholding jurisdic-

tion, a resident in the forum state could consummate a transaction with the defendant either directly via the Internet (*Cybergold* and *Zippo*), or by a toll-free number promoted through the Internet (*Inset Systems* and *Heroes*). In *Bensusan*, in contrast, a user in the forum state could not complete a transaction with the defendant either on the Internet or with the telephone number advertised on the defendant's Internet site.

However, as *Panavision* and *EDIAS* indicate, "plus" factors -- makeweight or otherwise -- are irrelevant under *Calder's* "effects test," which focuses instead on the foreseeability to the defendant of the nature and breadth of the in-forum injury likely to be borne by the plaintiff. *Calder* thus bears close analysis because it may play a pivotal role in determining personal jurisdiction in Internet defamation cases.

Calder involved an allegedly defamatory article published in *The National Enquirer* about the well-known entertainer, Shirley Jones. Jones, a California resident, brought suit in California Superior Court against the article's author and the *Enquirer's* president and editor, both Florida residents. Neither defendant had been physically present in California to research or write the article, nor had any control over the circulation of the article there. Relying on *World-Wide Volkswagen's* statement that "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause" (444 U.S. at 295), the defendants argued that they could not be subject to the California court's jurisdiction simply because they could have foreseen that the *Enquirer* would have been distributed in that state.

In rejecting that argument, the Supreme Court held that -- at least as to defamation -- foreseeability can be determinative:

[the defendants] are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. [Defendant] South wrote and [defendant] Calder edited an article that they knew would have a potentially devastating impact upon [Jones]. And they knew that the brunt of that injury would be felt by [Jones] in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances, [defendants] must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S., at 297 An individual injured in California need not go to Florida to seek redress from

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persons who, though remaining in Florida, knowingly cause the injury in California.

465 U.S. at 790-91.

D. Due Process and Internet Defamation

Calder could have serious implications for the Internet. As illustrated by the application of its "effects test" in *Panavision* and *EDIAS*, placement of defamatory (or other tortious content) on an Internet site — without more — can subject a defendant to personal jurisdiction in the plaintiff's home forum if it is foreseeable that the plaintiff will suffer significant injury there. Moreover, in a suit in other than the plaintiff's home forum, the court might be able to exercise personal jurisdiction at least if the defendant knew that the defamation would enjoy significant Internet dissemination there and such dissemination in fact occurred. See *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

However, neither *Panavision* nor *EDIAS* addresses the degree of Internet dissemination in the forum necessary to establish that significant injury there was an "effect" foreseeable by the defendant. Instead, both decisions presume widespread dissemination because of the Internet's pervasiveness. Yet in *Calder*, one factor persuading the Court of the defendants' intent to direct their article into the plaintiff's forum was proof that it was "the State . . . in which the National Enquirer has its largest circulation." 465 U.S. at 790-91. Likewise in *Keeton*, the defendant magazine "continuously and deliberately exploited . . . [the forum state's] market" 465 U.S. at 781.

If *Calder* and *Keeton* require substantial Internet dissemination in the forum, then — *EDIAS* and *Panavision* notwithstanding — forum accessibility to the site alone will not be sufficient. Even proof of several hundred random forum "hits" on the defendant's site might not be enough under an "effects test" requiring evidence of substantial dissemination (see *supra* note 8). A "passive" Internet site — i.e., a site disseminated by the serendipity of who happens to access it — thus almost certainly would not produce sufficient due-process contacts with the forum.⁹

On the other hand, one Circuit Court recently held that — at least as to an individual plaintiff — *de minimis* circulation of the defamation in the plaintiff's forum suffices under *Calder* for due-process purposes. *Gordy v. The Daily News, L.P.*, 95 F.3d 829 (9th Cir. 1996).¹⁰ If *Gordy* is the governing rule, an individual plaintiff could argue that defamatory material posted to even a "passive" Internet site should subject the defendant to jurisdiction in the plaintiff's forum of residence.¹¹ Moreover, if *Keeton* is ultimately held applicable to "passive" Internet defamations, the defendant might also be subject to jurisdiction in any other forum having access to the site where

the individual plaintiff allegedly sustains injury, at least if the plaintiff can prove persistent and significant Internet dissemination there resulting from the defendant's deliberate exploitation of the forum market.

A throw-away sentence in *Burger King* suggests an analytical basis for extending *Gordy* (and possibly *Keeton*) to such "passively" tortious Internet sites:

Moreover, where individuals "purposefully derive benefit" from their interstate activities, . . . it may well be unfair to allow them to escape having to account in other States for consequences that arise proximately from such activities; the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed.

471 U.S. at 473-74. Unlike a local vendor having no control over a purchaser's subsequent movement of the goods in interstate commerce, the creator of a "passive" Internet site places its content into an interstate facility expecting — and hoping — that it will be accessed at various points in the global network. The site's creator derives benefit from the Internet's interstate (and international) character, and courts may conclude that it would be unfair to allow someone disseminating a defamation in that manner to use the Due Process Clause to avoid jurisdiction in a forum that was a foreseeable recipient of the defamatory Internet message. Other courts thus may agree with the District Court in *EDIAS* that a defendant "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction." 1996 WL 700063 at *7.¹²

E. Conclusion

Although it seems that the evolving due-process jurisprudence in suits arising from Internet commercial activities will require, in addition to the Internet presence, more traditional forum contacts to sustain personal jurisdiction over the defendant,¹³ Internet-mediated torts — including in particular defamation — might fare differently. The Internet's inherent pervasiveness invites the presumption of significant injury in the forum and the foreseeability of that injury to the defendant. This presumption, coupled with a liberal application of *Calder*'s "effects test," affords a colorable due-process basis for haling the Internet tortfeasor into the forum court. If such an Internet-specific due process analysis finds acceptance, it will reflect judicial disquiet over the

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prospect of the Due Process Clause shielding defendants who knowingly use this vast communications network to inflict reputational injury in distant forums. °

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ENDNOTES

1. The term "Internet" means the panoply of services available on the existing global system of interconnected computer networks. The World Wide Web (the Web) — which is but a part of the Internet — is the Internet graphical interface service based on Hypertext Mark-Up Language (HTML), that, among other things, permits hypertext linking between Web sites. However, in common parlance — and in many of the court decisions discussed in this article — the Web and the Internet are sometimes used as interchangeable terms.

2. CPLR 302(A)(2) and 302(a)(3)(ii), which deal with tortious acts committed in or causing injury in New York.

3. The decision is also available at <http://zeus.bna.com/e-law/cases/heroes.html>.

4. The *Zippo* Court reached this result after surveying many of the recent decisions on Internet personal jurisdiction. Noting that the Internet makes it possible to conduct an international business from a desktop, and that there is "scant" law on the jurisdictional issues arising from this "global revolution," the Court distilled the few apposite decisions as follows:

the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. E.g., *Compuserve, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996). At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. E.g. *Bensusan Restaurant Corp. v. King*, 937 F.Supp. 296 (S.D.N.Y. 1996).

The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site. E.G. *Maritz, Inc. v. Cybergold, Inc.*, 1996 U.S. Dist. Lexis 15976 (E.D. Mo. Aug. 19, 1996).

1996 WL 37657 at *4 (footnote omitted).

5. Toepfen's "business" is finding a famous mark whose owner neglected to register it as an Internet domain name, registering the domain name himself and then selling it to the mark's owner when the latter — on later attempting to register the domain name — learns of Toepfen's prior registration. *Panavision International, L.P. v. Toepfen*, 938 F.Supp. 616, 619, 621 (C.D. Cal. 1996); *Intermatic Inc. v. Toepfen*, 1996 WL 716892 at *1, *6 (N.D. Ill. 1996).

6. Compuserve subscribers can set up Web sites directly through Compuserve, rather than using a separate Internet service provider.

7. *McDonough v. Fallon McElligott, Inc.*, 1996 WL 753991 (S.D. Cal. 1996), also addressed the interplay between Internet activities and "minimum contacts," but in a different context. There, because the content of the defendant's Web site was unrelated to the plaintiff's copyright claim, the plaintiff argued that the defendant's Internet presence constituted "substantial" or "continuous and systematic" contact with the forum giving rise to "general" jurisdiction over the defendant for any cause of action. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984). The Court perfunctorily rejected the plaintiff's argument:

Because the Web enables easy world-wide access, allowing computer interaction via the web to supply sufficient contacts to establish jurisdiction would eviscerate the personal jurisdiction requirement as it currently exists; the Court is not willing to take this step. Thus, the fact that [the defendant] has a Web site used by Californians cannot establish jurisdiction *by itself*.

1996 WL 753991 at *3 (emphasis added).

8. For example, in *Inset Systems* and *Heroes*, the availability of the defendant's toll-free number, even when added to the theoretical possibility that forum residents would access the defendant's Internet site, hardly evinced the level of purposeful conduct in the forum that courts have traditionally required regarding non-Internet, interstate business activities. See, e.g., *Nicholas v. Buchanan*, 806 F.2d 305 (1st Cir. 1986), *cert. denied*, 401 U.S.

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1071 (1987) (telephone contact with forum insufficient under "minimum contacts" test); *Jolivet v. Crocker*, 859 F.Supp. 62 (E.D.N.Y. 1994) (same); *Langsam-Borenstein Partnership v. NOC Enterprises, Inc.*, 137 F.R.D. 217 (E.D. Pa. 1990) (same). Compare *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So.2d 1351 (Fla. Dist. Ct. App. 1994) (holding that where the New York defendant's primary contact with Florida was by telephone access [albeit continual] to the plaintiff's Florida-based computer databank, due process prohibited the Florida court from exercising personal jurisdiction over the defendant) with *Plus Systems, Inc. v. New England Network, Inc.*, 804 F.Supp. 111, 119 (D.Colo. 1992) (on similar facts, sustaining jurisdiction over foreign defendant accessing the plaintiff's Colorado-based computer network). In *Cybergold*, the number of Missouri-originated "hits" on the defendant's site was hardly indicative of a purposeful presence in the state, given that (a) a "hit" identifies the location of the server making the "hit," which can be different from the location of the user, (b) search engines executing a search will sometimes be reported as a "hit," which means that not every "hit" records actual access by a user, and (c), as every Net surfer knows, a "hit" is often the result of random or misdirected browsing, which is not proof of interest in, let alone deliberate interaction with, a site.

9. See *Gordy v. The Daily News, L.P.*, 95 F.3d 829, 833 (9th Cir. 1996), distinguishing *Casualty Assurance Risk Insurance Brokerage Co. v. Dillon*, 976 F.2d 596 (9th Cir. 1992) (which held that Guam could not exercise personal jurisdiction over the defendant in a defamation), on the ground that in *Dillon* "there had been no distribution of the alleged libel in Guam."

10. In distinguishing *Core-Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482 (9th Cir. 1993), which held that a Swedish defendant could not be sued in California for allegedly defaming a worldwide corporation, *Gordy* quotes *Core-Vent* for the proposition that "[a] corporation does not suffer harm in a particular geographic location in the same sense that an individual does." 95 F.3d at 833.

11. But see *Robert D. Sack & Sandra S. Baron, LIBEL, SLANDER, AND RELATED PROBLEMS* §13.3.1, at 745 (1994 ed.), arguing that the "principle [that minimal circulation in the forum is insufficient] . . . ought to survive *Keeton* and *Calder*, on the grounds that such circulation is less purposefully directed' toward residents of the forum, less significant,' and more isolated,' random,' or fortuitous'" (footnotes omitted). See also *Playboy Enterprises, Inc. v. Chuckleberry Publishing, Inc.*, 939 F.Supp. 1032 (S.D.N.Y.

1996), holding that because U.S. Net surfers could access images posted to magazine's Italian Internet site, the defendant was "distributing" the magazine in the U.S. in violation of a 15-year-old trademark injunction. Because the Court was deciding whether the defendant's actions were a "distribution" within the meaning of the injunction, its holding is not precedent for the due-process issue discussed in this article. However, the Court's discussion leaves no doubt about its view that making an Internet site available in a jurisdiction is no different than distributing hard copies there of the allegedly actionable publication:

That the local user "pulls" these images from [the defendant's] computer in Italy, as opposed to [the defendant] "sending" them to this country, is irrelevant. By inviting United States users to download these images, [the defendant] is causing and contributing to their distribution within the United States. 939 F.Supp. at 1044.

12. See also *California Software Inc. v. Reliability Research, Inc.*, 631 F.Supp. 1356 (C.D. Cal. 1986), where the defendant posted allegedly defamatory messages to a computer network accessible to several thousand users. Using the "effects test," the Court held that it could exercise personal jurisdiction over the defendant in California, and made the following observation:

Unlike communication by mail or telephone, messages sent through computers are available to the recipient and anyone else who may be watching. Thus, while modern technology has made nationwide commercial transactions simpler and more feasible, even for small businesses, it must broaden correspondingly the permissible scope of jurisdiction exercisable by the courts.

631 F.Supp. at 1363. It should be noted that in *California Software* the alleged defamation was viewed by several of the plaintiff's customers outside of California, but not in California itself, although the corporate plaintiff claimed to have suffered injury there. In light of *Gordy's* exegesis on prior Ninth Circuit decisions concerning personal jurisdiction in defamation cases (see *supra* notes 9 and 10), the due-process holding in *California Software* is now questionable.

13. In addition to *Inset Systems, Cybergold, Heroes, Zippro* and *Bensusan*, see *CompuServe Inc. v. Patterson*, 89 F.3d 1254, 1264-67 (6th Cir. 1996), where the "plus" factors included the defendant's contract with the Ohio-based plaintiff, which provided that Ohio law would govern, and the defendant's periodic downloading of software to the plaintiff's computer pursuant to their contract and with knowledge of the software's Ohio destination. •

Texas Court of Appeals Rejects Fraud Claim Against Undercover Reporter Finds No Damages Directly the Result of the Misrepresentation

A Texas Court of Appeals has affirmed summary judgment in favor of King World on claims of libel and fraud brought by an aggrieved on-camera interviewee who allowed himself to be interviewed and to be taped believing that the interviewer was a potential investor in his employer's products. *Homsey v. King World Entertainment, Inc.*, No. 01-96-00708 (1st Dist. Texas, Feb. 6, 1997) The libel claims were disposed of by a finding of substantial truth. But the court dismissed plaintiff's fraud claims for failure to establish damages apart from alleged injury to reputation that was the basis of his libel claim.

Finding that under Texas law, a fraud claim requires "pecuniary loss suffered that is directly traceable to, and which resulted from, the false representation on which the injured party relied . . . Injury for fraud must be established apart from damages suffered as a result of another act by the defendant," the court found that plaintiff

had failed to establish his claim.

Homsey is a biomedical engineer involved in the production of a biomaterial, Proplast, that is used, among other things, in TMJ implants in the jaw. A corporation set up by plaintiff manufactured certain implants that became subject of numerous lawsuits in the U.S. As a result, the entity stopped producing the implant. Other TMJ implants were subject as well to an FDA investigation, which ultimately seized the products and required a patient notification process and recall.

Plaintiff moved to Switzerland where he worked as scientific director with another company that itself was using Proplast for implants. According to the court opinion, an assistant producer for *American Journal*, produced by a wholly owned subsidiary of King World, contacted plaintiff about export of the product to South America. With the assistant producer calling himself a "Dr." (which he contended in

his affidavit was what he had been called for years and was the customary title for people with degrees and of a certain class status in Columbia), plaintiff believed the assistant producer to be a legitimate South American investor. He met with him, spoke of his work and his employer and agreed to be videotaped. At the end of the interview, a reporter from *American Journal* arrived to question plaintiff.

The fraud claim was based on the alleged false representations made by the assistant producer in order to obtain the interview. Plaintiff sought nonpecuniary damages for mental anguish and pecuniary damages for losses resulting from disclosure of confidential information about himself, his work and his employer, as well as for the provision of footage of himself. As noted above, the court found that the failure of the plaintiff to prove injury apart from that resulting from the alleged defamation was fatal to his fraud claim. °

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