For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.
80 Eighth Avenue, Suite 200, New York, New York 10011-5126 (212) 337-0200 www.ldrc.com

LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through February 28, 2002

In This Issue

LDRC

Annual Study on Media Trials Shows That Media Defendants' Win Rate is Higher, but So Are Damage Awards 3
LDRC's 2002 Report on Trials and Damages released this past week

LDRC/ Defense Counsel Section Committee Reports 53

Libel

6th Cir. **$10.7 Million Verdict Against Time Inc. Reversed by Sixth Circuit** 5
Reliance on "bad guy" sources does not amount to actual malice

Mass. **Boston Jury Awards $2.1 Million to Doctor in Assessment of Damages Hearing Against the Boston Globe** 7
Hearing held in accordance with pretrial judgment of liability entered against paper for refusing to disclose confidential sources

Is *Ayash* Unique? 9
Disturbing result in Ayash exceedingly rare, but from trial courts, not unique

Cal. **Condit Case Brought By Gadfly Attorney** 12
Gary Condit's wife, claiming she is a privite figure, alleges three counts of libel against the National Enquirer

Ga. **Georgia Supreme Court Declines to Hear Jewell's Appeal on Key Issues** 13
Leaves standing rulings that Jewell is public figure and not entitled to confidential sources

Ill. **Honor Student Wins Reversal and Remand Against Newspaper** 14
Plaintiff contends trial court erred in submitting defendants' reckless disregard instruction to the jury

Ala. **Defense Verdict on Speech Claims in First Alaska Trial** 17
Post-trial motion to vacate jury award on spoliation claim rejected

Minn. **New Trial Ordered in Minnesota Implication Suit** 19
Allows public official to establish implied defamation based on a defamatory meaning not stated or intended by broadcaster

Md. **Court Grants Summary Judgment to Medical Professional Association in Lanham Act and Defamation Case** 21
Court held that article published by the association was not commercial speech so not restricted by Lanham Act

Utah **Utah Court Denies Personal Jurisdiction Over Interactive Website** 23
Website not targeting Utah residents does not have enough contacts with the state to establish personal jurisdiction

Ind. **Court Grants Summary Judgment to TV Station Sued by County Surveyor** 24
Evidence put forth not enough to prove reporter had acted with reckless disregard for the truth

Fla. **A Satisfying Moment for Defense Counsel: Media Defendants Awarded Costs in Libel Dismissal** 25
Circuit court judge orders plastic surgeon who lost his defamation case to pay court costs

News & Updates

La. **Louisiana App. Ct. Applies Anti-SLAPP Statute for First Time to Affirm Dismissal of Media Invasion Privacy Claim** 25
Dismissal of an invasion of privacy claim against a local New Orleans news station

(Continued on page 2)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

(Continued from page 1)

Del.	**Delaware Ethics Committee Issues Opinion on Lawyers' Use of E-Mail and Cell Phones** *Use does not violate lawyer's duty of confidentiality , barring extraordinary circumstances*	33
Cal.	**Judge Reverses Course, Rules E-Mail Records Must Be Revealed** *Departure from ruling that required company execs to establish libel before they could identify anonymous defendant*	34
S.D.N.Y.	**Poet Sues FCC, Claiming Her Song Was Wrongly Labeled Indecent** *FCC Fines a Radio Station for Playing the Song*	37
	Federal Shield Law Proposed *Rep. Jackson Lee plans to propose legislation to protect from Justice Dept. attempts to uncover confidential sources*	41
	What is the Definition of a Journalist? *Very Few Appellate Courts Have Weighed in on Who May Assert a Reporter's Privilege*	41
	Defining a Journalist: State Shield Statutes	45
	State Shield Statutes	48
Cal.	**California Supreme Court Strikes Down Portion of State's "Son of Sam" Law** *Found facially violative of the First Amendment and the liberty of speech clause of the California Constitution*	49

INTERNATIONAL

UK	**Bench Verdict Awaited in Super Model's Privacy Claim Against London Paper** *Naomi Campbell sues the Mirror for publishing article that exposed Campbell as a drug addict*	27
UK	**London Judge Finds No Privacy to Print Article of Celeb's Visit to Brothel** *Plaintiff previously discussed sexual exploits in public, can't complain about less flattering reports, judge finds*	28
Australia	**Australian High Court Refuses to Enjoin Broadcast of Illegally Obtained Videotape** *Press can publish non-confidential material that has been obtained illegally provided they did not take part in the acquisition*	29
UK	**BBC Wins Agreement to Broadcast Lockerbie Appeal** *Now in the position of broadcasting the first live footage of a Scottish appeal*	35

NEWSGATHERING

11th Cir.	**Eleventh Circuit Upholds Injunction Against Newsrack Scheme** *Upholds trial court's order permanently enjoining City of Atlanta from enforcing newsrack regulations in airport*	31
7th Cir.	**Newspaper Publisher Gains Access to Sealed Settlement Agreement** *Presumptive Right of Access Applied, Though Magistrate Retained No Jurisdiction Over Agreement*	31
NY	**New York Judge Authorizes Cameras in Brooklyn Judicial Bribery Case** *Holds NY Statute Barring All Camera Access Unconstitutional*	32
NJ	**Philadelphia Reporter Fined $1,000 for speaking to Juror** *Judge rules contact not a mistake, placing trial "at risk," and finds reporter in contempt*	33
	Washington Post Reporter Claims Soldiers Threatened Him at Missile Strike Site *Reporter claims he was detained at gun-point by a US soldier while investigating the site*	35
Media	**More Court Action in Terror War Access Issues** *Skirmishes between military and media; suspects arrested in murder of journalists; reality program to star troops*	39

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

The Ultimate Censorship

This month, as in all other months, LDRC is publishing a newsletter full of reports on the efforts by plaintiffs and government to limit or punish what journalists have or would like to say. We all regard and respond seriously to these tools for censorship or, at the least, impingements on First Amendment protected practices and principles.

But the murder of *Wall Street Journal* correspondent Daniel Pearl was the ultimate censorship, the most extreme form of chilling effect, intended to silence Daniel Pearl to be sure, but also his colleagues in the American press. It was the kind of censorship strike that simply does not exist as a rule for the American press, although we know that functioning as a journalist or publisher in various parts of the world has long been extremely dangerous — not for civil damages or limited access, but for serious injury, incarceration, torture, and death.

Daniel Pearl was the ninth journalist to die covering Afghanistan and Pakistan since September 11th. Louis D. Boccardi, president of AP, in a speech sponsored by the World Press Freedom Committee last October stated that the last ten years have been the most lethal decade in history for reporters and editors. Of the more than 1300 journalists believed to have been killed because of their profession since the 18th century, 458 of them died in the 1990s alone, Mr. Boccardi reported. The AP has lost 9 journalists since 1993 of the 26 who were killed in action since 1848. Interestingly, Mr. Boccardi points out that all but two of those lost since 1993 were either video or still photographers who, he believes, carry the greatest risks along with their visible equipment.

We are all so free in this country that it is easy to forget how desperate and dangerous so much of the rest of the world can be for those who serve in the media.

In November, LDRC will produce a panel for the LDRC Annual Dinner on the role of war journalists, photographers, and videographers. Ted Koppel of ABC News has agreed to moderate the panel. I believe that with the death of Daniel Pearl, this topic takes on a new urgency.

-- Sandy Baron

Annual Study on Media Trials Shows That Media Defendants' Win Rate Is Higher, but So Are Damage Awards

LDRC released this past week its annual REPORT ON TRIALS AND DAMAGES surveying the media's record on trials of libel, privacy and related actions, the 13th report since 1980. As openers, LDRC found that while there were more trials in 2001 than in 2000, the annual numbers of trials so far in the first years of the new century are lower than they were during the 1980s and 1990s.

The LDRC 2002 REPORT ON TRIALS AND DAMAGES also shows that :

- media defendants won these cases at a higher rate in 2001 than in the two previous decades, and
- while damage awards against media defendants from these trials were lower in 2001 than in 2000, they are still higher than they were in the 1980s and 1990s.

Of profound significance is the entry of a default judgment in one libel trial, against the *Boston Globe* in state court in Massachusetts, based upon the media defendants' refusal to identify the confidential sources used for the news reports at issue in the lawsuit. A subsequent $2.1 million award against the newspaper ($3.5 million to date as a result of the addition of pretrial interest to the award) makes it one of the highest awards arising from a 2001 loss. (The award was announced as the REPORT was going to press, and is not included in the REPORT 's statistics. See articles on pp. 7 and 9 for more on this case.)

From the LDRC 2002 REPORT ON TRIALS AND DAMAGES:

- ***Number of trials***. There were 17 full trials against the media in 2001 — eight defense victories, eight plaintiffs' victories, and one mistrial due to a hung

(Continued on page 4)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Annual Study on Media Trials Shows That Media Defendants' Win Rate Is Higher, but So Are Damage Awards

(Continued from page 3)

jury. This is a lower number of trials than the average during the 1990s, 18.5, and much lower then the 1980s average of 26.1 trials a year.

- ***Win rate***. The media victory rate in 2001 — 50 percent of those cases in which a verdict was reached — is a modest increase from the 2000 defense victory rate of 46.2 percent. But these recent rates of defense victory are significantly higher than the rates for the 1980s (35.1 percent) and the 1990s (38.7 percent).
- ***Damage awards***. In the eight cases won by plaintiffs in 2001, the average award was $1.8 million, and the median was $1 million. The 2001 median is one of the highest in the 20-year history of the REPORT, although the 2001 average is among the lowest over the course of the REPORT's history. Lower averages and high medians in recent years are the result of a number of very high awards each year.
- ***Punitive damage awards.*** Punitive damages made up 30.4 percent of the total damages awarded at trial to successful plaintiffs in 2001. This is higher than in 2000, when only 3.7 percent of the total award amount was punitive damages. But the 2001 figure is still less than half of the percentage of total damages awarded than in the 1990s (67.1 percent) and 1980s (63.1 percent).
- ***High number of television trials. Low number of newspaper trails.*** There were 12 trials involving broadcast defendants — a landmark year for trials involving television. In the last two decades, television averaged about 4 trials per year. And the television guys won 58 percent of these trials in 2001, a terrific win rate for media defendants at trial.

  By contrast, the number of newspaper trials was at an all time low, with only 4 newspaper trials reported, of which the defendants won one. In the 1990s, newspapers had an average of just under 9 trials per year. And in the 1980s, newspapers had an average of just over 16 trials per year. Clearly, these are dramatically descending numbers since the beginning of LDRC's reporting on media trials.
- ***First Internet trial.*** The REPORT also marks the first time a trial based on Internet content has met the criteria for inclusion. It involved a newsletter published online and while the trial itself was in 1999, LDRC found the case this past year. *SNA v. Array*, 51 F.Supp.2d 554 (E.D. Pa. bench verdict June 9, 1999)

In addition to information on 2001 trials, the REPORT also includes statistical information on 483 trials since 1980, which resulted in 274 damage awards against media defendants. In approximately 9 percent of those, the trial judges granted judgment notwithstanding the verdict in favor of the media defendants. On appeal, 45.8 percent of the remaining awards against the media were reduced or eliminated, while only 22 percent were affirmed. 14 percent of awards were not appealed by defendants, while 12.8 percent of cases won by plaintiffs at trial were settled before appeal. 5.4 percent are either pending or their disposition is unknown.

All media members of LDRC and Defense Counsel Section members who pay dues at a level of $1,000 or more should have already received the LDRC 2002 REPORT ON TRIALS AND DAMAGES. Others may order the report for $35 by contacting LDRC, 80 Eighth Avenue, Suite 200, New York, NY 10011, via phone at (212) 337-0200, or via our web site, www.ldrc.com.

Save the Date!

LDRC Annual Dinner
November 13, 2002

In honor of war reporting...moderated by Ted Koppel, ABC News

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

$10.7 Million Verdict Against Time Inc. Reversed by Sixth Circuit

By Douglass Maynard

The Sixth Circuit has reversed a $10.7 million judgment against Time Inc. in a libel case brought by Tex Cobb, a former heavyweight boxer and sometime actor. In *Cobb v. Time Inc.*, No. 00-519 (6th Cir. Jan. 30, 2002), the court, in a decision written by Judge Kennedy and joined in by Circuit Judges Moore and Cole, held that there was insufficient evidence of actual malice to support the verdict and ordered that judgment be entered in favor of defendant. Cobb has filed a petition for rehearing *en banc*.

The opinion makes no new law but strongly reaffirms the duty of appellate courts to undertake an independent review of the evidence in determining whether the actual malice standard has been met. The decision provides significant support for publishers who rely on sources with sordid backgrounds. So long as such sources are treated with the extra caution they require, reliance on "bad guy" sources does not amount to actual malice.

So long as such sources are treated with the extra caution they require, reliance on "bad guy" sources does not amount to actual malice.

"The Fix Was In"

The case arose from an October 1993 SPORTS ILLUSTRATED magazine article entitled "The Fix Was In" that described the corrupt practices of boxing promoter Rick "Elvis" Parker, including fixed fights and widespread drug use among his entourage. The main inside source for the article was Sonny Barch, one of Parker's associates. Barch was Cobb's opponent in a September 1992 fight in Fort Lauderdale that was the first in Cobb's putative comeback. Barch lost the fight by kneeling down three times in the opening round, thus handing Cobb a victory by TKO. The SI article recounted Barch's allegations that he met with Cobb before their fight to discuss how he would go down and that at a post-fight party he shared cocaine with Cobb and Parker.

Numerous Sources

The article was the result of an extensive investigation by SI journalists. In September 1993, Barch called SI's boxing editor, saying that he had been in a fixed fight with Cobb and had helped arrange other fixed fights, including one with Mark Gastineau, the prominent ex-NFL football player. SI later interviewed Barch at great length and tested his allegations by interviewing a number of other critical witnesses.

Don Hazelton, the Executive Director of the Florida Athletic Commission and a noted boxing expert, told SI that he was present at the Cobb-Barch fight and concluded that it was "an arranged affair." Hazelton first became suspicious when he learned at the weigh in on the day of the fight that Parker wanted to substitute Barch for a legitimate fighter as Cobb's opponent. The fight itself was so inept that immediately afterward Hazelton ordered that Cobb and Barch be tested for drugs. Both were suspended after they tested positive; Cobb for marijuana, Barch for cocaine. Hazelton further told SI that Barch had given sworn testimony as part of an ongoing investigation into the corruption surrounding Parker's boxing promotions.

SI also interviewed Rob Russen, who was Parker's partner at the time of the Cobb-Barch fight; Tim "Doc" Anderson, the boxer who was originally scheduled to fight Cobb; and Rick Hoard, who lost to Gastineau in a fixed fight — all of whom provided on the record information corroborating much of Barch's story. SI interviewed Parker, who denied Barch's allegations but did admit that he substituted Barch for Anderson because he could not let Anderson "derail me" by beating Cobb. After many attempts, one of the SI reporters was able to briefly interview Cobb by telephone. Cobb would not consent to a full interview but did deny that the fight was fixed and told the reporter to look at a tape of the fight. The SI journalists did repeatedly view a videotape of the Cobb-Barch fight and they concluded that it corroborated Barch.

Nailing Down Questionable Source

Well aware of Barch's questionable background, the journalists demanded that Barch give them a full history of his criminal history. He admitted drug use, involvement in check fraud and an accusation of rape. SI also

(Continued on page 6)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

$10.7 Million Verdict Against Time Inc. Reversed by Sixth Circuit

(Continued from page 5)

conducted an independent investigation of Barch's criminal history, a process that turned up consistent information, with one exception: Barch had not revealed a recent arrest for distribution of marijuana. After confronting Barch with his failure to admit that arrest, SI learned from the Memphis police that Barch was cooperating with them in an undercover capacity and had been told for obvious reasons to keep his role confidential.

When Barch first called SI he asked if he could be paid for his story. The editor explained that SI did not pay for information, but did sometimes pay for first person accounts. The editor agreed to pay Barch $1000 to hold the story while the journalists did their investigation and said he might pay more, but only if Barch's story checked out and he provided a first person account of his involvement. The article included a sidebar, which gave Barch's account of his fight with Cobb, and Barch was paid an additional sum of approximately $14,000.

The Trial

Cobb, an acknowledged public figure, brought a libel action based on a variety of allegedly defamatory statements in the article. After partial summary judgment was granted, the case went to trial on the basis of two challenged statements: (a) that Cobb knowingly participated in the fixed fight; and (b) that he shared cocaine with Barch after the fight. In June 1999 the jury returned a verdict in favor of Cobb, awarding him $8.5 million in compensatory damages and $2.2 million in punitive damages. The District Court denied post-trial motions for judgment as a matter of law or for a new trial or for remittitur.

The Appeal

Time Inc. appealed on several grounds, including the lack of evidence of actual malice, unfair evidentiary rulings and the grossly excessive amount of damages. The Sixth Circuit only reached the dispositive issue of Cobb's failure to prove by clear and convincing evidence that SI acted with actual malice.

Following *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the court made an "independent review" of the "factual record in full." The court rejected the three bases put forward by Cobb as evidence of actual malice: (1) SI had reason to doubt Barch's veracity; (2) SI intentionally published false statements; and (3) SI purposely avoided finding out the truth.

First, the court ruled that while SI was aware of Barch's "sketchy past," the reporters acted correctly by attempting to corroborate Barch's story, investigating his criminal background and confronting Barch when they learned about the recent arrest. The court held that the fact that Barch was paid for his first person account "does not, in itself, support a finding of actual malice."

Second, the court found that the collection of allegedly false statements in the article — that Cobb had an injured shoulder; that he tested positive for cocaine, not marijuana; and that Barch did not actually write the sidebar personal account — were collateral to the two statements at issue and, in any event, did not establish actual malice.

Third, the court rejected Cobb's contention that SI purposefully avoided the truth by failing to ask witnesses whether Cobb personally participated in fixing the fight and by not interviewing the referee, ringside judges or the fight doctor. The court held that the undisputed facts of this case distinguished it from *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989) and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The court pointed in particular to SI's reliance on Hazelton, an independent source who "provided powerful corroboration for Barch's story." The record of the journalists' efforts could not support a finding that SI intentionally avoided learning the truth.

As the court concluded, "[t]he jury's verdict cannot stand without significantly infringing on the 'breathing space' that the [Supreme] Court has carved out for the freedom of speech."

Douglass Maynard is Associate General Counsel at Time Inc. He tried the case together with Eddie Wayland of King & Ballow in Nashville. Floyd Abrams of Cahill, Gordon & Reindel in New York argued the appeal. Tex Cobb was represented at trial and on appeal by George Bochetto of Bochetto & Lentz in Philadelphia.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Boston Jury Awards $2.1 Million to Doctor in Assessment of Damages Hearing Against The Boston Globe

By Jonathan Albano

After a five week trial conducted pursuant to a contempt sanction that precluded the defendants from contesting liability, a Massachusetts jury has awarded a physician $2.1 million on her claims for libel, infliction of emotional distress and interference with business relations against *The Boston Globe* and a former *Globe* reporter. *Ayash v. Dana-Farber Cancer Institute, et al.*, Suffolk Superior Court Civ. No. 96-565-E.

The "assessment of damages" trial was held in accordance with a pretrial judgment of liability entered against the *Globe* for refusing to disclose confidential sources. Despite the plaintiff's concession that the confidential sources were not relevant to any of her defamation claims, the contempt sanction imposed liability on the *Globe* for publishing five news articles and two opinion pieces.

The "assessment of damages" trial was held in accordance with a pretrial judgment of liability entered against the Globe for refusing to disclose confidential sources.

The jury also awarded the plaintiff $2.1 million on her claims against her former employer, The Dana-Farber Cancer Institute, a co-defendant at trial. The sanction and the damages assessed will be challenged on state and federal grounds in post-trial motions and on appeal.

A Study Chairperson or a Scapegoat?

The plaintiff in *Ayash* was the Study Chairperson of an experimental breast cancer treatment administered at The Dana-Farber Cancer Institute. In November 1994, two patients enrolled in the protocol, including *Globe* health columnist Betsy Lehman, who accidentally received fourfold overdoses of chemotherapy. The overdoses were not discovered by Ayash until almost two months after Lehman's death and were the subject of an award-winning series of articles written by then-*Globe* medical reporter Richard Knox. After settling a malpractice claim brought by Lehman's estate, Ayash sued the *Globe* and Knox for libel and sued Knox for infliction of emotional distress and interference with business relations. She also sued Dana-Farber and its former physician-in-chief for sex discrimination, invasion of privacy, and related claims. Her complaint alleged that she was unfairly scapegoated by the *Globe* and the hospital for the overdose incidents and that the hospital violated her privacy rights by leaking confidential medical peer review information about her to the *Globe*.

During the course of 1995, the *Globe* published approximately 50 articles about the overdoses and the resulting investigations and reforms instituted by the hospital and various public agencies. The article that broke the overdose story incorrectly identified Ayash as having countersigned the Lehman overdose and described her as the "leader of the team." Ayash claimed that she was defamed by both statements, neither of which were based on any confidential sources. The *Globe* later published a correction of the countersigning report, but defended the reference to Ayash as the leader of the team as a substantially true description of her position as Study Chairperson and as having been published with neither negligence nor actual malice.

Ayash also alleged that she was defamed by other *Globe* articles, including an editorial that described the overdoses as an "error so glaring even a first year medical student should have spotted it," and a column that compared the treating physicians to The Three Stooges and hyperbolically described the overdoses as "nothing less than criminally negligent homicide."

Two Rounds of Confidential Source Rulings

The Superior Court initially ordered the *Globe* to disclose all of the confidential sources relied upon in connection with the overdose articles on the ground that the sources' identities were relevant to Ayash's libel claims against the *Globe*. As a sanction for non-disclosure, the court imposed escalating fines that, but for a stay pending appeal, within three months would have exceeded one

(Continued on page 8)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Boston Jury Awards $2.1 Million to Doctor in Assessment of Damages Hearing Against The Boston Globe

(Continued from page 7)

million dollars.

That judgment of contempt was vacated by the Massachusetts Appeals Court, which held that the plaintiff had failed to demonstrate that she needed the sources in order to pursue her libel claims. The case was remanded to the Superior Court, however, for a determination as to whether the plaintiff needed the sources in order to pursue any of her other claims against the *Globe*, Knox, or Dana-Farber. *Ayash v. Dana-Farber Cancer Institute*, 46 Mass. App. Ct. 384, 706 N.E.2d 316 (1999).

On remand, Ayash abandoned her argument that the sources were relevant to her libel claim against the *Globe* defendants. Instead, she principally argued that the sources were essential to her claim that the hospital violated her privacy and employment rights by leaking to the *Globe* confidential information about investigations of her role in the overdose incidents. She also argued that the sources were relevant to her claim that Knox had inflicted emotional distress on her by receiving (but not publishing) two confidential peer review reports.

The Superior Court adopted both of Ayash's arguments and again ordered disclosure. The court refused to delay consideration of contempt until after the defendants' pending summary judgment motions were heard. It also rejected the *Globe's* arguments that the sources were not central to any of the plaintiff's claims and that, in any event, by deposing only five of seven hospital employees identified as having had contact with the *Globe* during the relevant time period, she had failed to exhaust alternative sources of the information sought from the *Globe*.

In assessing sanctions against the *Globe*, the Superior Court explicitly took into account the *Globe's* disobedience of its first order, without mentioning that the order had been reversed on appeal. The court also editorialized on the *Globe's* confidential source position, opining:

> The *Boston Globe*, long a champion of the freedom of information and of unfettered access to public (and even not-so-public) records, has unilaterally and unnecessarily interrupted the free flow of information that may be critical to Ayash. It is ironic that the *Globe* defendants' conduct may serve to effectuate the interests of the very hospital, as well as the hospital's former chief executive, where the *Boston Globe's* own reporter was treated and died.

Ayash v. Dana-Farber Cancer Institute, 2001 WL 360054 *2 (April 4, 2001).

> ***The constitutional flaws with the contempt sanction are obvious. As the jury verdict against the hospital demonstrates, the sources were by no means essential to plaintiff's invasion of privacy claim against her former employer.***

A Trial on Damages

The highly questionable need for the *Globe's* confidential sources was underscored by two events at trial. First, despite the Superior Court's earlier finding that the *Globe's* confidential sources were "essential" to the plaintiff's invasion of privacy claims against the hospital, the jury found for the plaintiff on that claim without the sources ever being revealed. Second, before the case went to the jury, the plaintiff abandoned her claim that damages be assessed against Knox for receiving, but not publishing, two medical peer review investigatory reports, the other basis on which the Superior Court had ordered disclosure of the confidential sources.

Although the sanction was demonstrably unwarranted, because of the judgment of liability against the *Globe* defendants, Ayash was permitted to ask the jury to assess damages on all of her various theories, including her claim that the overall coverage "unfairly spotlighted" her, a claim that did not require any proof of falsity.

(Continued on page 9)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Boston Jury Awards $2.1 Million to Doctor in Assessment of Damages Hearing Against The Boston Globe

(Continued from page 8)

Post-Trial and Appellate Issues

The constitutional flaws with the contempt sanction are obvious. As the jury verdict against the hospital demonstrates, the sources were by no means essential to plaintiff's invasion of privacy claim against her former employer. That plaintiff abandoned the alternative theory on which the underlying discovery order was based only further proves that the order would have required the needless disclosure of confidential source information in violation of state and federal constitutional interests. *See generally In the Matter of Walter F. Roche,* 381 Mass. 624, 636-37, 411 N.E.2d 466, 475, 6 Media Law Rptr. 2121 (1980)

Even assuming that the discovery order itself could be justified, however, the overly broad and punitive nature of the sanction raises substantial constitutional issues. Reduced to essentials, the Superior Court permitted damages to be assessed for publications that included statements of opinion, substantially true statements on matters of legitimate public concern, and statements that the plaintiff did not prove were made either negligently or with actual malice. Both the state and federal constitutions require a more sensitive balancing of discovery disputes involving confidential sources, particularly where the press is not a party to a claim in which discovery is sought. *See generally See Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, 62 N.Y.2d 158, 166-67, 464 N.E.2d 967, 971 (1984), *cert. denied*, 469 U.S. 1158 (1985) ("[a] newspaper should not be required to accept substantial financial loss as the price for continuing to honor a commitment to maintain the confidentiality of one of its sources"); *Sierra Life v. Magic Valley Newspapers*, 101 Idaho 795, 799-801, 623 P.2d 103, 108-110 (1980) (trial court's sanction was "overly harsh and in the nature of punishment" because there was no suggestion that revelation of confidential source would have produced sufficient proof to sustain a judgment).

The size of the damages award also raises significant issues. Of the $2.1 million verdict against the *Globe* defendants, $1.8 million is for emotional distress, despite the testimony of the plaintiff's treating psychiatrist that Ayash suffered only "moderate" emotional distress, was not clinically depressed, and never required medication. Similarly, the plaintiff's attempt to enhance damages based on the 10 week delay in publishing a correction of the report that she countersigned the overdoses raises substantial issues, particularly in jurisdictions that do not permit the recovery of punitive damages. *See, e. g., McFarlane v. Sheridan Square Press, Inc.,* 91 F.2d 1501, 1515 (D.C. Cir. 1996) ("McFarlane presents no authority, however, nor are we aware of any, for the proposition that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication.").

The Boston Globe and Richard Knox are represented by Jonathan M. Albano and Martin F. Murphy of Bingham Dana LLP in Boston. Joan Lukey and Gabrielle Wolohojian of the Boston firm of Hale and Dorr represent the plaintiff Dr. Lois J. Ayash. The Dana-Farber Cancer Institute is represented by Kay Hodge of the Boston firm of Stoneman, Chandler and Miller LLP.

Is *Ayash* Unique?

The deeply disturbing result in *Ayash* — a default judgment entered against *The Boston Globe* in retaliation for its invocation of reporters' privilege and a subsequent $2.1 million verdict against the newspaper — is, in fact, exceedingly rare.

There appear to have been five cases prior to *Ayash* in which default judgments were issued after defendants refused to identify sources. Default judgment was vacated in four of these cases – once by the trial court itself, in the three others on appeal – and upheld in one.

Trial Court Reversal

The trial court that reversed itself was in *Plotkin v. Van Nuys Publishing Co.*, No. C359227 (Cal. Super. Ct. L.A. County filed Feb. 1982). The plaintiff, the only

(Continued on page 10)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Is *Ayash* Unique?

(Continued from page 9)

civilian among the 51 hostages held for 444 days at the American embassy in Iran in from 1979 to 1981, sought to compel the *Los Angeles Daily News* and its reporters to reveal its sources for a story stating that he was being investigated for drug trafficking. When the newspaper refused, Los Angeles Superior Court Judge Sara K. Radin found the defendants in default.

The *Daily News* then appeared to turn on its reporters, demanding that they reveal their sources. When the reporters refused, the newspaper said that it could no longer represent the reporters; the reporters hired their own lawyers, but the fees were apparently paid by the newspaper.

In a December 1982 hearing, the newspaper's attorneys argued that the default finding against the *Daily News* was improper because the editors and executives did not know the identity of the sources, and because the plaintiff was unlikely to succeed in a trial on the merits. Attorneys for the reporters argued that the finding was excessively punitive and unwarranted because the plaintiff had not shown a compelling need for the identification. Three months later, without explanation, Radin reversed her previous order, and ruled instead that the jury would be instructed to presume that the sources did not exist.

The case was heavily litigated, including three unsuccessful attempts to get the California Supreme Court to review various issues. One of the reporters eventually convinced his sources to identify themselves and testify, but the case never actually made it to trial. It was settled for an undisclosed amount in October 1988.

Appellate Reversals

The earliest instance of a default judgment against a media defendant being reversed is *Mitchell v. Watson*, 58 Wash.2d 206, 361 P.2d 744 (Wash. 1961).

In this case, the defendant *Seattle Post-Intelligencer* columnist refused to reveal his source for an article stating that the plaintiff business partners, who installed burglar alarm systems, were "ex-cons," beyond stating that the source was a person involved in law enforcement. The court responded by finding the reporter in contempt, entered a default judgment against him and his wife, and awarded the plaintiffs $200 in attorneys' fees. After a trial in which the defendants were barred from participating, the court awarded an additional $9,025 in damages.

The Washington Supreme Court upheld the contempt citation and the award of attorneys' fees to the plaintiffs, but reversed the damage award. A trial court may not, the Supreme Court said, "deny the right to defend the action as 'mere punishment.' Defendant cannot be deprived of a constitutional right." *Mitchell* at 216, 361 P.2d at 750. The appellate court thus instructed the trial court to re-try the case, and to respond to defendant's failure to reveal his source by presuming that no source existed.

The Idaho Supreme Court reversed a trial court's entry of a default judgment and awarding of damages in *Sierra Life Insurance Co. v. Magic Valley Newspapers, Inc*., 101 Idaho 795, 623 P.2d 103, 6 Media L. Rep. 1769 (Idaho 1980), reh'g denied (Feb. 23, 1981).

As part of its discovery request in a case alleging that articles published by the defendant *Times-News* in Twin Falls, Idaho misstated plaintiff's financial condition, plaintiff Sierra Life Insurance Co. sought a telephone log naming the people that the newspaper had spoken to for the articles. The newspaper refused, and two newspaper reporters refused to divulge sources of their article during their depositions.

After the trial judge ordered the disclosures, the newspaper sought a writ of prohibition from the Idaho Supreme Court, which dismissed the application without opinion. The court also rejected an appeal after the trial court announced an intention to strike the newspaper's pleadings, enter a default judgment and impose sanctions.

While the second effort to get the Idaho Supreme Court to review the case was pending, the newspaper and its owner informed the trial court that they were willing to comply with its orders, but that the reporters

(Continued on page 11)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Is *Ayash* Unique?

(Continued from page 10)

who knew the identity of the sources were no longer employed by the paper. The reporters separately responded that they continued to refuse to comply.

The Supreme Court finally accepted the case after the trial court issued a ruling striking defendants' answer, held the defendants in default, and awarded plaintiff damages of $1.9 million. The Supreme Court reversed, stating that the plaintiff had not proven that defendants' refusal to disclose the sources of the stories impaired its ability to establish that the articles were false.

In *Oak Beach Inn Corp. v. Babylon Beacon, Inc.*, the plaintiffs sought to force the defendant newspaper to identify the author of an anonymous letter to the editor. When the defendant refused, plaintiffs sought and obtained a conditional order from the trial court striking defendant's answer to the suit, effectively putting it in default. In issuing this order, the trial court held that New York's shield law barred only a contempt finding, that it did not bar other remedies.

The Appellate Division reversed, saying that the resulting inability of the plaintiffs to sue the letter-writer "is simply the price that must be paid in a society which seeks to encourage and protect an aggressive and unintimidated press." 92 A.D.2d 102, 104, 459 N.Y.S.2d 819, 820, 9 Media L. Rep. 1367, ____ (N.Y. App. Div., 2d Dept. 1983). As to the newspaper defendant, the appellate court ruled that "defendants' reliance on the shield of confidentiality will result in the imposition of restrictions on their ability to make use of the protected source in defending the action." *Id.*

After initially dismissing an appeal of this decision, 59 N.Y.2d 967 (1983), the New York Court of Appeals affirmed the lower appellate court, stating that "[a] newspaper should not be required to accept substantial financial loss as the price for continuing to honor a commitment to maintain the confidentiality of one of its sources." 62 N.Y.2d 158, 167, 464 N.E.2d 967, 971, 476 N.Y.S.2d 269, 273, 10 Media L. Rep. 1761, ____ (1984). The U.S. Supreme Court denied a petition for certorari. 469 U.S. 1158 (1985).

Default Judgment Upheld

Apparently the only case in which a default judgment against a media defendant who refused to reveal sources was upheld was *Georgia Communications Corp. v. Horne*, 164 Ga. App. 227, 294 S.E.2d 725, 8 Media L. Rep. 2375 (Ga. Ct. App. 1982), *reh'g denied* (Nov. 1, 1982).

In *Georgia Communications Corp.*, a local political gadfly and radio station owner Howard M. Williamson was sued for stating on the air that the plaintiff high school secretary was romantically involved with a school official. After the suit was filed, the defendant refused to identify his source for the allegation. He also refused to identify sources for additional on-air comments that the plaintiff and her attorney were involved in a conspiracy against him, which were added to the suit. In face of these refusals, the trial judge found the defendant in contempt, struck his pleadings, and entered a default judgment against him.

On appeal the court rejected Williamson's claim of "journalistic privilege" under the federal and state constitutions, stating that "the statements which Williamson was charged with making and with encouraging others to make on his radio show were quite clearly unrelated to any legitimate form of journalistic endeavor." *Georgia Communications Corp.* at 227, 294 S.E.2d at 726, 8 Media L. Rep. at ____.

The Georgia Supreme Court declined to review the case, and the case went to trial. This resulted in a liability verdict for the plaintiff, and an award of $75,000 in general damages and $125,000 in punitive damages. The damage award, but not the liability verdict, was reversed on appeal. *Williamson v. Lucas*, 166 Ga. App. 403, 304 S.E.2d 402 (Ga. Ct. App. 1983). The results of a re-trial, with a verdict of $25,000 general damages and $35,000 punitive damages, were affirmed. *Williamson v. Lucas*, 171 Ga. App. 695, 320 S.E.2d 800 (Ga. Ct. App. 1984). The Georgia Court of Appeals also rejected a second appeal of this award based on the argument that it was improper to impose damages based on a default judgment. *Georgia Communications Corp. v. Horne*, 174 Ga. App. 69, 329 S.E.2d 192 (Ga. Ct. App. 1985).

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Condit Case Brought By Gadfly Attorney

When Carolyn Condit, the wife of Congressman Gary Conduit, sued the *National Enquirer* on Feb. 21, she turned to a Los Angeles lawyer who takes pride in "challenging the news media for its use of illegal and surreptitious news gathering tactics."

In her lawsuit, Condit — whose husband has been hounded by inquiries regarding his relationship with Washington intern Chandra Levy, who has been missing since May 2001 — alleges that the *Enquirer* defamed her by falsely reporting that she "flew into a rage" when Chandra answered her call to the congressman's Washington condominium. The suit, in which Condit claims that she is private figure, alleges three counts of libel and seeks $10 million in damages. A spokesman for the *Enquirer* told reporters that the magazine stood by its story. *Condit v. National Enquirer*, Civ. No. 02-5198 (E.D. Cal. filed Feb. 21, 2002).

Attorney Neville L. Johnson came to the attention of the media defense bar when he and partner Brian Rishwan won $650,000 in damages from ABC on behalf of Mark Sanders, a "telepsychic" surreptitiously videotaped by a fellow employee who was actually working undercover for ABC News in an expose of the of the telepsychic industry. The settlement came after the California reinstated a jury verdict that had been overturned by the Court of Appeals. *See Sanders v. American Broadcasting Companies*, 20 Cal. 4th 907, 978 P.2d 67, 27 Media L. Rep. 2025 (1999) (reversing 52 Cal. App. 4th 543, 60 Cal. Rptr. 2d 595, 25 Media L. Rep. 1343, 28 Media L. Rep. 1183 (Cal. App. 2d Dist. 1997)); *see also LDRC LibelLetter*, July 1999, at 1. On remand after the reversal, the Court of Appeals upheld the award. *See LDRC LibelLetter*, Jan. 2000, at 5.

With interest, the judgment in *Sanders* amounted to almost $934,000 — and Johnson proudly displays the check on his website, at www.jandrlaw.com/Settlement_cheque.htm (visited Feb. 25, 2002).

"If journalists cannot create and live up to a serious code of ethics, but want to test the law, I'll be there to meet them when they err," Johnson wrote in a *Columbia Journalism Review* article on the *Saunders* case. "I consider it an important public service: to proclaim that journalists must not break the law to gather the news."

Other suits by Johnson and his partner Brian Rishwain include one by plaintiffs whose 1975 elementary school photos were used for short bits during ABC's Saturday morning programming in 1998, and one brough by a Beverly Hills plumber who was the subject of a practical joke filmed for an HBO version of "Candid Camera." He obtained a settlements totaling more than $540,000 in another case, brought by a "psychic to the stars" who was photographed in his home with client Courtney Cox during a consultation.

"We have been very successful with this sort of new approach to media-related activity, which is to sue them for their pre-publication or pre-broadcast activities," Rishwain told *Verdicts & Settlements*, a weekly supplement to the Los Angeles and San Francisco *Daily Journal* legal publications. "When you sue for publication-related activities, you have all those First Amendment hurdles. With the invasion-of-privacy activities, that because what they did prior to publication, the First Amendment does not apply in all aspects."

LDRC is distributing the

PRACTICE GUIDE: HOW TO DEFEAT PLAINTIFF'S CLAIMS OF ACTUAL MALICE

by e-mail, to allow you not only to read it, but to cut and paste easily from it. To obtain a copy, send an e-mail request to ldrc@ldrc.com.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Georgia Supreme Court Declines to Hear Jewell's Appeal on Key Issues

Leaves Standing Rulings that Jewell is Public Figure and Not Entitled to Confidential Sources

The Georgia Supreme Court, by a 6-1 vote, declined to consider the appeal of former Olympic security guard Richard Jewell. Last October, the Georgia Court of Appeals held that Jewell was both a voluntary and involuntary public figure for the purposes of his libel suit against *The Atlanta Journal-Constitution*. The Court of Appeals also vacated the trial court's order compelling the newspaper to reveal the identities of its confidential sources. See *The Atlanta Journal-Constitution v. Jewell*, 2001 Ga. App. LEXIS 1153 (Ga. Ct. App., Oct. 10, 2001); *petition for cert. denied*, No. S02C0194 (Ga., Feb. 11, 2001). See also *LDRC LibelLetter*, October 2001 at 3.

In 1996, during the Olympics in Atlanta, Jewell was initially hailed as a hero for spotting the bomb that killed one woman and injured 111 people. He was later investigated by the FBI, leading the *Journal-Constitution* to identify him as a suspect. Jewell claimed he was wrongly suspected by the FBI.

In October, in holding that Jewell was a voluntary public figure, the Georgia Court of Appeals focused on the volume and content of Jewell's repeated media appearances during the three-and-a-half days between the time of the bombing and when he was first named a suspect by the *Journal-Constitution*. The court found Jewell's media appearances to be extensive and voluntary, including "ten interviews and one photo shoot in the three days between the bombing and the reopening of the park, mostly to prominent members of the national press."

The Georgia Court of Appeals also concluded that Jewell was an involuntary public figure because he had the "misfortune to have a tragedy occur on his watch."

The Georgia Court of Appeals also vacated the trial court's order on Jewell's request for discovery of the identities of the *Journal-Constitution*'s confidential sources. This ruling made it clear that confidential sources are not automatically discoverable despite the fact that they are not protected by a specific reporters privilege in Georgia. The Court of Appeals found that there was a "strong public policy favoring the protection of the confidentiality of journalists' sources consistent with that favoring the protection of other types of sensitive information during discovery."

These holdings were left standing when the Georgia Supreme Court denied Jewell's petition for certiorari. Jewell's lone remaining appeal is to the United States Supreme Court. Jewell has informed the Court of Appeals that he will file petition for certiorari with the United States Supreme Court.

Peter Canfield, Sean Smith, Michael Kovaka and Tom Clyde of Dow, Lohnes & Albertson in Atlanta represent The Atlanta Journal-Constitution and its editors and reporters. Richard Jewell is represented by L. Lin Wood, Brandon Hornsby and Mahaley C. Paulk of L. Lin Wood, P.C. in Atlanta; and Wayne Grant and Kim Rabren of Wayne Grant, P.C.; and G. Watson Bryant.

LDRC *LibelLetter* Committee

Adam Liptak (Chair)
Mike Giudicessi (Vice Chair)
Robert Balin
Jim Borelli
Jay Ward Brown
Peter Canfield
Thomas Clyde
Robert Dreps
Jon Epstein
Charles Glasser, Jr.
Richard M. Goehler
Karlene Goller
Steven D. Hardin
Beth Johnson
Debora Kristensen
Dan Mach
William Robinson
Bruce Rosen
Madeleine Schachter
Charles D. Tobin
Paul Watler

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Honor Student Wins Reversal and New Trial Against Newspaper

Honor student Christopher M. Edwards was granted a new trial against Paddock Publications, Inc., publisher of the *Daily Herald* newspaper in Chicago, in a case where he sought compensatory and punitive damages against the local newspaper and some of it's reporters and editors for defamation. Edwards was granted a reversal and remand by the Appellate Court of Illinois, First District, Fourth Division after the Circuit Court of Cook County (Illinois) directed a verdict for all defendants on a negligence claim and for the three defendant-editors on all other counts, and the jury returned a verdict for the rest of the defendants on the remaining counts. See *Edwards v. Paddock Publs.,* 2001 Ill. App. LEXIS 858.

Edwards filed an action against defendants alleging defamation and false light arising from newspaper articles that misidentified him as having been arrested in conjunction with a drug "bust" in the suburbs of Chicago. The newspaper claimed that it had received the erroneous information from the police and were therefore entitled to a fair report privilege. Edwards contended that the trial court erred in, *inter alia*, directing a verdict on the negligence count, allowing the defendants to present their fair report privilege to the jury, submitting defendants' reckless disregard instruction to the jury, and allowing certain documents bearing a photograph of Edwards to be admitted into evidence.

> *After being shown a data sheet for Christopher A. Edwards with writing indicating "wrong photo," Investigator Stachnik acknowledged that it was his handwriting and that he placed the writing on the document sometime after the mistake had been discovered.*

Reporters Allowed in on Undercover Operation

In 1990, the Illinois State Police were involved in a joint undercover operation with two suburban township police departments in an effort to combat the growing gang problem in the suburbs. Defendants Anne Gasior and John Carpenter were reporters for the *Daily Herald* who gained approval to participate in the operation and accompany police on undercover assignments. While Carpenter and Gasior were included in a number of oral briefings and allowed to interview participating officers, it was understood that none of the information acquired would be published until after the suspects were arrested.

The reporters early on in the investigation found a photograph of a Christopher Edwards in the Hoffman Estates High School yearbook but never asked the police officers involved in the case to verify that the photograph was of the correct suspect. It was this photograph that was ultimately published in the *Herald* in connection with the arrest of Christopher A. Edwards on felony drug charges.

Defendants Carpenter and Gasior also obtained data sheets used by police to compile information on criminal suspects including name, address and a photograph of the suspect. These data sheets were to be used only to aid officers in the apprehension of suspects and were clearly not records generally made available to the public. They even contained a disclaimer at the bottom of the sheet that read, "NOT FOR DISSEMINATION."

While there was contrary police testimony, during a pre-arrest meeting, Gasior claimed to have received a data sheet for Christopher A. Edwards which mistakenly included plaintiff's yearbook photograph. Both Gasior and Carpenter testified that they recognized the photograph on Christopher A. Edwards' data sheet as the one Carpenter had previously found in the Hoffman Estates High School yearbook which listed Christopher Edwards with no middle initial. They assumed that the information provided to them from the police was accurate.

It Was the Wrong Photo

Following the arrest, the *Herald* published a number of articles pertaining to the arrests including a photograph of the plaintiff taken from his high school yearbook. The caption alongside the photograph indicated that "Chris Edwards" was [a] "former Hoffman Estates High School football star" and that he was charged with

(Continued on page 15)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Honor Student Wins Reversal and Remand Against Newspaper

(Continued from page 14)

"four counts of delivery of a controlled substance - all Class X felonies with mandatory 6 - to 30 - year jail terms, if convicted." The caption further stated that "undercover police dealt regularly with Edwards and his associates." The body of the article reported that "Edwards was a star high school football player, captain of the team and a member of the homecoming king's court," and that he was "doing business with the Black Gangster Disciples."

Gasior and Carpenter testified that they learned of the error the morning of the publication. Gasior stated, "We got an important fact wrong because we couldn't have checked it prior to that time and we relied on the information given to us from the police just as we do everyday." Gasior also acknowledged that there was nothing that prevented them from getting additional information on the suspects after the arrest other than the demands on their time.

The police department assigned an investigator to look into the matter. After being shown a data sheet for Christopher A. Edwards with writing indicating "wrong photo," Investigator Stachnik acknowledged that it was his handwriting and that he placed the writing on the document sometime after the mistake had been discovered. He did not recall when he did that or where he found the document that he marked.

On March 28, 1991 the *Herald* printed a front-page retraction of the story advising readers of the incorrect identification in the previous day's paper. The article explained that plaintiff attended Southern Illinois University, was on the dean's list and the football team, and was not associated in any way with the arrest of Christopher A. Edwards, another former Hoffman Estates High School student with the same name.

Rejecting Journalistic Malpractice Standard

The defendants maintain that the trial court's ruling was proper because Edwards was required to present evidence, expert or otherwise, of recognized journalistic standards or practices. The appellate court reviewed the trial court's ruling on a motion for a directed verdict *de novo*.

The court, relying upon an Illinois Supreme Court decision, *Troman v. Wood*, 62 Ill.2d 184 (1975), found that "the plaintiff need only establish that the defendant failed to act as a reasonably careful person would act under the same or similar circumstances," rejecting a "journalistic malpractice" standard. A plaintiff is not required to present expert opinion testimony to establish that a media defendant breached the duty of ordinary care.

The court therefore was forced to consider if the directed verdict was improper under an ordinary negligence standard. The court found that Edwards presented a question to the jury as to whether the *Herald* breached the standard of ordinary care in printing the false information.

[T]he instruction should make it clear that "a failure to inquire into the truth of one's own inference could constitute reckless disregard where there is substantial reason to doubt the truth of that inference."

If the jury chose to believe that the police were not the source of the misidentified information, there was sufficient evidence to support a finding of negligence. The appellate court thus reversed the trial court's ruling on the negligence count and remanded on that issue.

Backwards Fair Report Analysis

Next, Edwards contended that the trial court erred in allowing defendants to present a fair report privilege to the jury under the facts presented.

While the appellate court stated that it did not find any case that supported defendants' contention that the data sheet constituted an "official act or proceeding," it did not need to determine the issue because they found that the news media account was not an accurate summary of the information allegedly provided to the *Herald* reporters. The court found nothing in the intelligence data sheet itself reporting that plaintiff was arrested and charged with four counts of delivery of a con-

(Continued on page 16)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Honor Student Wins Reversal and Remand Against Newspaper

(Continued from page 15)

trolled substance as the *Herald* story claimed. Instead of accurately summarizing the information allegedly provided by the police, the *Herald* published information never reported in the data sheets. Therefore on remand defendants will not be entitled to present the fair report privilege to the jury.

Defining Reckless Disregard

Next, the court addressed Edwards' contention that the trial court erred in submitting defendant's reckless disregard instruction to the jury. Edwards sought to define reckless disregard as a failure to investigate or a lack of reasonable basis to believe the truth of statements published.

The court acknowledged that normally failure to investigate before publishing, even when a reasonably prudent person would have done so, is not enough to establish reckless disregard. However, in a set of defining phrases that sound more like negligence than reckless disregard, the court concluded that defendant's fact gathering abilities "may raise the spectre of reckless disregard when their use has revealed either insufficient information to support the allegations in good faith or information which creates substantial doubt as to the truth of the allegations published. " Quoting from *Wanless v. Rothballer*, 115 Ill.2d 158, 172, 503 N.E.2d 316,322 (1986).

The court felt that based upon prior Illinois law, a defendant could be found to have acted with reckless disregard if he drew an inference from an event or document, but lacks personal knowledge or documentary evidence to support the inference, and has failed to make any further inquiries to find out if the inference is correct. That being the case here, according to the court, the instruction should make it clear that "a failure to inquire into the truth of one's own inference could constitute reckless disregard where there is substantial reason to doubt the truth of that inference."

Accordingly, because the jury instruction that reckless disregard requires more than a failure to investigate did not form a clear and adequate picture of the applicable law as it applied to the facts of the case, the court reversed the lower court's ruling and remanded for a new trial on actual malice.

The court also found that on remand Edwards should be entitled to amend his complaint to allege punitive damages for false light.

Judge Theis delivered the opinion of the court. Christopher M. Edwards was represented by O'Callaghan & Colleagues, P.C., of Chicago (Joseph Michael O'Callaghan, Christopher Mauer, of counsel). Paddock Publications, Inc., was represented by Lord, Bissell & Brook, of Chicago (Edward P. Gibbons, Hugh C. Griffin, Hugh S. Balsam, of counsel).

Now Available:

Compendium of Judicial References to First Amendment Interests in Newsgathering

The Newsgathering Committee, chaired by Dean Ringel, Cahill Gordon & Reindel, and Kelli Sager, Davis Wright Tremaine, with author (and DCS President) David Schulz, and his colleagues at Clifford Chance Rogers & Wells, have created a COMPENDIUM OF JUDICIAL REFERENCES TO FIRST AMENDMENT INTERESTS IN NEWSGATHERING.

This 46-page report is a collection of statements by the courts, cataloged on a court-by-court basis, on the relationship of the First Amendment in newsgathering claims, access cases, and reporter privilege matters.

To obtain a copy of this very useful reference tool, send an e-mail to kchew@ldrc.com, or contact LDRC by telephone – 212.337.0200 – or by facsimile – 212.337.9893. Unless you indicate otherwise, it will be sent to you electronically.

Particular thanks for this reference report goes to David Schulz, Clifford Chance Rogers & Wells, and Nick Leitzes at the firm who assisted him in putting together the report.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Defense Verdict on Speech Claims in First Alaska Trial

Post-Trial Motion to Vacate Jury Award on Spoliation Claim Rejected

In what appears to be the first libel or privacy case against the media to reach trial in Alaska, a jury has ordered radio production company Westwood One to pay $150,000 for its failure to provide a tape of the radio comments at issue in the case. But the jury rejected the plaintiff's privacy and emotional distress claims based on comments made by Westwood One's nationally-syndicated radio host Tom Leykis. The radio station that broadcast the comments in Juneau settled the case before trial for $100,000. *Carpenter v. Alaska Broadcast Communications, Inc.*, No. 00-1153 CI (jury verdict Feb. 7, 2002).

Plaintiff Complains of Host's Vulgarity — "She Ain't Seen Nothing Yet"

Juneau radio station KJNO began broadcasting the syndicated "Tom Leykis Show" in 1998. Within a few weeks the show generated complaints, including a letter from Juneau resident Karen Carpenter, who sent a letter to the station saying that it was inappropriate for the show's vulgarity to be broadcast in the afternoon, when children could be listening. She added that she had contacted advertisers to tell them that she would not patronize their businesses, and threatened to begin picketing the station.

The station's management decided to drop the show after five weeks. But some KJNO employees were upset over the decision, and faxed Carpenter's letter to Leykis, with the hand-written note, "Have Fun!!"

Leykis read Carpenter's letter on the air during his July 24, 1998 program, the last to be broadcast by KJNO. He gave her name, and read the letter while mimicking a woman's voice. He then said, "Well, Karen, I have a little something you could use right now," and played a sound effect of a vibrating sound. "Sit on this, you old prune." Later, he said that his show would return to the air in Juneau, and "we're going to make that woman's life a living hell."

> *Later, he said that his show would return to the air in Juneau, and "we're going to make that woman's life a living hell."*

As Leykis continued to discuss Carpenter, he also took calls from listeners. One of the callers mentioned Carpenter's phone number, although the show's engineer blocked some of the digits from being broadcast. The caller also gave out Carpenter's home fax number, which was not blocked. Carpenter also alleged that another caller had given out her phone number later in the program, and that it was not blocked. Both Carpenter's phone and fax numbers were listed in the Juneau phone book.

Carpenter heard part of the broadcast while at work, and said that she came home to a number of harassing faxes, phone calls and hang-ups. In her lawsuit against Leykis, KJNO owner Alaska Broadcast Communications and syndicator Westwood One, Carpenter claimed that the broadcast was defamatory, that it invaded her privacy, and that it caused her emotional distress. On a motion to dismiss, the court dismissed Carpenter's claims of libel, false light invasion of privacy, violation of the constitutional right to privacy, negligent infliction of emotional distress and telephone harassment.

"My Job is to be Funny"

During discovery on the remaining claims for private facts and intentional infliction of emotional distress, Carpenter asked Westwood One to provide a tape of the entire July 24 broadcast. The company failed to provide the tape, although Carpenter eventually did obtain a tape of the first half of the four-hour program from KJNO.

During the two-week trial before Juneau Superior Court Judge Patricia Collins, Leykis said that his show is meant to be amusing, and that he did not understand how words could cause emotional harm. "My job is to do an entertaining and funny radio show," Leykis said during his testimony. "My job is to be funny."

In her testimony, Carpenter said that she felt "violated" and "scared" after she heard the broadcast. She came

(Continued on page 18)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Defense Verdict on Speech Claims in First Alaska Trial

(Continued from page 17)

home to a phone message which repeated the "dried up old prune" language that Leykis had used, and received several phone calls and faxes which she characterized as harassing. She admitted, however, that no phone calls or faxes arrived after the day of the broadcast.

The plaintiff also presented testimony from a psychiatrist, a psychotherapist and a clinical psychologist, who all said that Carpenter had post-traumatic stress disorder after the broadcast. This was disputed by a psychiatrist presented by the defense, who said that the radio show was not threatening enough to cause the disorder, and said that Carpenter was faking her symptoms.

The Jury Verdict

The jury of 10 women and two men was presented with claims of intentional infliction of emotional distress, invasion of privacy by revelation of private facts, and evidence spoliation stemming from the failure to turn over the broadcast tape during discovery. The plaintiff sought $16,500 in damages for medical expenses and lost income, about $100,000 in damages for pain and suffering, and unspecified punitive damages. The jury's verdict on spoliation, including whether the defendant's failure to turn over the tape was negligent or intentional, would determine whether there was common law actual malice to justify punitives.

Judge Collins instructed the jury that it could not impose liability unless it found that Leykis' comments were "intended to provoke a hostile reaction under circumstances where a clear and present danger of immediate violence exists," or that they disclosed private factual information about Carpenter, the revelation of which would be "highly offensive" to an ordinary person.

During deliberations, the jury asked to rehear testimony regarding the tape. Then, after a day and a half, the jury came back with verdict finding that the broadcast had not violated Carpenter's privacy or caused her emotional distress. The jury also found that Carpenter had not acted to mitigate her losses, and that the faxing of the letter by KJNO's employees did not affect any liability of Leykis or Westwood One.

But while the jury cleared Leykis and Westwood One on these claims, it also held that Westwood One had intentionally withheld the tape. It thus awarded Carpenter $5,042 as compensatory damages for the spoliation claim, and said that it would award punitive damages against both Westwood One and Leykis. But since Leykis had not been named in the spoliation claim, Judge Collins ruled that damages could not be assessed against him.

In arguments on the amount of punitive damages, Carpenter's attorney said that jurors should award an amount equal to one week's worth of Westwood One's revenue in 1999, or $6.9 million. After more deliberation, the jury awarded Carpenter $150,000 in punitive damages against Westwood One — although under Alaska law, the state will get half of the punitive amount.

In addition, prevailing parties in Alaska are entitled to reimbursement of some of their attorneys' fees: the plaintiff will get $18,000, and defendant Leykis will be reimbursed for 30 percent of his legal expenses. *See* Alaska R. Civ. Proc. 82 (2000).

After the verdict, the defense converted its earlier motion for a directed verdict into a motion for judgment not withstanding the verdict on the spoliation claim. The court rejected this motion on Feb. 22.

The plaintiff has said that she will appeal Judge Collins' instructions regarding what types of speech could be the basis for liability.

Westwood One was represented by Leslie Longenbaugh of Simpson, Tillinghast, Sorensen & Longenbaugh, P.C. in Juneau. Ray Brown of Dillon & Findley, P.C., in Anchorage and Juneau represented the plaintiff.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.
80 Eighth Avenue, New York, NY 10011

Ph: 212.337.0200
Fx: 212.337.9893
ldrc@ldrc.com

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

New Trial Ordered in Minnesota Implication Suit

Allows Public Official To Establish Implied Defamation Based on a Defamatory Meaning Not Stated Or Intended By Broadcaster

By Tom Tinkham and Kristin S. Westgard

On December 26, 2001, the Minnesota Court of Appeals partially reversed a jury verdict in favor of a local TV station and its reporter due to alleged errors in a jury instruction and the special verdict form and remanded for a new trial regarding whether an isolated, and allegedly false, statement in a broadcast impliedly defamed a public official. *Schlieman v. Gannett Minnesota Broadcasting, Inc.,* No. C0-01-935 (2001 WL 1646679 Minn. Ct. App. Dec. 26, 2001). The decision undercuts an earlier decision of the Minnesota Supreme Court in *Diesen v. Hessburg*, 455 N.W.2d 446, 452 (Minn. 1990), *cert. denied*, 498 U.S. 1119 (1991), which precluded public officials from bringing defamation claims based only upon alleged implications. The *Schlieman* decision would allow a determination by implication of a defamatory meaning not stated and not intended by the broadcaster based upon a single false statement in a broadcast. The decision raises serious First Amendment concerns because the media cannot anticipate and avoid every possible implication that a public official may later attribute to isolated statements in a broadcast.

The Facts

Plaintiff Thomas Schlieman ("Schlieman") is a St. Cloud police officer. On May 11, 1999, he fatally shot Kevin Hartwig. A reporter for a Minneapolis/St. Paul television station, KARE TV, prepared a story for live broadcast during the 6:00 p.m. News on May 12, 1999. Eighty percent of the broadcast (19 lines) reported the official police version that the shooting was justified self-defense; only 4.5 lines reported conflicting information questioning whether Hartwig was being aggressive. Evidence was presented at trial that KARE TV conducted a reasonable investigation and that conflicting eyewitness information existed as to exactly what happened during the shooting.

Schlieman sued KARE TV and its reporter for defamation. His theory was that three statements in the broadcast were defamatory in that they implied he was a "cold-blooded killer." Schlieman testified at trial that the report had called him a "cold-blooded killer," though those words appeared nowhere in the report. Schlieman's counsel argued to the jury that the three statements were factually false and "conveyed a defamatory meaning," i.e., they implied Schlieman is a "cold-blooded killer."

Defendants presented evidence and argued that the three statements are true and that they do not convey any defamatory meaning about Schlieman. They argued that the only way the three statements at issue could be interpreted as saying that Plaintiff was a cold-blooded killer was by improperly ignoring the rest of the broadcast and by improperly claiming that an alleged implication, through either the juxtaposition of statements or the omission of other facts, amounted to defamation.

The Instructions

The District Court was concerned that the jury might improperly consider defamation by implication through juxtaposition or omitted facts, a claim not available to a public official under *Diesen*. Although Schlieman's counsel opposed an instruction using the word "implication," he suggested that language based on a standard Minnesota jury instruction about juxtaposition and omissions be read immediately after the Court defined defamatory communication. The District Court thus instructed the jury as follows:

> In considering whether a statement is defamatory as to the Plaintiff, you must not consider whether the statement is an implication based upon the juxtaposition of those statements, or the omission of other facts. Here you may consider only whether Defendants published a false and defamatory statement which actually refers to the Plaintiff.

(Continued on page 20)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

New Trial Ordered in Minnesota Implication Suit

(Continued from page 19)

Schlieman's counsel also proposed the special verdict form at issue. Question No. 1 said "Were any of the following statements by Defendants defamatory?" and listed the three statements at issue. The jury responded "no" to each, finding no statement defamatory. Judgment was entered for Defendants.

Court of Appeals Decision

Schlieman appealed to the Minnesota Court of Appeals. Defendants cross-appealed for review of the District Court's partial denial of summary judgment in which it concluded that three statements were capable of defamatory meaning. A divided panel of the Court of Appeals affirmed in part, reversed in part, and remanded for a new trial on a single isolated statement. Judge Lansing wrote the majority opinion, joined by Judge Hanson. Judge Kalitowski dissented in part.

The Minnesota Court of Appeals recognized that Minnesota case law foreclosed a defamation by implication cause of action for public officials due to First Amendment concerns. However, it then limited the rule to alleged implications arising from statements that a public official admits are true. The court concluded that a public official may bring a "straight defamation" claim based only upon implication if he/she asserts that a statement in the broadcast giving rise to the alleged defamatory implication is false. It therefore held that the instruction regarding defamatory implication erroneously limited the defamatory meaning element and injected a standard that did not apply to Respondent's "straight defamation" claim.

On Defendants' cross-appeal, the Minnesota Court of Appeals held that two of the three statements submitted to the jury were not reasonably capable of conveying a defamatory meaning because they did not independently or in context give rise to an assertion that is defamatory or involved a subjective evaluation that is not easily susceptible to being proven true or false. As to the third statement, the court found that in context the statement was capable of defamatory meaning because it "convey[ed]" the meaning that the shooting was not justified.

Justice Kalitowski concurred in the majority's finding that the two statements were not reasonably capable of conveying a defamatory meaning. However, he dissented from the part of the majority opinion granting a new trial because (1) in the context of the entire broadcast, as a matter of law, the third statement was not capable of defamatory meaning, (2) the instruction regarding defamation by implication was not reversible error, and (3) substantial evidence supported the jury's verdict that the statements were not defamatory.

The court concluded that a public official may bring a "straight defamation" claim based only upon implication if he/she asserts that a statement in the broadcast giving rise to the alleged defamatory implication is false.

Justice Kalitowski found that the jury instruction was not error because there was no evidence that the jury was confused or improperly influenced by the instruction and the Plaintiff specifically requested the actions that the majority concluded constituted reversible error. Justice Kalitowski also found that no jury could find that Plaintiff had met his burden of proving actual malice.

Defendants have filed a Petition for Review to the Minnesota Supreme Court, asserting in part that the decision is not in accord with First Amendment law or Minnesota law and that a public official cannot base a defamation claim against a media defendant solely on an implication that is not stated in, reasonably apparent from or intended by a broadcast.

Patrick T. Tierney, Collins, Buckley, Sauntry & Haugh, PLLP, St. Paul, MN represented Thomas Schlieman. Thomas Tinkham and Amy Katz Rotenberg, Dorsey & Whitney L.L.P., Minneapolis, MN represented Gannett Minnesota Broadcasting, Inc.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Article by Medical Professional Association is not Commercial Speech

Lanham Act and Defamation Case Claims Dismissed

By Deanne E. Maynard, Katherine A. Fallow, and Jared O. Freedman

In a recent Lanham Act and commercial defamation case, *Neurotron, Inc. v. American Association of Electrodiagnostic Medicine ("AAEM")*, Civ. Action No. WMN-00-514, 2001 WL 1662089 (D. Md. Aug. 13, 2001), the federal district court in Baltimore granted summary judgment to a non-profit medical professional association that had been sued by the manufacturer of a medical device regarding an article published by the association that reviewed the medical literature on the device's efficacy. The district court held that the Lanham Act did not apply because the speech was not commercial speech. The district court also granted the AAEM summary judgment on the manufacturer's state law claims. The case is now pending on appeal in the Fourth Circuit on a subset of the manufacturer's state law claims; the plaintiff has not appealed the Lanham Act ruling.

Literature Review Device

The AAEM is a non-profit medical professional association of neurologists and physical medicine and rehabilitation specialists. As a professional association, it is dedicated to expanding the knowledge of electrodiagnostic medicine, improving the quality of patient care, and serving physicians who diagnose and treat patients with muscle and nerve disorders. As part of its educational mission, the AAEM publishes literature reviews in its scientific medical journal, *Muscle & Nerve*, on new medical technologies.

The subject of the suit was a literature review the AAEM published on the Neurometer, a relatively new medical device that was being marketed by its manufacturer to AAEM members. After reviewing the existing medical literature on the device, the review opined that the literature was insufficient to draw definite conclusions about the Neurometer's efficacy and that further research was needed.

Neurotron, Inc., the manufacturer of the Neurometer, sued the AAEM, alleging violations of Section 43(a) of the Lanham Act, claiming that the article was false or misleading commercial advertising or promotion within the meaning of the Act. Neurotron also alleged injurious falsehood, false light commercial disparagement, civil conspiracy, and tortious interference claims, contending that the opinions expressed by the AAEM about the state of the literature on the Neurometer were false and disparaging.

Neurotron alleged that the AAEM had a financial motive to publish a disparaging article because, according to Neurotron, the Neurometer can be used by medical professionals other than those who are AAEM members. Along with compensatory and punitive damages, Neurotron's complaint asked the court to require the AAEM to cease publication or distribution of its article, to publish "repeated retractions" of the article, and to provide Neurotron advance notice and pre-publication review of any further AAEM publication concerning the Neurometer.

Neurotron alleged that the AAEM had a financial motive to publish a disparaging article because, according to Neurotron, the Neurometer can be used by medical professionals other than those who are AAEM members.

Preliminary Injunction Denied

Neurotron's complaint was accompanied by motions for a temporary restraining order and preliminary injunction. Chief Judge Motz of the United States District Court for the District of Maryland denied two motions made by Neurotron for a temporary restraining order. The case was then assigned to Judge William Nickerson.

Following document discovery and an evidentiary hearing, Judge Nickerson denied Neurotron's preliminary injunction motion. In denying the motion, the district court stated that "the article does not contain false or misleading statements of fact and is not disparaging."

(Continued on page 22)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Ct. Grants Summary Judgment to Medical Professional Association in Lanham Act and Defamation Case

(Continued from page 21)

It further observed that "Plaintiff's recourse lies in the marketplace of ideas, not in suppressing contrary conclusions and opinions."

Test for Applying Lanham Act

After discovery, the district court granted the AAEM's motion for summary judgment on August 13, 2001. The court first rejected Neurotron's Lanham Act claim. In so doing, the court applied the four-part test enunciated by Judge Sand in *Gordon & Breach Publishers, S.A. v. American Institute of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994), to determine whether the Lanham Act's restrictions on "commercial advertising or promotion" applied to the AAEM's literature review.

Under *Gordon & Breach*, for speech to be "commercial advertising or promotion" it must be:

> (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services . . . [and] the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry.

Fully Protected Speech

Applying this test, the district court in *AAEM* concluded that the technology review was not subject to the Lanham Act because it was speech fully protected by the First Amendment. The court reasoned that the article did not constitute commercial speech because it neither proposed a commercial transaction nor did it relate "solely to the economic interests of the speaker and its audience." The article "neither suggested that the reader buy any product or service, nor that they refrain from buying any product or service." In so concluding, the court observed that the article was not disparaging:

> AAEM does not say that the product is bad . . . . It merely states that 'the reviewers concluded that information in these publications is insufficient to make conclusions about the usefulness of this form of sensory testing at the present time.'

The court also rejected Neurotron's claim that the article was related solely to the economic interests of the AAEM. To the contrary, the court found the AAEM's scientific journal was published "for the edification of the association's members." Although stating that the article was not removed from commercial speech merely because it was educational, the district court rejected Neurotron's attempts to portray the article as commercial. Indeed, the court noted that "[a]rguably, the only thing promoted by the article is further study and publication of additional articles so that some conclusion can be drawn about the effectiveness of the [the Neurometer]." In short, the court found no evidence that warranted treating the speech as commercial.

[T]he court recognized the chilling effect that extending Lanham Act coverage to this situation would have not only on the AAEM, but on all professional associations.

Finally, the court recognized the chilling effect that extending Lanham Act coverage to this situation would have not only on the AAEM, but on all professional associations. Noting that the "AAEM is the leading association for this profession," the court concluded that "chilling the speech of the AAEM in this instance would likely prevent all debate about such subjects from entering into the marketplace."

The district court then rejected all of Neurotron's common law claims. Applying *New York Times v. Sullivan*, the district court held that Neurotron's injurious falsehood claim was barred because "Plaintiff has not shown any evidence, let alone clear and convincing evidence, tending to prove actual malice." The district court did not specifically address Neurotron's other state law claims, as the plaintiff had conceded those claims must fail if its Lanham Act and injurious falsehood claims were rejected.

Deanne E. Maynard, Katherine A. Fallow, and Jared O. Freedman, of Jenner & Block's Washington, DC office, represented the American Association of Electrodiagnostic Medicine.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Utah Court Denies Personal Jurisdiction Over Interactive Website

A district court in Utah recently held that an interactive website that was not targeting Utah residents did not have enough contacts with the state to establish personal jurisdiction. *iAccess, Inc. v. WEBcard Techs.,* 2002 U.S. Dist. LEXIS 1258 (D.Utah, Central Div., Jan. 24, 2002). The court held that no evidence existed that defendant WEBcard, through its website, had consummated any transaction or made any deliberate or repeated contacts with or purposefully directed activities in the state of Utah to support personal jurisdiction over the California-based company. The court granted WEBcard's motion to dismiss.

iAccess, a rival manufacturer of small, business-card sized compact discs that is incorporated in Utah, argued that WEBcard purposefully directed activity in Utah by constructing and operating an interactive website. Its suit against WEBcard, based apparently on a disputed patent, alleged, among other things, false advertising, unfair competition, and tortious interference with economic relations.

Personal Jurisdiction: Interactive Websites

In order to determine whether a website may form the basis of personal jurisdiction in some cases, the courts, with a few notable exceptions, have analyzed the level and type of activity conducted on the website in question.

The court in this case perceived defendant's site as occupying a middle ground between passive and fully interactive websites. WEBcard's website allowed users to e-mail WEBcard or to subscribe to mailing lists, and allowed its customers to log-in and view the progress of their order. But the site did not allow users to make purchases of defendant's products. WEBcard admitted to a single sale of $20.00 to a Utah resident, but insisted that it had no place of business in Utah, no sales representatives, no distributors, no phone numbers, and no employees in Utah.

Indeed, iAccess did not allege that WEBcard targeted Utah residents, garnered Utah customers from its website, or even received hits on its website from Utah viewers. Rather it argued that a moderately interactive website such as WEBcard's was sufficient to support the exercise of personal jurisdiction in a patent case, citing *Biometrics, LLC v. New Womyn, Inc.* 112 F. Supp. 2d 869, 873 (E.D. Mo. 2000), and *Multi-Tech Sys., Inc.* 122 F. Supp. 2d 1046, 1051 (D. Minn. 2000). iAccess found no support with this court for its argument from either case.

In *Biometrics*, the court found personal jurisdiction because "it is clear that defendants' website is intended to generate interest in the accused product in Missouri, and therefore is an offer to sell under the patent statute." The court found personal jurisdiction based on evidence that the defendants intentionally targeted Missouri residents for sales and did sell product to a Missouri resident who had previously viewed the website, not the mere existence of an interactive website.

In *Multi-Tech Sys.*, visitors to VocalTec Ltd's website could register, download and use Internet Phone, the allegedly infringing software product. Based on this evidence, the court concluded that VocalTec Ltd's commercial activities were sufficient to exercise personal jurisdiction.

The court in the present case, however, felt that iAccess did not show either that WEBcard intentionally targeted Utah users or that Utah users actually interacted with WEBcard's website.

> …[M]ere interactivity will not support jurisdiction. Rather, iAccess must allege a nexus between WEBcard's web site and Utah residents....Here, WEBcard 'has consummated no transaction' and [has] made no 'deliberate and repeated' contacts with [Utah] through [its] Web site....Without such proof, this court may not exercise personal jurisdiction."

*iAccess at *14.*

United States District Judge Tena Campbell presided. iAccess.com was represented by Robert B. Lochhead, of Parr Waddroups Brown Gee & Loveless in Salt Lake City, and Wesley M. Lang and Randall B. Bateman, of Morriss Bateman O'Bryant & Compagni, P.C. in Salt Lake City. WEBcard Technologies was represented by C. Kevin Speirs, Dianna M. Gibson, Kenneth E. Horton, of Parsons, Behle & Latimer in Salt Lake City, and Susan B. Meyer and John L. Haller, of Brown Martin Haller & McClain in San Diego.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Court Grants Summary Judgment to TV Station Sued by County Surveyor

A district court in the Southern District of Indiana granted a television station's motion for summary judgment after the court held that the county surveyor and his employee could not satisfy the actual malice requirement. See *Isgrigg, et. al. v. Cosmos Broad. Corp., et. al.*, 2002 U.S. Dist. LEXIS 2201 (S.D. Ind. Feb. 7, 2002).

Robert L. Isgrigg and Lewis M. Love, III, sued WAVE-TV after the station did a series of reports that stated, among other things, that Isgrigg had hired and paid Love as a county employee, but used Love to perform work for Isgrigg's private engineering and surveying firm. The station's reports also accused Isgrigg of depositing into his private business' bank account a check that was made out to the County Surveyor's Office.

Both plaintiffs were required to prove actual malice. As the county surveyor, Isgrigg was clearly a public official. But under Indiana law even a private plaintiffs must establish actual malice when suing over statements on a matter of public concern.

In an attempt to establish actual malice, the plaintiffs claimed:

- The broadcast incorrectly stated that Isgrigg refused requests for an interview, when in reality he only refused a request for an on-camera interview.
- The reporter interviewed "disgruntled ex-employees."
- The reporter had information about Love's job that would have shown them that his periodic absences from the office were part of his public employment and did not themselves support a claim that he was working for anyone other than the county.
- The reporter had copies of Love's time sheets, illustrating that Love's work hours varied, and included weekends, but that he gave the county the required number of hours per week on the job.
- The televised reports included inaccuracies such as a claim that Love was being paid by the county when he appeared at Isgrigg's probation hearing (when in fact Love had taken the day off).
- The reporter had letters which should have led her to the conclusion that the county surveyor's office could not handle a large work request, and that was why Isgrigg deposited the check into his company's account and completed the work through his company.

The court felt that none of the evidence put forth by the plaintiffs was enough to prove the reporter knew the reports were false or had acted with reckless disregard for the truth. Because the plaintiffs could not show actual malice, their claims for false light, invasion of privacy and intentional infliction of emotional distress similarly failed.

The opinion was by Judge Sarah Evans Barker. William H. Hollander, of Wyatt Tarrant & Combs in Louisville, Kent., represented the defendants. Richard M. Trautwein, of Trautwein & Kenney in Louisville, Kent., represented the plaintiffs.

NAA/NAB/LDRC CONFERENCE

2002: SEARCHING FOR THE FIRST AMENDMENT

September 25-27, 2002
The Hilton Alexandria Mark Center
Alexandria, Virginia

You should look to receive registration materials for the Conference by April. A large number of you are pre-registered for the Conference. Thank you. For the rest of you, get your registrations in early. We are looking to have a great program.

Look to see you all there.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Louisiana Appellate Court Applies Anti-SLAPP Statute for First Time

Affirms Dismissal of Media Invasion of Privacy Claim

By Mary Ellen Roy and Sheryl A. Odems

In *Stern v. Officer John Doe, City of New Orleans, and WGNO, Inc.*, 2001 WL 1684552 (La. App. 4 Cir. Dec 27, 2001), the Louisiana Court of Appeal upheld for the first time in Louisiana the dismissal of a plaintiff's claim under Louisiana's new anti-SLAPP statute — here an invasion of privacy claim against a local New Orleans news station The court declined to reverse the trial court's denial of attorneys' fees notwithstanding the clear language of the statute, however, which mandates an award of attorneys' fees to a prevailing defendant.

Based on California Law

The decision is the first by the Louisiana appellate courts applying the anti-SLAPP statute, Article 971 of the Louisiana Code of Civil Procedure, which was enacted by the Louisiana Legislature in 1999. The Louisiana anti-SLAPP statute was modeled after the California statute and is virtually identical to it. Under the statute, a defendant must show that the suit arises from an act in furtherance of its free speech rights. Once the defendant does so, the burden shifts to plaintiff to establish a "probability of success" on the claims. The statute provides that a court, in making its determination, shall consider the pleadings, as well as any supporting and opposing affidavits.

The plaintiff in *Stern*, an eighteen-year old student, filed an *in forma pauperis* action alleging invasion of privacy based upon a news report that was broadcast regarding the problem of beginning-of-the-year truancy among students. The news story included footage of plaintiff being detained by truancy officers on a public street, taken into custody when he was unable to produce identification, and transported to the city's truancy center.

At the truancy center, plaintiff was cited for truancy and shown emptying his pockets, which contained cash, a condom, and a stick of gum. The station aired the story during its evening news broadcast. The voice-over to the picture of the condom from the plaintiff's pocket said, "He was prepared, just not for school."

Prior to the broadcast, plaintiff's sister called the station to assert that plaintiff was not truant, but rather had been sent home due to a paperwork error, and to request that the station not air the report. In his lawsuit, plaintiff argued that the station had invaded his privacy by publishing private facts (*i.e.,* the condom in his pocket) and by depicting him in a false light (*i.e.*, as a truant).

The defendant news station filed a special motion to strike pursuant to the anti-SLAPP statute and an exception

(Continued on page 26)

A Satisfying Moment for Defense Counsel: Media Defendants Awarded Costs in Libel Dismissal

By Robert Rivas

A Florida circuit court judge has entered a final judgment for $36,788.52 in court costs against a Palm Beach County plastic surgeon who lost his defamation case at trial two years ago.

Dr. Schuyler C. Metlis sued Randi Rhodes, a radio talk show host, and her then-employer, Fairbanks Communications, Inc., the former owner of WJNO-AM, West Palm Beach, after Ms. Rhodes made unflattering comments about Dr. Metlis during her afternoon talk show on October 22, 1995. The action was dismissed on April 7, 2000 on the defense's motion for a directed verdict at the close of the plaintiff's case.

The directed verdict was reported in the LDRC *LibelLetter* (May 2000 at 15). See also *Metlis v. Rhodes*, 28 Media Law Rptr. 1990 (Fla. 15th Cir. April 7, 2000) (order granting directed verdict for defendants, and final judgment for defendants), and *Metlis v. Rhodes*, 26 Media Law Rptr. 1697 (Fla. 15th Cir. Feb. 24, 1998) (order granting partial summary judgment, determining that the plaintiff was a limited purpose public figure).

In addition, the defendants have a claim for $355,000 in attorneys' fees pending against Dr. Metlis in the trial court. The attorneys' fees motion is scheduled to be heard on a docket in April or May of 2002. Dr. Metlis's appeal of the original final judgment against him remains pending in the Florida Fourth District Court of Appeal.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

La. App. Ct. Applies Anti-SLAPP Statute for First Time to Affirm Dismissal of Media Invasion of Privacy Claim

(Continued from page 25)

of no cause of action (equivalent to a motion to dismiss for failure to state a claim). The station argued that the action arose from the exercise of its constitutional right of free speech in connection with a public issue (the city's efforts to address truancy) and thus the special motion to strike was applicable. On the merits, the station argued that plaintiff had failed to demonstrate a probability of success on his invasion of privacy claim because the broadcast accurately portrayed plaintiff's encounter with law enforcement, concerned a newsworthy matter of public interest, did not depict plaintiff in a false light and was not highly offensive to a reasonable person.

The trial court granted both the special motion to strike and the exception of no cause of action and dismissed the action with prejudice. The court declined, however, to award attorneys' fees, as mandated by the anti-SLAPP statute. Plaintiff appealed. The station cross-appealed the trial court's failure to award attorneys' fees.

Dismissal Affirmed

The appellate court affirmed the dismissal of plaintiff's invasion of privacy claim. The opinion was written by Judge Steven R. Plotkin, joined by Judges James F. McKay III and Michael E. Kirby. In doing so, the court observed that the purpose of the anti-SLAPP statute was "to review frivolous and meritless claims against the media at a very early stage in the legal proceedings," and correctly recited the standard applicable to a special motion to strike — whether a plaintiff has demonstrated a probability of success on the claim — but noted its view that this standard was "legally ambiguous."

The court nevertheless concluded that it was able to interpret and apply the special motion to strike because the facts in the case were "undisputed," and affirmed the judgment on the grounds that appellant did not have an expectation of privacy on a public sidewalk or in the truancy center, that the news report did not broadcast any false information about the plaintiff, that the airing of the contents of appellant's pockets was not highly offensive to a reasonable person and that the news station had acted reasonably.

Although the court ultimately reached the correct result, the court's description of the probability of success standard as "legally ambiguous" is troublesome and suggests that a defendant would be wise to file an exception of no cause of action, where feasible, in addition to filing a special motion to strike, to provide the court with an alternative basis to dismiss the case. Notwithstanding the "legally ambiguous" language, the court noted that the plaintiff had failed to file an opposing affidavit and, thus, affirmed the granting of both the special motion to strike and the exception of no cause of action.

No Attorneys Fee Award

With regard to the station's cross-appeal for attorneys' fees, the court acknowledged that the anti-SLAPP statute provides that a prevailing defendant "shall be entitled to recover reasonable attorney's fees." The court nevertheless declined to award attorneys' fees, holding that

> [r]egardless of the language of the statutory authorization for an award of attorney fees or the method employed by a trial court in making an award of attorney fees, courts may inquire as to the reasonableness of attorney fees as part of their prevailing, inherent authority to regulate the practice of law.

Noting that plaintiff was *in forma pauperis*, the court held that there was not sufficient evidence to "indicate that the action was an abuse of the judicial process." In so holding, the court disregarded the mandatory language of the statute, opting instead to rely on prior case law that afforded trial courts substantial discretion in connection with attorneys' fees awards under statutes that permit, but do not mandate, such awards. The application of such precedent to the anti-SLAPP statute was improper, but will be distinguishable in most cases, which do not involve indigent teenagers.

Mary Ellen Roy and Sheryl A. Odems of Phelps Dunbar LLP represented WGNO-TV in the district court and on appeal. Charles J. Sennet was in-house counsel on the case for Tribune Company, which owns WGNO-TV. Glyn J. Godwin and Heather E. Baldo represented plaintiff in the district court, and Ms. Baldo represented plaintiff on appeal.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Bench Verdict Awaited in Super Model's Privacy Claim Against London Paper

In a case that could have a significant role in shaping the contours of the right of privacy under English law, the bench trial in model Naomi Campbell's case against the *Mirror* newspaper for publishing an article that exposed Campbell as a drug addict concluded on February 15th, with a ruling from Justice Morland expected in the next few months. *Naomi Campbell v. MGN Ltd.*

At issue in the case was a *Mirror* article published on February 1, 2000 entitled "Naomi: I am Drug Addict," which revealed that the model – contrary to her public denials – was addicted to drugs and was regularly attending meetings of Narcotics Anonymous ("NA"). The article was accompanied by a photograph of Campbell leaving an NA meeting in London.

Privacy Claims

Campbell's privacy claims centered on the article's revelation that she was attending NA meetings – not the revelation that she was an addict. Campbell claimed breach of confidence, alleging the article must have been based on a tip from an employee who would be bound by a confidentiality agreement or from another NA attendee who would also allegedly owe Campbell a duty of confidentiality. A second privacy claim was made pursuant to Article 8 of the European Convention on Human Rights ("ECHR") with Campbell alleging that her attendance at NA meetings (as opposed to being an addict) was a private fact entitled to secrecy. In addition, a third claim alleged that the article violated the Data Protection Act by revealing confidential medical information (the visits to NA) and, more surprisingly, that the accompanying photograph unnecessarily revealed her race in contravention of the Act – this despite the fact that her fame is entirely based on career as a model. A copy of Campbell's witness statement outlining her claims is available on the web at www.thesmokinggun.com/archive/naomisuit1.shtml

Newspaper: Campbell Not Harmed

It was apparently conceded that merely revealing her drug use could not be an actionable invasion of privacy since no right of privacy would attach to illegal conduct. Indeed, the heart of the newspaper's defense at the one week trial was that any damage caused to Campbell was from the revelation that she was a drug addict and that no stigma attaches to merely attending NA as a treatment for addiction. Moreover, the paper argued that no right of privacy should attach where Campbell had already given hundreds if not thousands of press interviews discussing intimate details of her life.

According to news reports in the *Guardian*, Campbell testified at trial that she was "shocked, angry, betrayed and violated" by the article and doubted her resolve to go on with treatment. Moreover, she testified that the source for the article must have been an intimate of hers and that the newspaper would have known that publication would be a breach of confidence. Campbell was, according to reports, vigorously cross examined regarding her drug addiction, her false public denials of addiction, her reputation for tantrums and history of giving press interviews regarding her personal life. In fact, the Mirror's barrister Desmond Browne QC accused Campbell of lying "on a grandiose scale, both before coming to this court and during the course of the evidence."

Mr. Justice Morland engaged in the peculiar English judicial custom of commenting on the veracity of witnesses during trial, calling Campbell "a most unreliable witness." *See* S. Hall, "Campbell 'a schemer who forfeited privacy," *The Guardian*, Feb. 15, 2002.

The Mirror's editor-in-chief, Piers Morgan, defended the paper at trial, describing the article as sympathetic to Campbell, defending its publication and the accompanying photograph as being in the public interest and denying breaching any confidences in pursuing the story. Campbell's barrister, Andrew Caldecott QC, characterized Morgan's testimony as "disingenuous" and "evasive." A compilation of articles on the trial is available through the *Guardian's* web site at www.guardian.co.uk.

Subsequent Mirror Article Alleged to be Racist

A side issue that generated considerable controversy concerned a subsequent article in *The Mirror* that referred to Naomi Campbell as a "chocolate soldier," a description she deemed a racial slur. Campbell claimed this and subsequent articles about her entitled her to punitive damages

(Continued on page 28)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Bench Verdict Awaited in Super Model's Privacy Claim Against London Paper

(Continued from page 27)

against *The Mirror*. The newspaper, on the other hand, claimed the term chocolate soldier dated to the First World War and merely described soldiers who wilted under the pressure of battle. The term was used in an article discussing how Campbell was fired as a campaigner for the animal rights group People for the Ethical Treatment of Animals (PETA) for wearing fur at a fashion show. Thus in context, the newspaper argued the term was used simply to portray her as an ineffective spokesperson for PETA. Justice Morland claimed never to have heard the term before, a fact he opined was significant.

Naomi Campbell is represented by the solicitors firm Schilling & Lom and Partners and barrister Andrew Caldecott QC; *The Mirror*, by solicitors Davenport Lyons and barrister Desmond Brown QC. In an interesting twist, *The Mirror's* chief in-house lawyer Martin Cruddace left the newspaper in January to join Schilling & Lom effective in April.

ORDER NOW!

LDRC 50-STATE SURVEY 2002:

EMPLOYMENT LIBEL AND PRIVACY LAW

An essential reference on critical employment issues.

$150

Visit our website — www.ldrc.com — and preview the *LDRC 50-State Survey 2002: Employment Libel and Privacy Law* Outline.

London Judge Finds No Privacy In Print Article of Celeb's Visit to Brothel

In the middle of the *Campbell* trial another High Court judge released a decision in a privacy action by a prominent BBC television and radio music host, Jamie Theakston, — also represented by solicitors Schilling & Lom — against the *Sunday People* tabloid. *Theakston v. Sunday People*. Last month, Justice Ouseley refused to enjoin the publication of an article detailing Theakston's visit to a London brothel, although the judge did ban the newspaper from publishing photos of the plaintiff taken in the brothel.

According to news reports, in an unpublished decision the judge found that a breach of confidence claim should not be judged only from the point of view of one participant and that here "the prostitutes clearly took a different view of the confidentiality of what they had seen and done." *See* "Kiss and tell blow for Theakston," *The Guardian*, Feb. 15, 2002 on line at www.guardian.co.uk. With regard to plaintiff's broad breach of privacy claim under the ECHR, the judge reportedly found that since the plaintiff had previously publicly discussed aspects of his sex life — including his relationships with other celebrities — he should not be heard to complain about less flattering reports about his sexual activities. News reports of the decision do not address any findings regarding banning the use of photographs with the article.

The *Sunday People* article is available on line — apparently none the worse for being published without photographs — at www.people.co.uk under the headline "Theakston exposed: the naked truth: Jamie was in a sexual trance, writhing naked on pink satin sheets as a porn film flickered in the corner. He was like an excited kid in a kinky sweet shop . . . ."

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Australian High Court Refuses to Enjoin Broadcast of Illegally Obtained Videotape

In November 2001, the High Court of Australia (the highest court in the Australian judicial system) issued a significant ruling on the media's liability for broadcasting illegally acquired material, holding that the press can publish material that has been obtained illegally by a source provided the press did not take part in the illegal acquisition and the material disclosed is not confidential. *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63 (15 Nov. 2001) (Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ). A copy of the decision is available through www.austlii.edu.au/.

Secret Third Party Videotaping at Possum Slaughter House

At issue in the case was a 1999 Australian Broadcasting Corporation ("ABC") news report on the operations of Lenah Game Meats ("LGM"), a possum slaughter house in Tasmania. The ABC report used portions of a secretly made videotape showing the slaughter process that was made by unknown persons presumed to have been trespassing at the facility. The videotape was anonymously given to an animal rights group, Animal Liberation Limited, which supplied the tape to ABC with the intention that the ABC would broadcast it. The videotape graphically depicted the slaughtering process. Indeed, the High Court acknowledged that "like many other lawful animal slaughtering activities, the respondent's activities, if displayed to the public, would cause distress to some viewers. It is claimed that loss of business would result. That claim is not inherently improbable. A film of a vertically integrated process of production of pork sausages, or chicken pies, would be unlikely to be used for sales promotion." Id. at ¶ 25.

Proceedings Below

Prior to broadcast, the ABC informed LGM of its intention to use portions of the videotape in its "7:30 Report." LGM then sued seeking to obtain a preliminary and permanent injunction barring any broadcast. A Tasmania trial court refused to issue a preliminary injunction on the grounds that LGM had failed to state a cause of action since there was no breach of confidence and no general invasion of privacy tort existed under Australian law to bar broadcast. LGM successfully appealed this ruling, on the ground that the use of the illegally made videotape was unconscionable. In the interim, though, ABC broadcast portions of the videotape. The appellate court, which found that LGM had at least an equitable cause of action against ABC, enjoined any further broadcast of the video. *See Lenah Game Meats Pty Limited v Australian Broadcasting Corporation* [1999] TASSC 114 (2 Nov. 1999).

High Court Ruling

On ABC's appeal of the injunction to the Australian High Court, LGM argued that broadcast of the illegally acquired tape would be a breach of confidence as well as unconscionable – a point seconded by the intervener Commonwealth Attorney General who argued that "the fact that the information was improperly obtained should weigh heavily against allowing the information to be used." *Australian Broadcasting Corporation v Lenah Game Meats Pty Limited* [2001] HCA 63 ¶ 31. More ambitiously, LGM argued that the court should explicitly recognize a general cause of action for invasion of privacy available to both individuals and corporations.

In dissolving the injunction, Chief Justice Gleeson – joined in result by three other justices – reasoned that if the activities depicted on the tape were private, the law of breach of confidence would be sufficient to stop publication. But here while the activities were carried out on private property, "they were not shown, or alleged, to be private in any other sense." *Id.* at ¶ 35.

He also urged caution in recognizing a tort for invasion of privacy, as requested by LGM, both because of the lack of precision in the concept of privacy itself as well as the tensions that exist between the interests in privacy and interests in free speech. Id. at ¶ 41.

Moreover, as to the claim that use of the videotape would be unconscionable, he found that the mere fact that the videotape had been illegally made by a source was not of itself reason to enjoin ABC from broadcasting it, quoting with approval U.S. Supreme Court Justice Stevens' words from *Bartnicki v Vopper* that:

(Continued on page 30)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Australian High Court Refuses to Enjoin Broadcast of Illegally Obtained Videotape

(Continued from page 29)

> The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it. If the sanctions that presently attach to a violation of [the statute] do not provide sufficient deterrence, perhaps those sanctions should be made more severe. But it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.

Id. at ¶ 48.

Justices Also Opine on Right of Privacy

The High Court decision also contains interesting and lengthy discussions by several justices working through the implications of plaintiff's request that the court recognize a tort of privacy. As noted, Chief Justice Gleeson urged caution. Other justices also expressed concern. Surveying Australian, English and American law authorities, including the Restatement of Torts , Justices Gummow, and Hayne noted that ""however else it may develop, the common law in Australia upon corporate privacy should not depart from the course which has been worked out over a century in the United States." *Id.* at 129. Justice Callinan, who with Justice Kirby, would have upheld the injunction, noted that " the time is ripe" to consider whether a tort of invasion of privacy should be recognized in this country. *Id.* at ¶ 335. The court's discussion suggests that under a different set of facts – namely a case involving an individual rather than a corporate plaintiff – there is support on the court for the development of a privacy tort.

Conclusion

Whether a privacy tort develops under Australian common law remains to be determined in future cases. But while the result in this case is positive, the decision demonstrates — albeit indirectly — the extent to which privacy rights under Australian common law (as in English common law) already exist under the rubric of breach of confidence law. Here the right to broadcast the tape turned on the nature of the slaughterhouse which was viewed as an open place of business. As the court noted, had the tape revealed any private activity, breach of confidence law would have been applicable and sufficient to enjoin broadcast. Thus while the Chief Justice Gleeson cited *Bartnicki* with approval, the result in *Bartnicki* would likely be untenable under Australian law.

ABC was represented by barristers T. K. Tobin QC, J. Gibson and R. Glasson and solicitor Judith Walker. LGM was represented by S. McElwaine and J. Bourke.

Now Available

LDRC 50 State Survey: MEDIA PRIVACY AND RELATED LAW

With a special report on privacy and related law in the Federal Courts of Appeals.

TOPICS INCLUDE: *False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes*

Visit ldrc@ldrc.com for ordering info.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Eleventh Circuit Upholds Injunction Against Newsrack Scheme

By Sean Smith

On January 4, 2002, the Eleventh Circuit Court of Appeals upheld a trial court's order permanently enjoining the City of Atlanta from enforcing a proposed newsrack regulation scheme at Atlanta's Hartsfield Airport. *Atlanta Journal-Constitution, USA Today and The New York Times v. City of Atlanta*, 2002 U.S. App. LEXIS 87 (11th Cir. 2002) (Hill, J., with Black and Stapleton, JJ.) The appeal was argued September 17, 2001.

The city's newsrack regulation scheme was preliminarily enjoined in July 1996, immediately following its implementation. In July 2000, the trial court permanently enjoined the scheme as an unreasonable restriction on the distribution of newspapers at the airport. *Atlanta Journal-Constitution v. City of Atlanta*, 107 F. Supp. 2d 1375 (N.D. Ga. 2000) (Story, J.). The court enjoined the city from imposing any newsrack scheme that (1) allowed unfettered discretion in the granting or revoking of permits for newsracks; (2) forced association with third party advertisers on newsracks; or (3) attempted to charge a fee for operation of newsracks that exceeded the city's costs for administering any such scheme.

The Eleventh Circuit upheld the trial court's permanent injunction in all respects. The Court found that the proposed plan was unreasonable in that it attempted to impose forced advertising on newsracks from non-publishers, that it allowed the city to grant or cancel permits with no criteria to limit that action, and that under settled Eleventh Circuit law, a government entity cannot charge a fee greater than its administrative costs when it is restricting or licensing activity protected by the First Amendment.

As to this last point, the Court, citing *Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Authority*, 745 F.2d 767 (2d Cir. 1984) and *Jacobson v. City of Rapid City, S.D.*, 128 F.3d 660 (8th Cir. 1997), noted that some circuits have held that in some circumstances a government may charge a reasonable fee for the exercise of speech rights that exceeds administrative costs of the speech-restricting program. But the Court, citing *Sentinel Communications Co. v. Watts*, 936 F.2d 1189 (11th Cir. 1991), held that controlling law in the Eleventh Circuit provides otherwise

Citing *Gannett*, *Jacobsen* and *Multimedia Publishing Co. v. Greenville-Spartan burg Airport Dist.*, 991 F.2d 154 (4th Cir. 1993), the city has filed a petition for hearing *en banc* as to the fee issue.

The Atlanta Journal-Constitution and the New York Times are represented by Peter Canfield and Sean Smith of Dow, Lohnes & Albertson in Atlanta. USA Today is represented by James Rawls of Powell, Goldstein, Fraser & Murphy. The City of Atlanta is represented by William Boice of Kilpatrick Stockton and by the Office of the Atlanta City Attorney.

Newspaper Gains Access to Sealed Settlement Agreement in 7th Circuit

Presumptive Right of Access Applied, Though Magistrate Retained No Jurisdiction Over Agreement

The Seventh Circuit Court of Appeals has cleared the way for a newspaper to gain access to a settlement document that was submitted to the district court for approval, even though the district court retained no jurisdiction to enforce the settlement agreement. See *Jessup v. Luther*, 2002 U.S. App. LEXIS 721 (7th Cir., Jan. 17, 2002). The opinion was written by Judge Richard Posner, joined by Judges Easterbrook and Kanne.

In 1998, David G. Bernthal, a magistrate judge, presided over the settlement discussions between Lake Land College, a public community college in Illinois, and Goble Jessup, a former vice president of the college. When the parties settled the suit, the magistrate approved the agreement, but did not retain jurisdiction to enforce the agreement in the event that either party violated the agreement's terms. Instead, he ordered the suit be dismissed with prejudice and sealed all documents.

Mid-Illinois Newspapers, Inc., intervened and made a motion to unseal the agreement, which was denied. The Seventh Circuit held that documents in judicial files are "presumptively open to the public and neither the

(Continued on page 32)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Newspaper Publisher Gains Access to Sealed Settlement Agreement

(Continued from page 31)

magistrate judge nor any of the parties has given us any reason to think the presumption might be rebutted in this case."

The court's analysis began with the general rule that records of a judicial proceeding are public. Settlement agreements, however, are ordinarily private documents and not judicial records. It was only the magistrate's treatment of this settlement agreement that transformed it into a document that the Seventh Circuit considered subject to the presumption of access.

As the court explained, settlement agreements that contain "equitable terms, an injunction for example," will be agreements over which a court will retain jurisdiction via a consent decree. This allows the judge to enforce the terms of the agreement. Consent decrees are therefore judicial records subject to public access. When there are compelling interests in secrecy, particular provisions may be concealed.

The magistrate who presided over this case, however, did not retain any jurisdiction over the enforcement of the agreement. The Seventh Circuit, in turn, placed great emphasis on what the magistrate did do: approve the settlement, seal the agreement, and place it in the court's files. According to the Seventh Circuit, the "fact and consequences" of the magistrate's participation are "public acts." The settlement agreement reflected input by a federal judge, according to the Seventh Circuit.

With no retention of jurisdiction by the magistrate, the settlement agreement was, in effect, "just another contract to be enforced in the usual way, that is, by a fresh suit." Thus, had the agreement not been placed in the court's files, it would have been a purely private agreement, and presumably, the newspaper would not have been able to gain access to it. However, Judge Posner concluded that by being placed in the court's files, the document was presumptively a public document. In the absence of any reason that rebutted that presumption, access was granted.

Donald M. Craven, of Craven & Thornton in Springfield, Ill., represented Mid-Illinois Newspapers, Inc. Goble Jessup appeared pro se. John Ewart, of Craig & Craig in Mattoon, Ill., represented the defendants from Land Lake College.

New York Judge Authorizes Cameras in Brooklyn Judicial Bribery Case

Holds NY Statute Barring All Camera Access Unconstitutional

A judge presiding over a trial in Brooklyn, New York of a judge accused of bribery has authorized the use of cameras at the trial despite a state statute barring use of cameras in New York courts. The trial is of Brooklyn judge Victor I Barron.

This is the first time in the five years since the various "experiments" in camera coverage in New York ended that a judge in New York City has allowed cameras in the courtroom. Several judges upstate, however, have agreed to camera coverage, finding the state's blanket rule against such coverage to be unconstitutional. In a short order, and, indeed, without asking for motion papers from the Daily News, Justice Nicholoas Colabella, brought into Brooklyn from Westchester County to preside over Barron's trial, granted a request made by a New York Daily News photographer for access. Judge Colabella is of the view that Section 52 of the Civil Rights Law, a 50 year old statute that bars access by any cameras to New York courts, is unconstitutional under the New York State Constitution. It is unclear whether the defendant will appeal the ruling.

While the Appellate Divisions of New York have not agreed, and the Court of Appeals, New York's highest court, has not addressed the issue, several upstate trial judges presiding over criminal (and in some instances, high profile criminal) matters have taken the position that a blanket ban on cameras in New York's courtrooms violates constitutional requirements. Perhaps the most highly publicized incidence of this was in 2000 when a trial judge in Albany ruled that cameras would be permitted in the criminal trial of the New York City police officers for the death of a suspect, Amadou Diallo. The trial had been moved out of New York City because of concerns about the ability of the defendants to obtain a fair trial as a result of the pretrial publicity regarding the case.

Courtroom Television in 2001 brought suit against the State of New York seeking a declaration that Section 52 is unconstitutional. See LDRC *LibelLetter* (Oct. 2001 at 47).

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Delaware Ethics Committee Issues Opinion on Lawyers' Use of E-Mail and Cell Phones

The Delaware bar's ethics committee has concluded that a lawyer's use of cell phones and e-mail to communicate with and about clients does not violate the lawyer's duty of confidentiality, barring extraordinary circumstances. *See* Delaware State Bar Ass'n Comm. on Professional Ethics, Op. 2001-2. In coming to its decision, the committee followed the American Bar Association ethics committee's opinion on the use of e-mail and relied on the federal statutes that are intended to protect cell phone conversations.

In 1999, the ABA issued its opinion advising that a lawyer may transmit confidential client information via e-mail without violating Rule 1.6. *See* ABA Formal Ethics Op. 99-413. The Delaware committee endorsed the ABA opinion, which concluded that the minimal risk of disclosing confidences via e-mail was offset by federal laws that criminalize hacking and that limit the authority of Internet service providers to inspect a user's e-mail. The Delaware committee also noted the ABA's point that modes of communications like land-line telephones and commercial mail were also vulnerable to interception, but presumed to protect confidentiality.

The Delaware committee did acknowledge that some use of e-mail was inappropriate, such as when a lawyer represents a client who shares an e-mail account with others. For instance, it would be inappropriate for a lawyer to communicate via e-mail with one spouse in a matrimonial proceeding when the other spouse shares access to the e-mail.

As to cell phones, the Delaware committee found a split of authority among the state bars, and no opinion from the ABA. Massachusetts and New Hampshire have advised against any use of cellular or cordless phones by lawyers discussing client information. Arizona, however, concluded that mere use of a cellular or cordless phone does not constitute a violation of confidence. The majority of jurisdictions have approached the middle ground.

Jurisdictions such as Illinois, Iowa, North Carolina, Washington, and New York City have advised lawyers to proceed with caution when using cell phones, disclosing that fact to the client. These jurisdictions recommend that lawyers obtain their clients' informed consent prior to using cell phones or cordless phones to discuss client matters.

The Delaware committee cited the 1986 Electronic Communications Privacy Act, which has been interpreted as applying to cell phones, as a law that alleviates the major risks associated with the use of cell phones. The Delaware committee, however, recommended that lawyers avoid discussing confidential matters in public places, as being overheard on a cell phone is a much larger problem than the interception of the cell phone conversation.

Philadelphia Reporter Fined $1,000 for Speaking to Juror

A reporter for *Philadelphia Magazine* was fined $1,000 and given a suspended 30-day sentence after a judge found her in contempt of court for speaking with a juror during a much-publicized murder trial.

In November, during the murder trial of Rabbi Fred J. Neulander, New Jersey Superior Court Judge Linda G. Baxter issued an order forbidding media contact with the jury. Carol Saline, who works for *Philadelphia Magazine* but does not have any forthcoming articles about the trial, admitted to asking a juror whether he thought his fellow jurors would be willing to talk at the conclusion of the case.

After the juror reported the incident, Judge Baxter denied Neulander's motion for a mistrial. A few days later, the trial ended with a deadlocked jury.

On January 22, New Jersey Superior Court Judge Theodore Z. Davis found Saline in contempt, ruling that the contact was not a mistake and that it placed the trial "at risk." Davis imposed the maximum fine allowed. Saline could have also received as much as a six-month sentence.

Four *Philadelphia Inquirer* reporters are also accused of violating Baxter's order. They will face a contempt hearing before Davis, but no date is set. The four *Inquirer* reporters are accused of violating the order by naming a juror in an article that was published after the trial.

Saline was represented by Mike Pinsky, New Jersey.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Judge Reverses Course, Rules Identity of E-Mailer Must Be Revealed

A California trial court denied a defendant's motion to quash a subpoena requiring Yahoo! to supply Ampex Corp. with records that would help identify the defendant, an anonymous former employee who posted messages to a Yahoo! bulletin board. The ruling without explanation also denies the defendant's ability to proceed anonymously. See *Ampex Corp., et. al., v. Doe 1, aka "Exampex" on Yahoo!, et. al.*, Case No. C01-03627 (Cal. Super. Ct., Contra Costa Co., Jan. 15, 2002).

The ruling last month marked a stark departure from the December ruling that would have required Ampex executives to establish that they had been libeled in the messages posted by their former employee before they could learn the identity of the defendant.

The dispute between Ampex and its former employee began when the employee posted comments about the company and its president on a Yahoo! bulletin board, using the pseudonym "Exampex." The comments included claims that Ampex President Edward J. Bramson had said that a single mother with AIDS had gotten what she deserved, and that marijuana smokers should be "taken out and shot." The postings were also critical of Ampex's dealings with a failed Internet video subsidiary called INEXTV.

When Judge Sanders ruled in December that Ampex should first provide the court with a verified complaint with some factual explanation of actual damages alleged to have flowed from the comments posted on the message board, it was considered a major victory for free speech advocates because the ruling could have helped prevent "fishing expeditions" by plaintiffs seeking to silence anonymous critics.

Last month, however, Judge Sanders reversed course. The defense argued that revealing the identity of an anonymous poster would have a chilling effect for on-line discussions. Nevertheless, the court denied the defendant's motion to quash the subpoena for Yahoo!'s e-mail records.

The defendant has filed a special motion to strike under the California Anti-SLAPP statute. A hearing on that motion is scheduled for March 12.

The defendant is represented by Jennifer Granick and Mike Shapiro of Stanford's Center for Internet and Society. Ampex is represented by William C. Morison-Knox, Michael D. Prough, and Tuari N. Bigknife, of Morison-Knox Holden Melendez & Prough in Walnut Creek, Cal.

Now Available

LDRC 50-STATE SURVEY 2001-02: MEDIA LIBEL LAW

With updated reports on libel law in the Federal Circuits and outlines of Canadian & English libel law.

Topics Include: *Defamatory Meaning • Opinion • Truth/Falsity • Fault •Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/ Statutory Provisions*

$150

Visit www.ldrc.com for ordering information

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

BBC Wins Agreement to Broadcast Lockerbie Appeal

By Rosalind M M McInnes

In a boost for open judicial proceedings, the BBC is currently broadcasting the criminal appeal of Mohmed Al Megrahi, a Libyan who was convicted last year of bombing Pan Am flight 103 in 1988. The criminal proceedings in the case are being heard by a panel of Scottish judges at Camp Zeist in the Netherlands pursuant to an extradition agreement with Libya which agreed to turn over Al Megrahi and another suspect (who was acquitted) for trial in a neutral country under Scottish law. BBC News Online at <http://news.bbc.co.uk> is providing live video coverage of the appeal on the web . The broadcasting of the appeal is the culmination of over a year's dedicated efforts to make justice truly open in the case of the 1988 bombing of Pan Am flight 103.

The Lockerbie Tragedy

Before considering the rightness of broadcasting this appeal live, or the broader questions of televising court proceedings, it is worth remembering the scale of the tragedy. Two hundred and seventy people were killed in the bombing — all 259 passengers and crew en route from London to New York, together with 11 Scots who lived in Lockerbie, Scotland where the plane crashed. It was clear from an early stage that there was no question of accident or malfunction; the court at Camp Zeist is dealing with the largest mass murder in Scottish legal history. The Crown commenced its case with a sombre list of the dead and of the numbers of widows, widowers, orphans and bereft parents left in the wake of the Lockerbie disaster. Twenty-one countries lost nationals.

The Need for Open Justice

The Lockerbie trial and appeal proceedings have, therefore, the highest possible claim on the public interest from both the human and political perspective. They also are legally unique. This is the first time that a Scottish court has sat outside Scotland; the first time that those accused of so serious a crime have been tried without a jury; and the first time that three senior Scottish judges have sat together to consider fact and law in this way.

There is no doubt about it: the Lockerbie proceedings have the strongest and most legitimate claim to our scrutiny as global citizens. That is why the BBC made two strenuous attempts to televise the trial last year, by petitioning the Supreme Scottish Court on two occasions. Both attempts were unsuccessful. Whilst the court accepted the principle that the media were the eyes and the ears of the public, and indeed that televising the proceedings would be the most effective way of doing that job, nonetheless they held that it could not be done.

Primarily, their argument addressed the impact upon witnesses. Another peculiarity of the Lockerbie trial was that not all of the witnesses were compellable by the Scottish court. There were concerns about the safety of witnesses, given the issues of terrorism and espionage. More simply, it was argued that the presence of television cameras would

(Continued on page 36)

Washington Post Reporter Claims Soldiers Threatened Him At Missile Strike Site

An attempt to access a missile strike site led to an incident between a *Washington Post* foreign correspondent and an unidentified U.S. soldier. According to reports, when *Post* reporter Doug Struck's car approached the site, which was surrounded by armed U.S. soldiers, he was detained at gun-point for approximately 15 minutes and told he would be shot if he went any farther.

In a briefing on February 11, Rear Adm. John Stufflebeem said "to believe that a U.S. American serviceman would knowingly threaten, especially with deadly force, another American is hard for me to accept."

According to Rear And. Craig Quigley, the soldier's words to Struck were: "For your own safety, we cannot let you go forward. You could be shot in a firefight."

Both the reporter and the U.S. military were investigating the scene of a missile strike. The missile was fired from a remote-controlled CIA spy plane and into the mountains of eastern Afghanistan. The attack killed several people who U.S. officials believed were members of the al-Qaida network.

A transcript of the Stufflebeem briefing is available online at: http://www.defenselink.mil/news/Feb2002/t02112002_t0211asd.html

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

BBC Wins Agreement to Broadcast Lockerbie Appeal

(Continued from page 35)

make the witnesses shy, tense, self-conscious or inclined to "play to the gallery." Finally, it was held that, whereas in Scotland non-expert witnesses are excluded from the court until after they have given evidence by broadcasting the trial they would be "briefed" on what had happened in court in their absence.

The Refusal to Televise the Trial

In vain, the BBC protested that all media reporting of proceedings was capable of "briefing" witnesses. In vain, did we promise to protect the identity of any witnesses and accept any constraints which the court might deem necessary to protect a witness. In vain, we argued that the trial was already being broadcast to remote sites in New York, Washington, London and Dumfries for the benefit of the bereaved families. This was glossed over by the court as amounting to a mere "extension of the courtroom." (By this profoundly unsatisfactory analogy, the Scottish court, already "extended" to the Netherlands, created four additional wholly private courtrooms, which the court itself could not see, still less control.)

Cameras in the Courts in Scotland

The final reason for refusing television was the refusal of the accused to consent. In the UK, television in court has traditionally been anathema. The Scottish judiciary is fact much more broad-minded here than its English, Welsh and Northern Irish counterparts. Televising of court proceedings has been legal in Scotland, under certain circumstances, since 1992.

Unfortunately, this bold and progressive development has been stymied, all too often, due to the criteria set out in the 1992 Guidelines issued by Lord President Hope. Filming of any trial or preliminary hearing was not permitted. It is necessary to get the consent of all concerned, including the lawyers. Curious as it may seem in a profession which still dresses up in wigs and gowns to orate for long stretches in an ostensibly public court - these unlikely candidates for camera-shyness tend to find performing on television a stage too far. The criminal fraternity, and their mothers, take a broadly similar view.

So in theory, Scots law permits the televising of legal proceedings, but in practice, it has not done so for years.

Broadcasting the Appeal

How, then, did the BBC come to broadcast the Lockerbie appeal? In fact, this was achieved through a remarkable degree of consensus, although not without constraint. A protocol exists binding all the media. It states that "the court in its sole discretion may make available to broadcasters … a feed of the audio-visual images of the appeal" and that "the court in its sole discretion may temporarily or permanently end" the access to the images. The simultaneous Arabic translation is also being made available to broadcasters. The court remains adamant on the question of not televising witnesses: no audio-visual images will be supplied to broadcasters of any evidence taken from witnesses during the appeal hearing. Broadcasters will be able to use excerpts, live or recorded, for the purposes of news programmes.

Puzzlingly, Al Megrahi, who previously apparently voiced an implacable resistance to having his trial televised, has made no murmur about the televising of the appeal.

The BBC is now in the position of broadcasting the first live footage of a Scottish appeal. This is a matter of pleasure and satisfaction to many interested people throughout the world, and especially to BBC Scotland, which has fought long, hard and expensively to advance the cause of open justice. Moreover, this broadcast will it is hoped encourage the Scottish judiciary to open other proceedings to public broadcast.

For at least this media lawyer, however, there is a slight sense of anti-climax. Viewers are being treated to appeal proceedings in one of the most complex, technical and significant murder trials ever mounted. For the viewer, this is roughly like coming in at the last chapter of "War And Peace." Live broadcast is not exactly too little: it is a substantial and reassuring advance in the Scottish courts' thinking about the media. But it is, perhaps, in this case a little late.

Rosalind M M McInnes is a Solicitor for BBC Scotland.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Poet Sues FCC, Claiming Her Song Was Wrongly Labeled Indecent

In March 2001, the FCC Fined a Radio Station for Playing the Song

A New York poet has filed suit against the FCC, seeking a declaratory judgment that would lift the "indecent" label from her spoken-word song "Your Revolution." See *Jones v. FCC,* 02-CV-693 (S.D.N.Y.). Sarah Jones claims the FCC violated her First Amendment rights last March when it labeled her song indecent and fined a Portland, Ore., radio station for airing the song.

In October 1999, KBOO-FM in Portland played Jones' song during a music show called "Soundbox." The idea behind the program, which aired between 7 and 9 p.m., was to create a "call and response" structure between consecutive songs. The show pitted songs by male rappers against songs by female rappers, such as "Your Revolution," which criticized the values expressed in the previous song.

Though Jones defends the song as a "statement against indecency and the indecent treatment of women in popular culture, against materialism, and against the exploitation of women's sexuality for material success and status," the FCC received a complaint alleging that KBOO's broadcast of the song violated the FCC's rules on indecency. In March 2001, the FCC deemed the song to be indecent, and issued a Notice of Apparent Liability fining KBOO $7,000 for playing the song at a time when children were likely to hear it. See *In re The KBOO Foundation*, FCC 01-1212.

Background: Beyond Pacifica

The basis for the FCC's power to regulate "indecent" broadcasts stems from the Supreme Court decision in *FCC v. Pacifica*, 438 U.S. 726 (1978). Despite the fact that indecent speech warranted some First Amendment protection, the Supreme Court held that the FCC was acting within its authority when the FCC cited a station for airing George Carlin's "Filthy Words" monologue in an afternoon broadcast. According to the Court, the FCC was permitted to channel indecent broadcasts to a time when children were not likely to be listening. After *Pacifica*, broadcasters knew that material containing Carlin's seven dirty words and in a manner akin to Carlin's monologue would be considered indecent, and thus should not be aired between 6 a.m. and 10 p.m.

Even in the wake of *Pacifica*, however, what was considered "indecent" was subject to interpretation. For example, a St. Louis television station was found not to have aired indecent material when it aired a Geraldo Rivera Show on "Unlocking the Great Mysteries of Sex," but a St. Louis radio station was found to have aired indecent material when on-air personalities read excerpts from a *Playboy* magazine account of the alleged rape of Jessica Hahn by the Rev. Jim Bakker.

For its part, the FCC has defined "indecency" as any "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." And last April, the FCC released a policy statement that attempted to provide some guidance for broadcasters.

In the policy statement, the FCC identified three factors that have "proved significant" in the Commission's decisions:

1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities;
2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities;
3) *whether the material appears to pander or is used to titillate,* or *whether the material appears to have been presented for its shock value*. FCC 01-90.

The FCC indicated that the third factor was especially important in its determinations.

The Jones Case

In 1998, Jones included the poem "Your Revolution" in her first performance of her "Surface Transit" show. The show is a mix of humor and social commentary. "Your Revolution" is an adaption of the famous poem "The Revolution Will Not Be Televised" by Gil Scott-Heron and is recited by a the character of a teenage girl in "Surface Transit" who is the only virgin in her building and is responding to the advances of men.

(Continued on page 38)

For excl usive use of MLRC members and other parties specifical l y authorized by MLRC. © Media Law Resource Center, Inc.

Poet Sues FCC, Claiming Her Song Was Wrongly Labeled Indecent

(Continued from page 37)

The repeated verse in the poem is "your revolution will not happen between these thighs." The poem also quotes or references other songs, none of which were ever found to be indecent but are sexually suggestive. For example, two verses of the poem read, "your revolution / will not find me in the / backseat of a Jeep with LL / hard as hell / doin' it & doin' it & doin' it well / your revolution will not be you / smackin' it up, flippin' it, or rubbin' it down / nor will it take you downtown or humpin' around / because that revolution will not happen between these thighs."

The complaint received by the FCC, however, references a verse later in the poem that reads, "you will not be touching your lips to my triple dip of / french vanilla butter pecan chocolate deluxe / or having Akinyele's dream / a six-foot blowjob machine / you wanna subjugate your queen; / think I should put that in my mouth / just 'cause you made a few bucks."

In issuing the Notice of Apparent Liability to KBOO, the FCC concluded that the sexual references "appear to be designed to pander and shock and are patently offensive." The FCC also rejected arguments that the social commentary offered by "Your Revolution" precluded any finding of indecency.

In her complaint, Jones alleged that the FCC did not consider the full context of the song and focused only on the sexual references. Jones offered as proof the fact that the FCC "ignored the fact that much of the lyrics in 'Your Revolution' are direct quotes from songs that are widely and nationally played on the radio." Moreover, Jones argued that the FCC "ignored the sensibilities of the 'average listener.'" Jones claimed the "average listener" would "understand that 'Your Revolution' was denouncing ideas expressed in those popular lyrics and not using sexual references to pander and titillate the listener."

The complaint also alleged that the FCC's decision has caused "irreparable damage to [Jones'] professional honor and reputation."

KBOO has contested the fine, but no action has been taken by the FCC.

Edward H. Rosenthal, Lisa E. Davis, Victoria Cook and Kesari Ruza, of Frankfurt Garbus Kurnit Klein & Selz in New York, and Elliot M. Mincberg and Lawrence S. Ottinger, of People for the American Way Foundation in Washington, D.C., represent Jones. Daniel Alter, of the U.S. Attorney's office, represents the Federal Communications Commission.

©2002
LIBEL DEFENSE RESOURCE CENTER, INC.
80 Eighth Avenue, Suite 200
New York, NY 10011
(212) 337-0200
www.ldrc.com

BOARD OF DIRECTORS
Robin Bierstedt (Chair)
Dale Cohen
Harold W. Fuson, Jr.
Henry Hoberman
Adam Liptak
Susanna Lowy
Kenneth M. Vittor
Mary Ann Werner
David Schulz (ex officio)

STAFF:
Executive Director: Sandra Baron
Staff Attorney: David Heller
Staff Attorney: Eric Robinson
LDRC Fellow: Russell Hickey
Legal Assistant: Kelly Chew
Staff Coordinator: Debra Danis Seiden

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

More Court Action in Terror War Access Issues

Media, Military Skirmishes

There have been more skirmishes between the military and the media in Afghanistan and a reporter for *The Toronto Star* was expelled from a military base in Kandahar for allegedly breaking the ground rules for media access.

Star reporter Mitch Potter was expelled on Feb. 12 by a Canadian military public affairs officer after writing an article that gave the number of guard towers at the detention facility on the base, and mentioned that commandos were conducting night operations. The officer told Potter that he had broken the ground rules for media access to the base.

A photographer from the *Star* was permitted to remain on the base.

A spokesman for the U.S. Central Command, which is overseeing the operation in Afghanistan, said that the rules for the media reporting from the base bar reporting on special operations activities or "the way that the detention facility is laid out."

Star executives protested the expulsion in a letter to Canadian Defense Minister Art Eggleton, whose spokesman told the newspaper that he was looking into the situation.

Suspects Arrested in Murder of 4 Journalists

In Afghanistan, authorities arrested two suspects in the killing of four journalists in a Nov. 19 ambush on a road from Jalalabad to Kabul. Four other journalists were killed on Nov. 11 when Taliban forces fired upon the Northern Alliance convoy they were riding in, and a Swedish TV cameraman was killed during a robbery on Nov. 26.

Reality Programs To Star Troops

While the Pentagon has limited reporting of some reporters on the ground, it is cooperating with producers of programs for ABC and VH1 that will focus on the "personal stories" of the troops in Afghanistan.

The VH1 program, tentatively called the "Military Diaries Project," will give 60 soldiers video cameras to "tell the story of what it's like to be a young man or woman in the armed forces right now," producer R.J. Cutler told the *Los Angeles Times*.

The ABC program, to be titled "Profiles from the Front Line," will be a 13-part series focused on the "compelling personal stories of the U.S. military men and women who bear the burden of this fighting," according to an ABC press release.

Rear Adm. Quigley told *The New York Times* that crews for the ABC show would have access to soldiers "trooping around all over the countryside — flying on planes, going on ships, going on patrol with the 101st Airborne, living a rugged life."

The Pentagon will review the footage of both programs for security concerns before airing, but those involved in each of the programs said that they will maintain editorial control. Cutler said that the Pentagon is "not at all interested in editing the stories we're telling."

"There's a lot of other ways to convey information to the American people than through news organizations," Quigley told the *Times*. "That's the principal means. But if there is an opportunity to tell about the courage and professionalism of our men and women in uniform on prime time television for 13 straight weeks, we're going to do it. That's an opportunity not to be missed."

Info On Detainees Sought

Battles over access to people still being detained after the Sept. 11 attacks continued. The *Detroit Free Press* and the *Ann Arbor News* filed a lawsuit seeking access to deportation proceedings of a Detroit area Muslim leader,

The lawsuit by the Michigan newspapers sought access to deportation proceedings against Rabih Haddad for overstaying his visa. Haddad is a cofounder of an Islamic charitable organization which has accused of supporting terrorism.. At the time the suit was filed, there had been three hearings in the Haddad's case in Detroit immigration court. *Detroit Free Press, Inc v. Ashcroft*, No. 02-CV-70339 (E.D. Mich. filed Jan. 28,

(Continued on page 40)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Media, Press Skirmishes

(Continued from page 39)

2002). *The Detroit News*, the *Metro Times* weekly newspaper, and Congressman John Conyers (D-Mich.). filed a separate lawsuit on the issue. *Detroit News, Inc. v. Ashcroft*, No. 02-CV-70340 (E.D. Mich. filed Jan. 29, 2002). Hearing on the newspapers' requests for a preliminary and permanent injunction in both cases are scheduled for March 26.

That organization, Global Relief Foundation, has filed its own suit over media reports identifying it was one of the charitable agencies who assets had been or may be frozen by the American government. *Global Relief Fdtn., Inc. v. O'Neill,* No. 02-C-0674 (N.D. Ill. filed Jan. 28, 2002). *See LDRC LibelLetter*, Dec. 2001, at 51. After the suit was filed, the federal government did freeze the assets of the organization; the group has challenged this action in a separate lawsuit.

A lawsuit seeking the names of detainees nationwide is pending, *Center for Nat'l Security Studies v. Dept. of Justice*, No. 01-2500 (D.D.C. filed Dec. 5, 2001), as is a suit seeking the names of those being detained in Hudson County, New Jersey. *American Civil Liberties Union of New Jersey v. Hudson County*, No. L-000463-02 (N.J. Super. Ct., Hudson County filed Jan. 22, 2002). Meanwhile, a federal judge in California rejected an effort by civil rights groups to obtain a list of Afghan detainees being held at Guantanamo Bay, Cuba. *Coalition of Clergy v. Bush*, No. 02-CV-00570 (C.D. Cal. dismissed Feb. 21, 2002).

In another access case, a group of television media outlets announced that they would not appeal U.S. District Judge Leonie Brinkema's decision denying their cameras access to the trial of suspect terrorist Zacaria Moussaoui. *U.S. v. Moussaoui*, No. 01-CR-455 (E.D. Va. order Jan. 18, 2002) (denying motion to record and telecast trial); *see LDRC LibelLetter*, Jan. 2002, at 3. They said that they would instead push for passage of S. 986, which would allow media coverage of federal district and appellate court proceedings. The bill passed the Senate Judiciary Committee on Nov. 29, and is due to be considered by the whole Senate.

The first issue of the 2002 LDRC BULLETIN, a REPORT ON TRIALS AND DAMAGES was published this month

2002 LDRC QUARTERLY BULLETIN

Attention Media Members and those DCS Members at a dues level of $1000 or more:
You *automatically* receive a single subscription to the BULLETIN with your membership.

The **2002 LDRC BULLETIN** will include an issue devoted to ***Crime and Punishment: Criminal and Related Government Regulation of Newsgathering and Publishing,*** with articles on criminal libel, the current Espionage Act and the proposed Official Secrets Acts, and defense of criminal charges based upon newsgathering activities.

LDRC also will update its **COMPLAINT STUDY**, a look at the characteristics of the plaintiffs who sue, which media they sue, and the claims they make. And the 2002 **REPORT ON TRIALS AND DAMAGES** in cases against the media

*The **LDRC BULLETIN** is written and edited by LDRC staff and by other noted First Amendment lawyers and scholars. It is often cited by lawyers, jurists, and academics, and helps set the agenda for First Amendment activists throughout the country.*

Contact us for more info.

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Federal Shield Law Proposed

By Lucy Dalglish

Rep. Sheila Jackson Lee (D-Texas) announced from the steps of the federal detention center in Houston on Jan. 4 that she planned to introduce legislation that would protect journalists like Vanessa Leggett from Justice Department attempts to discover the identities of confidential sources.

Jackson Lee accompanied Leggett as she left the detention center after serving 168 days for refusing to identify confidential sources used in writing a true crime book about a notorious Houston murder. The Congresswoman's announcement came as a surprise because Jackson Lee, who represents the district where Leggett lives, appeared to have come up with the idea for shield law legislation without consulting any journalists.

The Reporters Committee for Freedom of the Press contacted Jackson Lee's office to see where she was going with her proposed legislation. It became apparent that there had been very little work done on the issue and that her staff members were eager to discuss it with journalism groups. In fact, they were working under the false assumption that all that would be necessary would be an amendment to whatever federal law was out there to redefine "journalist" broadly so that book authors and freelancers like Leggett would be covered.

An ad hoc group of journalism organizations, including the Reporters Committee, Society of Professional Journalists, Radio-Television News Directors Association, the American Society of Newspaper Editors, the National Newspaper Association, the Newspaper Association of America and others met twice in Washington to discuss a strategy for dealing with the Congresswoman.

As a result, Reporters Committee Executive Director Lucy Dalglish and Legal Defense Director Gregg Leslie met with the Congresswoman on Feb. 7. She now understands that legislation creating a federal shield law would be required.

Past efforts to get a federal shield law (more than 100 bills since 1970) always broke down over basic issues, such as whether it would be an absolute or qualified privilege and whether journalists would be better off relying on common law protections where they exist. In the initial meeting with Jackson Lee, she asked that the members of the ad hoc group go to their constituencies to gauge whether a federal shield law is desirable. If so, she wants to know whether journalists would insist on an absolute privilege or whether a qualified privilege would work. She also would only be interest in sponsoring the bill if it encompassed freelancers and book authors. She will not take action on the legislation until she hears back from the journalism groups about whether they want her to proceed.

To that end, the Reporters Committee is collecting input from all those interested in this issue to see whether the journalism groups can reach a consensus about reporters privilege legislation. You can make your thoughts known by e-mailing Lucy Dalglish at ldalglish@rcfp.org. Jackson Lee specifically asked that the groups not contact her office individually. She wants a coordinated response.

At this point, please confine your comments to the desirability of the legislation, rather than the capabilities of the proposed sponsor.

Lucy Dalglish is Executive Director of Reporters Committee for Freedom of the Press, Washington, D.C.

Media Must Consider Options on Federal Shield Proposal

As the article on this page states, media are being asked to indicate their views on a federal shield law proposal and such specifics as how to define who is covered by the bill. This is an issue that all of you really should attend to so that the trade associations in Washington, and those of you that lobby on your own, speak effectively and, ultimately, with a single voice.

What is the Definition of a Journalist?

Very Few Appellate Courts Have Weighed in on Who May Assert a Reporter's Privilege

Last summer, when Vanessa Leggett went to jail rather than reveal her confidential sources, the point of contention was whether the reporter's privilege could be asserted during a criminal investigation. The district court and the Fifth Circuit Court of Appeals held that the qualified First Amendment privilege did not apply.

Last August, the Fifth Circuit Court of Appeals side-

(Continued on page 42)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

What is the Definition of a Journalist?

(Continued from page 41)

stepped the issue of whether Leggett was a journalist for the purposes of asserting a reporter's privilege by deciding the case on other grounds, holding that the privilege was "far weaker in criminal cases" and Leggett could not assert the privilege because she had not shown any evidence of governmental harassment or oppression.

Lost in the wake of these holdings was an equally important question: Who may assert the privilege? Leggett does not have extensive experience as a journalist. Her collection of published work consists of a single article in an FBI publication and one fictional short story.

Extensive experience, however, is not necessary to have standing to assert the reporter's privilege. In *von Bulow v. von Bulow*, 811 F.2d 136, 13 Media L. Rptr. 2041 (2nd Cir. 1987), *cert. denied*, 481 U.S. 1015 (1987) (explained below), the court said that prior experience as a professional journalist is not the sine qua non proof that the reporter's privilege applies. According to the court, a novice journalist could carry the burden of proof and successfully assert the privilege.

Perhaps most importantly for Leggett's purposes in analyzing her status under the privilege, she began researching the murder of a Houston socialite with the intent to publish a book on the murder. Under the test used and explained below, Leggett could satisfy one of the crucial elements of the test used to define a journalist.

The Fifth Circuit, while not reaching the issue, said in a footnote that its "inquiry into this question [of who qualifies as a journalist for the purpose of asserting privilege] would be guided by the three-part test used in other circuits, which asks whether the person claiming the privilege (1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public."

What follows is a look at the test first devised by the Second Circuit.

von Bulow v. von Bulow

In 1987, the Second Circuit Court of Appeals laid the groundwork for the three-part test cited by the Fifth Circuit last August when it decided *von Bulow v. von Bulow.* The underlying complaint involved an in-family dispute brought by two children who accused their step-father, Claus von Bulow of surreptitiously injecting their mother, who was in a permanent coma, with insulin and other drugs. Prior to the civil suit, Claus von Bulow was acquitted on charges of assault with the intent to murder his wife.

During the criminal trial, Andrea Reynolds, a friend of the step-father's and a "steady companion" during the trial, commissioned investigative reports into the lifestyles of the children. Reynolds initially conceded that when she commissioned the reports, "her primary concern was vindicating Claus von Bulow."

During the civil trial, Reynolds was ordered to produce the commissioned reports, her notes from the criminal trial, and the manuscript of her unpublished book about the criminal trial. Reynolds attempted to claim a reporter's privilege for the manuscript.

To bolster her claim to the reporter's privilege, Reynolds produced a press card from Polish Radio and Television, asserted that she was "acting as a writer" for the German magazine *Stern* and had "drafted" an article about von Bulow that had appeared in *Stern*, and claimed the *New York Post* had issued her a press pass for the trial (though she never covered the trial for the *Post*). That evidence, however, would not prove to be conclusive.

Prior to the *von Bulow* case, the typical struggle over a reporter's privilege was whether the privilege applied to a person who was not a member of the "institutionalized press." Prior case law made it clear that the privilege went beyond the "institutionalized press." The *von Bulow* court cited a Tenth Circuit decision which allowed a documentary film maker to assert the reporter's privilege, see *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977), and a case in which a chief executive officer of a technical journal successfully asserted the privilege, see *Apicella v. McNeil Laboratories, Inc.*, 66 F.R.D. 78 (E.D.N.Y. 1975).

The *von Bulow* court, however, was asked to define a journalist in much more generalized terms. Reynolds'

(Continued on page 43)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

What is the Definition of a Journalist?

(Continued from page 42)

standing as a reporter was challenged, not because she was writing a book as opposed to a newspaper article, but because she began gathering information initially for a "purpose other than traditional journalistic endeavors."

Turning to *Baker v. F&F Investment*, 470 F.2d 778, a 1972 Second Circuit decision that upheld a claim for a reporter's privilege, the *von Bulow* court found a central theme in that decision: compelled disclosure of a reporter's confidential source would have a deterrent effect on future "'undercover' investigative reporting," and in turn that "threatens the freedom of the press and the public's need to be informed."

The von Bulow Test

From this central holding, the court fashioned a two-part test that was later extended to include a third step. According to the *von Bulow* court, the person asserting the reporter's privilege must first be engaged in a newsgathering process. Second, and most critically, at the inception of that newsgathering process, the person claiming the privilege must have had the intent to disseminate to the public the information obtained through the investigation.

Reynolds' standing as a reporter was challenged, not because she was writing a book as opposed to a newspaper article, but because she began gathering information initially for a "purpose other than traditional journalistic endeavors."

Though Reynolds had clearly conducted an investigation, her intent at the time proved to be dispositive. According to the court, the individual claiming the reporter's privilege "must demonstrate, through competent evidence, the intent to use material — sought, gathered or received — to disseminate information to the public and that such intent existed at the inception of the newsgathering process." Reynolds' own admissions proved her original intent was not to disseminate her findings.

The *von Bulow* decision, however, included noteworthy dicta. The *von Bulow* court stated that the reporter's privilege could be successfully asserted by a "novice in the field" of journalism — so long as the person claiming the privilege could carry the burden of proving an original intent to disseminate to the public the information obtained through her investigative work.

Shoen v. Shoen: Adopting von Bulow to Book

In 1993, the *von Bulow* test was adopted by the Ninth Circuit Court of Appeals in *Shoen v. Shoen*, 5 F.3d 1289, 21 Media L. Rptr. 1961 (9th Cir. 1993). Again in the context of an in-family dispute, the Ninth Circuit was forced to consider whether a non-party investigative author could assert the reporter's privilege and avoid producing his notes and tapes from interviews he conducted with one of the defendants in a defamation action.

The underlying claim arose out of a battle over control of the U-Haul corporation. Ronald Watkins, the author, entered into an agreement with Leonard Shoen, the founder of U-Haul, whereby Shoen would grant Watkins in-depth interviews in exchange for a percentage of the book royalties and an interest in any possible movie deal. Prior to these interviews, Leornard Shoen made at least 29 statements to the press implicating his sons, Mark and Edward, in the murder of their sister-in-law Eva Berg Shoen.

After the brothers filed a defamation claim against their father, they served Watkins with a subpoena duces tecum, ordering him to appear with all documents and recordings in his possession regarding the interviews with the father. Watkins refused, asserting the reporter's privilege. The brothers argued that Watkins had no standing to invoke the reporter's privilege because a book author was not a member of the institutionalized print or broadcast media.

Intent is Key

Citing the Second Circuit's ruling in *von Bulow v. von Bulow*, the Ninth Circuit held that the reporter's privilege was "designed to protect investigative reporting, regardless of the medium used to report the news to the public." The Ninth Circuit went on to say that it

(Continued on page 44)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

What is the Definition of a Journalist?

(Continued from page 43)

would be "unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic."

Quoting *von Bulow*, the Ninth Circuit said the test for invoking the reporter's privilege was "whether the person seeking to invoke the privilege had 'the intent to use material — sought, gathered or received - to disseminate information to the public and [whether] such intent existed at the inception of the newsgathering process. If both conditions are satisfied, then the privilege may be invoked." Because Watkins possessed the intent to disseminate his findings to the public, the Ninth Circuit determined that the "critical question for deciding whether a person may invoke the journalist's privilege is whether she is gathering news for dissemination to the public."

In a footnote, the Ninth Circuit said that it left for another day the question of whether the reporter's privilege may be invoked by a "person writing a book about a recent historical figure, such as Harry Truman or Albert Einstein, where the intent, arguably, is not the dissemination of 'news,' but the writing of history."

[T]he Ninth Circuit held that the reporter's privilege was "designed to protect investigative reporting, regardless of the medium used to report the news to the public."

In re Madden: The Addition of a Third Step

In 1998, the Third Circuit used a three-part test when it decided that a World Championship Wrestling ("WCW") commentator could not assert the reporter's privilege. See *In re Madden*, 151 F.3d 125, 26 Media L. Rptr. 2014 (3d Cir. 1998). See also *LDRC LibelLetter*, August 1998 at 8.

The underlying case was brought by Titan Sports, Inc. against Turner Broadcasting Systems, Inc. Titan and TBS were both "prominent professional wrestling promoters." TBS, carried the WCW, while Titan controlled the World Wrestling Federation ("WWF"). Titan sued TBS alleging unfair trade practices, copyright infringement and other pendent state law claims. As part of its case, Titan subpoenaed Mark Madden, a WCW commentator.

As part of his duties, Madden produced tape-recorded commentaries on the WCW that were available via a 900-number hotline. The commentaries promoted upcoming WCW events and pay-per-view television programs. In the course of preparing his taped commentaries, Madden would receive confidential information from people within the WCW. When Madden was asked to identify the sources of allegedly false and misleading statements contained in his commentaries, he claimed a reporter's privilege.

Using *von Bulow* and *Shoen*, the Third Circuit concluded that to have standing to assert a reporter's privilege, a three-pronged test must be satisfied. The Third Circuit explained:

> As we have indicated previously, we agree with *von Bulow* that the person claiming privilege must be engaged in the process of "investigative reporting" or "newsgathering." Moreover, we agree with *Shoen*, which held that the critical question for deciding whether a person may invoke the journalist's privilege is "whether she is gathering news for dissemination to the public." We hold that individuals are journalists when engaged in investigative reporting, gathering news, and have the intent at the beginning of the newsgathering process to disseminate this information to the public.

Applying this test, the Third Circuit concluded that Madden did not satisfy any prong of the three-part test.

"Entertainment" Won't Fit

Madden's claim failed because, according to the court, his activities could not be considered "'reporting,' let alone 'investigative reporting.'" The court considered Madden to be more of an entertainer than a reporter. Second, the court concluded that Madden was not gathering "news." Finally, Madden did not have the requisite intent to disseminate the information when he began to gather it.

The court was skeptical about Madden's position with the WCW as it related to his original intent for gathering

(Continued on page 45)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

What is the Definition of a Journalist?

(Continued from page 44)

the information. The court concluded that "even if Madden's efforts could be considered 'newsgathering,' his claim of privilege would still fail because, as an author of entertaining fiction, he lacked the intent at the beginning of the research process to disseminate information to the public. He, like other creators of fictional works, intends at the beginning of the process to create a piece of art or entertainment." Thus, the Third Circuit made a distinction between entertainment and news, and therefore required that the investigative process be aimed at gathering news. What resulted was a new three-step test that was quoted by the Fifth Circuit last summer.

According to the footnote included in the Fifth Circuit's decision in the Leggett case, a person is a reporter for the purpose of asserting the reporter's privilege if she "(1) is engaged in investigative reporting; (2) is gathering news; and (3) possesses the intent at the inception of the news gathering process to disseminate the news to the public."

Other Cases

Despite the test, recent decisions have indicated that it still may be difficult to know who may assert the reporter's privilege. Recently, three courts limited or denied assertions of the reporter's privilege based on standing.

On February 4, Los Angeles Superior Court Judge David S. Wesley ordered Mary Fischer, who was a reporter for *GQ*, to testify before a DeKalb County (Ga.) grand jury. See *In re Mary Fischer*, No. 001806 (L.A. Sup. Ct., Feb. 5, 2002). Jeanne M. Canavan, the district attorney for DeKalb County, claimed that Fischer had "stepped outside the bounds of journalistic privilege" and became a material witness to an alleged assassination plot. According to Canavan, Fischer was no longer acting as a journalist when she helped arrange a meeting between two men who allegedly discussed the assassination of a sheriff.

DeKalb County prosecutors are trying to convict former Sheriff Sidney Dorsey of murdering the Sheriff-elect who defeated Dorsey. According to District Attorney Canavan, three months after the Sheriff-elect was assassinated in a plot that involved Dorsey's former deputy Patrick Cuffey, Fischer helped arrange a meeting between Dorsey and Cuffey. Canavan claims that in doing so, Fischer went beyond her duties as a journalist and became a material witness.

In January, a federal judge narrowed a Rhode Island radio host's ability to assert the reporter's privilege. U.S. District Judge Ernest C. Torres ruled that talk-show host John DePetro could assert the privilege only to questions involving information he obtained while "acting in his journalistic capacity."

DePetro, who has covered an FBI investigation into corruption allegations, obtained a videotape purportedly showing a top aide in the mayor's office accepting a bribe. The videotape was later aired on a local television station. Special Prosecutor Marc DeSistro, however, claimed that DePetro came into possession of the videotape because of a personal relationship and not as a result of newsgathering efforts.

In October 2000, a New Jersey Superior Court judge held that a public relations firm did not meet the definition of a newsperson, and therefore could not claim a reporter's privilege. The court held that "the public relations firm is in effect [a] spokesperson. As such, the public relations firm really is part of the news rather than a member of the news media reporting it." *In re Napp Technologies, Inc.*, 768 A.2d 274 (N.J. Super. Ct. Law Div. 2000).

Defining a Journalist: State Shield Statutes

One of the key issues for a federal shield law will be the definition of who is covered by it. There is no uniformity on the issue in the state shield laws. Thirty-one states have shield laws and they reflect a continuum in terms of how broadly they define who will be within the protected category.

More Formality Required

Some statutes, for example, seem to impose stricter requirements on the existence of a relationship between the individual seeking to be protected and an institutional media organization.

- **Nevada** has one of the most narrow of defining terms when it speaks in terms of "employee[s]." Nev. Rev.

(Continued on page 46)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Defining a Journalist: State Shield Statutes

(Continued from page 45)

Stat. Ann. §§ 49.275, 49.385.

- **Colorado** defines "newsperson" to mean "any member of the mass media *and any employee or independent contractor* of a member of the mass media who is engaged to gather, receive, observe, process, prepare, write or edit news information for dissemination to the public through the mass media." Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 - 06 (emphasis added).
- **Florida** too, talks in terms of someone "who obtained the information sought while working as a *salaried employee of, or independent contractor for*," and then listing a wide range of news institutions. The statute specifically excepts "book authors and others who are not professional journalists, as defined in this paragraph." Fla. Stat. §90.5015 (1)(a) (emphasis added).

  And a number of statutes use the term "*employed by*" without further definition. See, e.g., Maryland, Md. Code Ann. [Cts. & Jud. Proc.] §9-1112(b); District of Columbia, D.C. Code Ann. §16-4701 ("any person who is or has been employed by the news media [also defined, see below]...").

And More Flexible Terms

Other state provisions suggest less formality about the relationship.

- **Indiana**, for example, includes

  > any person connected with, or any person who has been connected with or employed by...as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news...

  Ind. Code § 34-3-5-1. See also Montana, Mont. Code Ann. §§ 26-1-901 - 03.

- **New York** provides that a "professional journalist" covered by its shield law is:

  > (6) "Professional journalist" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

  N.Y. Civ. Rights Law § 79-h.

  The statute also includes, however, "newscaster[s]" who are defined as: "a person who, for gain or livelihood, is engaged in analyzing, commenting on or broadcasting, news by radio or television transmission."

- **Ohio** includes encompassing terms such as "*engaged in the work of, or connected with*" in addition to "*employed by*" in its defining terms:

  > No person engaged in the work of, or connected with, or employed by any noncommercial educational or commercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news...
  >
  > Ohio Rev. Code Ann. §§ 2739.04, 2739.12.

  And similarly, with respect to the print side:

  > No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling , editing, disseminating, or publishing news ...
  >
  > Ohio Rev. Code Ann. §§ 2739.04, 2739.12. See also Oregon, Or. Rev. Stat. §44.520(1), (2); Pennsylvania, Pa. Stat. Ann. tit 42, §5942 (a); Kentucky, Ky. Rev. Stat. Ann. §421.100.

- **Oklahoma:** any person "*regularly engaged in,*" with those employed by included news organizations as being deemed to be "regularly engaged." Okla. Stat. tit. 12 §2506 (A)(7). See also Georgia, Ga. Code Ann. §24-9-30 ("Any person, company, or other entity engaged in the gathering and dissemination of news for the pub-

(Continued on page 47)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Defining a Journalist: State Shield Statutes

(Continued from page 46)

lic..."); Arizona, Ariz. Rev Stat. §12-2214 ("person engaged in gathering, reporting, writing, editing, publishing or broadcasting news to the public" and which is related to those activities).

- **Michigan:** A reporter or other person *who is involved in* the gathering or preparation of news for broadcast or publication..." Mich. Comp. Laws Ann. §767.5a.
- **Alaska:** "reporter means a person *regularly engaged in* the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege." Alaska Stat. §§ 09.25.300 - .390.
- Also **New Jersey**: " a person *engaged on, engaged in, connected with, or employed by* news media for the purpose of gathering, procuring, transmitting compiling editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated..." N.J. Stat. Ann. §§ 2A:84A-21-21.9, 2A:84A-29.
- And **Nebraska**, which includes any person "*engaged in* procuring, gathering, writing, editing, or disseminating news or other information to the public," including individuals, partnerships, and other entities. See also, Minnesota, Minn. Stat. §595.023 ("directly engaged in").
- And **Tennessee**: "A person *engaged in* gathering information for publication or broadcast connected with *or employed by* the news media or press, *or who is independently engaged* in gathering information for publication or broadcast..." Tenn. Code Ann. §24.1.208(a).
- **Delaware** presents perhaps the broadest and least rigid formula for defining who is covered by its shield law and specifically includes "scholar[s], educator[s]" and "polemicist[s]":

(2) "Information" means any oral, written or pictorial material and includes, but is not limited to, documents, electronic impulses, expressions of opinion, films, photographs, sounds records, and statistical data.

(3) "Reporter" means any journalist, scholar, educator, polemicist, or other individual who either:

a. At the time he obtained the information that is sought was earning his principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the patience of, obtaining or preparing information for dissemination with the aid of facilities for the mass production of words, sounds, or images in a form available to the general public; or

b. Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

(4) "Person" means individual, corporation, business trust, estate, trust, partnership or association, governmental body, or any other legal entity....

(7) "Within the scope of his professional activities" means any situation, including a social gathering, in which the reporter obtains information for the purpose of disseminating it to the public, but does not include any situation in which the reporter intentionally conceals from the source the fact that he is a reporter and does not include any situation in which the reporter is an eyewitness to or participant in an act involving physical violence or property damage.

Del. Code Ann. tit. 10, §§ 4320 - 26

- **Illinois** includes part-timers, defining "reporter" under its statute to mean "any person regularly engaged in the business of collecting, writing or editing news for publication through a news medium on a full-time or part-time basis ..." Ill. Ann. Stat. ch. 110, para. 8-901 - 09.

What Media Are Included

What is equally varied is the definition of the media by which the reporter is defined.

- Along with Delaware, quoted above, the **District of Columbia** provision is one of the broader ones. The District of Columbia provides:

For the purpose of this chapter, the term "news media" means:

(1) Newspapers;
(2) Magazines
(3) Journals;

(Continued on page 48)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Defining a Journalist: State Shield Statutes

(Continued from page 47)

(4) Press associations;
(5) News agencies;
(6) Wire services;
(7) Radio;
(8) Television; or
(9) Any printed, photographic, mechanical, or electronic means of disseminating news and information, to the public.
D.C. Code Ann. §§16-4701.

- Also **Maryland**, which, like the D.C. definition above, includes "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public," is one of the broader definitions of media encompassed by the shield laws.
- **Illinois'** definition is somewhat eclectic, perhaps reflecting what was on the minds of the legislators when they last looked at the provision:

  735 Ill. Comp. Stat.
  5/8-902 (b) "news medium" means any newspaper or other periodical issued at regular intervals and having a general circulation; a news service; a radio station; a television station; a community antenna television service; and any person or corporation engaged in the making of news reels or other motion picture news for public showing."

- **Georgia** recognizes the traditional media by limiting the reach of their provision to those publishing through "a newspaper, book, magazine, or radio or television broadcast."

Press associations are often, however, included even when the definition is a relatively limited one, weighted to traditional media (see, e.g., Indiana, Ind. Code §34-46-4-1; Louisiana, La. Rev. Stat. Ann tit. 45 §1451; Maryland Md. Code Ann. §9-112(a), Nevada Nev. Rev. Stat. §49.275).

While this note does not provide all of the terms or variations encompassed by the state shield laws, it is sufficient to show that the defining terms are different, and sometimes in important ways and certainly as between the extremes within the jurisdictions. These are ample examples of how such a provision could be written to include wide swaths of those who research, write, publish in any manner or medium as part of their professional lives – indeed, Vanessa Leggett.

State Shield Statutes

Alabama – Ala. Code § 12-21-142

Alaska- Alaska Stat. §§ 09.25.300 - .390

Arizona - Ariz. Rev. Stat. Ann. §§ 12-2214, 12-2237

Arkansas - Ark. Stat. Ann. § 16-85-510

California - Cal. Const. Art 1, § 2; Cal. Evid. Code § 1070

Colorado - Colo. Rev. Stat. §§ 13-90-119, 24-72.5-101 - 06

Delaware - Del. Code Ann. tit. 10, §§ 4320 - 26

District of Columbia - D.C. Cod Ann. §§16-4701 - 04

Florida - Fla. Stat. ch. 90.5015

Georgia - Ga. Code Ann. §24-9-30

Illinois – Ill. Ann. Stat. ch. 110, para. 8-901 - 09

Indiana - Ind. Code § 34-3-5-1

Kentucky - Ky. Rev. Stat. § 421.100

Louisiana - La. Rev. Stat. Ann. §§ 45:1451 - 59

Maryland - Md. Cts. & Jud. Proc. Code Ann. § 9-112

Michigan - Mich. Comp. Laws Ann. § 767.5a

Minnesota - Minn. Stat. Ann. §§ 595.021 - .025

Montana - Mont. Code Ann. §§ 26-1-901 - 03

Nebraska - Neb. Rev. Stat. Ann. §§ 20-144 - 47

Nevada - Nev. Rev. Stat. Ann. §§ 49.275, 49.385

New Mexico - N.M. Sup. Ct. R. of Evid. 11-514; N.M. Stat. Ann. § 38-6-7

New Jersey - N.J. Stat. Ann. §§ 2A:84A_21 _ 21.9, 2A:84A-29

New York - N.Y. Civ. Rights Law § 79_h

North Dakota - N.D. Cent. Code §31-01-06.2

Ohio - Ohio Rev. Code Ann. §§ 2739.04, 2739.12

Oklahoma - Okla. Stat. tit. 12, § 2506

Oregon - Or. Rev. Stat. §§ 44.510 - .540

Pennsylvania - 42 Pa. Cons. Stat. Ann. § 5942

Rhode Island – R.I. Gen. Laws §§ 9-19.1-1 - .1-3

South Carolina - S.C. Code Ann. § 19-11-100

Tennessee - Tenn. Code Ann. § 24-1-208

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Supreme Court Strikes Down Portion of State's "Son of Sam" Law

By Jonathan Bloom

In a long-awaited decision, the Supreme Court of California unanimously struck down California Civil Code section 2225(b)(1), a portion of California's "Son of Sam" law, as facially violative of the First Amendment and the liberty of speech clause of the California Constitution. *Keenan* v. *Superior Ct. of Los Angeles Cty.*, Slip Op. S080284 (Feb. 21, 2002). The Court held that section 2225(b)(1), which imposes an involuntary trust on proceeds from the sale of expressive materials that "include or are based on the story of a felony for which a convicted felon was convicted," was a content-based restriction of speech and not narrowly tailored to advance the state's compelling interest in assuring that the fruits of crime are used to compensate crime victims.

While the Court found the statute constitutionally defective for its burdening of expression that is not related to exploitation of crime, it made clear that its ruling did not preclude crime victims from reaching assets derived from expressive materials that describe crime by means of generally applicable civil remedies.

Sinatra Jr. v. Kidnapper

The constitutional challenge to section 2225(b)(1) was mounted by Barry Keenan, who, in 1963, along with two co-conspirators, kidnapped Frank Sinatra, Jr. from a Nevada hotel room and held him captive in Los Angeles until his father paid a $240,000 ransom. Keenan and his co-conspirators were subsequently apprehended, tried, convicted of felony offenses under California law, and Keenan spent five years in prison.

Sinatra, Jr.'s complaint, filed in July 1998, alleged that in January 1998 Keenan arranged to be interviewed by Peter Gilstrap for an article about the kidnapping that was published as "Snatching Sinatra" in a January 1998 issue of New Times Los Angeles. It was reported thereafter that Columbia Pictures had bought for up to $1.5 million the rights to make a motion picture based on the New Times story and on the firsthand recollections of Keenan and others regarding their role in the kidnapping.

In February 1998, Sinatra, Jr. made a demand of Columbia Pictures, pursuant to section 2225 of the California Civil Code, to withhold from the kidnappers, Gilstrap, and New Times any monies owing to them for the motion picture rights. Columbia Pictures refused to do so without a court order. The complaint alleged that all such monies were "proceeds", as defined by section 2225(a)(9), and "profits", as defined by section 2225(a)(10), and that they therefore were subject to being held by Columbia Pictures and New Times in an involuntary trust for Sinatra, Jr. as beneficiary.

In July 1998, Sinatra, Jr. moved for an injunction preventing Columbia Pictures and New Times (Keenan was not served with the motion) from paying "proceeds" and "profits" to any other defendant and requiring that all such payments instead be made to Sinatra, Jr. or to the Superior Court for distribution for the benefit of the victims of the kidnapping.

What "Proceeds" Were Covered

Under section 2225, "proceeds" paid or owing to a "convicted felon" from the sale of "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind" are subject to an involuntary trust for the benefit of "beneficiaries" if the materials "include or are based on the story" of the felony for which the felon was convicted.

Covered felonies are those defined by "any California or United States statute" which were committed in California. "Story" is defined as "a depiction, portrayal, or reenactment of a felony" but does not include "a passing mention of the felony, as in a footnote or bibliography." The trust lasts for five years from the date of the conviction or from the payment of any "proceeds" to the felon, whichever is later. During the five-year period, beneficiaries can bring actions to recover against the funds remaining in the trust after restitution, penalty fines, and crime-related attorney's fees have been paid. After five years, any profits remaining in the trust that have not been claimed by a beneficiary are to be trans-

(Continued on page 50)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Supreme Court Strikes Down Portion of State's "Son of Sam" Law

(Continued from page 49)

ferred to the Controller for allocation to a general Restitution Fund. Thus, the trust funds are not necessarily used solely to compensate victims of the convicted felon.

Preliminary Injunction in 1998

In August 1998, the trial court preliminarily enjoined Columbia Pictures from paying any monies to any of the kidnappers or their representatives in connection with the motion pictures rights to the story of the kidnapping. Keenan first appeared in the action in November 1998, when he filed a demurrer to the complaint and moved to dissolve the injunction on the grounds that it violated his federal and state free speech rights. Relying on *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991), in which the U.S. Supreme Court struck down New York's original "Son of Sam" law, Keenan argued that section 2225 was both underinclusive, because it reached only expression-related income, and overinclusive, because it reached all expressive works by convicted felons that included anything more than "passing mention" of a crime for which the felon had been convicted.

(Keenan also contended that section 2225, which was passed 23 years after the kidnapping, violated the constitutional prohibition against *ex post facto* laws. The Supreme Court did not reach this issue.)

The trial court summarily concluded that section 2225 was not unconstitutional, overruled the demurrer, and denied the motion to dissolve the injunction.

OK'd by Appellate Court

In December 1998, Keenan filed a petition for a writ of mandate in the Court of Appeal, which stayed proceedings in the trial court. In May 1999, the Court of Appeal denied the petition, finding section 2225 to be constitutional.

Unlike the New York law considered in *Simon & Schuster*, the Court of Appeal held that section 2225 was not overly broad because it was limited to convicted felons (the New York law also applied to persons who were accused of a crime or who had admitted crimes for which they were not prosecuted) and because it excluded materials that contained only a "passing mention" of the felony (the *Simon & Schuster* Court had identified as a flaw in the New York law its application to works in which a crime was mentioned only "tangentially or incidentally").

Reversed: Simon & Schuster Ruling's Key

The California Supreme Court granted Keenan's petition for review and reversed. The Court, in an opinion by Justice Baxter, began with a careful analysis of *Simon & Schuster*, in which the U.S. Supreme Court struck down New York Executive Law § 632-a.

That law required payment to the New York State Crime Victims Board of monies due under contracts relating to a "reenactment" of a covered crime or the expression of the thoughts or feelings about the crime. The Court held that the New York statute was a content-based regulation of speech, and hence presumptively invalid, because it singled out and burdened income derived from expressive activity based on its content.

Applying strict scrutiny review, the Court found that although New York did have a compelling interest in "ensuring that crime victims are compensated by those who harm them" and in "ensuring that criminals do not profit from their crimes," the state could not show that it had a greater interest in compensating victims with the profits of storytelling than with other assets. The Court concluded that the statute was not narrowly tailored to advance the state's interest in compensating victims from the fruits of the crime because it applied to "works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally" and because the statute applied even if the author was never accused or convicted of the crime.

To illustrate this overinclusiveness, the majority cited *The Autobiography of Malcolm X* and Thoreau's

(Continued on page 51)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Supreme Court Strikes Down Portion of State's "Son of Sam" Law

(Continued from page 50)

Civil Disobedience as examples of works involving discussion of criminal acts by the author that would be covered by the law but that do not "enable a criminal to profit from his crime while a victim remains uncompensated." Although Justice Blackmun, concurring, would have found the statute underinclusive for its limitation to speech-related income, the majority declined to so hold.

Following Simon & Schuster

The California court, following *Simon & Schuster*, rejected Sinatra, Jr.'s argument that section 2225(b)(1) was not a content-based regulation of speech because it merely imposed a financial penalty on speech. The Court then noted, and accepted as compelling, the state's interest in assuring that the fruits of crime be used to compensate crime victims.

With respect to narrow tailoring, the Court, like the majority in *Simon & Schuster*, declined to rule on whether the statute was underinclusive in focusing on speech-related income as distinguished from all other assets of the convicted felon. In this regard, the Court noted that, unlike the New York law, section 2225(b)(2) of the California law, relating to "profits" from the crime, applies to profits from sales of memorabilia, property, things or rights the value of which is enhanced by the notoriety of the crime — in other words, to non-storytelling income. The Court pointed out, however, that the fact that the law reached fruits of crime beyond those derived from storytelling would bear upon whether the law was underinclusive, not on whether it was overinclusive. The Court further stated that it did not read *Simon & Schuster* "to mean that a statute can escape examination as a content-based regulation of speech merely by targeting, in separate provisions, nonspeech income as well."

The court rejected Sinatra, Jr.'s arguments that section 2225(b)(1) was narrower than the New York law [in Simon & Schuster v. Members of N.Y. Crime Victims BD.] and thus not overinclusive.

Law Found Overinclusive

With respect to 2225(b)(1) — the "proceeds" provision — the Court concluded that, like the original New York law, it was overinclusive in that it

> penalizes the content of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, section 2225(b)(1) does not confine itself to such income. Instead, it confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere passing mention. By this financial disincentive, section 2225(b)(1), like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or not relationship to the exploitation of one's criminal misdeeds.

The court rejected Sinatra, Jr.'s arguments that section 2225(b)(1) was narrower than the New York law and thus not overinclusive. In this respect, Sinatra, Jr. argued that section 2225(b)(1) only applies to persons actually found guilty of felonies committed in the state. He also relied upon the exemption for works that contain only "passing mention of the felony, as in a footnote or bibliography."

In response, the Court observed that the *Simon & Schuster* Court had merely *illustrated* the overbreadth of the New York law by noting its application to works by those who had never been convicted of a crime and to works containing only tangential or incidental mention of past crimes; the Court did not suggest, the *Keenan* court explained, that a statute narrowed in these two re-

(Continued on page 52)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Supreme Court Strikes Down Portion of State's "Son of Sam" Law

(Continued from page 51)

spects necessarily would pass constitutional muster.

Instead, the Court posited that the Supreme Court was concerned with the fact that in order to serve the "relatively narrow interest" of compensating crime victims from the fruits of crime, the New York statute targeted, and confiscated all income from (and thus "unduly discouraged"), "a wide range of expressive works containing protected speech on themes and subjects of legitimate interest" simply because reference to past crimes was included.

The *Keenan* court pointed out the many contexts, not directly related to exploitation of the crime, in which one might mention past felonies, such as critically evaluating one's encounter with the criminal justice system; documenting scandal and corruption in government and business; describing the conditions of prison life, or providing an inside look at the criminal underworld. (As *amici curiae* Association of American Publishers, Inc. et al. pointed out, there is a compelling public interest in access to information and perspectives about the criminal justice system, including accounts by convicted criminals.) Mention of crime in these contexts, the Court noted, has "little or nothing to do with exploiting one's crime for profit."

In rejecting the argument that the "passing mention" exemption cured the overbreadth problem, the Court observed that *Simon & Schuster* did not suggest that a statute that confiscates all profits from works that make *substantial* mention of the author's past crimes would be constitutional. Such a statute, the *Keenan* court stated, "still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in nonexploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*" (emphasis in original). Accordingly, the Court concluded that section 2225(b)(1) was not narrowly tailored and hence was facially invalid under both the First Amendment to the U.S. Constitution and the liberty of speech clause of the California Constitution.

Limits on Cal. Ruling

In a footnote, the Court stressed the limitations of its holding.

- First, it stated that it was not passing on whether a more narrowly drafted statute could cure the constitutional overbreadth problem.
- Second, it stated that nothing in its opinion "precludes a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments."
- Third, it stated that it did not intend to preclude legislative efforts, not directly related to the content of speech, to ensure that a convicted felon's income and assets — "including those derived from storytelling about the crimes" — remain available to compensate victims of the felon's crimes.

The Court stated that it was not passing on whether a more narrowly drafted statute could cure the constitutional overbreadth problem.

Indeed, victim's rights groups have already indicated that they will push for legislation along those lines. They will likely be encouraged in that effort by Justice Brown's concurring opinion, which observes that "[a] properly drafted statute can separate criminals from profits derived from their crimes while complying with the First Amendment."

As Justice Brown put it:

> Mr. Keenan has every right to tell his story. That does not mean the First Amendment guarantees he can keep the money.

The concurrence points out that there is no constitutional bar to seizing a criminal's assets to compensate his victims and that a law not limited to "storytelling" assets would "likely survive review" because it would

(Continued on page 53)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

California Supreme Court Strikes Down Portion of State's "Son of Sam" Law

(Continued from page 52)

not be content-based. Limiting a law's scope to storytelling is "the Achilles' heel of a Son of Sam provision," Justice Brown wrote, because while there is "a compelling interest in depriving criminals of their profits," there is "little if any interest in limiting such deprivation to the proceeds of the wrongdoer's storytelling."

Issues Left Open

As noted, *Keenan* leaves open the question of whether section 2225(b)(2), which authorizes seizure of "all income from anything sold or transferred by the felon . . . including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony," is constitutional. The concurring opinion observes that section 2225(b)(2) — which, the majority opinion notes, is severable — is "arguably" content-neutral and might therefore be subject to, and survive, intermediate scrutiny.

Because many existing and proposed state Son of Sam laws are closer to section 2225(b)(2) than to section 2225 (b)(1), it will be interesting to see how influential *Keenan* is when constitutional challenges to those laws are presented. It can be (and has been) argued, certainly, that another "Son of Sam" variant, in which profits derived from "unique knowledge" of a covered crime are confiscated (as in Senate Bill No. 1939 currently being considered in Massachusetts), is still content-based and thus should not be subject to the more deferential review applicable to content-neutral laws. Moreover, it may well be that even in cases where the applicable "Son of Sam" law is not vulnerable to a facial challenge, as-applied challenges will be mounted that will rely upon many of the same free speech principles articulated in *Simon & Schuster* and *Keenan.*

Jonathan Bllom is counsel at Weil, Gotshal & Manges LLP in New York which submitted an amici brief to the Supreme Court of California in the case on behalf of The Association of American Publishers, Inc., The American Booksellers Foundation for Free Expression, Magazine Publishers of America, Inc., and PEN American Center.

LDRC/Defense Counsel Section Committee Reports

Each year we ask the chairs of the various LDRC/Defense Counsel Section Committees to give the membership an idea of what projects they are engaged in or about to launch. We will be publishing these reports over the next months.

If any of you are interested in participating on a committee, please let us know (ldrc@ldrc.com) or contact the committee chair(s) directly.

If any of you have an idea for a committee project, or even for a new committee, again, let us know.

These committee do extraordinary work for LDRC and its membership. Some of our most important projects are done through the committee structures and each year, we are all deeply grateful for the exceptional, useful work done in the committees.

Advertising and Commercial Speech Committee

Chairs: Steve Brody (King & Spalding) and Dick Goehler (Frost Brown Todd LLC)

The committee is planning to undertake a "round table" project to follow up on the LDRC Bulletin that was published in April of last year. Specifically, the "round table" project intends to examine and analyze additional aspects of the "encroachment" of the right of publicity and misappropriation and various speech claims into the editorial side of speech. We expect to be analyzing and discussing the key factors in several of the cases identified in the Bulletin which involve misappropriation and/or right of publicity claims. We expect that a paper and/or set of written materials will result from the Committee's "round table" discussion.

Conference & Education Committee

Chairs: Peter Canfield (Dow, Lohnes & Albertson) and Dan Waggonner (Davis Wright Tremaine LLP)

The committee continues its efforts to plan for the 2002 conference to be held on September 25-27. The 2002 conference will include some content originally intended to be offered in September 2001, but will also include updated and new programming based on recent

(Continued on page 54)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Committee Reports

(Continued from page 53)

developments. The committee is working with the international developments committee to offer an international session at the beginning of the 2002 conference as well as with other committees to ensure that their work is shared at the 2002 conference. The committee also is working to ensure that new speakers and discussion leaders will have an opportunity to participate as leaders of the conference.

Expert Witness Committee

Chairs: John Borger (Faegre & Benson LLP) and Michelle Tilton (First Media Insurance Specialists Inc.)

The committee conferenced with David Shultz in early January to discuss committee projects. We agreed that it would be very helpful to committee business if a list serv was developed so that expert witness templates, as well as other LDRC information, could be distributed electronically. It would also be helpful if the LDRC website could post the various templates for access by members. Since the *Libelletter* is going to be sent electronically to membership, it may also be possible to use this electronic distribution list for the expert witness template.

It was also discussed that the insurance company members who submit information to the LDRC in respect to the Complaint Study could also help compile information about experts. The committee is currently working on the expert witness templates, which need to be simplified.

International Media Law Committee

Chairs: Jim Borelli (Media/Professional Insurance, Inc.) and Kurt Wimmer (Covington & Burling)

The committee is engaged in two principal activities at the moment. First, it is preparing international panels for the September 2002 Alexandria conference, following on the ever-successful tradition that Kevin Goering, Bob Hawley and Dick Winfield began. Second, it is planning for an international conference to be held in Europe in September 2003. Although planning is in the early stages, the committee anticipates that this conference will be modeled on the successful London conferences that LDRC held in 2000 and 1998. The conference likely will be held either in Paris (with a potential side-trip to Strasbourg, where the European Court of Human Rights is located) or London.

Legislative Affairs Committee

Chair: James Grossberg

The federal subcommittee and its members expect to play a central role in monitoring and, if necessary, opposing any renewed effort to enact so-called "Official Secrets" legislation; resisting other legislative efforts to erode the First Amendment rights of the media in the name of national security; responding to possible efforts to enact a federal reporter's shield law, including legislation purporting to define who is and is not a "journalist"; and resisting legislative efforts to promote "privacy" interests at the expense of the media's ability to freely publish legally obtained information.

The state and local subcommittee will continue to work closely with the Newspaper Association Managers and other state and local media groups to spot issues and legislative initiatives where LDRC resources are needed.

Working quickly through email communications, the subcommittee will continue its efforts to help press associations and lobbyists to locate experts, briefs and factual information. Often, LDRC's information networks have produced leads on bills that have not yet surfaced at state capitals or that have not yet received public airing — such as various tort reform measures that may have implications for defamation laws beneath the surface.

Prepublication/Prebroadcast Review Committee

Chair: Jack Greiner (Graydon, Head & Ritchey)

1. Seminar bank. The seminar bank contains a lot of useful materials (seminar outlines, newspaper clippings, videotape) which can be used to instruct clients on a variety of topics. A bibliography of mate-

(Continued on page 55)

For exclusive use of MLRC members and other parties specifically authorized by MLRC. © Media Law Resource Center, Inc.

Committee Reports

(Continued from page 54)

rials in the bank was sent out from LDRC several months ago. We need to continue updating the bank to make sure the materials are current.

2. *Bartnicki*. Now that this case has been favorably resolved, there will undoubtedly be a lot of articles published about the case. Members of this committee may be in as good a position as any (other than perhaps Lee Levine himself) to discuss the implications of the case for news gathering. What do we tell our clients now if the mysterious, but hot, material shows up on our client's doorstep? How do we define what is a matter of public concern that would warrant Bartnicki protection? Is the decision limited to public figures, and who would be considered to be a public figure? What are the likely outcomes of the two other cases still before the courts? Are there broader implications of the Bartnicki decision for news gathering about matters of public concern?
3. Foreign jurisdiction. Where do we stand as a matter of international law on jurisdiction issues for global publications. What kind of advice are we giving our clients in prepub review about content which may be defamatory (or invade some other interest of the subject) to a person abroad?
4. Releases. What advice do we give clients during prepub review about whether it is necessary to obtain a release from the subject of a publication or broadcast? Are there release forms which clients (especially broadcasters) traditionally use that could (should? should not?) be shared with others?
5. A user-friendly list of issues to watch out for in prepublication/prebroadcast review.

Pre-Trial Committee

Chairs: Charity Kenyon (Riegels Campos & Kenyon LLP) and Joyce Meyers (Montgomery McCracken Walker & Rhoads LLP)

In the Summer of 2000 the committee, through the leadership of Henry Abrams, published an Issue Checklist for Motions to Dismiss and Summary Judgment in a Defamation Action. The nine-member committee developed and annotated a checklist of questions to ask when a complaint arrives in the office. The list starts with jurisdiction, removal or remand, choice of law and early summary disposition alternatives. It proceeds through statute of limitations, elements of the prima facie case, burden of proof and summary judgment standards. It ends with standard of fault issues, elements of damages that may not be supportable as a matter of law, and the absolute or qualified privileges. The checklist cites major United States Supreme Court cases as well as some leading circuit court of appeals and state court cases where dispositive issues may receive different treatment.

The committee embarked this Fall on a Discovery Roadmap with Dick Goehler taking the lead in coordinating assignments. The format for the project is evolving, but we think it likely will take the form of our recent Issue Checklist. This format will allow authors of particular sections to discuss discovery philosophy, strategy issues and approaches to discovery. The general topics that we have identified include discovery regarding: plaintiff's status as either a public or private figure, whether the publication is "of and concerning" the plaintiff; whether the publication tends to harm reputation; truth/falsity; standard of fault — actual malice or negligence; public concern or public controversy; absolute or qualified privileges; damages; and other tort or related non-libel claims. Contributors welcome!

Steve Comen is formulating a project on mediation as well. Again, volunteers are welcome as well as suggestions for ways to give practical value to defense practitioners.

Trial Techniques Committee

Chairs: Guylyn Cummins (Gray, Cary,Ware & Freidenrich) and David Sanders (Jenner & Block)

The Committee's key project for 2002 is to begin work on creating a repository at LDRC of transcripts of closing arguments in media cases, hopefully indexed by subject matter covered.

For excl usive use of MLRC members and other parties specifical l y authorized by MLRC. © Media Law Resource Center, Inc.

Save the Date!

LDRC Annual Dinner
November 13, 2002

In honor of war reporting...moderated by Ted Koppel, ABC News

NAA/NAB/LDRC CONFERENCE
2002: Searching for the First Amendment
September 25-27, 2002
The Hilton Alexandria Mark Center
Alexandria, Virginia

You should look to receive registration materials for the Conference by April. A large number of you are pre-registered for the Conference. Thank you. For the rest of you, get your registrations in early. We are looking to have a great program.

Look to see you all there.