

MILRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through February 25, 2003

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UPDATE: Ventura v. Cincinnati Enquirer

Judge Dismisses Claims That Newspaper Violated Source Confidentiality Promise

Federal District Court Judge Herman Weber has dismissed all claims brought against the Cincinnati Enquirer (Enquirer) and Gannett by George Ventura, at one time considered to be a confidential source for reporters who wrote the controversial and highly controverted series in 1998 about Chiquita. Judge Weber concluded that the newspaper defendants could not be held to have breached any promise of confidentiality as a result of disclosures during a grand jury investigation even if such cooperation with the investigation resulted in the unmasking of the source. *Ventura v. Cincinnati Enquirer*, C-1-99-793 (S.D. Ohio 2003).

In the February 11 ruling, the court held Ohio state precedent and public policy favored absolute immunity for the newspaper defendants from subsequent civil actions for disclosures they may have made during judicial proceedings such as a grand jury investigation. The court also held that the Enquirer could not be vicariously liable for any disclosures its reporter made after the reporter's employment was terminated. Finally, the court found that none of the materials actually provided by the Enquirer in the course of the judicial proceedings would have alone identified Ventura as a source.

The Series on Chiquita Leads to Investigations

The case originated from a series of articles the Enquirer published on the business practices of Chiquita, which is based in Cincinnati. Plaintiff approached the paper claiming to have information relevant to the Enquirer's investigation. In return for his assistance, Ventura claimed that reporters for the Enquirer, Michael Gallagher and Cameron McWhirter, promised Ventura they would not disclose his identity and he would remain a confidential source. Ventura says he provided the reporters the passwords to certain voice mail mailboxes at Chiquita which one of the reporters used to gain entry into Chiquita's system. In summary judgment papers filed by the newspaper defendants, they would quote Ventura as admitting in his deposition that he permitted the Enquirer to use his name, to say that the reporters had spoken with him, as long as it was not disclosed that he was the source for material provided them as a confidential source (e.g.,

code for accessing the Chiquita voicemail system).

The Enquirer published the first Chiquita article in May 1998. After threatening legal action, Chiquita and the Enquirer agreed to a \$10 million settlement and the paper publicly apologized for the conduct of its reporters.

Later that month, a special prosecutor was appointed to investigate whether any laws were violated when the Enquirer's reporters accessed Chiquita's voice mail system. On June 26, 1998, the Enquirer was subpoenaed to produce information relating to the Chiquita story to the grand jury. The same day, the Enquirer fired Michael Gallagher, the reporter who actually called into Chiquita's voice mail system, and

Immunity for "disclosure of information relating to the reporting and prosecution of a crime to the prosecuting attorney and/or grand jury" should protect a party who provides documents and other materials in response to a subpoena.

requested the return of any Enquirer property in the reporter's possession. In response to the subpoena, the Enquirer asserted an Ohio Shield Law objection and, according to its brief on this motion, set up an elaborate system to screen out from its production any materials that would disclose the

identity of confidential sources.

The Post-It Note

Included in the information provided by the Enquirer to the grand jury, however, was a post-it note with plaintiff's phone number and the initials "GV" written on it, a point Ventura fixed on in his case. The value of the post-it as evidence of identifying Ventura as a source was apparently not significant as the special prosecutor testified in his deposition, and again quoted in the summary judgment brief of defendants, that the newspaper gave them nothing that identified a confidential source. There was also evidence that Ventura himself had advised Chiquita that he had been called by the Enquirer reporter.

In fact, Chiquita informed the special prosecutor, before the prosecutor had reviewed the post-it note, of Ventura's admission that he had spoken to the Enquirer. The post-it only suggested, according to the special prosecutor in his testimony in the case, that the reporter had Ventura's phone numbers, not that the plaintiff was a confidential source. The special prosecutor also never intended to offer the post-it into

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evidence at trial.

The terminated reporter, Michael Gallagher, was also subpoenaed by the grand jury and requested to provide any and all materials in his possession relating to the Chiquita article. Citing Ohio's Shield Law, the reporter refused. The special prosecutor subpoenaed the reporter's home computer, however, on which were found what the reporter seemingly thought were deleted and disposed of e-mail messages between Gallagher and Ventura. Some of the additional information the reporter refused to divulge was eventually made available to the grand jury as a result of a plea agreement between the reporter and the special prosecutor.

Ventura Indicted, Sues Gannett

Ventura was indicted on ten felony counts in September 1998 relating to his involvement in accessing Chiquita's system. After pleading no contest, he was eventually convicted of four misdemeanor counts of attempted unauthorized access to a computer system. As a result of his conviction, Ventura lost his partnership in a Utah law firm and was suspended from the practice of law in Utah for 90 days.

Ventura subsequently brought several claims against the Enquirer including breach of contract, tortious breach of contract, promissory estoppel, promissory fraud, negligent hiring or supervision, and negligent disclosure. The Enquirer moved for summary judgment contending that there was no probative admissible evidence proving that the paper had identified Ventura as a source; that Ventura could not recover damages based on an alleged promise to withhold information from a grand jury; and that Ventura's injuries were caused by his own actions, not the papers.

Magistrate's Report

A report by the U.S. Magistrate Judge on July 25, 2002 recommended that the Enquirer be granted summary judgment on the breach of contract, tortious breach of contract, and negligent hiring or supervision claims, but denied for the claims of promissory estoppel, promissory fraud, and negligent disclosure.

Testimony and Documents Immune

Judge Weber reversed in part and affirmed in part, holding that all of Ventura's claims against the Enquirer should be dismissed. As this was a case in diversity, the court found

Ohio state law and precedent applicable. The court drew from Ohio precedent a state public policy of precluding the use of testimony provided during a judicial proceeding from serving as basis of a subsequent civil action.

The first case cited by the court was *Taplin-Rice-Clerkin Co v. Hower*, 124 Ohio St. 123 (1931) which held that grand jury testimony could not be used as a basis for a malicious prosecution claim. This holding was later expanded to include claims for libel and intentional infliction of emotional distress (*M.J. DiCorpo, Inc. v. Sweeney*, 634 N.E. 2d 203 (1994)) Statements made during any judicial proceeding that bore "some reasonable relation to the proceeding" were granted absolute immunity. *DiCorpo* at 506 (citing *hecht v. Levin*, 613 N.E. 2d 585 (1993)). The *DiCorpo* court explained the policy basis for immunity as encouraging individuals to report criminal activity and to "aid in the proper investigation of criminal activity". *DiCorpo* was expanded in *Fair v. Litel Communication, Inc.* 1998 WL 107350 (Ohio App. 10th Dist. 1998) which held that immunity included for any information, true or false, provided to prosecutors, if the information "bears some reasonable relation to the alleged activity reported".

Immunity Applies to Evidentiary Materials

The court held that the paper could not be found liable, even assuming that Ventura produced evidence which demonstrated that the Enquirer breached a contract or promise to maintain confidentiality. Judge Weber wrote that he believed the Ohio Supreme Court would extend the holding in *DiCorpo* to include "documentary or other evidence supplied by an informant or produced pursuant to a subpoena". The broad interpretation of *DiCorpo* by Ohio state courts and the public policy underpinnings of those decisions led the court to believe that immunity for "disclosure of information relating to the reporting and prosecution of a crime to the prosecuting attorney and/or grand jury" should protect a party who provides documents and other materials in response to a subpoena.

The court dismissed Ventura's argument that immunity should not apply because the Enquirer promised to maintain his confidentiality even in the face of a subpoena, and that the Enquirer did not go far enough in protecting the agreement. Judge Weber stated that immunity would apply because it was "immaterial" whether the Enquirer "could have

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taken additional steps to protect plaintiff's identity." The court also noted that aside from Ventura's claim that the Enquirer disclosed his identity to the grand jury, there was no suggestion that the Enquirer had given documents identifying Ventura to anyone else.

The court additionally held that promissory estoppel did not apply to the agreement between Ventura and the Enquirer's reporters because both sides "acted with a lack of good faith and fair dealing". Therefore, enforcing the promise of confidentiality would only serve to violate Ohio's public policy favoring immunity, and not prevent any injustice.

No Vicarious Liability

Furthermore, the Enquirer could not be liable under vicarious liability (assuming immunity would not apply) for the reporter's disclosure of information after he was fired. Ventura claimed, under respondeat superior, the Enquirer's failure to obtain from Gallagher the materials identifying Ventura bestowed upon the reporter apparent authority to act in the Enquirer's behalf. This apparent authority, according to various precedent from various jurisdictions, Ventura contended existed because the Enquirer had not given notification of the end of the reporter's employment.

The court rejected Ventura's argument finding that "there is no evidence that Gallagher [the reporter] was authorized to act as defendants' agent," after the reporter was fired, nor was there any evidence that the reporter had authority to "enter into any transaction on behalf of defendants following his termination." Even though the reporter was the Enquirer's

agent during his employment, and during the initial interactions between Ventura and the paper, this agency concluded with the end of employment.

No Direct Liability

Finally, the court held that the Enquirer could not be "directly liable for breach of their promise not to reveal his identity as a news source." Judge Weber found that no reasonable jury could find the Enquirer liable as a result of the information it provided (which may or may not have identified Ventura as a source) to the grand jury as a result of a subpoena. The court held that none of the materials the Enquirer passed onto the grand jury directly identified Ventura, even though a combination of some of them could have connected Ventura with the reporters. For example, the post-it note only suggested the reporters had Ventura's phone number, not that they had actually spoken with him, let alone that he was a confidential source. Again, Ventura had contemporaneously disclosed the fact that he had been in contact with the reporters. Therefore, the paper did not breach its promise of confidentiality.

For Ventura: Marc David Mezibov and John Philip Feldmeier or Sirkin Pinales Mezibov & Schwartz (Cincinnati)

For Cincinnati Enquirer: John Flanagan and John Greiner of Graydon Head & Ritchey (Cincinnati); Robert C. Bernius of Nixon Peabody (D.C.)

For Gannett Co.: John Flanagan and John Greiner of Graydon, Head & Ritchey (Cincinnati); Thomas Green, Christine Liverzani Prame, Kristin Graham Koehler, Mark D. Hopson of Sidley Austin Brown & Wood (D.C.)

Fourth Circuit Holds That Newspaper Raid By Off-Duty Sheriff's Deputies Violated First Amendment

Reverses Summary Judgment Ruling Against Publisher

By Ashley Kissinger

On January 16, 2003, the Fourth Circuit Court of Appeals reversed a decision granting summary judgment for defendants in a civil rights action instituted by Ken Rossignol and Island Publishing Company, publishers of the weekly community newspaper St. Mary's Today, against the Sheriff of St. Mary's County, Maryland, seven of his deputies, the Board of County Commissioners, and the State's Attorney for the county. The district court held that

the defendants, who were off duty, did not act "under color of law" when they bought the lion's share of the 1998 Election Day edition of the newspaper.

In a ringing defense of the First Amendment right of even unpopular speakers to speak about matters of public concern, and particularly to criticize candidates for public office, the Fourth Circuit held not only that the defendants acted "under color of law" despite their off-duty status, but that their conduct constituted a First Amendment violation of the first order. See *Rossignol v. Voorhaar*, 316 F.3d 516 (2003).

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The Newspaper Raid

In the early morning hours of Election Day 1998, two teams of off-duty deputies from the St. Mary's County, Maryland Sheriff's Office drove around the county to convenience stores and newsboxes and purchased the lion's share of that day's edition of St. Mary's Today. The newspaper bore the front-page headline "Fritz Guilty of Rape," accurately reporting that Richard Fritz, the Republican candidate for State's Attorney, had pled guilty in 1965 to a charge of carnal knowledge of a minor. Another article in that edition of the paper criticized the handling by incumbent Sheriff Voorhaar, who also stood for election that day, of an employee's sexual harassment claim.

The defendants, offended by the newspaper's long history of criticizing the Sheriff's Office and county officials and anticipating more of the same on Election Day, conceived of the newspaper raid as a way to "protest" Mr. Rossignol's allegedly "unsavory journalism" and prevent him from "smear[ing] Richard Fritz, and [Sheriff Voorhaar] . . . in the newspaper on Election Day." To implement their plan, the defendants pooled their money, including \$500 contributions from Sheriff Voorhaar and Richard Fritz.

Although at least two of the deputies carried their guns, which were at times during the night unconcealed, they had agreed to wear civilian clothing and to drive their own cars. Moreover, although they can be called to duty at any time, and several of them in fact were paged by the one on-duty defendant in the middle of the night and met with him to discuss an ongoing investigation, six of the deputies formally had taken leave in advance of the election.

These six deputy sheriffs split into teams of three to remove St. Mary's Today from circulation as it was delivered to newsboxes and convenience stores throughout the county. Anticipating that Mr. Rossignol would accuse them of theft, they obtained receipts from those stores that were open for business and videotaped themselves dropping quarters into vending newsboxes. As one defendant boasted on camera in the middle of the night:

"You know what, Rossignol has never given us enough credit to have formally laid plans. He al-

ways calls us bumbling idiots. We're gonna see who's an idiot tonight. We have a plan, we're working our plan. We planned our work and we're working our plan, Rossignol."

Rossignol fortuitously learned of the raid at approximately 2:00 in the morning on November 3, election day, while it was in progress. But when the defendants saw him frantically driving around to restock the papers, they followed him around the county and purchased the replenished stock.

The defendants' videotape and the receipts they collected are a testament to the success of their plan: Of the approximately 2,600 newspapers sold at retail stores and 1,100 sold from vending newsboxes in the county, the defendants managed to purchase at least 1,379 copies of the paper by the time the polls opened on Election Day. They bundled the newspapers together and stored them in a barn on the Fritz family farm, where they remain to this day.

The Federal Bureau of Investigation and United States Attorney's Office spent 22 months investigating the newspaper raid. Ultimately, however, the government did not indict anyone and closed its investigation. In the meantime, Mr. Rossignol and Island Publishing Company filed a civil suit in federal court in Maryland. The complaint alleged, inter alia, that the defendants, acting under color of law, imposed an unlawful prior restraint on the press in violation of the First Amendment, executed warrantless seizures of plaintiffs' property in violation of the Fourth Amendment, and deprived them of property without due process of law in violation of the Fourteenth Amendment. Plaintiffs sought damages and declaratory and injunctive relief.

The District Court Opinion

On the parties' cross-motions for summary judgment, which followed extensive discovery, Judge William Nickerson of the U.S. District Court for the District of Maryland denied the plaintiffs' motion and granted the defendants' motions on the sole ground that "the mass purchase

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These six deputy sheriffs split into teams of three to remove St. Mary's Today from circulation as it was delivered to newsboxes and convenience stores throughout the county.

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constituted private conduct not executed under color of law.” *Rossignol v. Voorhaar*, 199 F. Supp. 2d 279, 289 (2002). Starting from the unremarkable premise that a “state officer’s private conduct, no matter how wrongful, is not actionable under § 1983,” *id.* at 286, the court reached the sweeping conclusion that where, as in this case, the defendants “are unquestionably state officials,” the only relevant inquiry – despite the fact that the defendants contended they acted as private citizens – “is whether ‘the actions complained of were committed while the defendants were purporting to act under authority vested in them by the State, or were otherwise made possible because of the privileges of their employment.’” *Id.* at 287 (citation omitted).

The court acknowledged both the defendants’ retaliatory motive and their intent to remove the newspaper from circulation, but concluded that “[t]he fact that Defendants’ conduct was related to or motivated by their state employment does not transform that conduct into state action.” *Id.* According to the court, there was no evidence that the defendants invoked their authority as public officials in carrying out their plan, and it therefore granted defendants’ motions for summary judgment.

Shortly after the district court announced its decision, Fritz – who was elected to the office of State’s Attorney in the 1998 election – issued a press release praising the ruling as one that “signifies the last gasp of a dying political machine that attempted to subvert democracy through the use and control of an unprincipled tabloid editor on the eve of an election.”

The Fourth Circuit Reversal

Writing for the unanimous court, Chief Judge Wilkinson made clear that it was the defendants, not Rossignol, who “attempted to subvert democracy.” Before addressing the “under color of law” question, the court issued a stinging rebuke to the defendants, holding that, “there can be no question that, if defendants acted ‘under color of law,’” they “clearly contravened the most elemental tenets” of the First Amendment:

“In suppressing criticism of their official conduct and fitness for office on the very day that voters were heading to the polls, defendants did more than

compromise some attenuated or penumbral First Amendment right; they struck at its heart.” 316 F.3d at 521-22.

Rejects That Paying Made It Lawful

In that regard, the court expressly rejected the defendants’ argument that, because they lawfully purchased the newspapers, they did not unlawfully suppress speech. “The First Amendment is about more than a publisher’s right to cover his costs,” the court explained.

“Indeed, it protects both a speaker’s right to communicate information and ideas to a broad audience and the intended recipients’ right to receive that information and those ideas.”

Id. at 522 (emphases in original). Given this “inherently communicative purpose of First Amendment activity,” the court observed, the “fact that a small newspaper seeks to turn a meager profit does not remove it from the protections of the First Amendment.” Instead,

“[w]hat matters is that defendants intentionally suppressed the dissemination of plaintiff’s political ideas on the basis of their viewpoint. And in doing so before the critical commentary ever reached the eyes of readers, their conduct met the classic definition of a prior restraint.” *Id.*

“Under Color of Law”

Moving to the “under color of law” inquiry, the court rejected defendants’ wooden test, adopted by the district court, analyzing only whether the defendants misused their state authority. Rather, the court held, the ultimate question is whether conduct is “fairly attributable to the State,” and that determination requires “a look at the totality of the circumstances that might bear on the question of the nexus between the challenged action and the state.” *Id.* at 523 & n.1. After undertaking such a review, the court concluded there was “no doubt” that defendants acted “under color of law.” *Id.*

Most important to the court was the fact that the defendants’ motive in carrying out the raid was directly linked to their official capacities. The “link between the seizure’s purpose and defendants’ official roles” – i.e., defendants’

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dual desires “to retaliate against those who questioned their fitness for public office and who challenged many of them in the conduct of their official duties,” and to censor speech critical of them – “help[ed] demonstrate that defendants’ actions bore a ‘sufficiently close nexus’ with the State to be ‘fairly treated as that of the State itself.’” *Id.* at 523-25 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Their “scheme,” the court observed, was “a classic example of the kind of suppression of political criticism which the First Amendment was intended to prohibit,” *id.* at 523, and the fact that they “acted after hours and after they had taken off their badges” could not “immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance,” *id.* at 524.

Several other factors “reinforced” the court’s conclusion that the raid constituted state action.

“Among these was defendants’ ability to use their positions in the Sheriff’s Department to ensure that they would not be prosecuted for their election day seizure.” *Id.* at 525.

The “defendants’ efforts to prevent St. Mary’s County readers from reading Rossignol’s newspaper put them in direct peril of criminal prosecution” under the Maryland Newspaper Theft Act, which was passed to criminalize “mass censorship-oriented appropriations of newspapers which cannot otherwise be punished as theft.” *Id.* “Voorhaar’s position as Sheriff,” the court recognized, “gave him the ability to help shield his coworkers from the consequences of their crime through both formal direction of his department’s investigations and informal ties to other law enforcement agencies.” *Id.* at 525.

Rejecting the district court’s view of the evidence, the court also held that “the deputies’ identities as state officers played a role at several points during the seizure itself,” enabling them “to execute their scheme in a manner that private citizens never could have.” *Id.* at 526. Two defendants carried their firearms during the evening; one wore a Fraternal Order of Police sweatshirt; several used their department-issued pagers to conduct business with an on-duty defendant deputy during the night; and one team of deputies stopped at a Sheriff’s Office outpost during the raid, the court observed. *Id.* at 526. More significantly,

there was evidence that, although defendants “made no explicit threats,” they “made it clear” to at least one convenience store clerk that if he didn’t sell them his store’s entire stock of St. Mary’s Today newspapers, “they could make [his] life . . . a living hell.” *Id.*

A Need to Deter Such Censorship

Finally, the court observed, “both the First Amendment and 42 U.S.C. § 1983 exist in significant part to deter the kind of misdeeds perpetrated by defendants on election day.” *Id.*

“The First Amendment was drafted in the context of a lengthy history of censorship carried out by private organizations with complicated ties to the state apparatus and compelling motives to suppress speech unfavorable to the Crown.” *Id.* at 526.

Similarly, the court observed, the “whole purpose of the Ku Klux Klan Act,” which was later codified as 42 U.S.C. § 1983,

“was to prevent public authorities from violating constitutional rights through the use of nominally private means. Whether the rights be those of small papers and their readers or those of freedmen is not dispositive. The unlawfulness of private infringement of those rights remains the same.” *Id.* at 527.

Addressing the grave implications of upholding the district court’s decision, the court eloquently concluded by reaffirming the importance of alternative newspapers in public discourse:

The incident in this case may have taken place in America, but it belongs to a society much different and more oppressive than our own. If we were to sanction this conduct, we would point the way for other state officials to stifle public criticism of their policies and performance. And we would leave particularly vulnerable this kind of paper in this kind of community. Alternative weeklies such as St. Mary’s Today may stir deep ire in the objects of their irreverence, but we can hardly say on that account that they play no useful part in the political dialogue. No doubt the public has formed over time its opinion of

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the paper's responsibility and reputation. If defendants believed its attacks to be scurrilous, their remedy was either to undertake their own response or to initiate a defamation action. It was not for law enforcement to summon the organized force of the sheriff's office to the cause of censorship and dispatch deputies on the errands of suppression in the dead of night.

Id. at 527-28.

The defendants filed a Petition for Rehearing and Rehearing En Banc, and the court ordered the plaintiffs to respond by February 18, 2003, a request that may be made by any active sitting judge. If the petition is denied and the

defendants do not appeal the decision to the United States Supreme Court, the case will be remanded to the district court for further proceedings.

Mr. Rossignol and Island Publishing Company are represented by Lee Levine, Seth Berlin, Ashley Kissinger and Audrey Critchley of Levine Sullivan & Koch, L.L.P., and by Alice Neff Lucan. Most of the sheriff's deputies are represented by Daniel Karp of Allen, Karpinski, Bryant & Karp. Sheriff Voorhaar, Deputy Daniel Alioto, and the Board of County Commissioners of St. Mary's County, Maryland are represented by John Breads of the Local Government Insurance Trust. Mr. Fritz is represented by Kevin Karpinski of Allen, Karpinski, Bryant & Karp.

UPDATE: *Uranga v. Federated Publications*: Idaho Supreme Court Reverses Gears

Upholds Dismissal of Privacy, Intentional Infliction Claims Against The Idaho Statesman

The Idaho Statesman (Statesman) received a Valentine's Day gift from the Idaho Supreme Court when it reversed its own initial decision and affirmed the dismissal of invasion of privacy and intentional infliction of emotional distress claims brought against the paper. *Uranga v. Federated Publications, Inc.* 2003 WL 328431. Justice Eismann, writing for the court, held that the First and Fourteenth Amendments prevent the paper from being held liable for "publishing a document contained in a court record open to the public." The Idaho Supreme Court in its initial decision on the matter, issued June 2001 (see *MLRC Media-LawLetter*, July 2001, at 27), held that Uranga could proceed with his claims against *The Statesman* and rejected the paper's First Amendment claims. *Uranga v. Federated Publications, Inc.*, 29 Med. L. Rptr. 1961 (June 21, 2001).

Article on Gay Sex Investigation

Uranga's claims stem from an October 15, 1995 article published in *The Statesman* which referred to the investigation of adult men propositioning teenage boys at a local YMCA in the mid-1950s. The article was illustrated with a photocopy of a statement taken in that investigation which

referred to Fred Uranga having a homosexual affair. The article did not identify Uranga by name but did summarize the statement.

Uranga demanded a retraction claiming it was libelous and invaded his privacy. *The Statesman* refused and countered with two offers: Uranga could submit a written response to the article that would be published on *The Statesman's* editorial page, or *The Statesman* would put a justification for the article in a subsequent

issue which would state that the paper had no opinion as to the truth of the statement and did not intend to suggest the statement was truthful.

On October 14, 1997, Uranga filed a suit against the paper for invasion of privacy (intrusion upon seclusion, false light, and publication of private facts) and intentional and/or reckless infliction of emotional distress. The district court granted *The Statesman's* motion for summary judgment on the grounds that the paper was immune under the First Amendment and the fair report privilege. On appeal, the Court of Appeals affirmed. On June 21, 2001, the Idaho Supreme Court vacated the district court's dismissal of the claims, but the Supreme Court granted *The Statesman's* petition for rehearing.

"The examination of a public court record cannot be the basis of a claim for invasion of privacy by intrusion."

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UPDATE: Uranga v. Federated Publications*(Continued from page 9)****No Intrusion Upon Seclusion or False Light***

The court first upheld the dismissal of the intrusion upon seclusion claim. Uranga failed to declare, “any intrusion into any place where had secluded himself, or any overseeing or overhearing of his private affairs, or any other form of investigation or examination into his private concerns,” instead claiming that the paper knew or should have known Uranga did not desire his name disclosed to the public regarding these events. The court rejected Uranga’s argument holding that *The Statesman*’s only possible intrusion was its investigation into public records. According to the court,

“The examination of a public court record cannot be the basis of a claim for invasion of privacy by intrusion.” *Citing Baker v. Burlington Northern, Inc.*, 99 Idaho 688, 587 P. 2d 829 (1978)

In his original complaint, Uranga also made a claim for false light invasion of privacy. However, he did not pursue this claim in his petition for review and was therefore not discussed in the court’s opinion.

Public Disclosure Claim

Summary judgment for *The Statesman* on plaintiff’s claim for public disclosure of private facts was also upheld. The issue before the court relating to Uranga’s claim for public disclosure of private facts was whether a defendant could be liable under the First and Fourteenth Amendments for accurately publishing embarrassing information obtained from a court record available to the public.

First, the court held that the statement shown was in fact a public record that was available to the public; was part of a court record when it was published in *The Statesman*. While the court did not know who put the statement in the record and why, the presence of the statement in the record was enough for the court. Under Idaho court administration rules, court files are open to the public for inspection except if specified under state law, regulation or case law. The court held that the statement did not fall under any exception preventing the public access.

Next, the court compared the present situation to that in *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975). In *Cox*, the Court held that an individual’s right of privacy “diminishes when the invasion of that right is based upon the publication

of information contained in a record that is open to the public.” When the information at issue has been available to the public pre-publication, society has a lesser interest in protecting the privacy right of the plaintiff. The Court was also concerned that these kinds of claims would discourage the media from reporting public information.

The Idaho Supreme Court adopted *Cox* and the Idaho Court’s reasoning in *Baker v. Burlington Northern, Inc.* In *Baker*, the information disclosed was the plaintiff’s criminal record that was obtained from the public record, thus there could be no liability for public disclosure as the facts were not private in nature. In the present case, the court saw little difference in the facts in *Baker* and those in the present case holding that *The Statesman* could not be liable for public disclosure. Briefly, the court also held that the same Constitutional protections apply to claims for intentional infliction of emotional distress.

Uranga presented two arguments.

First, the amount of time between the disclosure of information and the event described in the information was significantly longer than in *Cox*. The court rejected this argument finding that the

passage of time did not create a right of privacy to public facts. According to the court,

“There is no indication that the First Amendment provides less protection to historians than to those reporting current events.”

Uranga also had not offered any sort of test that could be used to determine the length of time at which public information becomes private again. With no test, any such determination would be extremely difficult and could result in “self-censorship” by the media.

Second, Uranga claimed that his name was not newsworthy and *The Statesman* should have redacted his name from its publication of the statement. Quoting *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the court held that the information disclosed must be viewed as a whole, not separated into its individual parts. As long as the information as a whole was of public significance, it was immaterial whether certain portions were not newsworthy.

For Uranga: John L. Runft (Boise)

For Federated Publications, Inc.: Debora K. Kristensen of Givens Pursley LLP (Boise)

The passage of time did not create a right of privacy to public facts.

Court Rejects Contract Claim Against New York Times for Use of News Conference Photo

By David E. McCraw

The New York Times has won a dismissal in a case brought by a man who claimed the newspaper breached a confidentiality agreement with him by publishing his photograph – a photograph taken as the man spoke at a public news conference organized by the New York State Attorney General's Office. *Ramalho v. The New York Times Company*, Index No. 124436/01, Decision, filed Jan. 15, 2003.

The plaintiff, Fernando Ramalho, was one of several investors who were victims of a securities fraud perpetrated by Luigi Alexander. When Alexander pleaded guilty in February 2001, the state prosecutors invited some of the victims, including Ramalho, to address the press during a news conference announcing the conviction.

The next day, The Times ran a photograph of Ramalho from the news conference, identifying him only by his first name.

Ramalho sued, claiming that he had agreed to appear at the news conference only if the assembled members of the press agreed not to photograph or identify him. He also alleged that publication of his photograph constituted intentional infliction of emotional distress and violated New York Civil Rights Law §§ 50 and 51, which prohibit commercial use of photographs without the subject's permission.

Justice Ira Gammerman of New York State Supreme Court rejected all of those theories and granted The Times's motion to dismiss for failure to state a claim.

The centerpiece of Ramalho's contract claim was his allegation that he privately told representatives of the Attorney General's Office that he would not appear except under conditions of confidentiality and that one of the prosecutors then went to the lectern and "directed" the journalists to protect his identity.

Justice Gammerman held that those allegations failed to establish the existence of a legal contract between Ramalho and The Times. "Specifically, the complaint fails to allege that the press was aware that it was asked to enter into an agreement to forego certain rights in exchange for plaintiff's appearance at the conference," the court wrote.

In rejecting Ramalho's emotional distress cause of ac-

tion, Justice Gammerman relied on *Doe v. American Broadcasting Companies, Inc.*, 152 A.D.2d 481 (1st Dep't), *appeal dismissed*, 74 N.Y.2d 945 (1989), citing it for the proposition that the failure of a journalist to maintain the anonymity of an interviewee does not give rise to a cause of action in tort.

As for Ramalho's Civil Rights Law claim, Justice Gammerman cited the well-established exemption for photographs used in connection with news coverage. Ramalho contended that the news exemption should not apply in cases involving breaches of confidentiality agreements. "There is no case law to support this proposition," the court concluded.

Plaintiff was represented by Vogel & Rosenberg of New York City. The Times was represented by former senior counsel Adam Liptak and subsequently by counsel David McCraw.

David McCraw is Counsel at the New York Times.

Failure of a journalist to maintain the anonymity of an interviewee does not give rise to a cause of action in tort.

UPDATE

Sixth Circuit Denies Government's Request for En Banc Rehearing in Detroit Free Press v. Ashcroft

Ensuring a circuit split, the Sixth Circuit on January 22 denied a government motion to rehear en banc the decision in *Detroit Free Press v. Ashcroft*, 303 F.3d 681. Last year, a three judge panel ruled against the government and held that under the *Richmond Newspapers* test the public and media have a right to attend the immigration proceedings of Rabi Haddad. This ruling conflicted with the Third Circuit, who held in *North Jersey Media Group v. Ashcroft*, 308 F.3d 198, that access was not required for immigration proceedings under *Richmond Newspapers*. The Third Circuit also denied the media's motion for a hearing en banc.

In neither case, has a decision been announced about seeking Supreme Court review. North Jersey Media Group Inc. and New Jersey Law Journal have until March 3 to file a writ of certiorari.

Rapper Master P Ordered to Pay For Company's Default

Song Included Recording of 80-Year-Old Woman



Rap artist and producer Master P, whose given name is Percy Miller, was ordered in late December to pay \$35,000 in compensatory damages and \$105,000 in punitive damages to a grandmother whose voice was used on a recording without her permission. *Burger v. Priority Records, Inc.*, No. KC027869 (Cal. Super. Ct., L.A. County bench verdict Dec. 26, 2002).

Master P was ordered to pay the damages on behalf of his apparently defunct recording company, Boutit, Inc. – which did business under the name No Limit Records, Inc. – after California Superior Court Judge R. Bruce Minto ruled that Master P and the company were alter egos.

The plaintiff, 80-year-old Geneva Berger, was surreptitiously recorded in 1997, while speaking on the phone to Johnny Lupo, a musician who was a friend of her grandson. In the recording, Burger was heard asking, “When people get hooked on pot, can they get sick if they don’t get it?”

The question was included in the introduction to the rap song “No Limit,” by the artist Magic. The song, which is laced with profanities and includes references to drug use, was produced by Master P and also featured rappers C-Murder (Corey Miller, who is Master P’s younger brother) and Snoop Dogg (Calvin Broadus). The song was included on the album “Sky’s the Limit,” which was released in 1998 by No Limit Records and distributed by Priority Records.

In June 1999, Burger sued the various artists and record companies for intrusion, common law misappropriation and intentional infliction of emotional distress. In pretrial depositions, she claimed that since release of the album she had been subjected to statements such as, “there goes that rappin’ granny.”

“They’re making fun of me because my voice is on that filthy record,” she said.

Two defendants settled prior to trial: Snoop Dogg for \$75,000, and Priority Records for \$300,000. Priority Records is now suing Master P and No Limit Records for reimbursement of this settlement. *See Priority Records LLC v. No Limit Records, Inc.*, No. KC038316 (Cal. Super. Ct.,

L.A. County filed March 5, 2002).

After a five-day trial in April 2002, a jury found that Master P was not liable for the presence of Burger’s voice on the album because he was not directly involved in production of the album. But Judge Minto held that he was liable for a \$35,000 compensatory damages default judgment against his company, which did not appear for trial.

A second, bench trial was held in December to establish the amount of punitive damages in the company’s default judgment. Since Master P was also liable for paying this award, the trial focused on his net worth. In September 2002, *Forbes* magazine listed the 33-year-old’s net worth at \$293.8 million. Minto decided that Master P’s net worth was \$200 million, although the rapper denied that it was that high.

On Dec. 26, Minto awarded \$105,000 in punitive damages. In deciding on this amount, the judge said that he had considered Master P’s net worth, his apparent lack of remorse for the harm caused to Burger, and the relative severity of that harm. “[C]onsidering the universe of evil and other wrongs that abound in the world, the nature of the wrong visited upon the Plaintiff is not of momentous magnitude,” Minto wrote in his order.

Donald K. Wilson of Los Angeles represented Master P. The plaintiff was represented by Neville Johnson of Johnson & Rishwain LLP of Los Angeles.

Neville Johnson Publishes “Primer” for Plaintiffs Lawyers

Neville Johnson, attorney for plaintiffs Carolyn Condit, and in numerous privacy cases in the California courts, including *Sanders v. ABC*, is publicizing his new law review article as “a primer for plaintiffs’ attorneys.” It is entitled “Establishing Constitutional Malice for Defamation and Privacy/False Light Claims when Hidden Cameras and Deception are Used by the Newsgatherer” and is written with his partner, Brian Rishwain, and David A. Elder, Salmon P. Chase College of Law, Northern Kentucky University. It was published by *Loyola of Los Angeles Entertainment Law Review* but is available on the firm website at www.jrllp.com.

Washington Court of Appeals Clarifies Public Figure and Actual Malice Rules in *Eubanks v. North Cascades Broadcasting*

By Bruce E. H. Johnson

On January 16, 2003, Division III of the Washington Court of Appeals issued its decision in *Eubanks v. North Cascades Broadcasting*, 2003 Wash. App. LEXIS 55, affirming an Okanogan County Superior Court summary judgment dismissing defamation claims brought by Robert Eubanks against North Cascades, which owned a local radio station. The decision was a straightforward and useful application of public official principles to a man who ought to portray himself as lacking sufficient authority.

The case grew out of a 1999 broadcast regarding Eubanks, director of the rural Okanogan County Improvements Department, which had been formed "to provide the structure and personnel" needed for oversight "of remodeling improvements to county buildings, primarily the Vir-

ginia Granger School." The North Cascades broadcast discussed concerns about the department's hiring policies, poor accounting practices, improper handling of asbestos at the School, and the "aggressive and sometimes threatening behavior of Director Eubanks."

In August 1999, Eubanks sued North Cascades, alleging merely that the broadcast contained "false statements." Fifteen months later North Cascades moved for summary judgment, which was granted by the trial court, based on its determination that Eubanks was a public official and that he had failed to offer any evidence that North Cascades had acted with actual malice.

The Washington Court of Appeals, Division III, affirmed. Although the parties' briefing had focused on actual malice and privilege issues, the court's opinion initially discussed whether the plaintiff had even presented a *prima*

(Continued on page 14)

Update: Kansas Criminal Libel Statute Survives

A legislator's effort to repeal the Kansas criminal defamation statute has failed.

State Sen. Derek Schmidt (R-Independence) introduced a bill before the legislature convened in January that would have repealed Kan. Stat. Ann. § 21-4004. See S.B. 3, 2003-04 Kan. Leg. (introduced Dec. 31, 2002). After the bill did not make it out the Senate Judiciary Committee, Schmidt offered a compromise version that would have added an exception for speech about "public officials or public figures on matters of public concern" that was rejected on Feb. 18.

The statute, adopted in 1988 and amended in 1995, garnered new attention last year when the editor and publisher of *The New Observer*, monthly political newspaper, were convicted on seven misdemeanor counts of criminal defamation. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct., Wyandotte County jury verdict July 17, 2002); see *LDRC MediaLawLetter*, Aug. 2002, at 5. In December, the publisher and editor were each fined \$3,500 and sentenced to one year unsupervised probation, although the sentences were suspended pending appeal. See *LDRC MediaLawLetter*, Dec. 2002, at 14.

In the *New Observer* case, the newspaper's editor and its corporate owner are represented by Douglas J. Patterson of Leawood, a member of the Kansas State House.

In committee hearings held on the bill Jan. 21 and 22, proponents of repealing the law argued that the statute was antiquated and that civil defamation provided an adequate remedy. Witnesses arguing against repeal said the statute provides recourse to those who cannot afford to bring civil libel suits. Wyandotte County District Attorney Nick Tomasic, who prosecuted the *New Observer* case, testified that repealing the law was unnecessary since it was so rarely invoked, saying that just one criminal libel case had been filed in state since 1995.

An analysis by MLRC found five cases in which charges were brought under the Kansas criminal defamation since 1987. See *Criminal Defamation After Garrison v. Louisiana*, 2003 LDRC Bulletin No. 1 (forthcoming). In one case the charges were dropped by the prosecution. Trial courts dismissed the charges in two cases: in one, this decision was not appealed, in the other it was reversed but the final result afterwards is unknown. Two cases – a 1987 case and the *New Observer* case – ended in conviction.

Washington Court of Appeals Clarifies Public Figure and Actual Malice Rules in *Eubanks*

(Continued from page 13)

facie case of falsity – which in Washington law means also that the plaintiff must prove that the offensive statement is “provably false.” The court criticized Eubanks’ briefing for failing to identify the parts of the North Cascades story that were allegedly false.

“At most,” the court suggested, the plaintiff had challenged three parts of the broadcast as “particularly offensive” and these were: (1) a discussion of an internal County report critical of the Department’s hiring and accounting practices and Eubanks’ anger management problems; (2) a statement about Eubanks’ use of an unlicensed “crew of county trustees” to remove asbestos at the School; and (3) a claim that Eubanks had been “responsible for the burning of old county records” at the School several years earlier. At oral argument, Eubanks also “placed importance on alleged unauthorized faxes by county personnel” but the court noted that the radio report contained no reference to the fax allegations.

Having sorted out the allegedly false statements that were at issue, the court determined whether the actual malice or negligence standard would apply, a question that turned on whether Eubanks was a public official – a question of law. The court said that a plaintiff who is employed by the government and who “wields general power and exercises broad discretion” is a public official, at least as regards statements made about the official’s public duties.

Although Eubanks characterized himself “as nothing more than a contractor without authority to do much of anything,” the court pointed to his official letterhead which described him as “Project Manager” or “Project Director” for the County’s office of capital improvements, and to the fact that he reported directly to the County commissioners and received a County salary. His responsibility was to “oversee” the remodeling of the School for use as County offices and he also supervised remodeling of the County Courthouse for disability access. He had also claimed that he “monitored” the capital improvement and maintenance departments. In his brief he described himself as “Director of Facilities.”

The court’s opinion cited other public statements by Eubanks, in which he insisted on or boasted of his authority and power, and concluded that the record “clearly contradicts Mr. Eubanks’ attempt to downplay the importance of his public role in Okanogan County.” It further noted that “every material word” in the broadcast “related in some way” to his “area of supervision.”

Having determined that Eubanks was a public official, the court quickly disposed of the evidence (or lack of evidence) of actual malice. North Cascades “received initial information” and then “made follow-up calls” but because of inconsistencies between the sources, it decided to spike the story. Then, a few months later, it “received more information from additional sources and decided to make more contacts” that resulted in “more than a dozen phone calls to check the validity of the story.” Because it was undisputed that North Cascades had “made an effort to investigate and validate the story before broadcasting it,” the court determined that Eubanks had failed to prove actual malice.

The plaintiff was represented by James McPhee, of Spokane, WA. The defendant was represented by Richard B. Price, of Omak, WA.

Bruce Johnson is a partner in the Seattle office of Davis Wright Tremaine LLP and vice-president of the executive committee of the MLRC’s Defense Counsel Section.

A plaintiff who is employed by the government and who “wields general power and exercises broad discretion” is a public official, at least as regards statements made about the official’s public duties.

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First Circuit Strikes Down Puerto Rico's Criminal Libel Law

Following a series of actual and threatened criminal libel prosecutions against two Puerto Rican investigative journalists for their reports on police corruption, the First Circuit issued a declaratory judgment holding the territory's criminal libel statute unconstitutional. *De Jesus Mangual v. Rotger-Sabat*, No. 02-1669, 2003 WL 139403 (1st Cir. Jan. 21, 2003).

In a unanimous decision written by Judge Sandra Lynch, joined by Judge Jeffrey Howard and Illinois District Court Judge Milton Shaudur sitting by designation, the Circuit Court held that Puerto Rico's criminal libel statute was unconstitutional because it did not require proof of actual malice for statements about public officials and did not provide for truth as a complete defense.

The Court's precise holding, though, is somewhat confusing. In one part of the decision the court states the statute is "unconstitutional on its face" because of its defects, but in conclusion "holds" the statute unconstitutional as applied to statements about public officials and public figures. The distinction is important since to the extent the statute remains in force it can continue to be misused against the press – a reasonable possibility given the facts of the case.

The reporter-plaintiff sought clarification of the ruling on a motion for rehearing which was denied this month. The issue now goes back to the district court which was instructed to issue a declaratory judgment and injunction on remand consistent with the First Circuit's decision. Plaintiffs will press the trial court for an order and injunction striking down the statute as applied to statements about public figures and matters of public concern.

Police Threatened Reporters With Prosecution

The underlying facts involve a sustained campaign of threats against two investigative reporters for El Vocero de Puerto Rico for their reports on alleged police corruption. In 1998, the newspaper published an article by reporter Obed Betencourt that a drug dealer was bribing police officers in the narcotics squad of the Caraguas police department. The article also reported, based on information from a police administrative hearing, that the dealer was having an affair with a member of the squad, Officer Elsa Rivera, who was reportedly under department investigation.

In February 1999, Officer Rivera and another police officer filed criminal complaints against Betencourt for libel. The complaints were ultimately dismissed after a judicial hearing concluded there was lack of probable cause. A civil declaratory judgment action filed by *El Vocero* and Betencourt to strike down the statute was thereafter dismissed as moot. *El Vocero v. Fuentes Agostini*, No. 99-1272 (D.P.R. Sept. 14, 1999).

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Seven Charged With Violating Native American Defamation Law

Seven members of the Citizen Potawatomi Nation in Shawnee, Okla., are facing criminal libel charges for statements allegedly slandering their tribal chairman.

The seven were charged in tribal court in December with making, "knowingly and with malicious intent," statements that would "impeach the honest [sic], integrity, virtue or reputation of the Tribal Chairman of the Citizen Potawatomi Nation."

According to *The Oklahoman* newspaper, in Oklahoma City, the charges stem from a political advertisement posted on the Internet in May that accused tribal Chairman John Barrett of "underhanded" politics for allegedly sabotaging a fellow member's candidacy for vice chairman of the tribe.

Barrett blocked the ad, which was endorsed by four members of tribe's grievance committee, from being published in the tribe-published newspaper, *HowNiKan*, and then won an injunction from the tribal court to prevent it from appearing in any other publications, the *Oklahoman* reported.

Citizen Potawatomi Nation District Court Judge Phil Lujan ordered the tribe's attorney general, John Papas, to turn over all evidence relating to the charges to the seven defendants by Feb. 24. Both sides are expected to meet again March 3 to discuss the case and possibly set a trial date.

Under the tribal statute law in effect at the time of the alleged crime, the defendants face jail sentences if convicted. Originally, they were charged under a newer version of the law, which provides for banishment from the tribe but would have barred a jury trial in the case.

1st Cir. Strikes Down Puerto Rico's Criminal Libel Law

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In March 1999, *El Vocero* published four articles by another reporter, Tomas de Jesus Mangual, on police corruption. These articles again accused Officer Rivera of corruption and it described her criminal libel complaint as a retaliatory action to silence the paper and its reporters. The articles also reported that officer Rivera had an affair and child with her married superior officer, thereby explaining her undue influence in the Caraguas police department.

In April 1999, Officer Rivera wrote a letter to the Puerto Rico Secretary of Justice threatening to file criminal libel charges against the *El Vocero* reporters. The Assistant Attorney General responded by noting that the department would only intervene after a police investigation and finding of probable cause – but forwarded the letter to the Superintendent of Police “for any action he may deem appropriate.”

The instant action began when Mangual brought an action in federal district court for a declaratory judgment to strike down the statute. The action was dismissed on the ground of mootness because no criminal charges had been filed against him within the one year statute of limitations. *Mangual v. Fuentes Agostini*, 203 F. Supp.2d 78 (D.P.R. 2002). The district court also denied applications of the publisher and other reporters to intervene, including another *El Vocero* reporter, Jorge Medina, who was threatened with a criminal libel prosecution by a gubernatorial candidate. These parties were allowed to file an amicus brief.

First Circuit Finds the Claim Justiciable

Reversing dismissal of the declaratory judgment action, the First Circuit held that the reporter's claim was justiciable. The finding of mootness was incorrect where a journalist faced prosecution based on his ongoing investigative reporting and the ongoing chilling effect of the statute. 2003 WL 139403 at 8. The court also granted Jorge Medina's motion to intervene – finding he too was faced with the same threat of prosecution and chilling

effect for reporting on public officials. The core facts, as found by the court, were succinctly stated as follows:

A newspaper publishes a series of stories about corruption in government. In turn, the government responds with actual and threatened criminal prosecution of the reporters. The newspaper later publishes a story critical of a candidate for high public office; the reporter is threatened with criminal prosecution. The free press is threatened for commenting on public officials on matters of public concern. *Id.* at *10.

Criminal Libel Statute is Unconstitutional

In reaching the merits of the reporters' claim the court noted that “Puerto Rico's criminal libel statute is not an antiquated and moribund statute; it is less than thirty years old.” Indeed the statute was amended as recently as 1999 to increase tenfold its penalties, from \$500 to \$5,000. The statute, 33 P.R. Laws Ann. §§ 4101 provides in relevant part:

“[The court] observed that “the vast majority of state courts that have found constitutional infirmities in criminal libel statutes have declined to rewrite them but have instead struck them down.”

Any person who maliciously, by any means, or in any way, publicly dishonors or discredits, or charges the commission of an act constituting a crime, or impugns the honesty, integrity, virtue or reputation of any natural or juridical person, or who blackens the memory of one who is dead, shall [be punished with a term of imprisonment of not more than 6 months and a fine of not more than \$5,000].

Reviewing *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Garrison v. Louisiana*, 379 U.S. 64 (1964), the First Circuit wrote:

Section 4101, on its face, is constitutionally deficient, in that it does not require that the New York Times and Garrison standard of actual malice be proven in order for a statement disparaging a public official or figure to be successfully prosecuted.

(Continued on page 17)

1st Cir. Strikes Down Puerto Rico's Criminal Libel Law*(Continued from page 16)*

2003 WL 139403 at *11. The First Circuit also refused to construe the statute so as to comply with *Garrison*. It observed that “the vast majority of state courts that have found constitutional infirmities in criminal libel statutes have declined to rewrite them but have instead struck them down.” *Id.* at *9 n. 7. Here the court noted, “the question is less one of construal of an unclear issue than of judicial rewriting” which it refused to engage in. *Id.*

The court also found the statutory section on truth as a defense constitutionally deficient. Section 4102 provides that truth is an absolute defense only if the victim “is a public officer and the charge made refers to the performance of his duties.” Otherwise truth is a defense if the de-

fendant had “good intentions and justifiable ends.” The First Circuit found this limitation fatal under *Garrison*, which extends to any statements which “might touch on an official’s fitness for office.”

Even the statute section providing a privilege for reports of official proceedings, § 4102, was defective where it required reports be “fair and true.” The court found, “it is inconsistent with First Amendment standards to require that a true statement about official acts must also be fair.”

Plaintiffs were represented by MLRC member attorney Juan Marchand of San Juan. Roberto Sanchez Ramos and Camelia Fernandez Romeu of the Commonwealth Office of Solicitor General represented Puerto Rico.

Prosecutor Declines Criminal Libel Prosecution For Ramsey Coverage

Citing the questionable constitutionality of Colorado’s criminal defamation statute, in early February a special prosecutor declined to prosecute various defendants, including newspapers and reporters, for criminal libel over coverage of the Jon Benet Ramsey case.

The special prosecutor was appointed in response to a complaint by Fleet and Priscilla White, friends of the parents of the six-year old whose 1996 murder remains unsolved. The Whites complained about a Feb. 25, 2000 article in the Boulder, Colo. *Daily Camera* in which a California woman theorized that Jon Benet had been killed during a party focused on child sexual performances. The woman claimed that she had been the victim of such activity as a girl.

Other news organizations picked up the *Daily Camera* story, and it was discussed on several web sites, chatrooms and bulletin boards. The article led Boulder police to investigate the woman’s claims, but found them to have no merit.

The Whites sought prosecution of the newspapers that published the story, the reporters that wrote the stories, and

individuals who discussed the story on various web sites, claiming that the articles implicated them in the death. Fleet White was with Jon Benet’s father when he discovered her body.

Their August 2000 complaint led to an investigation by police and the Boulder District Attorney’s office. In Sept. 2000 the prosecutor, citing a conflict of interest because of

D.A. Alex Hunter’s statements regarding the woman’s story, requested that a special prosecutor be appointed. Boulder County District Court chief judge Roxanne Bailin appointed Pueblo County District Attorney Gus Sandstrom.

But the Whites complained that Sandstrom should be removed after the special prosecutor was quoted in the *Daily Camera* saying that he “didn’t have much choice” in taking the assignment, and had done so reluctantly. Judge Bailin responded in October 2000 by dismissing the case.

While the Colorado Court of Appeals dismissed the Whites’ attempt to obtain an order re-opening the case, in November 2000 Bailin appointed a new special prosecutor: El Paso County District Attorney Jeanne Smith. Smith assigned the investigation to El Paso County prosecutor

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[Prosecutor] Harward’s 13-page report concludes that there is insufficient evidence for a prosecution, and cites potential problems with Colorado’s criminal libel statute.

Prosecutor Declines Criminal Libel Prosecution For Ramsey Coverage

(Continued from page 17)

Bob Harward, who sent his report to Judge Bailin on Feb. 6, 2003.

According to *The Daily Camera*, Harward's 13-page report concludes that there is insufficient evidence for a prosecution, and cites potential problems with Colorado's criminal libel statute. In 1991, the Colorado Supreme Court held that the statute would be unconstitutional if applied to statements about public officials or public figures on matters of public concern. *People v. Ryan*, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991), *cert. denied*, 502 U.S. 860 (1991).

Other Developments

In another case stemming from the Ramsey murder, in early January the New York Post settled a suit by the parents of Jon Benet Ramsey over articles alleging that her brother Burke was a suspect in the murder. The terms of the settlement were not disclosed. *Ramsey v. NYP Holdings*, No. 00-Civ-3478 (S.D.N.Y. dismissed Jan. 8, 2003); *see also LDRC MediaLawLetter*, Aug. 2002, at 23.

Also, in early February Ramsey attorney L. Lin Wood withdrew his threat to sue the city of Boulder for its alleged failure to investigate the murder after Boulder County District Attorney Mary Keenan took over the investigation from the city's police department. Wood had said that the suit would also focus on an alleged campaign of leaks from the police department that was meant to defame John and Patsy Ramsey.

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Massachusetts Anti-SLAPP Ruling Protects Cyber-Speech

By David Plotkin and Robert A. Bertsche

In a Massachusetts first, the state appeals court has held that the state's Anti-SLAPP Act protects speech posted on the Internet. The broad ruling establishes that cyber-speech will be afforded the same level of protection as traditional modes of speech, at least under the Anti-SLAPP law. *MacDonald v. Paton*, 782 N.E. 2d 1089 (Mass. App. Ct., Feb. 5, 2003).

The Controversy

The case pitted a town selectman in Athol, Massachusetts against a resident who operated a website encouraging discussion of local political issues. One such issue was a controversy regarding the siting of a new police station. The local newspaper had repeated speculation that selectmen had intentionally delayed posting notice of the meeting at which the new police building was selected. The coverage also noted that one particular selectman – a former state trooper named MacDonald – was aligned on the issue with the local police chief. Some months later, a columnist for the newspaper referred to MacDonald (who was then campaigning for re-election) as a “Gestapo agent.”

The controversy found its way to an internet site operated by Athol technology aide Elsa Paton. The website, called the “Athonics Home Page,” offered an open forum on local issues: school funding, legislation, town politics, and the like. It included a satirical “First Dictionary of Athonics,” for which many of the “definitions” were supplied by other residents. One entry read as follows:

nazi - not see 1. A political affiliation whose platform espouses military dictatorship, racial cleansing, eugenics and intolerance. 2. In Athol, a term sometimes used to describe certain selectmen who wish to ignore most issues except for those which place them firmly in bed with the chiefs of police. (see Old MacDonald had a gun, E - I - E - I - Oh shit)

The Lawsuit

Notably, Paton's website did not last long. In response to criticism of the site, Paton dismantled the Dictionary of Athonics and, ultimately, the entire site. It wasn't until later that MacDonald (who had lost the election) wrote Paton a letter indignantly denying any affiliation with the American Nazi Party followed up by a lawsuit alleging defamation and intentional infliction of emotional distress.

Paton turned to the American Civil Liberties Union of Massachusetts, which referred her to pro bono counsel who tried a “first honey, then vinegar” approach. In a detailed letter, Paton's lawyer outlined the governing law and tried to persuade MacDonald's counsel to withdraw the claim and thereby avoid an award of fees against his client.

When that failed, Paton filed not one but two motions to dismiss. The first, a motion to dismiss for failure to state a claim, asserted that the “nazi” definition was protected hyperbole. The second, a special motion to dismiss under the Massachusetts Anti-SLAPP Act, M.G.L. c. 231,

§59H, asserted that MacDonald's suit was based on Paton's petitioning activities, and had to be dismissed because her posting of the “definition” was not devoid of factual or legal support. As permitted by the statute, Paton filed a detailed affidavit in support of her argument.

Surprisingly, the motion judge chose not to rule at all on the 12(b)(6) motion (which did not carry a fee award), and instead ruled only on – and denied – the Anti-SLAPP motion (which, when allowed, carries a mandatory award of reasonable attorneys' fees). Paton turned to a Single Justice of the Appeals Court, and won the right to take a (rare) interlocutory appeal of the judge's order – still without submitting to discovery.

The Anti-SLAPP Act

The Massachusetts Anti-SLAPP Act enables a defendant to file a “special motion to dismiss” if the suit is based on that party's exercise of her “right of petition” – a

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The broad ruling establishes that cyber-speech will be afforded the same level of protection as traditional modes of speech, at least under the Anti-SLAPP law.

Mass. Anti-SLAPP Ruling Protects Cyber-Speech

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phrase defined very broadly to include “any statement reasonably likely to enlist public participation in an effort to effect . . . consideration” of an issue before a “legislative, executive, or judicial body or any other governmental proceeding.” Once the motion is filed, all discovery is stayed unless otherwise ordered by the judge.

To prevail, the moving party must make a “threshold showing” that the claims against it are based on “petitioning activities.” Once this showing is made, the burden shifts to the movant, who must show by a preponderance of the evidence that (1) the moving party’s petitioning activity was devoid of any reasonable factual support or any arguable basis in law; and (2) that the moving party’s petitioning activity caused the non-moving party actual injury. *See Duracraft Corp. v. Holmes Products, Corp.*, 427 Mass. 156, 165 (1998); *Office One v. Lopez*, 437 Mass. 113, 122-24 (2002).

The Appeals Court’s Ruling

The argument on appeal focused primarily on whether the statement on Paton’s website could be considered “petitioning activity.” The Appeals Court ruled that it did. Quoting from Paton’s affidavit, it said that the website “served as a technological version of a meeting of citizens on the Town Green, a space where concerned individuals could come together to share information, express political opinions, and rally on town issues of concern to the community.”

The Court further held that selectman MacDonald had failed to satisfy his burden of showing that the petitioning was “devoid” of reasonable factual support or arguable legal basis. The Court directed the lower court to allow the Anti-SLAPP motion, and invited Paton to file for the mandatory award of her costs and reasonable attorneys’ fees incurred at the trial and appellate levels.

It is interesting to note that MacDonald also sued the local newspaper, its publisher, and its editor, which opted not to bring an Anti-SLAPP motion. After depositions and written discovery, the newspaper (separately represented) won summary judgment, and MacDonald is currently appealing that victory.

Robert A. Bertsche and David Plotkin of Prince, Lobel, Glovsky & Tye LLP in Boston (and formerly of Hill & Barlow) represented Elsa Paton, as did former Hill & Barlow associate Kristen Carpenter. Christopher M. Uhl represented Mark MacDonald.

UPDATE:

Clinton OKs Papers Release

Former President Bill Clinton has waived his rights to prevent disclosure for papers of his administration containing confidential advice, but has asserted attorney-client privilege to bar release of documents relating to investigations into Whitewater and his relationships with Paula Jones and Monica Lewinsky.

In answers to written questions, Clinton told the Associated Press that “I believe that the more information we can make available to scholars, historians and the general public, the better informed people will be about the formulation of public policy and the decision-making process in the White House.” According to the AP, Clinton hopes to make the papers available when his presidential library opens in 2004.

An executive order issued by Clinton’s successor, current President George W. Bush, gives both current and former presidents 90 days to review material from the prior president’s administration before it is released, and to block disclosure of the documents for indeterminate periods. *See* Exec. Order 13233, 66 Fed. Reg. 56025 (2001). The order led to a delay of up to 17 months in the release of documents from the Reagan Administration. *See LDRC MediaLawLetter*, July 2002, at 34.

A bill in Congress to repeal the order was approved by the House Government Reform Committee, but did not reach the floor. *See* H. R. 4187, 107th Cong. (2002); *see also LDRC MediaLawLetter*, July 2002, at 34. A lawsuit filed in November by coalition of historical associations and public interest groups is still pending. *See American Historical Ass’n v. Nat’l Archives and Records Admin.*, No. 01-CV-02447 (D.D.C. filed Nov. 28, 2001); *see also LDRC MediaLawLetter*, Dec. 2001, at 47

President Bush is not expected to invoke his power under the order to delay release of the Clinton documents.

Kentucky Federal Court Applies Single Publication Rule to Web Site

In a February 3 decision, the federal district court of the Western District of Kentucky ruled that the single publication rule applies to statements posted on the Internet. *Mitan v. Davis*, 2003 WL 259018 (W.D.Ky.) Judge Simpson granted defendant's motion for summary judgment because plaintiff had failed to initiate his suit within the statute of limitations. As the single publication rule was rejected by a Kentucky state court in 1899 and no state court had discussed the rule since, the court determined that a state court today would adopt the single publication rule and apply it to the Internet.

History

The present suit is the result of a business deal between the parties gone bad. The defendants, Emory and Carol Davis, sold their glass company to Kenneth Mitán. Once the sale was completed, defendants claim that Mitán completely mishandled the company by not paying employee insurance premiums, company bills, selling assets, and diverting corporate funds. In response, defendants

proceeded to set up a website (www.mitanalert.com) detailing their experience with Mitán and providing information on his other business exploits.

After becoming aware of the site's existence, Mitán unsuccessfully sought to have the website deactivated by filing a lawsuit in October 1999. Mitán did not pursue any further legal recourse until December 2000 when he initiated the current suit. He singled out ten statements as libelous. Defendants moved for summary judgment claiming that Mitán was barred by the one year statute of limitations from bringing suit on nine of the statements.

Kentucky Court Would Adopt Single Publication Rule Today

The court explained that it had to decide first whether a Kentucky court sitting today would adopt the single publication rule for libel claims, and if yes, whether the rule applies to Internet publications. The last relevant state court decision was in *Louisville Press Co v. Tennyly* in 1899 in which the state court rejected the single publica-

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Pennsylvania Supreme Court Grants Review on Neutral Reportage

Media Amicus Will Be Filed

At issue in the appeal just accepted by the Pennsylvania Supreme Court in *Norton v. Glenn* is whether the Commonwealth will recognize a constitutional privilege of neutral reportage. The case involved a report in a local paper about a local politician who had been a disruptive force in the town council. The article at issue involved some horrendous accusations by the council member, William T. Glenn, Sr., against several of his fellow councilmen and the town's mayor made immediately before and after public meetings.

The newspaper published the statements in an article about Glenn's behavior and how it was creating havoc in the running of the town council, how it was bringing the council operations to a standstill – a newspaper story which proved important, according to the evidence, to local voters who voted Glenn out of office at the next election. Despite that result, the council President, represented by Richard Sprague's firm in Philadelphia, as well

as the Mayor sued the newspaper, the reporter and Glenn.

The reporter suggested he had serious doubts about the truth of Glenn's statements quoted in the article. The case was tried by Sam Klein and was the first in Pennsylvania to be tried on a theory of neutral reportage. The jury found for the newspaper defendants. The Superior Court reversed, holding that there is no constitutional privilege for accurately reporting the false statements of public officials, even in a neutral fashion, if the publisher doubts their accuracy. That decision can be found at 797 A.2d 294 (Pa. Super.2002).

Dechert is representing the newspaper defendants. An amicus brief is being prepared by Lee Levine of Levine Sullivan & Koch. Any media entity interested in joining the amicus brief in this very important case should contact Gayle Sproul, Amy Ginensky, or Michael Baughman at Dechert or Lee Levine. The brief must be filed by March 12, 2003.

KY Fed. Ct. Applies Single Publication Rule to Web Site*(Continued from page 21)*

tion rule and held that in a libel action, “every sale or delivery of a written or printed copy of liable is a fresh publication.”

Judge Simpson however believed that the state court would adopt the single publication rule today. First, the Restatement of Torts which contains the rule, has been frequently cited by Kentucky courts. Second, the single publication rule has been adopted in many other jurisdictions. Third, Kentucky law commentators have written that the single publication rule prevails in Kentucky. Fourth, with the single publication rule is better suited to protect defendants from old libel suits based on aggregate communication.

Single Publication Rule Applies to the Internet

Next, the court had to determine whether the single publication rule was applicable to Internet postings. Judge Simpson compared the present facts to the only three cases which the court found had discussed this issue. In *Swafford v. Memphis Individual Practice Association, 1998 WL 2819356 (Tenn. Ct. App. 1999)*, the Tennessee Court of Appeals had to determine whether the rule applied to a medical database maintained on the Internet. The court held that the single publication rule did not apply because the database was not widely available, confidential and only accessible to a select number of entities. These characteristics distinguished the database from publications to which the single publication rule was applied.

In contrast to *Swafford*, in *Firth v. State, 706 N.Y.S. 2d 835 (N.Y. Ct. Cl. 2000)*, a New York state court held that the single publication rule did apply to a publication posted on the Internet and available to the public. The court in *Firth* stated, “there was ‘no rational basis upon which to distinguish publication of a book or report through traditional printed media and publication through electronic means.’” The reasons for the creation of the single publication rule (including the concern over technological advances and the desire to protect defendant publishers from a multiplicity of suits) were held to be as valid today as when the rule was first adopted. As long as the Internet publication was not altered, then the publication’s “continued availability” would be not considered a republication.

The single publication rule was also applied to the Internet in *Van Buskirk v. New York Times Co., 200 U.S. Dist. LEXIS 12150 (S.D.N.Y. 2000)*. The publication at issue in *Van Buskirk* was a letter critical of the plaintiff which was accessible by the public. The Southern District held that the nature of the Internet mandated that the single publication rule applied. Plaintiff’s argument that because Internet postings can be removed at any time was rejected by the court. Internet publications were compared to the possibility of a book publisher selling an older title which contained a defamatory statement. As the single publication rule would apply to the book, it so applies to the Internet.

Judge Simpson adopted the approach taken in *Firth* and *Van Buskirk*. As in these cases, the Davis website was accessible to the public, unlike the database in *Swafford*. The comparison in *Firth* and *Van Buskirk* of an Internet posting to a book (both available to the general public) was embraced because information in either medium can be accessed at anytime by anyone. According to the court,

A statement electronically located on a server which is called up when a web page is accessed, is no different from a statement on a paper page in a book lying on a shelf which is accessed by the reader when the book is opened.

For *Mitan*: Pro se

For *Davis*: J. Fox DeMoisey and Jonathan Earl Breitenstein of DeMoisey & Smither (Louisville)

Published in November

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Jurisdiction Analysis for Internet Content Claims Can Include Non-Internet Contacts

By Matthew Broderick

The Third Circuit recently held that, in a case arising out of a defendant's alleged misuse of its interactive web site, a plaintiff, seeking to establish the court's personal jurisdiction, should generally be allowed to take discovery from a defendant regarding both its Internet *and* non-Internet contacts with the forum state. *Toys "R" Us, Inc. v. Step Two, S.A.* No. 01-3390, 2003 WL 175322 (3d Cir. Jan. 27, 2003).

Writing for the panel, Judge Oberdorfer (sitting by designation) reversed the district court's dismissal for lack of jurisdiction, finding that the district court, by limiting its inquiry to the record as it related to Internet contacts only, had improvidently denied Toys "R" Us's request to take jurisdictional discovery from Step Two, a Spanish corporation, which, Toys "R" Us alleged, had, *inter alia*, infringed on its trademark by marketing toys on a web site under the "Imaginarium" name.

While activity on the defendant's web site was the basis for the lawsuit, whether the defendant's "purposeful availment" is sufficient to confer personal jurisdiction depends on the totality of the defendant's contacts, Internet and non-Internet alike, with the forum, Judge Oberdorfer held.

Trademark Overlap Online

In 1999, Toys "R" Us, which is headquartered in New Jersey, acquired Imaginarium Toy Centers, Inc., along with its line of toy stores and the associated Imaginarium mark, which had been registered with the U.S. Patent and Trademark Office in 1989. Step Two, a Spanish corporation, "owns or has franchised toy stores operating under the name 'Imaginarium' in Spain and nine other countries [not including the United States]." *Id.* at *1.

Step Two has registered the Imaginarium mark in Spain and "several other countries where its stores are located." *Id.* In addition to their stores, both Toys "R" Us and Step Two maintain interactive web sites under the Imaginarium name where toys and other educational products are sold online.

How to Analyze "Purposeful Availment"

"Step Two's web sites," the Court found, "while commercial and interactive, do not appear to have been designed or intended to reach customers in New Jersey." *Id.* at *6. For instance, these web sites are entirely in Spanish; Step Two ships merchandise purchased on the web sites only within Spain; and prices were advertised in pesetas or Euros. *Id.* To prove that it is not impossible for someone in New Jersey to purchase and receive merchandise from the web sites, Toys "R" Us, through an employee and through its attorney, conducted two online purchases and had the items shipped to a Toys "R" Us employee in Madrid, who then reshipped the items to New Jersey.

"The precise issue raised by this case," wrote Judge Oberdorfer,

"is whether the operation of a commercially interactive web site accessible in the forum state is sufficient to

support specific personal jurisdiction, or whether there must be additional evidence that the defendant has 'purposefully availed' itself of the privilege of engaging in activity in that state." *Id.* at *4.

**Whether the defendant's
"purposeful availment" is sufficient to confer personal jurisdiction depends on the totality of the defendant's contacts, Internet and non-Internet alike, with the forum.**

Intention of Web Site is Key

The Court read the now-familiar decision in *Zippo Mfg. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), where the court had "stressed that the propriety of exercising jurisdiction depends on where on a sliding scale of interactivity the web site falls," as standing for the proposition that "the exercise of jurisdiction [is] proper where the commercial web site's interactivity reflected specifically intended interaction with residents of the forum state." *Id.* That is, Judge Oberdorfer understood the question of the web site operator's intention in creating interactive site to be the crux of the *Zippo* interactivity inquiry.

"The [*Zippo*] court summarized the pivotal importance of intentionality as follows: 'When a defendant

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Jurisdiction Analysis for Internet Content Claims Can Include Non-Internet Contacts

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makes a conscious choice to conduct business with the residents of a forum state, it has clear notice that it is subject to suit there. . . . If [the defendant] had not wanted to be amenable to jurisdiction in Pennsylvania, . . . it could have chosen not to sell its services to Pennsylvania residents.” *Id.* (quoting *Zippo*, 952 F. Supp. at 1126-27) (internal citation and quotation omitted).

Judge Oberdorfer reasoned that the intentions of a web site operator toward the forum state could not always be determined by reference to the web site alone. Rather,

“[i]n deciding whether to exercise jurisdiction over a cause of action arising from a defendant’s operation of a web site, a court may consider the defendant’s related non-Internet activities as part of its ‘purposeful availment’ calculus.” *Id.* at *5

Where the Internet contacts by themselves are insufficient to support personal jurisdiction, the “‘something more’ needed to establish personal jurisdiction” may reside in

“non-Internet contacts such as serial business trips to the forum state, telephone and fax communications directed to the forum state, purchase contracts with forum state residents, contracts that apply the law of the forum state, and advertisements in local newspapers.” *Id.* at *6 (quoting *Barrett v. Catacombs Press*, 44 F. Supp. 2d 717, 726 (E.D. Pa. 1999)).

The district court’s error had been to “preclude[] consideration of other Internet and non-Internet contacts – indicated in various parts of the record – which, if explored, might provide the ‘something more’ needed to bring Step Two within [the court’s] jurisdiction.” *Id.* at *8. The Court acknowledged that, “on the facts established thus far, Toys [“R” Us] has failed to satisfy the purposeful availment requirement.” *Id.* at *6.

“At best,” Judge Oberdorfer wrote, “Toys [“R” Us] has presented only inconclusive circumstantial evidence to suggest that Step Two target its web site to

New Jersey Residents, or that it purposefully availed itself of any effort to conduct activity in New Jersey.”

Id. at **6-7.

Even so, in the Court’s judgment, Toys “R” Us had made the “threshold showing” of “factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between [the party] and the forum state,” entitling it to conduct further discovery. *Id.* at *8 (internal quotation and citation omitted).

Accordingly, Toys “R” Us’s factual allegations are the context for determining the appropriate scope of jurisdictional discovery. The gravamen of Toys “R” Us’s claims was that

“Step Two is attempt[ing] to expand [its] business throughout the world including the United States by operating international web sites that offer goods similar to the goods offered in Toys’ [sic] IMAGINARIUM stores.” *Id.* at *9 (internal quotation omitted).

Essentially, Toys “R” Us is alleging that “Step Two’s intent [. . .] is to capitalize for [its] own pecuniary gain on the goodwill and

excellent reputation of Toys [“R” Us].” *Id.* Given Toys “R” Us’s allegations that Step Two uses its web sites to imitate Toys “R” Us’s marketing and steal market share, “[l]imited discovery relating to [Step Two’s business plans for purchases, sales, and marketing] would shed light on the extent, if any, Step Two’s business activity [. . .] were [sic] aimed towards the United States. This information, known only to Step Two, would speak to an essential element of the personal jurisdiction calculus.” *Id.* at *9.

The import of Judge Oberdorfer’s opinion is unclear. One possible interpretation is that jurisdiction may lie on the basis of web-related activities, even where the web-related contacts with the forum are *de minimis*, provided other, non-Internet contacts evidence the requisite intent to be subject to jurisdiction. If nothing else, in cases arising out of the operation of a web site, artful pleadings will now be framed so that a defendant’s intent in operating the web site might be inferred from a defendant’s non-Internet activity and contacts with the forum as well as from the web site itself.

Matthew Broderick is with Clifford, Chance, New York, NY.

Renewed Confrontations on Crime Reporting in Canada and England

By Robyn Aronson

The question of where journalistic freedom ends and prejudicial coverage of criminal prosecutions begins has flared up again in Canada and England.

Canada, A Killer, and Internet Publication

In Canada, the preliminary hearing of alleged serial killer Robert Pickton began in January, and immediately created a tussle over the scope of media coverage. Pickton is a pig farmer accused of murdering fifteen women, mostly prostitutes and addicts who had vanished from Vancouver's East Side over the last twenty years. The case — the largest and most extensive murder investigation in the country's history — has drawn interest not only in Canada, but in the U.S. as well, especially in nearby Seattle.

Canadian law limits publication of information about evidence, submissions, and rulings made during preliminary proceedings, in order to prevent potential taint of the jury pool. A few days into the preliminary hearing, the presiding judge, who refused to listen to the arguments of media lawyers, issued a warning to both American and Canadian journalists that their reporting may result in contempt of court and criminal charges.

Provincial Court Judge David Stone has interpreted the publication ban to apply not only to Canadian media, but also to American media attending the trial, if their reports are available on the Internet. Citing three reporters for American outlets by name, Judge Stone warned them that they were "on notice," and that their access to the courtroom would be restricted and other sanctions were possible if they did not observe the publication ban and keep material about the proceeding off the Internet.

Judge Stone is concerned that Canadians will follow the proceedings via the Internet and evade the publications ban. For example, since *The Seattle Times* began covering the hearing, the number of Canadian visitors to its website has increased — from 5,000 visitors on the first day of the hearing, to 13,000 on the second. Pickton's lawyers have also complained that Canadian journalists are directing readers to those Internet sources where the banned material is available.

The judge's warning did not address the issue of whether the court could assert jurisdiction over Internet servers out-

side the country, and his immediate focus has been on expelling from the courtroom or punishing those reporters who are responsible for material that appears on the Internet.

England's Alleged Terrorist Trials

Media reports regarding the recent arrests of several individuals in London and Manchester on terrorism charges have also alarmed some human rights watchdogs, who believe that the resultant coverage is lopsided and assumes the suspects' guilt. While England's Contempt of Court Act 1981 makes it a contempt to publish anything that creates a "substantial risk that the course of justice in the proceeding in question will be seriously impeded or prejudiced," many believe that media coverage has done just that — by omitting the word "alleged" when describing the suspects, by linking them to unrelated terror activity without any justification, by adding "government, MI5 and media spin" to what should be objective reportage.

The amount of speculative coverage reached a new level of intensity recently, when a raid on the home of terror suspects resulted in the death of a police officer. In response to the flurry of media reports about the incident, Attorney General Lord Goldsmith issued a statement on January 17, 2003, expressing his concern over the "lack of balance in some of the coverage and the assumptions that have been made." Stressing that nothing be done "that might prejudice the right to a fair trial," Lord Goldsmith reminded editors "of the dangers of publishing as fact the guilt of an individual after his arrest and before his trial or creating a climate that strongly suggests the guilt of an individual." Lord Goldsmith concluded his statement by warning journalists that he would monitor coverage of the case closely, and would not hesitate to take action under the Contempt of Court Act 1981, if warranted.

That said, such warnings have been issued before. On November 21, 2002, and December 6, 2002, the Attorney General released similar (if less strongly worded) warnings to the press, in the context of two other terrorism trials. Despite these multiple admonitions, though, no action against any media outlet has yet been taken.

Robyn Aronson is with Clifford Chance, London

German Chancellor Schroder Attempts to Enjoin UK Newspapers

A recent bid by German Chancellor Gerhard Schroder to enjoin an English newspaper from publishing a story about his allegedly floundering marriage highlights a simmering European legal clash over privacy rights.

On Jan. 16, a Hamburg court, without notice to the newspaper, granted Chancellor Schroder an injunction forbidding Associated Newspapers' *Mail on Sunday* from repeating stories linking him with a well-known German television interviewer, according to a news report. See J. Hooper, *German chancellor sees red in privacy battle with British tabloid newspaper*, *The Guardian Online* Jan. 20, 2003 (available at <www.mediaguardian.co.uk>). Chancellor Schroder obtained injunctions in January against two German newspapers, *Märkische Oderzeitung* and *Südwestpresse*, preliminarily barring them from reports of difficulties in his marriage.

This is apparently the first time a foreign court sought to enjoin a newspaper publication in the United Kingdom — and even the issuing German court conceded its ruling was valid only in Germany. In fact, the *Mail* went ahead and published its story three days

later together with a statement that it could “ignore this blustering and these threats. Because of our different tradition and our robust democracy, we can publish this sort of material and believe we have every right to do so.”

According to one news report, the Chancellor's lawyer claimed that publication by *Mail on Sunday* could result in a fine of approximately \$270,000. See M. Gavin, *Schröder v. the Media*, *International Herald Tribune Online* Jan. 28, 2003 (available at <www.iht.com>). But the German Chancellor has apparently made no attempt to enforce the injunction in England.

In Germany, the right to privacy is protected at the constitutional level — and German law recognizes a broad concept of privacy for a public or private person's “intimate sphere.” Last year Chancellor Schroeder obtained an injunction barring the German press from repeating allegations that he dyed his hair. Not surprisingly, the German press's reports about the private lives of public officials are comparatively restrained.

In England, where the press routinely covers the private lives of politicians, most explicit right to privacy is England's incorporation of the European convention on Human Rights which has a free speech and press provision along

with one on privacy. In an editorial published along with the offending story on Jan. 19, the *Mail* said Schroder's attempts to quash reporting in a foreign newspaper presaged a dilution of British press rights. “The European Union is entering a new stage of its life which its leaders hope to create a ‘Common Legal Space,’” the paper said in an editorial.

“As the EU expands into ever more shadowy and unstable parts of Europe, we will not see English liberties carried into Slovakia or Latvia, but Slovakian practices brought here and Latvian judges pronouncing our rights.”

While one might consider the *Mail's* tone alarmist, it touches on the potentially troublesome trend in European law toward harmonizing choice of law in defamation and privacy

While one might consider the Mail's tone alarmist, it touches on the potentially troublesome trend in European law toward harmonizing choice of law in defamation and privacy actions.

actions. See the article on page 27 which discusses a European Court of Human Rights decision, *Peck v. U.K.*, from January 2003 finding the U.K. privacy law inadequate.

Under Article 7 of the European Union's “Rome II” proposals, the applicable law in any defamation or privacy claim would be the law of the country where the alleged victim is “habitually resident.” If such a law were in effect, for example, German law would conceivably be applied in England to Schroder's claim against the *Mail*.

Such rules would hamstring publishers by forcing them to consider the country of habitual residence of each person written about and then gamble on the risk of facing defamation or privacy claims. Publishers also have complained about the chilling effect such rules could cause as publishers are forced to anticipate the effect of foreign libel and privacy laws. Some small publishers have suggested that such litigation liabilities would simply put them out of business.

At a recent hearing in Brussels on the regulation, newspaper and broadcasting interests claimed Article 7 was unfairly balanced against freedom of the press. They added that such a regulation would be difficult to follow since it's not always easy to determine the habitual residence of prominent individuals who may have moved for tax reasons or have several residences. Many media interests are supporting an alternative “country of origin” approach in which the law of the principal place of business of the publisher would apply. See <www.europa.eu.int>

European Court of Human Rights Insists on UK Privacy Right

In a significant decision that could establish new privacy rights in UK law, the European Court of Human Rights ruled that the United Kingdom's existing laws did not provide an effective privacy remedy for a man whose attempted suicide on a public street was captured by a government security video camera and later published by the media. *Peck v. United Kingdom*, Application no. 44647/98 (ECHR Jan. 28, 2003) (available online at <<http://hudoc.echr.coe.int/>>).

The plaintiff did not complain over the video surveillance itself – indeed he conceded it may have saved his life. His complaint against a local government authority focused instead solely on the media publicity that followed the release of the videotape. The ECHR essentially ruled that such publicity can be actionable notwithstanding its truth or newsworthiness.

Attempted Suicide Captured on Security Video

On Aug. 20, 1995, the plaintiff, Geoffrey Peck, who was suffering from depression, attempted to commit suicide by cutting his wrists on a public street in Brentwood, England. He was filmed in the immediate aftermath of the attempt,

holding a knife, by a closed-circuit security camera installed by the Borough Council at a street intersection. A monitoring operator called police, who then relieved Peck of the knife and took him into custody. After being examined and treated by a doctor, Peck was released without charges.

One month later, the Council decided to publicize their security camera system as an effective anti-crime tool by providing photos and other information to the media. Within weeks, footage and photos of Peck appeared in two local newspapers and a local news program. The newspapers did not blur the plaintiff's face; the local news program partially blurred his face. During this time, Peck learned that he had been filmed, but declined to take action because he claimed he was still suffering from depression.

In March 1996, Peck learned that the footage was set to be broadcast on a national BBC show "Crime Beat," which is seen by some 9.2 million viewers. Peck complained to the Borough Council about the upcoming program. Soon after "Crime Beat" aired, Peck made a number of media appear-

ances to protest the release of the footage. Peck also filed complaints with the UK's Broadcasting Standards Commission, Independent Television Commission and Press Complaints Commission.

The BSC and ITC upheld Peck's complaints against the broadcasters under their relevant broadcast standards. They found the broadcasters unintentionally failed to adequately blur his face, making him recognizable at least to people who knew him, thereby infringing his privacy. The BBC broadcast the finding of privacy infringement on a "Crime Beat" episode. The local broadcaster, Anglia Television, apologized to Peck. The PCC rejected Peck's complaint over the newspaper publications, finding the events in question took place in a public street, open to public view, and that the articles did not suggest Peck had committed a crime.

In a sweeping formula it concluded that "there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" ¶ 57.

Suit Over Tape's Release to Media

Plaintiff also sued Brentwood Borough Council for wrongfully releasing the video to the media. While noting some sympathy for plaintiff's claim, the High Court rejected the challenge, holding

that a portion of the Criminal Justice and Public Order Act 1994 empowered local authorities to publicize the effectiveness of security cameras in preventing crime.

I have some sympathy with the applicant who has suffered an invasion of his privacy, as is borne out by the findings of the Independent Television Commission and the Broadcasting Standards Commission. However, if I am right in deciding that the Council does have power to distribute the film footage from its CCTV system, there may on occasion be undesirable invasions of privacy. Unless and until there is a general right of privacy recognised by English law (and the indications are that there may soon be so by incorporation of the European Convention on Human Rights into our law), reliance must be placed on effective guidance being issued by Codes of practice or otherwise, in order

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European Court of Human Rights Insists on UK Privacy Right

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to try and avoid such undesirable invasions of a person's privacy.

The evidence is that the CCTV cameras in public places play an important role in both crime prevention and crime detection. In this case, the film footage showed a man walking in the High Street carrying a large knife in his hand. It did not show him attempting to commit suicide. It was plainly a potentially dangerous situation which the Council's monitoring employee quite properly put to the police, as a result of which the man was arrested ... It was not unreasonable for the Council to conclude that the footage was a useful example of how a potentially dangerous situation can be avoided ... In those circumstances, it seems to me that the decision of the Council to distribute the film footage to the media could not be said to be irrational or unreasonable, bearing in mind that the film did not show an attempted suicide and that, at the time, they did not know the applicant's identity. ¶ 32.

Leave to appeal was denied by the high court and the Court of Appeal.

A Violation of Article 8

In its Jan. 28 decision, the ECHR ruled that disclosure and distribution of the footage to the media violated Peck's privacy rights under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which was incorporated into UK effective October 2000. Article 8 provides in relevant part:

1. Everyone has the right to respect for his private and family life, ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of ... public safety or ... for the prevention of disorder or crime, ..."

The ECHR noted that while "private life" is "not susceptible to exhaustive definition" it encompasses "a right

to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world and it may include activities of a professional or business nature." In a sweeping formula it concluded that "there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" ¶ 57.

Under UK law it is generally not actionable to publish a photograph of a person taken in a public place. However, the ECHR rejected arguments that Peck's actions should be considered public simply because he was on a public street. The panel noted that Peck was not on a public street for the purposes of participating in a public event – such as a demonstration – and it placed particular importance on the fact that he was out late at night and was in a "state of distress." ¶ 62.

Furthermore, the court said that because Peck's identity was not adequately, or in some cases not at all, blurred in the images, his action "was viewed to an extent which far exceeded any exposure to a passer-by or to security observation ... and to a degree surpassing that which the applicant could possibly have foreseen." *Id.*

Lack of Sufficient Safeguards

In its defense, the government argued that the video disclosures were aimed at enhancing the visibility of the security camera system, including "to inspire public confidence and support for the system and to deter criminals." The government also argued that cooperation with the media to publicize the system would be undermined if they had to obtain consent from everyone who appeared on tape. ¶¶ 69 - 70.

While conceding that promoting the security system would enhance its role in crime prevention, the court said the council had other options available to reach the same objectives. Specifically, the court said, the council could have secured permission from Peck, blurred his image itself or, at the least, better ensured that the media would blur his image. There were no sufficient reasons to justify the direct disclosure, the court said, absent adequate safeguards. ¶ 80.

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**European Court of Human Rights
Insists on UK Privacy Right**

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***Voluntary Media Appearances Did Not
Mitigate Responsibility***

Because Peck appeared on TV to protest the actions, the government also argued that Peck was complicit in his loss of privacy. However, the ECHR found that a protest appearance was not enough to justify the intrusion. “The applicant was the victim of a serious interference with his right to privacy involving national and local media coverage,” the court wrote. “It cannot therefore be held against him that he sought thereafter to avail himself of the media to expose and complain about that wrongdoing.” ¶ 86.

No Effective Remedy for Privacy Breach

The court held that Peck had no effective legal remedy against the local council under any other UK legal theory such as defamation law or breach of confidence. It also found that the broadcast commissions did not provide an adequate remedy because they had no power to award compensatory damage. The ECHR awarded Peck approximately \$12,000 in damages for emotional distress and an additional \$19,000 for legal costs.

Impact on the Media

By its terms, Article 8 applies only to the government so the court’s decision does not directly establish a cause of action against the media under UK law. For instance, Peck argued that the BBC and Anglia television could be held liable under the theory that as broadcast licensees they were state entities — an argument the court found unnecessary to address given its decision in the case. ¶¶ 88-89. But the decision will likely provide fuel to the development of a common law right of privacy. Indeed the ECHR’s decision in *Peck* has been cited by Michael Douglas and Catherine Zeta-Jones in support of their highly publicized claim against *Hello!* magazine for its unauthorized publication of the couples’ wedding photographs. The trial on their claim is ongoing and it presents an invitation to the court to recognize a claim against the media parallel to that of *Peck* – invasion of privacy by the publication of true and newsworthy material that cause embarrassing or simply unwanted publicity.

Geoffrey Peck was represented by Philip Leach, Legal Director of the Kurdish Human Rights Project, and formerly Legal Director of the UK civil rights group Liberty. The United Kingdom was represented by Ruma Mandal of the Foreign and Commonwealth Office.

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Barbie Denied Cert: Mattel v. MCA Records

Supreme Court Denies Appeal of Toy-maker in Trademark Case

On January 27, the Supreme Court denied cert in *Mattel v. MCA Records* without comment. (02-633) Mattel was appealing a Ninth Circuit decision which affirmed the dismissal of Mattel's trademark infringement claims against MCA. 296, F. 3d 894 (C.A. 9, 2002). Mattel contended that the hit song "Barbie Girl" distributed by MCA diluted Mattel's trademark in the "Barbie" name and gave the false impression that the toy-maker was involved with the song. According to Mattel, MCA violated Mattel's trademark through the use of certain lyrics in the song, television advertisements for the song which were broadcast during Saturday morning cartoons, as well as the use of a color scheme in advertising materials for the song which were similar to those used by Mattel for the Barbie doll line (specifically electric pink).

The district court for the Central District of California granted MCA's motion for summary judgment and the Ninth Circuit affirmed. The Ninth Circuit held that the song was a parody whose purpose was to comment on the public image projected by the Barbie doll, and therefore protected expression under the First Amendment.

Judge Kozinski, for the court, also stated that it was unlikely that anyone hearing the song would assume that Mattel was involved with the song's creation or promotion, or that the song was part of an advertising campaign by Mattel for the doll. MCA was additionally properly awarded summary judgment on the trademark dilution claim because the song fell under the non-commercial use exception of the Federal Trademark Dilution Act considering that the song was not purely commercial speech.

MCA had brought a cross-claim against Mattel for defamation which was dismissed by the district court and affirmed by the Ninth Circuit. MCA took offense to Mattel comparing MCA to a "bank robber." Judge Kozinski considered the statement "nonactionable rhetorical hyperbole."

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Copyright Claim Dismissed for Lack Of Substantial Similarity

By Joyce S. Meyers

On January 31, Judge Charles R. Weiner of the United States District Court for the Eastern District of Pennsylvania granted summary judgment for defendants in *Daley v. Granada US Productions, et al.*, on a copyright infringement claim. The court held that the defendants' film did not infringe plaintiff's copyright because, despite some similarities in characters, and certain general themes and plot elements, the *copyrightable* elements of the two works are not substantially similar.

Daughters of Robin Hood

The claim arose out of *Princess of Thieves*, a made-for-television film, which was aired by ABC on the *Wonderful World of Disney* and later released as a video. The film tells the story of the coming-of-age of Gwyn, the daughter of Robin Hood, as she demonstrates her courage, idealism and skills to defeat the evil Prince John, place the son of King Richard the Lionheart on the throne, and win her father's respect and approval.

Plaintiff Brian Daley claimed that the film infringed his copyright on *sHerwood*, a "jazz swing" musical play that was also based on the Robin Hood legend and included a plot sequence about Robin Hood's daughter Robyn, who also comes of age and ultimately wins her father's respect and approval.

Similarities Faded With the Viewing

The complaint included long lists of alleged similarities between *Princess of Thieves* and *sHerwood*, including overlapping characters, the coming-of-age theme, the battle against an evil ruler, a daughter's attempt to prove herself to her father, and numerous other plot details. The complaint also claimed that the defendants had access to plaintiff's work, listing the names of eighteen agents and fifty-six theaters to which plaintiff had allegedly submitted his work.

Plaintiff also alleged that the play had been performed in both Philadelphia and New York. Although the complaint attached copies of plaintiff's copyright registrations, it did

not attach the works themselves. Based on the plaintiff's allegations alone, it appeared that the claim would be difficult to defend.

The picture changed considerably, however, when defense counsel requested and obtained copies of the script of *sHerwood* and a video of a production of the play. After viewing videos of both works, it quickly became apparent that, despite the lists of similarities in the complaint, the two works were entirely different. Although both stories revolved around a daughter of Robin Hood and made use of elements from the Robin Hood legend such as Nottingham Castle, Sherwood Forest, merry men, and the villains Prince John and the Sheriff of Nottingham, the plot sequences and the characterizations of the two daughters, as well as the

portrayal of other characters from the Robin Hood legend, were quite different. The total concept and feel of the two works were also quite different. *sHerwood* was a musical play aimed at adults with supernatural and comic elements while *Princess of Thieves* was a straightforward action adventure story aimed primarily at children.

The challenge in the case was to get the court to focus on the differences without getting bogged down in expensive discovery on access or getting sidetracked with collateral issues of fact that could arguably justify a trial.

Defense's Strategy

Defense counsel concluded that, despite certain similar elements in the two works, there was not enough similarity in copyrightable elements, as opposed to elements in the public domain, to support a copyright claim. The challenge in the case was to get the court to focus on the differences without getting bogged down in expensive discovery on access or getting sidetracked with collateral issues of fact that could arguably justify a trial. This challenge was complicated by having a judge who is famous in the Eastern District of Pennsylvania for forcing settlements and resisting dispositive motions.

The defense chose the strategy of answering the complaint and attaching as exhibits the scripts and videos of the two works, then filing a motion for judgment on the pleadings limited to the threshold legal issue of substantial similarity. While the motion was pending, the judge held several status conferences. In each one, he pressed for settlement

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Copyright Claim Dismissed for Lack Of Substantial Similarity

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discussions while plaintiff's lawyer pressed for the deposition of the screenwriter and argued that access was clear and the similarities between the works were sufficient to prove copying. He also informed the judge that he had an expert who would opine that the film was copied from plaintiff's work.

At each of the conferences, defense counsel told the judge that he could dispose of the case in three hours, simply by watching the videos. Although the judge resisted for months and continued trying to get the parties to engage in settlement discussions, defense counsel politely but firmly insisted that he rule on the pending dispositive motion and persuaded him to stay all discovery pending the outcome of the motion.

Experts and a Third Film Finish the Case

Although the works speak for themselves, the court relied on two additional pieces of evidence in ruling on defendants' motion. The first was an expert report by Robert A. Gorman, a law professor and author of a copyright casebook. Defendants initially took the position that no expert opinion was necessary because the court could determine substantial similarity as a matter of law simply by viewing the works. Plaintiff's insistence on submitting an expert report, however, and the judge's obvious willingness to consider it, persuaded defense counsel to retain an expert and submit their own report. Defendants' expert was much more qualified than plaintiff's expert (a producer of TV game shows) and provided a report that supported the factual and legal analysis in defendants' brief. The court explicitly relied on Professor Gorman's report in its opinion.

The other helpful piece of evidence was a 1959 film entitled *Son of Robin Hood*, in which the "son" turned out to be a daughter who, like the daughters in *sHerwood* and *Princess of Thieves*, disguised herself in men's clothes, was skilled in archery, and fell in love. The 1959 film showed that the concept of Robin Hood's daughter was not original with the plaintiff and that the similarities on which plaintiff relied were *scenes a faire*, inherent to any story based on that concept.

Applied an "Extrinsic Test"

Because the court considered the expert reports and the 1959 film, in addition to the videos filed with defendants' answer, it converted the motion for judgment on the pleadings to a motion for summary judgment. The court acknowledged that the element of substantial similarity was a threshold issue of law and applied the "extrinsic test," which focuses on the objective similarities in specific expressive elements, such as plot, themes, dialogue, mood, settings, pace and sequence of events, to determine whether the works were substantially similar.

In applying the extrinsic test, the court filtered out elements that are not protected by copyright, such as general plot ideas and themes in the public domain and situations and incidents flowing naturally from a basic plot premise, or *scenes a faire*. The court acknowledged that the two works shared many of the same characters, a similar setting and certain common action sequences, such as archery tournaments, sword fighting, Nottingham Castle, Sherwood Forest, Robin Hood and his merry men, and the villains, Prince John and the Sheriff of Nottingham.

The court concluded, however, that "a simple viewing of the two works reveals that they are entirely different with respect to plot, themes, sequence of events, mood and setting." The court held that the themes of a young woman trying to prove herself to her father and falling in love were *scenes a faire* that are standard in any story of a young woman coming of age and that the two works expressed the character of Robin Hood's daughter in entirely distinctive manners.

The outcome of this case illustrates the unreliability of lists of similarities and the need to filter out uncopyrightable elements in the analysis of substantial similarity. It also illustrates the importance of getting the court to focus early on the dispositive legal issue of substantial similarity to avoid getting mired in protracted discovery on access.

Plaintiff was represented by Gavin P. Lentz of Bocchetto & Lentz, P.C. Defendants were represented by Joyce S. Meyers, Michael D. Epstein, and Danielle M. White at Montgomery, McCracken, Walker & Rhoads, LLP.

The outcome of this case illustrates the unreliability of lists of similarities and the need to filter out uncopyrightable elements in the analysis of substantial similarity.

The Fight For Enron Documents

By David Donaldson

When Enron collapsed in November of 2001, and when Arthur Andersen was taken to the woodshed for having shredded documents that revealed the depth of Enron's financial shenanigans, it was a sure bet that lawsuits against Enron and those involved with Enron were not far behind. Several such lawsuits were filed against Enron itself, its directors, lawyers, investment bankers, and many others alleging complicity in what is one of the largest financial collapses ever.

While there have been other more recent and larger financial catastrophes, Enron, as one of the first and one of the biggest, has come to symbolize the excesses and questionable financial reporting that has resulted in a great deal of investor skepticism about the stock market since that time. The numerous lawsuits filed over the debacle promised discovery that would illuminate in even greater detail exactly what Enron did and how it did it.

Those cases have now largely been consolidated into the Court of Judge Melinda Harmon, Federal District Judge for the Southern District of Texas, sitting in Houston. (In *Re Enron Corporation Securities Litigation*, Civil Action No. 01-3624, not reported on Westlaw). One of her earliest acts was to enter an aggressive scheduling order in February of 2002 establishing a schedule for the filing of motions to dismiss, the responses to the motions to dismiss, potential rulings on the motions to dismiss, and requiring the creation of a Document Depository to centralize the production of documents into a system that could be accessed by the numerous Plaintiffs and Defendants who would be involved in the litigation. The Document Depository was to be created by April of 2002. As it turned out, it was much later than that before it was created, but that gets ahead of the story.

Private Securities Litigation Reform Act

One of the peculiarities of federal securities law is a relative recent enactment called the Private Securities Litigation Reform Act. Under the PSLRA the filing of a motion to dismiss stays all discovery until the motion to dismiss is

ruled upon. The theory behind the legislation was to limit exposure of companies to substantial discovery burdens until there was some indication that the Plaintiff would be capable of sustaining a lawsuit by surviving a motion to dismiss. Normally the PSLRA would have prevented any discovery of Enron or the other parties while the motions to dismiss were pending. But Judge Harmon, together with the bankruptcy judge overseeing the Enron bankruptcy in New York, allowed some discovery in those instances where Enron had already assembled and provided certain documents to government agencies who were investigating Enron's collapse.

Documents Already Provided to Government Ordered Produced

In February of 2002 Judge Harmon issued an order

This case differed from many other cases involving confidentiality orders because the Plaintiffs and Defendants did not agree on a confidentiality order.

providing for Enron to deposit into the Document Depository all of the documents that Enron had produced to government agencies concerning its ERISA-governed plans for Enron retirees. Concern about retirees who had held substantial amounts of Enron stock

in their portfolios at the time Enron collapsed was the subject of some early congressional hearings. Judge Harmon reasoned that there was no basis for withholding from the Plaintiffs information that Enron had already collected in response to other inquiries.

The Court reached the same conclusion in August of 2002 when it ordered that Enron place into the Document Depository additional documents and materials that had been provided to government agencies investigating a variety of Enron practices. This production was to be subject to the Court's relatively recent standing order concerning protecting privacy in electronically filed documents.

The Southern District of Texas has shown Internet savvy by making it possible to access pleadings filed in that Court through the Pacer system or through the Court's web site. Those pleadings are scanned and made available through Internet access.

But to protect the privacy of persons who may be mentioned in those materials, the Court issued a standing order in July 2002 (No. 2002-09) that provided for the protection

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of personal information that might be included in these Internet accessible materials. The information to be kept private includes social security numbers (except last 4 digits), names of minor children (use initials only), dates of birth (use 1 year only), financial account numbers (except last 4 digits).

But despite both of Judge Harmon's rulings, by September of 2002 no documents had been placed into the Document Depository because the ground rules for the Document Depository had not yet been agreed to by the parties. Although the Court had ordered the parties to agree by April of 2002, the parties had been unable to reach any agreement by that time so the Court issued an order on April 8, 2002, providing that all of the documents that may be produced into the Document Depository, or produced to the Plaintiffs pursuant to earlier orders, should be treated as confidential pending further orders of the Court.

Finally, in September of 2002, most of the parties ultimately agreed to the form of the Document Depository and the Court entered an order creating the Document Depository. By that time the issue had been joined over whether the Court would grant a protective order and, if so, what it would look like.

Confidentiality Order

This case differed from many other cases involving confidentiality orders because the Plaintiffs and Defendants did not agree on a confidentiality order. Frequently the parties to a dispute will enter into an agreement among themselves concerning confidentiality of discovery products. Commonly courts will enter those orders without any serious consideration on input from the public or the media. Usually the media shows up after such orders have been entered and ends up challenging those orders citing the public's interest in the information.

In this case, however, the Plaintiffs themselves *refused* to agree to make anything confidential and actually filed a motion asking the Court not to enter any confidentiality orders on any of the information provided by Enron. At a minimum the Plaintiff did not want the type of blanket confidentiality order that allowed Enron to designate anything it wished as confidential and that designation would hold until someone else could challenge it.

Enron, in response to the Plaintiff's motion, was even more aggressive in its proposed blanket confidentiality order, not only assuring that anything if labeled confidential stayed confidential, but also putting the onus on the Plaintiff to bring forward any documents that they wish to make public and show why they should not be considered confidential.

Media Motion Allowed Over Enron Objection

Dow Jones, joined by Gannett, The New York Times, The Washington Post, ABC News, The Houston Chronicle, and the Reporter's Committee for Freedom of the Press filed a motion to intervene and challenged Enron's requested order, joining with the Plaintiffs in urging the Court not to enter the type of blanket confidentiality order that Enron sought. Enron and the other Defendants challenged the intervention, arguing that the Plaintiff was in an equal position to argue the matters raised by the Media Intervenors and, therefore, there was no need for intervention.

The Court found, however, as the Media Intervenors had argued in reply, that while the Plaintiff's interest and the Media Intervenors' interest were somewhat aligned, the Plaintiff would have different motivations than the Media Intervenors in maintaining the position regarding openness. The Plaintiffs might determine later that their litigation strategy would be served by keeping documents confidential that the Media Intervenors would want to be opened. The Court found that the Media Intervenors were entitled to intervene as of right to assert their interest in openness.

On the merits, the Media Intervenors urged the Court to exercise its discretion to deny any blanket protective order and, at a minimum, deny any protective order on documents Enron had already produced to the government. The Media Intervenors asserted that the materials that were particularly at issue at that point and that were deposited in the Document Depository were documents that Enron had already produced to government agencies. Enron disclosed those materials to government investigators without any explicit promise of confidentiality. Since the government agencies are instruments of the public, the public should have an opportunity to see what the government agencies had seen to both better understand what occurred in the Enron situation and to measure past government duplicity as well as the adequacy of the government's current investigation and actions in the wake of Enron's demise.

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The Fight For Enron Documents

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Court Supports Openness

On the substantive question of whether the blanket confidentiality order should be entered, the Court came to a very favorable conclusion supporting openness in discovery. The Court adopted the Media Intervenors' position that under the Federal Rules of Civil Procedure the parties are presumed to be free to use the discovery products in any manner that they wish. Absent the entry of some form of protective order, the Plaintiffs in the Enron case were free to share the information with the Media Intervenors and others. (In fact, the Plaintiff's lawyers had proposed posting some of the production on a web site to make it available through the Internet).

This was a subtle difference from the usual argument that the media was entitled to access to the unfiled discovery products as a matter of right. Given some of the unfortunate case law concerning access to discovery products that are not filed, the Media Intervenors did not press for a ruling that access was required for that unfiled discovery.¹ Since the Plaintiffs were willing to make available the products of the discovery, as the Federal Rules allow them to do in the absence of a protective order, the Media Intervenors did not need to make an access argument.

Judge Harmon largely adopted the arguments of the Media Intervenors to deny Enron a blanket protective order. Judge Harmon recognized that in most instances the parties have agreed to a protective order, but where the parties have not so agreed the law of the Fifth Circuit (and arguably the law of all circuits in light of the Federal Rules of Civil Procedure) was that discovery products were presumed to be open and shareable with members of the public including the press. Order at 4, referring to *Harris v. Amoco Production Co.*, 768 F.2d 669, 683-64 (5th Cir. 1985); *Citizens First National Bank of Princeton v. Cincinnati Insurance Company*, 178 F.3d 943, 945 (7th Cir. 1999); *San Jose Mercury News, Inc. v. United States District Court*, 187 F.3d 1096, 1103 (9th Cir. 1999).

Judge Harmon denied Enron's request for a blanket protective order and granted Plaintiff's motion that no such blanket protective order should be entered. The Court put Enron to its obligation, under the rules, to make a presentation sufficient to show good cause why a protective order should be entered.

Following a telephone conference concerning the form of any such presentation, the Court entered an order requiring

Enron to make a motion proposing a method for establishing the confidentiality of documents, giving the Media Intervenors and the other parties an opportunity to respond, and then the Court promised to schedule a hearing on the issue. Pending the hearing to set up the mechanism for access and assertion of protective order issues, the Court has kept the documents confidential.

While the Court has denied any blanket confidentiality for the documents that were produced to government agencies, it has not yet ruled on the Media Intervenors' argument, joined by the Plaintiffs, that all of the documents that Enron provided to government investigators are in response to legislative or executive subpoenas should be available for review and not granted any special confidentiality. While we have a good beginning on this issue, more still needs to be done to assure openness in this important dispute.

David Donaldson is with George & Donaldson, Austin, Texas and represented the media.

¹ Although the Court directed the parties to agree on a Document Depository, and later entered an order that endorsed that concept, the Document Depository was a private undertaking by the parties.

California State Court Agrees to Release Computerized Court Records

By James M. Chadwick and Diana Ng

In a case that may establish an important practical precedent, the San Jose Mercury News recently reached a settlement with the Superior Court of California, Santa Clara County under which the Court agreed to distribute data derived from court records in bulk electronic form. The acquiescence of the Court is significant because it recognizes a basis for asserting public access to bulk distribution of computerized court records under California law, and established a blueprint for the amicable resolution of issues arising from the use of electronic databases by courts.

Commencement of Litigation

In October 2001, the Mercury News filed a lawsuit for declaratory and injunctive relief against the Court, its presid-

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Ca. Ct. Agrees to Release Computerized Ct. Records

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ing judge, and its chief executive officer, for access to information in the Court's civil case management database in the case entitled *San Jose Mercury News, Inc. v. Superior Court of California*, United States District Court, Northern District of California, Case No. C 01-20999 RMW. The case also challenged policies that were adopted by the Court in the summer of 2001 cutting off public access to its database through computer terminals in the Courthouse, and even terminating the Court's long-standing policy of providing printed dockets.

The Court's database includes information regarding civil cases filed in Santa Clara County, such as the parties, counsel, case number, filing date, and type of case. This information is obtained primarily from civil case cover sheets required by California statute to be filed with each new case. The database also contains docket information, such as the title of papers filed in civil cases, the subject matter of court orders, dates of hearings, and entry of court orders.

The Mercury News filed suit after the Court rebuffed a reporter's repeated requests for copies of the electronic database and asserted that the database contained confidential information. The Mercury News pointed out to the Court that the vast majority of the information in the database was not confidential because the data was obtained from public court records.

Nevertheless, the Mercury News offered to agree that confidential information could be redacted, to the extent it existed in the database. It further offered to pay the costs of the copies and any computer programming necessary for the redaction of confidential information.

The Court refused to take the Mercury News up on its offers. After the Court cut off all access to its existing database and began refusing to provide printed dockets, the Mercury News sued. The Mercury News contended that the database constituted court records that were subject to public access under the First Amendment, federal common law, and California law.

Settlement Resulting in Bulk Distribution of Computerized Court Records

At the time the Mercury News commenced litigation, the Court was preparing to convert to a new case management database system and had plans to provide the public with remote electronic access to it via the Internet once the conversion was complete. Under the parties' settlement, the Court will provide the Mercury News with electronic copies of the information available to the public on the Court's website in structured data files. The information will be derived from the Court's new case management database, but will include information on all cases from the Court's prior database as well. The Court will provide access to its case calendar, case index, and register of actions, which provide information similar to that available in traditional paper dockets, as well as future scheduled events. The Mercury News will pay the Court the direct costs of generating copies of the electronic database and updates to the database. The Court expects to make the website available to the public in March.

While the Mercury News' lawsuit was pending, the California Judicial Council—which establishes rules for the California courts—considered and adopted rules on electronic access to court records. Over the objections of the Santa Clara County Superior Court, the Judicial Council enacted California Rules of Court ("CRC") 2070 *et seq.*, governing public access to electronic trial court records. Specifically CRC Rule 2073, adopted on July 1, 2002, provides that a "court may provide bulk distribution of only its electronic calendar, register of actions, and index." It defines the term "bulk distribution" to mean "distribution of all, or a significant subset, of the court's electronic records."

However, because the CRC explicitly states that California courts "*may* provide bulk distribution of . . . [their] electronic calendar, register of actions, and index," they are not required to provide them. The settlement between the Mercury News and the Court is particularly significant because of the Court's recognition of the media's right of access to bulk distribution of computerized court records.

Under the parties' settlement, the Court will provide the Mercury News with electronic copies of the information available to the public on the Court's website in structured data files.

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Ca. Ct. Agrees to Release Computerized Ct. Records

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Impact of Settlement

Bulk electronic access to the Court's database is particularly useful for media newsgathering because it permits analysis of civil cases filed in Santa Clara County across categories of cases—such as the number of cases filed against health care providers within a given time period and the outcome of those cases—as opposed to the limited analysis that could only be achieved by a laborious examination of the Court's paper records on a case-by-case basis.

Not only is the information valuable for reporting on new lawsuits filed in the county, but the release of the database also promotes public awareness of the civil cases pending in Santa Clara County. If the public has access to information about lawsuits in their community—such as the doctors most frequently sued for malpractice in the

area, or the number of cases that fail to be adjudicated within the time limitations mandated by California law—the citizenry is better informed and the interests of public safety and justice can be better served.

The Mercury News was represented in the case by Edward P. Davis, Jr., James M. Chadwick, and Diana Ng of Gray Cary Ware & Freidenrich LLP. The Court, presiding judge, and chief executive officer were represented by Jerome Falk, of Howard, Rice, Nemervoski, Canady, Falk & Rabkin, and the California Attorney General's Office.

James M. Chadwick is a partner at Gray Cary Ware & Freidenrich LLP in Palo Alto, California. Diane Ng is an associate at the firm.

Newspaper's Motion to Obtain Report on 'Business' Bankruptcy

Bankruptcy Judge Urges Party to Withdraw Motion Rather than Provide Public With Report

The Copley Press has sought to obtain a key report in the bankruptcy proceedings of Peregrine Systems, Inc., ultimately obtaining mixed results from Judge Fitzgerald. *In re Peregrine Systems, Inc.*, Case No. 02-12740, Fitzgerald, J. (Bankr. D. Del.).

Peregrine Systems filed for protection under Chapter 11 in Bankruptcy Court in Delaware when, after announcing that restated earnings would show a decrease of \$250 million, a slew of lawsuits were filed against it.

A special audit committee overseen by Latham & Watkins conducted an investigation and prepared a report (the "Latham Report"), detailing incidents of fraud and financial misconduct. The report was given to the SEC and to the Committee of Unsecured Creditors.

The Committee filed a motion for an evidentiary hearing to appoint a Chapter 11 trustee to manage the affairs of Peregrine. The Committee attached the Latham Report. The motion and the Latham Report were filed under seal. The judge granted the motion and scheduled a trial.

The Committee then filed under seal a motion to determine that the Latham Report is admissible in evidence at the trial.

The Copley Press filed a motion to unseal the motions and the Latham Report. Peregrine argued that the Latham Report should remain under seal because (i) it would compromise an ongoing SEC investigation, (ii) it contained defamatory material, and (iii) it contained confidential commercial information. The SEC said it had no objection to unsealing the Latham Report.

Judge Fitzgerald held that the Latham Report would be stricken from the record as it was not relevant to any of the issues presently before the Court. The judge then convinced the Committee of Unsecured Creditors to withdraw its motion to determine the admissibility of the Latham Report, and to refile a more limited version. Counsel for the Committee stated that, although he believed that case law supported the admissibility of the entire report, he would refile the motion seeking the admission of only those portions of the Latham Report involving admissions by Peregrine. The judge unsealed the motions themselves, subject to redaction.

The Copley Press has filed a motion for reconsideration.

Counsel for The Copley Press, Inc.: David L. Finger, Wilmington, DE, www.davidfinger.com

Harry Potter Series Tops List of the American Library Association's Most Challenged Books Four Years in a Row

According to the American Library Association's (ALA) Office for Intellectual Freedom, the Harry Potter series of children's books by J.K. Rowling tops the list of books most challenged in 2002. The Potter series drew complaints from parents and others concerned about the books' focus on wizardry and magic.

The ALA Office for Intellectual Freedom, in a press release issued in January, said that it had received a total of 515 reports of challenges last year, a 15 percent increase since 2001. ALA defines a challenge as a formal, written complaint, filed with a library or school, requesting that materials be removed because of content or appropriateness. The majority of challenges are reported by public libraries, schools and school libraries. Judith F. Krug, director of the Office for Intellectual Freedom, was quoted in the release as stating that the number of challenges reflects only incidents reported, and for each challenge reported, four or five remain unreported.

In addition to the Harry Potter series, the books, in order of most frequently challenged in 2002 were: Alice series, by Phyllis Reynolds Naylor, for being sexually explicit, using offensive language and being unsuited to age group.

"The Chocolate War" by Robert Cormier (the "Most Challenged" book of 1998), for using offensive language and being unsuited to age group. "I Know Why the Caged Bird Sings" by Maya Angelou, for sexual content, racism, offensive language, violence and being unsuited to age group.

"Taming the Star Runner" by S.E. Hinton, for offensive language.

"Captain Underpants" by Dav Pilkey, for insensitivity and being unsuited to age group, as well as encouraging children to disobey authority.

"The Adventures of Huckleberry Finn" by Mark Twain, for racism, insensitivity and offensive language.

"Bridge to Terabithia" by Katherine Paterson, for offensive language, sexual content and Occult/Satanism.

"Roll of Thunder, Hear My Cry" by Mildred D. Taylor, for insensitivity, racism and offensive language.

"Julie of the Wolves" by Julie Craighead George, for sexual content, offensive language, violence and being unsuited to age group.

Other books that the ALA report as having been on recent lists in the past included "Of Mice and Men," by John Steinbeck, for using offensive language and being unsuited to age group; "The Catcher in the Rye" by J.D. Salinger for offensive language and being unsuited to age group; "The Color Purple," by Alice Walker, for sexual content and offensive language; "Fallen Angels," by Walter Dean Myers, for offensive language and being unsuited to age group; and "Blood and Chocolate" by Annette Curtis Klause for being sexually explicit and unsuited to age group.

Published in July 2003

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D.C. District Court Rules EPIC is Member of “News Media” for FOIA Purposes

On January 16, Judge John Bates of the federal district court of the District of Columbia ordered that the Electronic Privacy Information Center (EPIC), a public-interest organization headquartered in D.C., be classified as a “representative of the news media” by the Defense Department (DoD) for purposes of Freedom of Information Act (FOIA) requests. *Electronic Privacy Information Center v. Department of Defense*, 2003 WL 132432 (D.D.C.) The order means that EPIC will now have preferred fee status when making FOIA request to the Pentagon and can only be charged for document duplication (over 100 pages).

DoD had determined that EPIC was not a member of the news media under DoD regulations because the organization was not organized or operated to publish news, and therefore not entitled to the reduced fee. EPIC contends that it is in fact a representative of the news media because it regularly publishes articles, produces a newsletter on its website (www.epic.org), as well as writes, edits and publishes books on various privacy and civil liberties issues.

Background

On February 21, 2002, EPIC submitted a FOIA request to DoD for all records relating to the government’s new intelligence initiative, the Information Awareness Project, and the project’s director, John Poindexter. In the request, EPIC asked to be classified as a member of the news media due to its website publications (including an electronic newsletter), online library, book publishing, and that EPIC staff members regularly contribute to other news media outlets.

DoD denied EPIC’s request to be considered a member of the news media. Internal DoD regulations specify in order to be considered “news media”, the entity making the FOIA request must actively gather news and be organized to disseminate news to the public. “News” according to the DoD is “information that is about current events or that would be of current interest to the public.”

DoD claimed that the information requested by EPIC was not “news,” and that while EPIC did engage in some dissemination of information to the public, the organization’s internal structure was not designed for this purpose. DoD then classified EPIC as an “other” entity subject to fees for the collection and copying of requested documents.

EPIC’s appeal of the decision, as well as a request for reconsideration of the appeal were denied by DoD.

EPIC then filed a suit with the D.C. district court and asked that the court declare that EPIC was a member of the “news media” under FIRA and DoD regulations.

FOIA & FIRA

FOIA was amended in 1986 by the Freedom of Information Reform Act (FIRA). The statute mandates that each federal agency adopt regulations relating to which type of organizations and/or individuals will be eligible for fee waivers or reductions for searches and duplications undertaken to fulfill a FOIA request. An entity making a FOIA request for a commercial purpose may be charged. However, an entity can only be charged for duplications over 100 copies if the request is for a non-commercial purpose and the entity is either a “educational or noncommercial scientific institution, whose purpose is scholarly or scientific research; or a representative of the news media”. 5 U.S.C. §552 (a)(4) (A)(ii)(II) Those entities which do not fall under any of the waiver categories are placed in the “other” category and may be charged for document search and duplication. In the present suit, DoD placed EPIC within the “other” category.

Analysis

The two parties first disagreed as to whether the court should review DoD’s decision de novo or with greater deference. While FIRA’s language, statutory history, and court precedent indicated a de novo review, the court sidestepped the issue by declaring that the result would be the same regardless of the standard used.

National Security Archive v. Dep’t of Defense

Judge Bates ruled that the issue of whether EPIC properly qualifies as a representative of the “news media” is governed by *National Security Archive v. Dep’t. of Defense*, 880 F. 2d 1381 (D.C. Cir. 1989). In *National Security*, a non-profit organization, National Security Archive, made a FOIA request similar to EPIC’s and asked to be classified as a member of the “news media” based on its dissemination of government information to the public. Based on a review of

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FIRA’s legislative history, the court found that Congress intended for entities such as National Security Archive to be included within the “news media” fee waiver.

“News media”, the *National Security* court ruled, is to be interpreted broadly so as to include “any person or organization which regularly publishes or disseminates information to the public” (remarks of Senator Leahy). Specifically, the court held,

“[a] representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw material into a distinct work, and distributed that work to an audience.” *Id.* at 1387.

Applying this standard, the court held that National Security Archive fell within the “news media” waiver as the organization intended to distribute the information which it requested to the public, and disseminated

information to the public in the past through articles and maintenance of a library database. The *National Security* court was careful to note however that merely making information available to the public in a library and/or database did not, by itself, satisfy the “news media” standard. However, the standard was met when National Security’s intent to actively disseminate the information was combined with the organization’s library.

EPIC’s Activities Make it Part of “News Media”

The court then examined the type of activities EPIC engaged in and determined that EPIC met the threshold set in *National Security*. EPIC’s activities included collecting information from the government and other sources, analyzing and editing this information, and then disseminating it to the public in the form of books and other publications. These publications, on various privacy and other civil liberty topics, also, the court noted, contained information in which the public had an interest.

DoD asserted that EPIC is a “public interest research center”, a type of organization which Congress never intended to a recipient of a fee waiver. According to DoD, the fact that EPIC is a “public interest research center” precluded it from being a disseminator of news. The court disregarded this argument ruling that even if EPIC was organized as a “public interest research center”, its *activities* were similar to that of the news media. As in *National Security*, the court stressed that, “Labels and titles alone, therefore do not govern; the organization’s substantive activities control.”

The court also dismissed DoD’s argument that EPIC’s status as a tax-exempt entity under 26 U.S.C. §501(c)(3)

precluded EPIC from receiving the waiver. Nowhere in either FIRA or DoD regulations, according to the court, is there any mention of tax-exempt organizations from being ruled ineligible from receiving the fee waiver. The “determinative” factor is

EPIC’s activities, not its internal organization or tax status. The court also noted that the requesting entity in *National Security* was tax-exempt.

Electronic Newsletter Falls Under “News Media”

The court determined as well that EPIC was a member of the “news media” because of its biweekly newsletter. DoD regulations state that “publishers of periodicals” can be a “representative of the news media” but only when the publisher disseminates news to the public. 32 *C.F.R.* §286.28(e)(7)(i)(2002) While DoD did not define the term, the court held that EPIC’s newsletter qualifies as a “periodical” because it is published on a regular interval (biweekly) and contains information in which the public has an interest.

Specifically, the newsletter disseminates “news” on various civil liberty issues, court cases, legislation and other government actions, as well as social trends in pri-

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“News media”, the National Security court ruled, is to be interpreted broadly so as to include “any person or organization which regularly publishes or disseminates information to the public” (remarks of Senator Leahy).

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vacy, and international developments. The court also took note of that the newsletter is sent to other journalists, indicating the content was “news”. If the newsletter resembled a press release and only contained information about EPIC, then, the court said it would be more difficult to find EPIC a “disseminator of news”. The newsletter is also made easily accessible to the general public through either a subscription or in an electronic library on the EPIC website.

The fact that the newsletter is delivered electronically had no bearing on the court. Although merely having a website is not enough to justify a “news media” fee waiver. The

court pointed out that many types of entities have websites and do not engage in the dissemination of information to the public. Simply allowing any organization or individual with site to receive the waiver would result in a end run around the intent of the legislation. Finally, Judge Bates took notice that other government agencies have previously granted EPIC a “news media” fee waiver.

For EPIC: David Sobel and Marc Rotenberg of EPIC (Washington, DC).

For DoD: Peter S. Smith, Heather Graham-Oliver, Special Assistant United States Attorney (Washington, DC).

War and Post 9/11 Access Matters:***Suit for Afghan War Access / Iraq Plans / INS Gags / Patriot II Leaked / NJ Court Closed / 9-11 Records Sought******Hustler’s Suit Seeking Troop Access Dismissed***

While reiterating his view that “there may be a limited or qualified right of the media access to the battlefield,” U.S. District Court Judge Paul Friedman nevertheless dismissed a lawsuit brought by Larry Flynt and *Hustler* magazine over the Defense Department’s failure to allow *Hustler* reporters to accompany troops during military operations in Afghanistan. *Flynt v. Rumsfeld*, Civil. No. 01-2399, 2003 WL 355958, *12 (D.D.C. Feb. 19, 2003).

Flynt told reporters that he would appeal the decision. “We’re going to ask the appellate court and hopefully the Supreme Court for a definitive ruling,” the Associated Press reported Flynt saying. “Do we have a First Amendment right to cover the war, period?”

Friedman added that he was “hesitant ... to announce such a significant principle of First Amendment protection in the context of a new application of the facial challenge mechanism, unmoored to a case or controversy in the traditional sense,” *id.*, and dismissed the case on the grounds that it was unripe and that the plaintiffs lacked standing. “The Supreme Court’s direction to consider declaratory relief through the lens of ‘wise judicial administration’ cautions against taking such a bold step in the current posture of this case,” he wrote. *Id.*

Flynt filed suit after he sent two letters to Pentagon officials seeking to have reporters accompany ground troops on combat missions in Afghanistan. In response, the reporters’ names were placed on a waiting list for access to humanitarian missions and airstrike flights, and they were told that the same list would be used for access to ground troops once it was permitted. In late January 2002 – two weeks after Judge Friedman denied Flynt’s request for a preliminary injunction (*see LDRC LibelLetter*, Jan. 2002, at 37) – the Pentagon began organizing press pools to accompany troops on missions in Afghanistan.

When Friedman heard argument regarding the government’s motion to dismiss on May 8, 2002, American troops were still rooting out Taliban and al Qaeda forces in eastern Afghanistan. When he released his decision nine months later, the American military was still involved in occasional skirmishes, but the nation was under at least nominal control of a new government, and aid agencies were attempting to rebuild the country.

Friedman held that *Hustler*’s claims were unripe because the magazine was not denied access to ground troops that was available to others. At the time, he wrote, no me-

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media organizations were being granted such access; like *Hustler*, they were placed on a list to be used when access was available. "Absent a final agency decision denying plaintiffs' request for access," he concluded, "plaintiffs' as-applied claims based on this alleged denial are unfit for adjudication." *6.

Friedman's view that the Pentagon had not actually denied access when *Hustler* filed suit also led him to the conclusion that the plaintiffs lacked standing for the suit because they had not suffered an actual injury.

Finally, Friedman rejected the Pentagon's arguments that the plaintiff's facial challenge to its media access policies should be dismissed on the grounds that the case was not "prudentially ripe" for adjudication (for application of this principle, see, e.g., *Suitam*

v. Tahoe Regional Planning Agency, 520 U.S. 725, 733 (1997)) and that the case presented a political question. Nevertheless, he concluded that "the more prudent course is to delay resolution of these consti-

tutional issues until and unless plaintiffs are denied access after having pursued their request through normal military channels."

John Perazich of Washington, D.C. represented the plaintiffs. John R. Griffiths, David Jay Anderson, and Vincent Morgan Garvey, all of the U.S. Department of Justice, Civil Division, represented the government.

Military Releases Embedding Plans

As the American military continued its preparations for military action against Iraq, in mid-February the Pentagon informed news organizations of how many journalists they will be able to send to join American troops, and the units to which they will be assigned.

Military officials said that their goal was to facilitate coverage of the fighting, and to counter propaganda from the other side.

The media were also provided with a lengthy set of guidelines for coverage of military operations in Iraq, in-

cluding restrictions on reporting about military operations. Reporting on future missions is strictly prohibited under the guidelines, while coverage of on-going engagements is subject to commander approval. The document states that reporting may only generally refer to time, location and results of past military missions.

The Pentagon's approach is a marked difference from last year's military activity in Afghanistan, where the military initially limited coverage to sanctioned press pools. In other military actions of recent years, the press have complained about restrictions on access, information, and reporting imposed by the American military. After coverage restrictions led to tension during the first Persian Gulf War, the military and the media formulated a set of principles

which was to serve as a blueprint for coverage of future military action. See *LDRC LibelLetter*, Oct. 2001, at 60.

The document laying out the military's rules for news coverage in Iraq was sent to reporters as media outlets were

informed about "embedding" reporters with American troops during any operation in Iraq, reported *Editor & Publisher* on Feb. 14.

Pentagon officials also announced plans to hold remote press conferences with field military commanders in combat zones in any Iraq operation, using two-way satellite video phones.

More than 500 journalists are expected to be included in the program, including more than 100 from non-American news organizations. About 230 reporters have attended Pentagon-sponsored training sessions to prepare for covering the military, and several news organizations have paid for private training for their employees. See *LDRC MediaLawLetter*, Nov. 2002, at 41.

Pentagon officials told *E&P* that reporters will be permitted to leave the units to which they are assigned, but may not be permitted to return. "If the reporter decides to leave the slot, the slot becomes vacant," U.S. Defense Department Press Operations Director Col. Jay DeFrank.

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While military officials said that reporters will be able to come to the region on their own, without being embedded, it is unclear how much freedom such reporters will have.

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“But there may be exceptions.”

While military officials said that reporters will be able to come to the region on their own, without being embedded, it is unclear how much freedom such reporters will have. Such reporters will apparently not have military credentials – which, depending on the circumstances, could place them in either more or less personal peril.

There were also concerns about whether smaller publications and broadcast outlets, as well as those not owned by major chains, would be included in the embedding program.

While journalists have expressed concerns about military restrictions on coverage, an ABC News poll released in mid-January found that most Americans favored such restrictions. Sixty percent of those polled agreed that the government’s need to keep secrets in wartime is more important than freedom of speech, while 34 percent disagreed. The poll had a margin of error of three percentage points.

Domestically, in mid-February the Bush Administration expelled a reporter who covered the United Nations for Iraq’s official news agency, saying that he his activities were a threat to national security. In an apparent response, Iraq expelled a reporter from Fox News who had been stationed in Baghdad.

INS Rule Gags Local Jails

The Immigration and Naturalization Service has finalized a rule first proposed last April which prohibits jails operated by state and local governments and private contractors from disclosing information regarding INS detainees. See 68 Fed. Reg. 4364 (Jan. 29, 2003) (adopting 8 CFR § 236). For text of the rule, see 67 Fed. Reg. 19508 (April 22, 2002); see also *LDRC MediaLawLetter*, April 2002, at 62. For government facilities, the INS rule trumps state and local freedom of information laws.

The INS often contracts with local government and

privately-operated jails to house immigrants who are subject to various types of proceedings, including determination of refugee status and deportation.

The rule was made effective the same day that the final version was published in the *Federal Register*, although it had already been put in force during the required public comment period. Information covered by the new rule includes a detainee’s name and any details regarding the detainee’s case.

In enacting the final rule, the INS rejected submitted comments from the ACLU and other groups arguing that the rule violated various constitutional provisions including the First Amendment, that it violates international law, that it exceeds the Attorney General’s authority, and that it was implemented improperly.

The rule was drafted after a New Jersey trial court held that local jails were required to by the state’s freedom of information law to release names of those detained while the INS pursues deportation proceedings. That

decision was reversed by a state appeals court, which cited the new INS rule in its decision. See *American Civil Liberties Union of New Jersey v. County of Hudson*, 352 N.J. Super. 44, 799 A.2d 629 (N.J. Super. App. Div. 2002), *rev. denied*, 174 N.J. 190, 803 A.2d 1162 (table) (N.J. 2002); see also *LDRC MediaLawLetter*, June 2002, at 61, and July 2002, at 37.

An appeal of a decision ordering disclosure of detainees’ names nationwide under the federal Freedom of Information Act was heard by the D.C. Circuit in November. *Center for Nat’l Security Studies v. U.S. Dept. of Justice*, Nos. 02-5254, 02-5300 (D.C. Cir. argued Nov. 18, 2002); see *LDRC MediaLawLetter*, Nov. 2002, at 35.

Patriot Act II Leaked

In early February the Center for Public Integrity posted on its web site a document which it said was a draft of legislation to further provisions of the USA Patriot Act, passed in October 2001 in reaction to the terrorist attacks.

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that was available to others.***

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The text and analyses of the proposal are available on the center's website, www.publicintegrity.org. For a summary of provisions of the first act, see *LDRC LibelLetter*, Dec. 2001, at 47.

The Center said that the proposed legislation had been drafted by Justice Department attorneys, and that the existence of the draft – although not its contents – had been discussed on Capitol Hill for several weeks.

After the document became public, the Justice Department issued a statement that the Department is “continually considering anti-terrorism measures and would be derelict if we were not doing so. ... Department staff have not presented any final proposals to either the Attorney General or the White House. It would be premature to speculate on any future decisions, particularly ideas or proposals that are still being discussed at staff levels.”

According to the Center, the draft legislation would prevent targets of subpoenas in terrorism investigations from disclosing the fact that they have been subpoenaed; specifically provide that information regarding persons detained as part of terrorism investigations be exempt from disclosure under the Freedom of Information Act; limit access to companies' reports on possible environmental hazards of the chemicals they use; provide that Congressional information provided to OSHA in order to meet the agency's workplace standards be exempt from FOIA; and impose federal grand jury secrecy rules on grand jury witnesses and counsel in terrorism cases.

Other provisions would allow evidence gathered in intelligence investigations to be used in criminal prosecutions without the approval from the Attorney General now required; allow administrative subpoenas in terrorism investigations instead of only those issued by grand juries; allow for sharing of more types of information between the federal government and state, local, and foreign governments; and protect businesses from civil liability for disclosing information to the federal government.

Groups Seek Appeal of Secret Court's Decision

A coalition of civil rights and Arab-American groups has asked the U.S. Supreme Court to review the first decision ever by a court established in 1978 to hear appeals

regarding government requests for surveillance as part of intelligence investigations.

The petition stems from the first decision ever by the Foreign Intelligence Surveillance Court of Review, holding that a new policy allowing use of evidence gathered in intelligence investigations in non-intelligence cases, such as criminal prosecutions, was permissible under the Foreign Intelligence Surveillance Act of 1978 (FISA). *In re: Sealed Case No. 02-001*, 2002 WL 31546991 (F.I.S. Ct. Rev. Nov. 18, 2002), available at www.cadc.uscourts.gov/common/newsroom/02-001.pdf; see also *LDRC MediaLawLetter*, Nov. 2002, at 43.

While the groups' petition for *certiorari* does not address the secrecy of the lower courts, it is raised in their petition for leave to intervene in the case. “These fundamental issues should not be finally adjudicated by courts that sit in secret, do not ordinarily publish their decisions, and allow only the government to appear before them,” the groups argued in the petition.

The petition argues that the government is unlikely to seek review because the Court of Review agreed with most of its arguments, and that the target of the surveillance order cannot seek review because he or she is not even aware of the proceeding.

While the statute creating the Court of Review authorizes oral argument by the government only, the appeals court did accept amicus briefs from a coalition of civil rights groups and from National Association of Criminal Defense Lawyers.

The coalition that submitted the *certiorari* petition consists of the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the American-Arab Anti-Discrimination Committee and the Arab Community Center for Economic and Social Services.

9/11 Records: City Must Release Most Fire Dept. Records, Disclosure of Death Certificate Filings Less Certain

New York City must release most written and audio records relating to the fire department's response to the Sept. 11 attacks on the World Trade Center, a Manhattan trial judge ruled in early February. The ruling came in an

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Article 78 proceeding (brought under that article of New York's Civil Practice Law and Rules, which allows for challenges of decisions by government officials or agencies) by *The New York Times* and the families of nine World Trade Center victims. *New York Times Co. v. City of New York Fire Department*, No. 110753/02 (N.Y. Sup. Ct., N.Y. County order Feb. 4, 2003).

The city had asserted several rationales to prevent disclosure, including the use of some of the material in the prosecution of alleged terrorist conspirator Zacarias Mousaoui, and violation of firefighters' privacy.

Supreme Court Justice Richard Braun rejected most of these arguments. But he ruled that the city could withhold materials, such as opinions expressed in interviews and intra-agency documents, that will be used to formulate new policies regarding fire department reactions to future disasters.

"The press and public should be permitted to obtain as much non-exempt information as available in relation to one of the most poignant episodes of our lifetimes," Braun wrote.

Meanwhile, a New York City Surrogate's Court judge reserved judgment on a motion brought by the Associated Press requesting access to papers filed by families of World Trade Center victims seeking death certificates under a special procedure set up after the disaster. The procedure is in the form of a declaratory judgment action brought in the name of the city's medical examiner against the city's health commissioner seeking issuance of death certificates based on documents submitted by families. The AP sought access to the documents by filing a motion in this case to expedite the death certificate process. *See Hirsch v. Frieden*, No. 754000/01 (N.Y. Sup. Ct., N.Y. County filed Sept. 2001).

But Surrogate Eve Preminger indicated during a Feb. 13 hearing that she generally agreed with the recommendations of NYU Law Professor and former ACLU legal director Burt Neuborne, who she appointed to represent the interests of the families in January.

Neuborne recommended that the affidavits filed by 2,400 families remain sealed, but urged disclosure of 50 applications that were found to be fraudulent. He also recommended that personal information such as Social Security numbers and salary information not be disclosed, but that opinions of the judges that granted or denied death certificates should be made public.

The AP accepted the latter two recommendations, but the Manhattan District Attorney's Office objected to the second, regarding disclosure of decisions regarding death certificate grants and denials.

David Schulz of Clifford Chance is representing the AP.

"The press and public should be permitted to obtain as much non-exempt information as available in relation to one of the most poignant episodes of our lifetimes," Judge Braun wrote.

N.J. Appellate Court Reverses Closed Hearings

A trial court judge closed a remand hearing in the case of an Egyptian immigrant accused of forgery without adequate findings, a New Jersey appeals court ruled in mid-January. The appellate court ordered that the lower court hold a new hearing, and to adequately justify any closure. *State v. El-Atriss*, No W-3337476 (N.J. Super. Ct. App. Div. order Jan. 14, 2003).

On July 31, 2002, deputies with the sheriff's office in Passaic County, N.J. raided the home and business of Mohammed El-Atriss, saying that he produced fake IDs including those used by two of the Sept. 11 hijackers. But shortly after the raids, a federal law enforcement official told *The New York Times* that the sheriff's actions had jeopardized a larger investigation into El-Atriss's alleged ties to terrorists.

Passaic Sheriff Jerry Speziale, who invited dozens of reporters to join the raid on El-Atriss's business, was reportedly later lectured about cooperation at a meeting with the New Jersey Attorney General and the local federal prosecutor.

El-Atriss was arrested on state forgery charges at John F. Kennedy Airport in New York on Aug. 20, as he returned from a trip to Egypt. He appeared in handcuffs and

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chains before Judge Marilyn C. Clark of the New Jersey Superior Court three days later, and was ordered held in lieu of \$250,000 cash bail.

“This case must be approached with the utmost caution,” Clark said at that hearing, citing the then-ongoing investigation into El-Atriss’s links to terrorists.

After the Aug. 23 hearing, Judge Clark apparently held three additional bail hearings in closed courtrooms: on Nov. 19, an unknown date, and on Jan. 8, 2003. In addition to being closed to the public, the defendant himself was barred from the proceedings, as was his attorney.

According to *The New Jersey Law Journal*, Judge Clark herself first suggested the closure and that the case record be sealed in a letter to both the prosecution and defense counsel in October. Senior Assistant Passaic County Prosecutor Steven Brizek then formally requested closure. Clark did not issue a formal opinion granting the request, but cited as authority *State v. Campesi*, 64 N.J. 120, 313 A.2d 193 (N.J. 1973), an obscure case in which the New Jersey Supreme Court rejected a defendant’s contention that the trial judge should have set bail without regard to sealed testimony and affidavits regarding the defendant’s alleged connections to organized crime.

El-Atriss’s attorney at the time did not object to the decision to close the proceedings until after the Nov. 19 hearing was held in closed court. Clark responded that she had ensured that El-Atriss had received due process, and then raised his bail to \$500,000.

The subject matter of the two other hearings is unclear, although the *Law Journal* reported that Clark heard testimony from Brizek and two other witnesses. Again, the defendant and his lawyer were excluded.

After the third closed hearing on Jan. 8, El-Atriss’s new lawyer, solo practitioner Miles Feinstein of Clifton, N.J., filed an emergency motion with the Superior Court’s Appellate Division challenging the closure order. Stating that the closure decision “neither articulated nor applied the standards upon which the trial court relied,” the Appellate Division remanded for such a statement. The appeals court also noted that while Judge Clark had invoked national security concerns, she had not first asked the federal government to participate in the case, and required that she do so on remand.

But by that time the federal government’s interest in the case had apparently waned. “The U.S. Attorney’s office is not involved in the case,” U.S. Department of Justice spokesperson Michael Drewniak told the *Law Journal* for a Jan. 15 article. “Hence it is entirely in the hands of the Passaic County Prosecutor’s Office.”

After remand, the defendant plead guilty on Feb. 4 to one count of second-degree sale of simulated documents, and was sentenced to five years’ probation.

At a hearing accepting the plea – held in open court – Judge Clark said that without the agreement she had been planning to proceed with a hearing regarding closure of proceedings in the case. She also agreed to El-Atriss’s request that the address at which he would be staying not be disclosed.

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Federal Trade Commission Pushes Proposal to Penalize Press Over Diet Ads

FTC Asserts Eight Ad Claims are “Almost Certainly False”

By Bruce E. H. Johnson, Jeffrey L. Fisher, and Victor A. Kovner

The Federal Trade Commission appears to be moving ahead with a proposal, for the first time in its history and in apparent violation of representations it made to Congress almost seventy years ago, to hold the media liable for failing to screen allegedly false advertisements. The object of the FTC’s ire is diet advertising.

Announces Proposal at FTC Workshop

On November 14, 2002, the Commission conducted a Workshop on Advertising of Weight Loss Products (the “Workshop”). The Commission had announced that it intended to issue a list of eight weight loss claims that members of the media would be instructed to refuse in accepting advertisements, on pain of FTC sanctions.

Prior to the Workshop, an FTC Commissioner publicly complained that “[o]ur law enforcement experience suggests that some media members are not paying close enough attention to the [weight loss] ads that are being run.” She went on to warn that “[the FTC] is looking broadly at the question of who has liability for deceptive advertising claims” and “caution[ed] those that assume that they are immune to an enforcement action as long as they don’t sell dangerous products or cancer cures.”

At the Workshop, the FTC asked participants to assume that the United States Government has determined that eight types of weight loss claims are “almost certainly false” – regardless of context – and informed the media that Commission guidelines will mean that the press will risk liability if they allowed any advertisements containing these claims to be published. The Commission claimed that imposing a duty of pre-screening ads on magazines and newspapers will not be difficult because “a simple reading” of proposed ad copy and subsequent elimination of eight specific types of claims that the FTC determines are likely to be false “on their face” are all that is necessary to avoid the FTC’s threats of media liability.

In connection with the Workshop, the Commission actively explored whether providing the media with formal notification of these allegedly false claims (*i.e.* issuing its own list of prohibited diet claims) could serve as a predicate to a successful enforcement action. In response to the query, the only legal expert the Commission invited to the Workshop concluded that “formal notification would make some sort of FTC action easier.”

FTC Not Deterred By Opposition

Following the Workshop, *The Wall Street Journal* reported that “[the] Commission is pressing cable channels, newspapers and magazines to reject false and misleading diet and health advertising – and making veiled threats of legal action if they don’t.” In a follow-up article in *USA Today* the Commission said that, while it is “premature,” suing media outlets that refuse to screen false advertisements would be among the Commission’s options.

On February 3, 2003, the Magazine Publisher of America (“MPA”) and the Newspaper Association of America (“NAA”), filed comments (“Comments”) that were critical of the Commission’s stance. These Comments are described in greater detail below.

In February 2003, notwithstanding media criticisms and concerns about the proposal, Commission members and staff began paying visits to major publishers, discussing the FTC’s proposed guidelines that were intended to require the press to pre-screen diet ads and to reject advertising containing claims that the Commission has predetermined would be deemed false. Initial feedback from these meetings suggests that the Commission is not deterred by the opposition expressed to its threatened diet ad guidelines and that it will press ahead with the initiative, notwithstanding constitutional, statutory, and factual problems with its assumptions and its plans. We do not have a complete list of the media entities the Commission is contacting. If your clients are targeted for a visit, you may be interested in reviewing the MPA/NAA Comments.

“Our law enforcement experience suggests that some media members are not paying close enough attention to the [weight loss] ads that are being run.”

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FTC Pushes Proposal to Penalize Press Over Diet Ads

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As part of this media relations campaign, Commissioner Anthony told *Advertising Age* (as reported in its February 3, 2003 issue):

“The media should engage in pre-publication screening of potentially problematic ads. Newspapers, magazines, radio stations and cable TV should follow the lead of the major broadcast TV networks and responsible print-media companies by refusing to run or promote those ads, that, on their face, promise incredible and unachievable results. Our recent law-enforcement experience suggests that some members of the media are, for the most part, not paying enough attention to the ads they publish.”

Commissioner Anthony also noted that while she was concerned by some comments on the industry panel at the Workshop, “in some ways, she was most disappointed by [the media] panel” because they “admitted that they do not pre-screen ads.” She said she “found this very disturbing” because she “think[s] consumers trust the media to screen ads at some level.”

FTC Chairman Muris told the Cable Television Advertising Bureau on February 11, 2003, that the media should join with the Commission in a “joint endeavor” in rejecting what the Commission decides are “obviously false ads.” The determination of which diet claims were scientifically valid, he suggested, was a simple task: “This is not rocket science,” he said. “You take extensive steps to prevent defamation,” he added. “We are asking for modest steps to prevent fraud.” Muris also told media representatives that the Commission would not require them to develop “network-style screening” of diet products.

“Instead, we will send you a list of claims that are commonly made, but that the scientists state are not valid. We will do the hard part of developing the list. You need only screen out those claims. It is still a tough job, but there is no one better qualified than you to do it.”

Chairman Muris also characterized these weight loss ads as

a “plague” – and, indeed, the FTC’s own data showed that the number of distinct weight loss advertisements appearing in magazines increased 212% between 1992 and 2001. However, the actual increase in advertisements was a modest 11, from 9 distinct advertisements in 1992 to 20 in 2001. Moreover, for all products except dietary supplements, advertising actually decreased from 1992 to 2001, with 7 products advertised in 1992 and only 6 products advertised in 2001.

The only increase in advertisements from 1992 to 2001 occurred for dietary supplements, which went from 0 to 12, but this increase in advertisements for dietary supplements is likely related to the passage of the Dietary Supplement Health and Education Act of 1994, not to increased greed on the part of publishers. Prior to 1994, dietary supplements were subject to pre-market approval by the FDA. After 1994 they were not.)

The Commission is apparently relying on two sections of the FTC Act – but neither supports FTC actions against the media.

No Statutory Support for Media Liability

Notwithstanding Chairman Muris’ optimism that the media will fall in line behind the Commission’s goals, the FTC’s statutory hurdles are significant. In threatening to impose false advertising liability on the press

for publication of advertisements containing these eight “almost certainly false” diet claims, the Commission is apparently relying on two sections of the FTC Act – but neither supports FTC actions against the media. Section 14 of the FTC Act, 15 U.S.C. §54, which allows the imposition of criminal fines for false advertising, provides a clear exemption to the media, and explicitly states that no such fines may be levied against any “publisher,” “radio-broadcast licensee” or similar media entity solely for disseminating an unlawful advertisement.

The alternative basis for media liability is Section 13 of the FTC Act, 15 U.S.C. §53, which allows for equitable civil penalties for false advertising. But the Commission told Congress when it received these powers that it would not exercise this jurisdiction over the media. In 1936, in response to media concerns when Congress proposed to codify the Commission’s right to punish false or deceptive advertising, the Commission suggested that it lacked the power to issue complaints against the press, as opposed to

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FTC Pushes Proposal to Penalize Press Over Diet Ads*(Continued from page 48)*

advertisers, for false or misleading advertisements. As one senator noted in assuring media representatives, “[t]here is nothing in this act that seeks to hold newspapers responsible for those things at all.”

The Commission also reminded Congress that its powers were directed against advertisers and not the press. The Commission stated that it “never has issued a complaint against any newspaper for carrying a false or misleading advertisement.” As Charles H. March, Acting Chairman of the FTC, observed:

“No newspaper, small or large, has ever been so cited” by the Commission and “no complaint or cease-and-desist order was ever issued against a newspaper for carrying [a false or misleading] advertisement. No newspaper has ever been required by order of the Commission to discontinue such advertising.”

An FTC Commissioner continued:

“In other words, our procedure is against the advertiser, and, of course, we realize that if we stop the advertiser from advertising there is not any danger of the newspapers continuing to carry the advertising free of charge.”

FTC Action Would Violate First Amendment

The Commission’s proposed guidelines also amount to a violation of the First Amendment. As the MPA’s and NAA’s Comments noted,

“the Commission’s statements before, during and after the Workshop constitute an implied threat that the Commission will take law enforcement action against the media if it fails to screen weight loss advertisements to the Commission’s satisfaction. If the Commission goes forward and disseminates its list of prohibited claims without dispelling this threat, then the Commission’s actions will constitute an unconstitutional prior restraint on speech.”

Quoting from a 1995 D.C. Circuit case involving the FCC, the MPA’s and NAA’s Comments argued that the key element of an unconstitutional system of informal prior restraint is that “the scheme in practice causes a speaker of

reasonable fortitude” to suppress protected expression in order to steer clear of a threat of prosecution.

That is exactly what would happen here. As the MPA and NAA made clear at the Workshop, newspapers and magazines cannot be reasonably expected to maintain the professional staff necessary to make decisions regarding what weight-loss claims are accurate based upon the evolving state of science. Only one publication maintains a staff that is dedicated to and capable of verifying the product claims made by its advertisers. This operation is essential to *Good Housekeeping’s* editorial mission and costs the magazine over \$2.4 million a year – a figure which is more than the gross revenue of 90% of the magazines published in the United States.

Contrary to the FTC’s assumption that the media can effectively ferret out false diet ads without concomitant loss of truthful diet advertisements, the MPA and the NAA explained that

“The most that ad sales people are reasonably capable of doing on deadline is to examine an advertisement’s facially apparent characteristics, such as whether it clearly proposes illegal activity or complies with the magazine’s or newspaper’s standards of taste. Consequently, if the Commission urges publishers to comply with a list of guidelines, the probable reaction of many magazines and newspapers will be to cease printing advertisements for diet products altogether.”

This categorical decision, the MPA and NAA argued, will result in the self-censoring of a wide swath of protected speech. Even if some magazines and newspapers decide still to accept some diet product advertising, they undoubtedly will reject some constitutionally protected advertisements for fear of sanctions.

The other argument advanced by the MPA and the NAA was that if – in response to FTC threats – the media assume a duty to pre-screen advertising, which did not exist at common law, they may risk unlimited liability to potential plaintiffs harmed by other products that are advertised, and which might pose greater risk to life and limb than quack diet remedies. Plaintiffs’ lawyers will argue that the media, having undertaken this pre-screening duty for certain products, have necessarily assumed it for other advertised products or services – and will file law-

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FTC Pushes Proposal to Penalize Press Over Diet Ads*(Continued from page 49)*

suits blaming the media for damages caused to victims who purchase those products. Case law suggests that limiting the pre-screening only to the FTC's favorite topics may not be permitted by the courts and this new liability is a serious risk.

Finally, in their Comments, the MPA and the NAA, pointed out that the evidence offered at the Workshop record did not support the Commission's categorical conclusion that eight particular diet claims in advertisements rendered those ads "almost certainly" false "on their face" such that newspapers and magazines could instruct their staff to refuse all such ads without risking a loss of rights protected by the First Amendment. They said that, given the Workshop testimony, none of the eight diet claims listed by the FTC could be summarily eliminated from First Amendment protection by government fiat.

1. "ALMOST CERTAINLY FALSE" CLAIM 1: "THE ADVERTISED PRODUCT WILL CAUSE SUBSTANTIAL WEIGHT LOSS TO ALL USERS."

The Commission believed that any advertisement which said: "No will power required . . . [w]orks for everyone no matter how many times you've tried and failed before" was a good example of this claim. In the course of the Workshop, however, several physicians said that the claim could be true. The MPA and NAA, in their February 3, 2003 Comments, argued that this evidence suggested "that a critical reading of the advertisement, as a whole, is necessary in order to reach a valid conclusion."

2. "ALMOST CERTAINLY FALSE" CLAIM 2: "THE ADVERTISED PRODUCT WILL CAUSE PERMANENT WEIGHT LOSS."

The Commission cited as an example an advertisement that read: "Get it off and keep it off. You won't gain the weight back afterwards because your weight will have reached an equilibrium." One physician commented that long-term trials for the fat blocking drug, Xenical, indicated that users were able to take the drug and keep weight off for years. Another noted that the questioned claim could be true if the advertisement indicated that the user would need to "continue to use the product."

3. "ALMOST CERTAINLY FALSE" CLAIM 3: CONSUMERS WHO USE THE ADVERTISED PRODUCT CAN LOSE

SUBSTANTIAL WEIGHT WHILE STILL ENJOYING UNLIMITED AMOUNTS OF HIGH CALORIE FOODS."

In lieu of an actual advertisement that made this claim, the Commission made one up: "Eat as much as you want, the more you eat, the more you'll lose, we'll show you how." Witnesses who testified in support of the Commission proposal were apparently unaware of the article released on the day of the Workshop reporting on the Duke University study that found high-fat diets (like the Atkins Diet) resulted in more significant weight loss than the low-fat diet recommended by the American Heart Association.

Among other things, the Duke University study found that dieters who were allowed to eat unlimited amounts of high fat foods like eggs and meat lost much more weight than those on the AHA low-fat diet. At the Workshop, the Commission encouraged the scientists to ignore such current developments in weight loss science by limiting their discussion to "OTC drug products, dietary supplements, creams, wraps, devices and patches" and not to "the Atkins Diet." In doing so, the Commission was apparently unaware of the fact that the Atkins Center currently offers 66 dietary supplements for sale through its web site, which are premised on the same scientific principles as the Atkins Diet.

4. "ALMOST CERTAINLY FALSE" CLAIM 4: "CONSUMERS WHO USE THE ADVERTISED PRODUCT CAN LOSE WEIGHT ONLY FROM THOSE PARTS OF THE BODY WHERE THEY WISH TO LOSE WEIGHT."

The Commission said the following advertisement contained an example of this claim: "[The product] has taken quite some inches off my butt, 5 inches, and thighs, 4 inches, my hips now measure 35 inches, I still wear the same bra size, though the fat has disappeared from all the right places." Several physicians and scientists testifying at the Workshop said that clinical evidence supported the claim and others could not state unequivocally whether the claim was true or false.

5. "ALMOST CERTAINLY FALSE" CLAIM 5: "THE ADVERTISED PRODUCT WILL CAUSE SUBSTANTIAL WEIGHT LOSS THROUGH THE BLOCKAGE OR ABSORPTION OF FAT OR CALORIES."

The Commission said an example of such a claim is an advertisement that said: "Lose up to two pounds daily. The named ingredient can ingest up to 900 times its own weight

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FTC Pushes Proposal to Penalize Press Over Diet Ads*(Continued from page 50)*

in fat, that's why it's a fantastic fat blocker." Again, there was testimony at the Workshop that fat absorption agents, i.e. pills, do in fact work. When the issue was discussed by the entire panel, the panel was unanimous that fat absorption pills could effectively reduce weight. The bulk of their discussion centered on how to define the non-scientific term "substantial weight loss." Some believed it should be analyzed as a percentage of body weight while others thought that a straight poundage standard was appropriate.

As the MPA and NAA noted in their Comments, the panel's discussion illustrated a fundamental problem for the press: "that in order to screen advertisements for products that claim to 'block or absorb fat calories' appropriately, publishing executives would need to accomplish what the scientists could not – decide upon an appropriate measuring standard to determine reasonably achievable weight loss from the use of such products. Given that at least some of these products are clearly not bogus – as their categorical inclusion in the prohibited claims list implies – it is hard to see how perfectly legitimate fat blocking product advertisements would not be censored because publishing executives could not decide, on deadline, whether to use a poundage or percentage of body weight standard in determining whether the level of weight loss suggested by the ad is reasonable."

6. "ALMOST CERTAINLY FALSE" CLAIM 6: CONSUMERS CAN LOSE SUBSTANTIAL WEIGHT THROUGH THE USE OF THE ADVERTISED PRODUCT THAT IS WORN ON THE BODY AND RUBBED INTO THE SKIN."

The Commission pointed to an ad that read: "Lose weight safely with the original herbal patch, now available in the U.S.A." Every member of the Workshop panel recognized the efficacy of trans-dermal delivery devices for a variety of drugs. One physician stated that he was not qualified to make a blanket pronouncement about the questioned claim because "[he was] not an expert in pharmacology or drug development." As the MPA and NAA Comments noted, this candid statement by a medical expert "belies another core assumption by the Commission: that ad copy screeners at newspapers and magazines – publishers, salespeople, proof-readers – are qualified to make accurate determinations about weight loss products without professional training."

7. "ALMOST CERTAINLY FALSE" CLAIM 7:

"CONSUMERS WHO USE THE ADVERTISED PRODUCT CAN LOSE SUBSTANTIAL WEIGHT WITHOUT REDUCING CALORIC INTAKE AND/OR INCREASING THEIR PHYSICAL ACTIVITY."

The advertising example: "U.S. patent reveals weight loss of as much as 28 pounds in 4 weeks and 48 pounds in 8 weeks. Eat all your favorite foods and still lose weight. The pill does all the work." Most of the scientists on the Workshop panel ignored the Commission's example and devoted their time to discussing what "substantial weight loss" could mean to various people under various circumstances. One scientist noted: "So, I would argue on behalf of the consumer that 'substantial' to them would be a weight loss that would be desirable and that they could measure freely and that would be using a scale or a dress size or pants size in the context of how a consumer would interpret this [claim]." Thus, according to at least one expert, there was nothing wrong with the claim.

8. "ALMOST CERTAINLY FALSE" CLAIM 8:

"CONSUMERS WHO USE THE ADVERTISED PRODUCT CAN SAFELY LOSE MORE THAN THREE POUNDS PER WEEK FOR A PERIOD OF FOUR WEEKS."

The Commission did not provide an advertisement that actually contained this claim. Not surprisingly, almost all of the medical experts at the Workshop relayed anecdotes of people who were able to lose a lot of weight – much more than twelve pounds – in a month without suffering serious side effects.

* * *

Notwithstanding these deficiencies in the Workshop record, and the likelihood that its proposal would "chill" and maybe even eliminate advertisements that are not even false or misleading, the Commission apparently intends to move forward with this unprecedented effort to extend its regulatory authority over the American press.

Bruce Johnson and Jeff Fisher are lawyers in Davis Wright Tremaine's Seattle office, and Victor Kovner is in the firm's New York office. They assisted the Magazine Publishers of America, Inc., and the Newspaper Association of America in filing Comments on February 3, 2003, in response to the FTC Workshop discussed herein.

Idaho Court: No Newspaper Liability for Private Medical Facts in Advertisement

By Charles D. Tobin and Elizabeth M. Dunne

While the Federal Trade Commission considers whether to require publishers to verify the accuracy of weight loss ads, an Idaho state court has held that a newspaper has no liability for publishing a physician's paid advertisement that allegedly disclosed his patient's private medical information without her consent.

In *Doe v. Haw and Federated Publications, Inc. d/b/a The Idaho Statesman*, slip. op., Case No. CV OC 0205441D (Idaho Fourth Dist. Ct. Feb. 5, 2003), the court in Boise dismissed a plaintiff's privacy and negligence claims against *The Idaho Statesman*, a Gannett newspaper. Judge Deborah A. Bail's 17-page decision holds that the law imposes no duty on newspapers, when an advertiser places an ad containing a third party's personal information, to verify that the person named in the ad has consented.

Patient Letter Quoted

Plaintiff, identifying herself in the litigation as "Jane Doe," sued endocrinologist Dr. Tarek Haw and the newspaper alleging invasion of privacy by publication of embarrassing private facts, and negligence. According to the Complaint, at Dr. Haw's request, Doe wrote a letter to the Executive Director of the Idaho Board of Medicine in support of him. Dr. Haw allegedly asked for the letter to demonstrate the success of his treatment of menopause through hormone injections, the subject of confidential Board proceedings against Haw. Doe's letter described her condition pre-dating her treatment by Dr. Haw – including details of her hysterectomy, the removal of her ovaries, and her hospitalization for severe depression – and concluded that Haw's treatments had been of immense help. The Complaint alleged that Dr. Haw made Doe believe the letter would be submitted to the Board in confidence.

Allegedly unbeknown to Jane Doe, Dr. Haw had been publishing paid advertisements criticizing the Board. The ad campaign included previous letters from other patients. One group of patients published a peti-

tion, signed by each of them, requesting that the Board leave Haw alone.

On August 3, 2000, allegedly without Doe's permission, Dr. Haw published her letter in *The Idaho Statesman* as a paid advertisement. Haw inserted a heading above the text of the letter: "NOTICE TO THE PUBLIC, GOVERNOR DIRK KEMPTHORNE AND THE IDAHO STATE LEGISLATORS." Doe's Complaint charged the newspaper with a failure to verify that she had consented to the publication. The Complaint theorized that the obviously intimate nature of the ad's content, coupled with the newspaper's policy of verifying the authorship on letters to the editor published on the op/ed pages, gave rise to a duty by the *Statesman* here.

"Legal Alchemy" and "Subject Matter" Newsworthiness

Judge Bail first analyzed the privacy claim, observing that any litigation challenging speech on a matter of public concern implicates the Constitution.

"Regardless of whether there is already a fourth element of newsworthiness in an action for invasion of privacy based upon the public disclosure of private facts, there are First Amendment issues which arise when the defendant is a news media defendant who has publicized the matter either in a report or in an advertisement." *Doe v. Haw, et al.*, slip op. at 7.

Judge Bail noted that the United States Supreme Court, in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) – a libel action arising out of a paid advertisement supporting the civil rights movement – acknowledged "the free speech importance of 'editorial advertisements' which express opinion and communication information as an important outlet for the public's right of freedom of speech." *Doe v. Haw, et al.*, slip op. at 8. She also observed that, in *Sullivan*, the Supreme Court had cautioned judges not to engage in or sanction "legal alchemy designed to punish speech" about public officials' conduct. *Id.*

The Idaho court then looked to the newsworthiness analysis in the Tenth Circuit's decision, *Gilbert v. Medical*

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Idaho Court: No Newspaper Liability for Private Medical Facts in Advertisement

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Economics, Co., 665 F.2d 305 (10th Cir. 1981). There, a magazine published an article criticizing the medical profession's failure to police itself, pointing to a physician's psychiatric history and personal problems that allegedly contributed to her malpractice. The Tenth Circuit held that physician had failed to state a privacy claim, as her private medical information bore "substantial relevance" to the newsworthy topic of physician self-policing.

Judge Bail noted, however, that the *Statesman* advertisement was a different context than a work of journalism. Where a reporter writes an article, she opined, it is reasonable to require that every private fact must bear some relation to a matter of public concern. That burden, she held, is too great for a court to impose on advertising executives. In finding that only the subject matter – as opposed to every private fact – need be of legitimate public concern, the Idaho court recognized: "it would be a serious intrusion on the right of free speech exercised in an editorial advertisement to require that a newspaper edit it as it would an article of its own." *Id.* at 12. The court agreed with the newspaper that the ad was newsworthy because it was published in the context of a dispute between a physician and the Board of Medicine over the way he ministered to patients.

Finally, Judge Bail noted that under older Idaho case law, a plaintiff in a privacy case needs to allege and prove "malice." She found that appropriate form of malice in this context is *New York Times v. Sullivan* "actual malice." Plaintiff's allegation of a failure to verify her consent was not sufficient under this standard, the court held.

No Duty to Investigate or Verify Advertisements

The court also rejected Doe's attempt to impose an unprecedented duty on newspapers to verify a testimonial in an advertisement. In applying a traditional foreseeability analysis, the court weighed the risk of harm

against the burden of preventing it. In finding that the test weighed decidedly against imposing such a duty, Judge Bail noted that "[t]he burden on newspapers to verify every type of endorsement claim made in the advertisements it runs is enormous." *Id.* at 13.

The court also relied heavily on a line of newspaper advertising liability case authority cited by *The Idaho Statesman*. The court found, "there is no duty on the part of a newspaper to investigate the accuracy of claims, or their wisdom, or the authorization to use third party material in an advertisement." *Id.* The court further pointed out that Doe had not alleged any special relationship between her and the newspaper, and the newspaper's policy of verifying the authorship of letters to the editor did not constitute an assumed duty to verify letters in paid ads.

Finally, the court reasoned that even if there were such a duty, where a newspaper publishes truthful information lawfully obtained, it cannot be liable for merely negligent actions. Relying on the Supreme Court's decision in *Florida*

Star v. B.J.F., 491 U.S. 524 (1989), the Idaho court agreed that:

"It is ... a strange situation if newspapers cannot be punished for publishing false and defamatory matter unless there is actual malice but a newspaper which published truthful, but private, information, could be punished when the publication involved only ordinary negligence." *Id.* at 15.

Doe's failure to adequately allege actual malice thus likewise doomed her negligence based claim.

Chuck Tobin and Elizabeth Dunne are with the Washington D. C. office of Holland & Knight LLP. They represent The Idaho Statesman in this lawsuit, along with Boise counsel Paul L. Westberg, of Westberg, McCabe & Collins, CTD. Boise solo practitioner Wm. Breck Seinger represents plaintiff Jane Doe.

"It would be a serious intrusion on the right of free speech exercised in an editorial advertisement to require that a newspaper edit it as it would an article of its own."

Small Papers Hit By Patent Claim

Has Paul Heckel Sued You Yet?

By Dawn Philips Hertz

The recent spate of software patent lawsuits asserting infringement for the use of basic web site functions has struck the newspaper industry.

Paul Heckel, a southern California inventor, filed suit on January 6 of this year against 12 small home town newspapers located in ten states from Massachusetts to California in the Northern District of California.

In his lawsuit Heckel asserts violations of two patents which he obtained in 1984 and 1996. He claims patents in the click through commands used on most newspaper sites.

Although patent lawyers have not yet opined on the validity of the patents, the patents appear to be very broad. If Mr. Heckel's patents are upheld, he, not Al Gore, can claim that he invented the Internet as we know it.

License Rejected by Papers

The real question is why Plaintiff sued twelve small, home town newspapers rather than larger newspapers or web designers who have the wherewithal to evaluate these kinds of claims.

Plaintiff tried to license a large newspaper chain before seeking fees from these twelve defendants. The large newspaper chain resisted and no suit was filed.

Then in November of 2002, twenty or so newspapers across the United States received letters from Mr. Heckel claiming infringement of his patents and asking for a check in varying amounts generally calculated on the basis of \$1.00 per print reader. Heckel offered a one time 30% discount for anyone sending a check before year's end. Checks were to be made payable to Mr. Heckel personally notwithstanding that according to the U.S. Patent office one patent has been assigned and the other has a co-inventor.

Most did not respond and twelve were sued including Cadillac News of Michigan, The Nonpareil of Council Bluffs, Iowa, and The Daily Standard in Ohio and

The Tryon Daily Bulletin in North Carolina. These newspapers of course have virtually no California contacts. A motion to dismiss based upon lack of personal jurisdiction will be filed by March 6.

Heckel is represented by Kathleen Walker, a sole practitioner in Southern California. Ms Walker also represents another patent holder in litigation brought by a company called PanIP against twenty small businesses located across the United States, everything from a plumbing supply company in New Jersey to a chocolate manufacturer in Indiana.

www.youmaybenext.com

For a quick and entertaining glimpse into this type of litigation, check out www.youmaybenext.com. The owner of the chocolate company put up this web site about the litigation. It earned him an amended complaint from Ms. Walker with a libel count added.

Lee Enterprises and the Newspaper Association of America are preparing for a vigorous defense of this action.

In answer to the question, why sue small businesses in the PanIP case, Ms Walker was quoted as saying they reviewed many web sites, but the businesses chosen were the result of the "luck of the draw." She went on to say that the Patent Law "doesn't say you have to go after the biggest fish first. An infringer is an infringer, regardless of how large they are."

Other Web Patent Suits

There are a plethora of these kinds of claims for patents on web technology: Global Network Inc. is claiming a patent in the technology for on line advertising that allows an ad to automatically adjust for different newspaper sites and monitors ads for success; Leon Stambler's case is set for trial next week in San Francisco on his patent infringement claim against VeriSign *et al.* for a patent he

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By targeting small family owned newspapers, Plaintiff Heckel probably hoped to collect licensing fees without close scrutiny of his patents.

Small Papers Hit By Patent Claim

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claims covers an Internet Web security standard known as the Secure Sockets Layer which was developed by Netscape; Default Proof Credit Card Systems has filed suit in federal court in Miami claiming that Wal-Mart, Starbucks and other are violating its patent the technology for prepaid debit cards.

However, what distinguishes these claims from those of this Plaintiff is that the target defendants are large well funded industries. By targeting small family owned newspapers, Plaintiff Heckel probably hoped to collect licensing fees without close scrutiny of his patents.

Fortunately, newspapers exercise their First Amendment rights not only in the pages of their publication, but also in numerous trade groups like NAA and Inland Press. Unless a court determines that the patents are valid, these defendants are committed to defending against these kinds of tactics.

Dawn Phillips Hertz is Of Counsel to Butzel Long and practices in their Media Department. She serves as General Counsel to the Michigan Press Association and represents the four newspaper defendants resisting personal jurisdiction in the litigation.

Ethics Corner

Conflicts of Interest and the “Accommodation Client”

By Len Niehoff

The indignant subject of a recent article has filed a libel suit against your longtime newspaper client. He has also personally named the reporter whose byline appears on the piece. You proceed to represent both named defendants because no apparent conflict exists and because doing otherwise would result in inefficiency and unnecessary expense.

But then memories and perspectives start to diverge on critical points, and it becomes increasingly clear that your reporter client and your newspaper client may not share the same goals and interests. Temperatures escalate, and the once collegial relationship among and between you and your clients vanishes. You turn to the ethics rules for guidance, mindful of the distressing wisdom offered in that scene in *Butch Cassidy and the Sundance Kid*: “there are no rules in a knife fight.”

Didn't the reporter understand that the newspaper was your longtime client and you were representing her as an accommodation? Didn't the reporter expect you to share any information she gave you with your newspaper client? Didn't the reporter understand that your representation of her was short-term and specific to this matter?

ABA Model Rule 1.7(b)

Indeed, the rules you find seem to offer you scant consolation. ABA Model Rule 1.7(b) allows for representation of multiple clients in a single matter if their interests do not conflict. The Comments note that “[a]n impermissible

conflict may exist by reason of substantial discrepancy in the parties’ testimony,” precisely your situation. And the Rule cautions that the lawyer must provide those clients up front with an “explanation of the implications of the common representation and

the advantages and risks involved” – an explanation you did not provide because you could not have anticipated the problem that has arisen.

It gets worse. In many states (mine, as reflected in Michigan Ethics Opinions R-16, RI-98, RI-111, and RI-134, and hypothetically yours as well), lawyers who find themselves in this situation cannot pick and choose among clients, but must withdraw from representing all of them. Here, this would include your longtime newspaper client.

(Continued on page 56)

Conflicts of Interest and the “Accommodation Client”

(Continued from page 55)

A mechanical application of your state’s ethical rules might lead to this result, but query whether common sense does. After all, didn’t the reporter understand that the newspaper was your longtime client and you were representing her as an accommodation? Didn’t the reporter expect you to share any information she gave you with your newspaper client? Didn’t the reporter understand that your representation of her was short-term and specific to this matter?

Restatement 3rd on the Accommodation Client

The Restatement 3rd of the Law Governing Lawyers § 132 may offer some help in its recognition of the concept of the “accommodation client.” The Restatement acknowledges that

“[w]ith the informed consent of each client ... a lawyer might undertake the representation of another client as an accommodation to the lawyer’s regular client, typically for a limited purpose in order to avoid duplication of services and consequent higher fees.”

And it provides that, in the event adverse interests later develop between clients, circumstances might warrant the inference that the “accommodation client” understood and impliedly consented “to the lawyer’s continuing to represent the regular client in the matter.”

The Section lists circumstances most likely to evidence such an understanding:

- (1) the lawyer has represented the regular client for a long period of time before undertaking representation of the other client;
- (2) the representation was to be of limited scope and duration; and
- (3) the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client. All these criteria seem to apply here. Now you just have to hope your jurisdiction will embrace the concept of the “accommodation client.”

Several cases have employed this concept in analyzing these types of situations. See *In re Rite Aid Corp Securities Litigation (Laborers Local 1298 Annuity Fund v Grass)*, 139 F. Supp. 2d 649 (E.D. Pa., 2001) (court denied disqualification motion brought by corporate CEO, holding corporation

was firm’s primary client and CEO was merely an “accommodation client”) and *Universal City Studios Inc. et al. v. Reimerdes et al.*, 98 F. Supp. 2d 449 (SDNY 2000) (court held that party was more than a mere “accommodation client,” but nevertheless denied motion for disqualification). Alas, most jurisdictions have not explicitly addressed this approach.

With any luck, you will have a judge who will review the issue thoughtfully, empathize with your position, understand the illogic of disqualification, apply the concept of the “accommodation client” appropriately, and allow you to continue representing your newspaper client in the matter. But luck sometimes runs dry. And the look on a skeptical judge’s face may remind you of another line from film history, this from *Bad Day at Black Rock*: “I feel for you, but I’m consumed with apathy.”

Len Niehoff is with Butzel Long in Ann Arbor, Michigan.

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**BREAKING NEWS:
Media Granted Summary
Judgment in Libel Case by
Islamic Charity Global Relief**

On February 19, 2003, the United States District Court for the Northern District of Illinois entered summary judgment for several news organizations in a libel case brought by an Islamic charity challenging news reports of the news reports addressing the government's financial war on terrorism. In *Global Relief Foundation, Inc. v. The New York Times Company, et. al*, the court first determined that the gist of the news organization defendants' news reports was that the government was investigating the plaintiff and considering a freeze of its assets, and not that the plaintiff actually had financial ties to terrorists as the plaintiff contended. The court then held that the news reports were substantially true because the government was investigating the plaintiff and subsequently froze the plaintiff's assets, as shown by affidavits filed by government officials in other cases. A complete discussion of this case will be included in future editions.

**CORRECTION:
Roman Catholic Diocese of
Lexington v. The Lexington
Herald-Leader, et al.**

We wish to correct an error in the article "Roman Catholic Diocese of Lexington v. Lexington Herald-Leader" published in last month's *MediaLawLetter* (pg. 31). Specifically, the article misidentifies *The Lexington Herald-Leader* for *The Courier-Journal* as the target of the Diocese's contempt motion, and as the newspaper which published the information contained in records that had previously been ordered sealed. The article should have stated that it was *The Courier-Journal*, and not *The Lexington Herald-Leader*, which obtained and published the information at issue.

Published in July 2003

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