

MULRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through February 23, 2004

MLRC		Page
Bulletin	MLRC 2004 Report on Trials and Damages <i>Trials Against Media Defendants</i>	4
Legislative	Legislative Affairs Update: Congress Considers Indecency Bills <i>Broadcast Decency Enforcement Act; Database and Collections of Information Misappropriation Act; Congressional Research Accessibility Act</i>	61
SUPREME COURT		
S.Ct.	Supreme Court Rejects Appeal by Sammy “The Bull” Gravano <i>Application of forfeiture statutes to book proceeds</i> State v. Gravano	14
S.Ct.	Supreme Court Rejects 9/11 Access Appeal <i>Deportation proceedings were closed</i> US v. Bellahouel	52
LIBEL & PRIVACY		
W.D.Mo.	Judge Issues, Then Rescinds, Prior Restraint in Libel Case <i>Following the lifting of the order, TV station identified man caught in Internet sex sting</i> John Doe v. KCTV-5	5
Ind.Cir.Ct.	Indiana Mayor Wins Libel Trial Against Local Newspaper <i>Jury awards \$235,000 in compensatory damages and punitives for publication of political ad</i> Shepard v. The Daily Clintonian	7
Mo.Cir.Ct.	Substantial Truth and Fair Report Support Summary Judgment in Doctor’s Suit <i>Court follows rule that language must be evaluated in context</i> Marylou Davis, M.D. v. KMOV-TV and Multimedia KSDK, Inc.	7
Cal. App.	California Appeals Ct. Affirms Dismissal of Libel Suit Against San Diego Union-Tribune <i>Court finds statement concerning a person’s motivation is generally a matter of opinion</i> Atiga v. San Diego Union-Tribune	9
Ohio App.	Ohio Appellate Court Reverses Summary Judgment for Newspaper <i>Jury could find quotes were fabricated</i> Murray v. Beacon Journal Publishing Company	10
La.Dist.Ct.	Louisiana Court Dismisses Lawsuit by Mardi Gras Reveler <i>Judge suggests person riding float at Mardi Gras parade assumes risk of publicity</i> Johnson v. John Wiley & Sons Publishers, et al.	11
N.D.Tex	No Jurisdiction Over German Publishers in Texas <i>Court finds Europe, not Texas, was the “geographic focus” of articles</i> Fielding v. Hubert Burda Media, Inc.	13
N.Y.A.D.	Flynn on The Hot Seat in “Mulberry Street” <i>Libel and fraud claims continue over professor’s research project</i> 164 Mulberry St. Corp. v. Columbia University	15
N.M.	Court Rules that One Scholar’s Criticism of Another is Not Defamatory <i>Court deems comments, in context of academic community, to be understood as non-defamatory</i> Fikes v. Furst	17
E.D. Tex.	Scott O’Grady Misappropriation/Lanham Act Case Settles During Trial <i>Air force pilot shot down in Bosnia sued Discovery Channel under Lanham Act</i>	19
N.J. App.	Plaintiff Must Plead Actual Malice with Specificity to Defeat Fair Report Privilege <i>Court says allowing case to continue on a mere allegation of actual malice violates free speech</i> Darakjian v. Hanna	20

W.D.Pa.	Bare Allegation that Corporate Officer was Responsible for Content of Broadcast Is Sufficient to Overcome Fraudulent Joinder Argument <i>Joyce v. NextMedia Operating, Inc., et al.</i>	21
Ill.Cir.Ct.	Newspaper Is Immune from Liability for Publishing Name of Juvenile Sex Offender <i>Juvenile Court Act conferred immunity for secondary release of legally obtained information</i> <i>Doe v. Kankakee Daily Journal Company</i>	23
Tex.App.	Court Affirms Denial of Summary Judgment in Public Official Libel Case <i>Record presented fact issues of actual malice and substantial truth</i> <i>The Hearst Corporation, et al. v. Jack Skeen, Jr. et al.</i>	25
Mass.Super.	Trial Court Rules that Single Publication Rule Applies to Internet Publication <i>Decision continues trend seen last month in Georgia and Mississippi decisions</i> <i>Abate v. Maine Antique Digest</i>	30
REPORTER'S PRIVILEGE		
Ala.	Judge Seeks Guidance from Alabama Supreme Court in Reporter's Privilege Case <i>Federal district judge asks state supreme court whether shield law protects magazine reporters</i> <i>Price v. Time, Inc. and Don Yaeger</i>	14
N.J. Super.	Rare Rejection of Reporter's Privilege by New Jersey Court <i>Court orders reporter to reveal source for article in criminal case after other witnesses testify</i> <i>State v. Daly</i>	57
ACCESS/NEWSGATHERING		
11th Cir.	Appeal Heard in Morris v. PGA: Are There Property Rights in Real Time Golf Scores? <i>Outcome will significantly impact the ability of news agencies to timely report facts via Internet</i> <i>Morris v. PGA Tour</i>	27
2d Cir.	Closure of Voir Dire in Martha Stewart Trial Was Error <i>Substantial media coverage of the case was not enough to warrant wholesale closure</i> <i>In re ABC Inc., et al.</i>	45
Cal. Super	News Organizations Battle for Access to Michael Jackson Proceedings and Records <i>Coalition of major media entities fight on several fronts to ensure maximum public access</i> <i>People v. Michael Jackson</i>	47
Cal. App.	California Appellate Court Upholds 'No Cameras' Ruling in Peterson Trial <i>Final order entered barring television coverage</i> <i>People v Peterson</i>	48
Tex.	Texas Attorney General Rules that State Access Law Limits HIPAA Privacy Rule <i>Government bodies using HIPAA as a shield must reconsider disclosure</i>	49
Ala.	Court Rules that a Public Corporation is Subject to State's Open Records Law <i>Unanimous decision applies open records law to a public corporation for the first time</i> <i>Water Works and Sewer Bd. of the City of Talladega v. Consolidated Publishing, Inc.</i>	51
N.J. Super.	Judge Orders Release of Malpractice Payment Notices <i>Assignment judge orders State to provide notices to local newspaper</i> <i>North Jersey Media Group Inc. v. State of New Jersey</i>	53
D.C. Cir.	Court Rejects First Amendment Right to Accompany Troops in Battle <i>Court found no basis for claim that military must accommodate press corps at war</i> <i>Flynt v. Rumsfeld</i>	54
Cal.	Univ. of California Regents Ordered to Disclose Meeting Transcripts and Investment Info <i>Regents exhaust appellate options; high court upholds lower court rulings forcing disclosure</i> <i>Coalition of University Employees v. Regents of University of California</i>	55
COPYRIGHT & TRADEMARK		
California	Playboy and Netscape Settle Web Trademark Case <i>Settlement cuts short opportunity for Ninth Circuit to consider important trademark issue</i>	30

INTERNET

9th Cir.	DMCA Safe Harbors May Require Careful - If Not Strict - Compliance <i>Court held jury could find AOL failed to implement policy against repeat infringers</i> Ellison v. Robertson and America Online Inc.	31
Cal.App.	Update: Court Affirms Narrow Sec. 230 Interpretation on Rehearing <i>Court held that defendants with knowledge of defamatory content not entitled to immunity</i> Barrett v. Rosenthal	34
Cal.App.	Summary Judgment for eBay Under Sec. 230 Affirmed <i>Argument that defendant not covered because it does not offer Internet connection rejected</i> Grace v. eBay, Inc.	34
Canada	Canadian Court Takes Jurisdiction in Internet Libel Case Against Washington Post <i>Raises prospect of plaintiffs commencing actions abroad to take advantage of lax libel laws</i> Bangoura v. The Washington Post	35

INTERNATIONAL

Canada	Non-Media Libel Case Cites Place of Publication for Jurisdiction <i>Ontario Superior Court will hear defamation claim against NY investment company</i> Trizec Properties, Inc. v. Citigroup Global Markets, Inc.	36
Canada	Canadian Developments in Seizure of Reporter's Materials <i>Anti-terror law under Constitutional scrutiny; Ontario court applies reporter's privilege</i>	37
U.K.	Don King's Libel Suit Against NY Lawyer Can Go Forward in London <i>Jurisdiction based on King's general notoriety and internet "publication" in England</i> Don King v. Lenox Lewis, Lion Promotions and Judd Bernstein	39
Canada	Alberta Court Awards Damages in Stock Chat Room Libel Case <i>Trial court awards \$75,000 to company over series of e-mails</i> Vaquero Energy Ltd. v. Weir	40
U.K.	Wall Street Journal Wins Harrods Libel Case <i>Jury returns verdict in favor of Journal in case over article likening Harrods to Enron</i> Harrods Ltd. v. Dow Jones & Co.	41
Europe	Right of Reply in Europe - A Bold Resolution or a Resolution Re-bowled <i>Council of Europe is finalizing a draft recommendation that covers online publications</i>	41
ECHR	Austrian Journalist Wins Appeal to ECHR over Defamation Conviction <i>Court rules journalist's description of politician as a "closet Nazi" was protected opinion</i> Scharsach v. Austria	43

NEWS & UPDATES

10th Cir.	10th Circuit Upholds Do-Not-Call Registry <i>Court holds that registry is a valid commercial speech restriction</i> Mainstream Marketing Systems, Inc. v. FTC	22
D.Md.	UPDATE: Lawsuit Testing Limits of SEC's Power Over Publishers Continues <i>District court denies motion to dismiss lawsuit against financial/investment publisher</i> SEC v. Agora, Inc., et al.	56
D.Neb.	Malicious Prosecution Claim Against Newspaper Publisher Survives Summary Judgment <i>Court found that the publisher misled prosecutors</i> Lynch v. Omaha World-Herald	58
S.D.Fla.	Criminal Statute Prohibiting Disclosure of Complaints about Police Held Constitutional <i>Court rules against newspaper editor arrested for publishing report on police misconduct</i> Cooper v. Dillon	59
FCC	FCC Fines News Station & Radio Broadcaster for Indecency <i>Regulators slam broadcasters with cumulative penalty; Congress looks to increase fines</i> Clear Channel Broadcasting Licenses, Inc; Young Broadcasting of San Francisco, Inc.	63

MLRC's Annual Study of Media Trials Shows 14 Trials in 2003, With Media Winning 57 Percent

There were 14 cases against media defendants based on editorial content that went to trial in 2003, according to MLRC's annual report on Trials and Damages, and media defendants won eight (57.1 percent).

The 57.1 percent media victory rate in 2003 was lower than the victory rate in 2002 (83.3 percent), but it is still the third highest victory rate since 1980.

Details on the 14 trials, and analysis of their results and the results of 494 media trials since 1980, are included in MLRC's 2004 REPORT ON TRIALS AND DAMAGES.

2003 Cases

Seven of the 14 trials in 2003 involved television defendants, five involved newspapers, one involved a radio defendant, and one case was against an Internet web site. The web site case, which involved www.newsok.com, the combined web site of The Oklahoman newspaper and KWTW News9, is the second Internet content case to qualify for inclusion in the MLRC REPORT.

Twelve of the 2003 trials were in state court; two, in federal court. All of the cases were tried before juries, although judges issued directed verdicts in two of the cases. Media defendants won both federal cases, and half of the state cases.

Of the six verdicts for plaintiffs in 2003, three involved awards of over \$1 million; of these, two exceeded \$10 million. The average of the six trial awards is \$5.4 million, while the median is \$2 million.

Compensatory and Punitive Damages

Besides the analysis of results at trial and on appeal in cases against the media since 1980, this year's REPORT also evaluates cases in light of the U.S. Supreme Court's statement in *State Farm Mutual Ins. v. Campbell*, 123 S.Ct. 1513, 1524 (U.S. April 7, 2003) that punitive awards that exceed compensatory awards by more than a nine-to-one ratio are unlikely to survive constitutional scrutiny. MLRC's analysis of the 153 verdicts with both types of damages since 1980 found that 27 of these verdicts (17.6 percent) included punitive damages that exceeded compensatory awards by more than a nine-to-one ratio.

Overall Results

The overall results of the MLRC study show that plaintiffs have won about 61.3 percent of cases that have gone to trial since 1980. But plaintiff victories were modified by post-trial motions in 24.5 percent of cases, and almost half (45.8 percent) of the awards that survive post-trial motions in some form are modified on appeal.

In the end, of the 275 awards won by plaintiffs at trial that survived post-trial motions, plaintiffs appear to have held on to their awards in 96 cases (34.9 percent): 63 (22.9 percent) were affirmed on appeal, while 33 (12.0 percent) were not appealed. Awards were reversed or modified on appeal in 126 cases (45.8 percent). Appeals are currently pending in four cases (1.5 percent). There were settlements after trial in 38 cases (13.8 percent), and the final dispositions of eight cases (2.9 percent) are unknown.

Best Courts for the Media

The REPORT also examines the results of all trials since 1980 to determine media defendants' track record in various courts. Among the federal district courts, those within the Third Circuit produced the best victory rate at trial for media defendants since 1980, 66.7 percent (six of nine trials). The media fared worst in the district courts within the Tenth Circuit, where media defendants lost both of the trials that have since 1980.

Alabama (\$40,000) and Hawaii (\$40,138) vied among states with more than one trial for the lowest average initial trial award. Meanwhile, Ohio had the highest average initial award, \$9.1 million. Among states with more than three cases since 1980, Connecticut and Oregon shared the highest media victory rate at trial, 83.3 percent, while in Kansas media defendants lost all six cases.

TO ORDER

2004:1 MLRC BULLETIN
ANNUAL REPORT ON TRIALS & DAMAGES

PLEASE CONTACT US AT 212-337-0200

Judge Issues, Then Rescinds, Prior Restraint in Libel Case

By Bernard J. Rhodes

Earlier this month, a federal district judge in Kansas City, Missouri issued a prior restraint order prohibiting the CBS-affiliate in Kansas City, KCTV-5, from disclosing the name or showing the face of a man caught in an Internet sex sting as part of the station's upcoming series on the results of its sting. The next day, the judge reversed himself and lifted his order. *John Doe v. KCTV-5*, No. 04-00131-CV-W-SOW (W.D. Mo., Feb 5, 2004). Following the lifting of the order, the station disclosed the identity of the man and broadcast images of him being stung.

Investigation of Men Seeking Teens Online

Late last year, KCTV-5 began working with a group called Perverted-Justice.com. Perverted-Justice is a group of volunteers who surf the web posing as underage teens in regional chat rooms. When men engage in sex chats with these apparent teens, Perverted-Justice posts a transcript of the chat on its website, along with the man's identifying information. KCTV-5 worked with Perverted-Justice to take this one step further and arranged for the men to be invited to appear at a rented house in a Kansas City suburb for what they believed was a face-to-face meeting and sexual encounter with the apparent teen while the teen's parent(s) were gone. When the men arrived, however, they were met instead by a KCTV-5 reporter and a camera crew. Over the course of four days, 16 men showed up at the rented house hoping to have sex with an apparent teen.

One of the men who showed up was Jeff Emerson, an employee of a local electrical contractor. Emerson, who had engaged in his chat from work, had arranged to meet what he thought was a fourteen-year old girl after work—that is, after he finished up some Christmas

shopping. During the chat Emerson acknowledged that the person he was chatting with said she was 14, and even asked at one point if the apparent girl's mother could leave the house earlier so that he did not have to wait to come over. When Emerson arrived at the house and was confronted by the KCTV-5 reporter, he changed his story, saying he was there to meet the mother, not the apparent 14 year-old daughter.

Man Caught in Sting Attempts to Stop the Report

Shortly after Emerson was stung at the house, his lawyer wrote a cease and desist letter to the station, demanding that the station not identify Emerson and not use his photograph in any news report. Over the course of the next several weeks, the station's counsel and Emerson's lawyer traded voicemail messages, but never talked.

KCTV-5 began airing promotional spots for its upcoming investigation during the Super Bowl. Those spots featured videotaped footage of several of the men coming to

the door of the rented house and being confronted by the KCTV-5 reporter. One of the men whose face was shown in the promotional spots was Emerson. The following Tuesday, Emerson's lawyer called the station's counsel and again demanded that the station not use Emerson's name and photograph. When the station refused to agree to Emerson's demand, he threatened a prior restraint action.

At 11:30 a.m. the next day, Wednesday, February 4, Emerson filed his prior restraint action in the federal district court for the Western District of Missouri. The case was captioned *John Doe v. KCTV-5*. The case was assigned to Judge Scott O. Wright, an appointee of President Jimmy Carter.

In his lawsuit, Emerson (who was identified in the lawsuit only as John Doe) alleged that the upcoming news report—which was scheduled to begin the following evening—would libel him and threaten his right to a fair and

The judge announced that he was rescinding his order of the day before and shortly thereafter issued a written order which stated that "a Temporary Restraint Order in this context is a violation of the First Amendment's prohibition against prior restraints."

(Continued on page 6)

Judge Issues, Then Rescinds, Prior Restraint in Libel Case

(Continued from page 5)

impartial jury if he were to be charged with a crime as a result of his sex chat. Emerson claimed that he needed a temporary restraining order to stop the broadcast in order to avoid irreparable harm to his relationship with his wife, his employer and the community at large.

Judge Wright held a telephone conference on Emerson's motion at 3:00 p.m. the same day. During the conference call Judge Wright appeared swayed by Emerson's argument that he was not seeking to stop the broadcast altogether, but only to require KCTV-5 not to use Emerson's actual name and to obscure Emerson's face. In a surprising ruling, Judge Wright agreed, appearing to say that such an order was not a prior restraint because the station could go forward with its report, just without the use Emerson's name or face. At the conclusion of the call the station's counsel informed the court and counsel that he would be filing a motion for reconsideration and Judge Wright agreed to hold a second conference call the following day to hear the motion for reconsideration. In the meantime, however, Judge Wright ordered the station to stop broadcasting its current promotional spots because those spots contained a clear photograph of Emerson's face.

KCTV-5's Response to the Prior Restraint Order

In compliance with Judge Wright's order, the current promotional spots were immediately pulled and new promotional spots were prepared. The new spots simply substituted a photograph of another of the 16 men for Emerson's photograph. The new spots were back on the air Wednesday evening.

At the same time, the station's counsel prepared and filed shortly before 5 p.m. Wednesday a motion for reconsideration. Because the motion identified Emerson by name, Judge Wright ordered the motion filed under seal.

In the motion, KCTV-5 set out in some detail the lurid nature of Emerson's chat, as well as a transcript of his confrontation with the reporter. The television station also set for the applicable prior restraint law. The next morning, Emerson filed a brief in opposition to KCTV-5's motion, arguing that the court's order was not a true prior restraint in that it allowed the station to broadcast its report, but the station simply could not use Emerson's name or photograph. KCTV-5 immediately filed a reply brief in which it

argued that any judicial censorship of the broadcast was a prior restraint.

Minutes before the scheduled 2:00 p.m. conference call on Thursday, another man caught in the sting, Jarrod Houp, moved to intervene in the Emerson lawsuit. "John Doe No. 2," as the second-plaintiff called himself, had driven a red Porsche to the sting and had also been prominently featured in promotional spots for the upcoming series of reports.

Judge Rescinds His Order

The conference call began with Judge Wright announcing that he had read the briefs and that there was no way under U.S. Supreme Court and Eighth Circuit precedent he could continue his order. Both Emerson's lawyer and Houp's lawyer attempted to convince Judge Wright otherwise, but were unsuccessful. The judge announced that he was rescinding his order of the day before and shortly thereafter issued a written order which stated that "a Temporary Restraint Order in this context is a violation of the First Amendment's prohibition against prior restraints."

As a result, the series of reports began that evening as planned. During the series 15 of the 16 men were identified by name and photograph, including both Emerson and Houp. One man, who consented to an interview with the station, was not identified.

Both the Emerson and Houp lawsuits remain pending.

Postscript

A subsequent article on the KCTV-5 series in *The Kansas City Star* noted "Channel 5's strong Nielsen numbers [for the series] virtually ensure that its formula will be copied by TV stations across the country."

Jeff Emerson is represented by Brian W. Costello, Kevin C. Baldwin and Jason A. Davey of the Law Offices of Brian Costello. Jarrod Houp is represented by James C. Wirken of the Wirken Law Group.

Bernard J. Rhodes and David C. Vogel of Lathrop & Gage in Kansas City, Missouri represented KCTV-5.

Indiana Mayor Wins Libel Trial Against Local Newspaper

Jury Awards \$235,000 Over Publication of Political Ad

On January 22, 2004, a Vermillion County jury returned a verdict in favor of Clinton, Indiana Mayor Ron Shepard against the *The Daily Clintonian* and its publisher George "Sonny" Carey, awarding \$235,000 in compensatory and punitive damages. *Ron Shepard v. The Daily Clintonian*, No. 83C01-0208-CT-32 (Ind. Cir. Ct., Vermillion County jury verdict Jan. 22, 2004).

At issue was an advertisement published on April 28, 2002 stating that "Abuse of office is a criminal offense." The ad alleged that Mayor Shepard abused his office when he refinanced a city fire truck and did not renegotiate rates with the Clinton Township Water Company, a water utility run by Carey. The ad was signed only with the phrase "Concerned Citizens."

The newspaper and Carey apparently defended the suit by arguing that the allegations in the ad were substantially true and that there was no actual malice. In his deposition, Carey said that he and his wife, who edits the newspaper, believed that Shepard had acted illegally when he refinanced a bond issue. Carey, however, refused to identify

the sponsor(s) of the ad during the two-day trial, although in a pre-trial deposition he said that he knew one of the individuals behind the ad. He denied that he was the author of the ad.

According to local press reports, former employees of the newspaper testified that Carey and his wife routinely made derogatory comments about Mayor Shepard and had instructed photographers covering city events to exclude Shepard from photographs to reduce his exposure. See Suzanne Risley, "Clinton mayor wins big in lawsuit," *Tribune-Star* January 23, 2004 (available online at www.tribstar.com/articles/2004/01/23/news/news02.txt).

The jury of four women and two men awarded \$225,000 in compensatory damages and \$10,000 in punitive damages.

The newspaper was represented by James T. Flanigan of Skiles Hansen Cook and DeTrude in Indianapolis. Plaintiff was represented by Eric A. Frey of Terre Haute.

According to Hoosier State Press Association, an appeal to the Indiana Court of Appeals is expected.

Substantial Truth and Fair Report Support

Summary Judgment in Doctor's Suit Against KMOV-TV

By Mark Sableman

The libel claims of a physician against St. Louis television station KMOV-TV were dismissed on January 14, 2004, based on the substantial truth doctrine and the fair report privilege. The decision also rejected a libel by implication theory. *Marlou D. Davis, M.D., v. KMOV-TV, and Multimedia KSDK, Inc.*, No. 022-10209 (Missouri Cir. Ct. Jan. 14, 2004).

In the case, Dr. Marlou Davis sued both KMOV-TV and Multimedia KSDK-TV over news reports relating to Dr. Davis's arrest in late 2000, and subsequent charges against him for overprescribing controlled substances. Dr. Davis is currently facing a 93-count indictment arising out of the arrest.

Broadcast Reported on Drug Abuse Problems

Dr. Davis's claims against KMOV related to two broadcasts that mentioned his arrest and charges, and his background, in the course of stories about drug abuse. The first story, broadcast March 21, 2001, described drug abuse problems in a small town in Missouri, and mentioned, toward the end of the report, that the previous year federal agents had arrested a doctor "for overprescribing OxyContin." Video footage of Dr. Davis's office and a mention of the community he worked in made it clear that the doctor was Dr. Davis. The second story, broadcast May 3, 2001, focused on OxyContin abuse, and contained this passage:

So how does the drug get on the street? In some cases from doctors. * * *

(Continued on page 8)

Substantial Truth and Fair Report Support Summary Judgment in Doctor's Suit Against KMOV-TV

(Continued from page 7)

charged Bridgeton doctor Marlou Davis with writing unnecessary prescriptions for OxyContin and other narcotics. Davis has a previous conviction for Medicare fraud.

Plaintiff Had Been Charged with Overprescribing Narcotics

Because Dr. Davis had indeed been charged with overprescribing narcotics, KMOV-TV moved for summary judgment early on the case, before any depositions had been taken, using the criminal charges against Dr. Davis, and the record of a past civil Medicare fraud case that he lost by default, as the evidence of substantial truth.

The motion noted that although some details in KMOV's report were erroneous, these minor errors were immaterial under the substantial truth doctrine and the fair report privilege.

In response, plaintiff took aim at two errors that he claimed were material – the use of the brand name “OxyContin” as opposed to the generic drug name “oxycodone” in the indictment, and the description of the civil default judgment as a “conviction for Medicare fraud. Plaintiff also argued a kind of libel by implication theory – that by including mention of Dr. Davis in news reports about specific addiction incidents, KMOV somehow “gratuitously” linked him to those incidents.

In a ten-page written summary judgment ruling, Judge David Dowd, of the Circuit Court of the City of St. Louis, Missouri, granted KMOV's motion in full.

After discussing the facts, the legal standards, and the arguments of the parties, the court rejected plaintiff's theory that by mentioning Dr. Davis in news reports about drug abusers, KMOV somehow connected Dr. Davis to those abusers. Following the rule that the language must be evaluated “in context and without innuendo,” the court found nothing in the KMOV broadcasts to indicate that Dr. Davis had been “specifically involved with” the drug abuse incidents described in those broadcasts.

Use of Brand-name “Oxycontin” Rather than Generic “Oxycodone” Was Immaterial

With respect to the errors that plaintiff claimed were material, the court recited the familiar “gist or sting” standard applicable to both truth and fair report defenses. Under this standard, KMOV's use of the brand-name word “OxyContin” rather than the generic word “oxycodone” was immaterial:

The technical difference between a trade name formulation of an active drug and its generic chemical name is insubstantial to the hearer of the report. The gist of the statement regarding Davis is that he overprescribed a prescription painkilling agent in OxyContin, which has been linked to addiction in the area.

Similarly, the court found the description of the civil Medicare fraud default judgment as a “conviction” “immaterial to the effect of the reported conduct,” since the gist was “that Davis had been found guilty and penalized for fraudulently overcharging for Medicare” and the focus of the

statement was on Davis's culpability, not the technical status of the case.

The other defendant, Multimedia KSDK, which was sued on its initial report of Dr. Davis's arrest, has not yet filed any motion.

Plaintiff is represented by Jon and Eric Carlson of Carlson & Carlson in Edwardsville, IL. Multimedia KSDK is represented by Gerald Ortals of Stinson Morrison Hecker LLP in St. Louis.

Mark Sableman is a partner in Thompson Coburn LLP in St. Louis. He represented KMOV in this case together with Elizabeth S. Eastman.

The court rejected plaintiff's theory that by mentioning Dr. Davis in news reports about drug abusers, KMOV somehow connected Dr. Davis to those abusers.

Any developments you think other MLRC members should know about?

Call us, or send a note.

Media Law Resource Center, Inc.
80 Eighth Avenue, Ste. 200
New York, NY 10011
Ph: 212.337.0200

California Appeals Court Affirms Dismissal of Libel Suit Against San Diego Union-Tribune

By Gregory Roper

On January 21, the California Court of Appeal, Fourth Appellate District Division One, affirmed the dismissal of a defamation complaint pursuant to an anti-SLAPP motion brought by The San Diego Union-Tribune and reporter Cheryl Clark. *Atiga v. San Diego Union Tribune*, 2004 WL 95201 (Cal. App. 4 Dist.) (unpublished).

In April 2002 the newspaper published an article written by Clark concerning the Medical Board of California's website and, in particular, the information provided to the public under an option in the website to "check your doctor online." The article, headlined "Loophole leaves some medical suits off Web site," began by discussing three local medical malpractice cases which were settled after jury verdicts.

One of the cases was against plaintiff, Dr. Schubert Atiga. The article stated that he had been found negligent by a jury and had paid \$356,000. The article noted that although the verdict appeared in public records it, and hundreds of others, were not disclosed on the website because of a "legal loophole." Although the law required that settlements, judgments and arbitrations be reported to the Medical Board, only judgments and arbitration awards were reported on the Board's website.

Newspaper Discussed Loophole in Disclosure of Settlements

The article discussed a reform package then under consideration by the Board (and subsequently adopted) which would add disclosure of verdicts and settlements to the information provided on the Web site. The article noted that under the current procedure a doctor could settle after verdict but before judgment and keep information about the case from being posted. The article reported the views of those who favored the reform and those who opposed the changes.

The article also quoted a malpractice attorney who said: "I think it's disgusting. The defense attorneys manipulate

the rules by settling after a verdict. It keeps the verdict from being publicly disclosed." Another attorney said the system stifled public disclosure.

Dr. Atiga alleged that the article falsely accused him of using a loophole to prevent disclosure of the case on the Web site. He argued that the article was libelous on its face because it insinuated defamatory facts about him in his medical profession. He asserted he had been exonerated in all previous cases and had settled the case in question at the urging of the trial judge after a motion for new trial by the malpractice plaintiff was granted and an additur ordered. He contended the article left the impression he was found liable for negligence on various occasions and had covered it up.

San Diego Superior Court Judge Vincent P. DiFiglia who heard the anti-SLAPP motion ruled that Atiga had not met his burden to demonstrate a probability of prevailing. The judge found that Atiga failed to demonstrate any falsity in the statements directly about him and his malpractice case,

(Continued on page 10)

The court said a statement concerning a person's motivation is generally a matter of opinion unless the person has actually stated his intentions and motivations.

RECENTLY PUBLISHED

2003 MLRC BULLETIN

SECTION 43A OF THE LANHAM ACT: USES ABUSES, AND LIMITS

To order contact us or visit our website
www.medialaw.org

California Appeals Court Affirms Dismissal of Libel Suit Against San Diego Union-Tribune

(Continued from page 9)

also concluding the criticisms concerned the Board, not Atiga and the attorney's description of the procedure as "disgusting" constituted opinion.

The judge said: "any fair reading of this article is that the criticism is directed at the Board and the loophole that has been created by the Board which is in charge of reporting these things as opposed to the doctors, and as indicated there's no claim that the statements are untrue and the – besides failing to demonstrate the falsity or substantial falsity of the statements which are specifically referable to the plaintiff, the statement is made in the context of the Board's practice not to report on its website and that is not against Dr. Atiga."

Appeals Court Finds Article Was True or Protected Opinion

The Court of Appeal first noted that although the article was negative toward Atiga's career, all statements directly about Atiga were true. As to the contention of implied defamation regarding Atiga's intentions in settling, the court said a statement concerning a person's motivation is generally a matter of opinion unless the person has actually stated his intentions and motivations. Even if a reader interpreted the article to suggest that Dr. Atiga had settled to avoid disclosure, that suggestion could only reasonably be viewed as an opinion since the article did not say that Atiga had admitted that was his intention or mention any specific facts concerning Atiga's motivation.

Pursuant to stipulation, Atiga reimbursed the newspaper for its attorney's fees and costs incurred in defending the case in the lower court prior to the appeal. Upon return of the case to the lower court, the newspaper will seek its fees and costs on appeal if not voluntarily paid by Atiga.

Plaintiff was represented by Thor O. Emblem, of Escondido, California.

Gregory Roper, a partner in Luce, Forward, Hamilton & Scripps in San Diego, represented The San Diego Union-Tribune and reporter Cheryl Clark.

Ohio Appeals Court Reverses Summary Judgment for Newspaper

At press time, an Ohio appellate court reversed summary judgment in favor of the Akron Beacon Journal, its publisher, a reporter and several editors in a libel suit by a coal industry executive and his company. *Murray v. Beacon Journal Publishing Company, et al.*, Case No. 02 BE 45 (Ohio App. Feb. 18, 2004).

Plaintiff Robert E. Murray, a well-known figure in the Ohio coal industry, was profiled as part of a series of articles entitled "Power to Pollute" that discussed pollution problems in the state. Murray was profiled in an article entitled "Mine Owner Isn't the Shy, Quiet Type."

Reinstating the libel claim, the court found that reading the article as a whole a jury could find four passages in the profile to be defamatory and made with actual malice, including quoting plaintiff saying "The only thing I want is a long line at my funeral. I'm sick. I bought my cemetery plot"; that competitors jokingly referred to plaintiff as "Honest Bob"; that his friends "roll their eyes at his hyperbole"; and that he "tends to exaggerate a good bit."

Citing *Masson v. New Yorker*, 501 U.S. 496 (1991), the court held that a jury could find that some of the quotes used were fabricated or significantly altered.

Plaintiff was represented by Richard Lieberman of Chicago and Michael Shaheen of St. Clairsville, Ohio. The newspaper was represented by Ronald Kopp and Alisa Wright of Roetzel & Andress in Akron, Ohio.

The *MediaLawLetter* will publish a fuller analysis of this decision in its March 2004 issue.

Louisiana Court Dismisses Lawsuit by Mardi Gras Reveler

By Mary Ellen Roy

A book publisher does not have to obtain the consent of a Mardi Gras parade float rider before putting her picture on the cover of a travel guide about New Orleans, a Louisiana district court ruled recently. *Johnson v. John Wiley & Sons Publishers, et al*, Civil District Court, Parish of Orleans, State of Louisiana, No. 03-13698-D (notice of signing of judgment issued January 16, 2004).

Women Sued Over Use of Parade Photo on Book Cover

Ten years ago, Rachael Johnson, now a Tulane Law student but then a teenager, rode in the Zulu parade in New Orleans in Mardi Gras regalia. Freelance professional photographer Frank Siteman took her picture, along with many other pictures documenting Carnival festivities in the Big Easy. Wiley Publishing put Ms. Johnson's colorful picture on the cover of *Frommer's Irreverent Guide to New Orleans*.

Years later, a law school classmate of Ms. Johnson's recognized her photograph on the cover of the *Irreverent Guide* and alerted Ms. Johnson. Ms. Johnson sued the publisher, Wiley, and the photographer, Siteman, as well as Guy LeBlanc, the book's author, Michael Freeland, the book's cover designer, and Michael Spring, the book's editor. She alleged "unauthorized use and misappropriation of her likeness for profit," false light invasion of privacy because of the book's "derogatory" title, invasion of privacy, defamation and intentional infliction of emotional distress. She asserted damages of "loss of economic opportunity," past present and future medical expenses and "mental pain, suffering, and anguish."

Wiley argued that Ms. Johnson's claims were barred by prescription, the Louisiana equivalent of the statute of limitations, because she failed to assert her claims within one year after publication of the book. Wiley pointed to the principle, well-established in most jurisdictions, that the so-called "discovery rule," known in Louisiana as the doctrine of *contra non valentem*, does not apply to mass

media publications under the theory that a widely distributed and available publication is readily discoverable by the plaintiff. The court stated that it was "inclined to agree" that Ms. Johnson's claims were time-barred, but decided the case on other grounds.

Defendants File an Anti-SLAPP Motion to Dismiss

Wiley also filed an Exception of No Cause of Action (equivalent to a motion to dismiss for failure to state a claim) and a Special Motion to Strike pursuant to the Louisiana anti-SLAPP statute, Code of Civil Procedure article 971. The anti-SLAPP statute provides for early dismissal of claims arising out of defendants' free speech activities when the plaintiff cannot demonstrate a likelihood of success. Judge Lloyd Medley of Civil District Court for the Parish of Orleans granted Wiley's motions and later signed a Judgment dismissing Ms. Johnson's claims against all defendants with prejudice.

Wiley's dispositive motions argued that her misappropriation claim was fatally flawed because she could not allege any intrinsic commercial value to her persona. She did not allege that she modeled professionally, for example. In addition, selling a book with an "unauthorized" picture on the cover for profit is not sufficient to establish misappropriation where the person's likeness is relevant to the contents of the book (Mardi Gras parades being a tourist attraction in New Orleans) and thus, is a valid editorial use.

Attending Mardi Gras is "Almost Like Assumption of Risk"

Wiley also argued that Ms. Johnson did not state a cause of action for tortious invasion of privacy because her picture was taken in a public place; there was nothing false about it; and the Zulu parade was a newsworthy event. In his oral reasons from the bench, Judge

In his oral reasons from the bench, Judge Medley placed particular emphasis on the fact that Mardi Gras in New Orleans is a public spectacle watched by thousands of people on the streets and around the world.

(Continued on page 12)

LA Court Dismisses Lawsuit by Mardi Gras Reveler

(Continued from page 11)

Medley placed particular emphasis on the fact that Mardi Gras in New Orleans is a public spectacle watched by thousands of people on the streets and around the world. The judge cited his own participation in the very same parade, noting that he recalls his photograph being taken by numerous photographers along the parade route and one year, his float was shown time and again on a television broadcast about Mardi Gras in New Orleans. As the court said, "It's almost like an assumption of the risk."

Photo on Cover Was Not Defamatory

Similarly, Wiley argued that putting Ms. Johnson's picture on the cover of a guidebook was not defamatory or false. Wiley explained that being part of an "irreverent" guide was no adverse reflection on Ms. Johnson's character. Ms. Johnson had protested to the contrary that because "irreverent" means "lacking re-

spect," then the book cover conveyed the meaning that she was "not respectable." Indeed, Wiley pointed out that the Zulu parade itself, which features a satirical "Big Shot" and "Mr. Big Stuff," is an irreverent event, poking fun at the *faux* royalty of other Mardi Gras krewees.

Although Wiley requested attorneys' fees, which are supposed to be mandatory for prevailing defendants under the Louisiana anti-SLAPP statute, the court declined to award fees. The plaintiff has not indicated whether or not she intends to appeal.

Ike Spears and Carolyn Bryant of Spears & Spears in New Orleans represented the Plaintiff.

Mary Ellen Roy is a partner in Phelps Dunbar LLP in New Orleans. She represented John Wiley & Sons Publishers and the individual defendants in this case with associate J. Michael Monahan II.

Just Published!

MLRC 50 State Survey:

EMPLOYMENT LIBEL AND PRIVACY LAW 2004

TOPICS INCLUDE: *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

\$175

For ordering information on the most current editions, including the 2003 edition currently in stock, go to www.medialaw.org.

No Jurisdiction over German Publishers in Texas

By Marc E. Ackerman and Jennifer Johnson Millones

A U.S. District Court judge in Texas has dismissed on personal jurisdiction grounds a lawsuit alleging libel, intentional infliction of emotional distress, tortious interference with prospective business relations and civil conspiracy claims against Gruner + Jahr AG, Bunte Entertainment Verlag GmbH and related entities, including among others, Bertelsmann AG. *Fielding v. Hubert Burda Media, Inc.*, No. 2:03-CV-0872-K (N.D. Tex. Feb. 11, 2004) (Kinkeade, J).

Articles Discussed Ambassador's Alleged Affair with Model

Thomas Borer, formerly the Swiss ambassador to Germany, and his wife, former Miss Texas Shawne Fielding, sued defendants after several articles detailing an alleged affair between Plaintiff Borer and Ms. Djamila Rowe, a former nude model, appeared in the German magazines *Stern* and *Bunte*. The story was originally published in Switzerland, but was picked up by the media world wide, including in Germany and the U.S. The defendant publishers were all organized under the laws of Germany.

Decision Focused on Lack of Specific Jurisdiction

The 17-page decision focused on the court's lack of specific jurisdiction over defendants, finding that plaintiffs suffered the "brunt of the harm," both emotionally and professionally, in Europe and that Europe, not Texas, was the "geographic focus" of the articles.

The court relied on *Calder v. Jones*, 465 U.S. 783 (1984), the seminal Supreme Court case on specific jurisdiction in a libel suit, and *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the Fifth Circuit's primary case interpreting *Calder*. The district court rejected plaintiffs' argument that specific jurisdiction may be predicated on the republication of defendants' allegedly defamatory articles by the Texas media because of the lack of authority for predicating jurisdiction on republication, among other things.

The Court also found that it lacked general jurisdiction

over defendants, rejecting the argument that BMG, a Bertelsmann affiliate, has a registered agent in Texas, and, therefore, Bertelsmann and Gruner + Jahr should be subject to jurisdiction in Texas under the single enterprise theory.

No Texas Contacts

The Court stated,

"In order for the theory to apply ... some party must have minimum contacts in the first place. As Plaintiffs' only evidence of any contacts in Texas by any defendant in this case is the em-

ployment of a registered agent by BMG, a non-party to this case, there are no contacts that could even potentially be attributed to the other Defendants."

Because the Court lacked personal jurisdiction over Defendants, it did not decide the other grounds for dismissal raised by defendants, namely, improper service of process, forum non conveniens, or failure to state a claim.

Defendant Gruner + Jahr AG was represented by Robert L. Raskopf, Marc E. Ackerman and Jennifer Johnson Millones of White & Case LLP, in New York and Mark L. Mathie of McKool Smith P.C., in Dallas, Texas. Defendants Hubert Burda Media, Inc., Hubert Burda Digital, Inc., Burda Media, Inc., Burda Publications, Inc., Bunte Entertainment Verlag GmbH and Hubert Burda were represented by Thomas S. Leatherbury and Michael L. Raiff of Vinson & Elkins L.L.P., in Dallas. Defendants Bertelsmann AG and Bertelsmann, Inc. were represented by Charles L. Babcock and Kimberly Van Amburg of Jackson Walker L.L.P., in Dallas. Plaintiffs were represented by Kent C. Krause of Speiser Krause and Larry M. Lesh in Dallas.

Marc E. Ackerman is a partner and Jennifer Johnson Millones is an associate with White & Case LLP in New York.

Plaintiffs suffered the "brunt of the harm," both emotionally and professionally, in Europe... Europe, not Texas, was the "geographic focus" of the articles.

Judge Seeks Guidance from Alabama Supreme Court in Reporter's Privilege Case

Federal district court Judge Lynwood Smith has asked the Alabama Supreme Court for guidance in determining whether *Sports Illustrated* magazine can be compelled to reveal confidential sources for an article at issue in a libel suit brought against the magazine by former University of Alabama football coach Mike Price. In December 2003, Judge Smith issued an 18-page memorandum opinion in which he ruled that magazines are not within the scope of the Alabama shield law. See *MediaLawLetter*, December 2003 at 15.

On February 3rd, Judge Smith certified to the Alabama Supreme Court the question:

“Does the exemption from disclosing sources... apply to a person ‘engaged in, connected with or employed by any magazine, while engaged in a newsgathering capacity?’”

Price v. Tim, Inc. and Don Yaeger, No. CV-03-S-1868-S, (N.D.Ala. Feb. 3, 2004).

Price is seeking \$20 million damages from Time, Inc. for a *Sports Illustrated* story entitled “Bad Behaviour: How He [Price] Met His Destiny At a Strip Club.” Reporter Don Yaeger quotes an unnamed woman, who agreed to speak to the magazine on condition that her identity not be revealed. She vividly described events of Price’s visit to Pensacola and his encounter with a stripper named “Destiny.” After publication, the University of Alabama terminated Price as head coach of their football program.

Supreme Court Turns Deaf Ear on Mafia Songbird

The U.S. Supreme Court has denied cert. in a case brought by former Mafia hitman Sammy “The Bull” Gravano arguing that Arizona’s racketeering forfeiture statutes violate the First Amendment. *State v. Gravano*, 60 P.3d 246 (Ariz. App. 2003), cert. denied, 72 USLW 3485 (No. 03-651)(Jan. 26, 2004).

Gravano sought to claim more than \$380,000 in royalties from a book about his life: “Underboss: Sammy the Bull Gravano’s Story of Life in the Mafia.” Gravano worked with author Peter Maas on the one-time best seller in a deal that promised him a share of the royalties.

The high court’s refusal to hear the case leaves intact an Arizona appellate court decision that held the application of the state forfeiture statutes to the book royalties did not violate the First Amendment.

2004 NAA/NAB/MLRC CONFERENCE

Alexandria, Virginia
September 29, 30 and October 1, 2004

Sponsorships for the 2004 Conference are being solicited.

Any firm interested in providing underwriting for the Conference should contact Sandy Baron at MLRC.

RECENTLY PUBLISHED

2003 MLRC BULLETIN

MLRC 2003 REPORT ON
SIGNIFICANT DEVELOPMENTS

To order contact us or visit our website
www.medialaw.org

Flynn on The Hot Seat In "Mulberry Street"

Libel and Fraud Claims Continue Over Professor's Research Project

By Susan Davis

On January 20, 2004, almost seventy years after the publication of Dr. Seuss' "And To Think That I Saw It On Mulberry Street," a book about a boy who fabricates stories about the things he has seen on Mulberry Street, the New York Appellate Division, First Department affirmed a ruling against a Columbia University Business School professor for similar conduct. The Court held that the professor's research project, which "allegedly caused havoc at several New York City restaurants [could] form the basis of a lawsuit sounding in various tort causes of action against the academic institution and the researcher." *164 Mulberry St. Corp. v. Columbia University*, 2004 WL 78353 (N.Y.A.D. 1 Dept. Jan. 20, 2004).

In two separate actions, the Appellate Division allowed intentional infliction of emotional distress, libel, and negligent and fraudulent misrepresentation claims alleged against defendants Francis J. Flynn, Columbia University and Columbia University Business School, to proceed based upon false allegations of food poisoning contained in a letter sent by Flynn to various plaintiffs. The group of plaintiffs includes a number of New York City restaurants, restaurant owners and restaurant employees.

Professor Sent Letters to Restaurants Pretending to Have Suffered Food Poisoning

Defendant Flynn, a Columbia University Business School professor, engineered a creative, albeit costly, research project to test the responsiveness of New York City restaurants, their owners and their employees to putative customer allegations of food poisoning. Flynn sent letters to plaintiffs pretending that he had been the victim of food poisoning at each of the plaintiffs' restaurants. Although the letters differed in minor respects, all of them closed with Flynn stating that:

"[a]lthough it is not my intention to file any reports with the Better Business Bureau or the Department of Health, I want you, Mr. [restaurant owner], to understand what I went through in anticipation that you will respond accordingly."

Plaintiffs did not discover until several weeks later, when they received a letter of apology from defendants, that Flynn's letter was fictitious. Plaintiffs promptly filed suit.

Restaurants Filed Claims for Distress, Libel & Misrepresentation

In the first action, the "Chez Josephine" action, plaintiffs asserted claims against defendants for negli-

gent and intentional infliction of emotional distress and libel. Plaintiffs asserted in general terms that they had suffered severe emotional distress, guilt, and fear of loss of individual jobs and businesses as a result of de-

endants' conduct. Plaintiffs alleged that Flynn sent the letter knowing that plaintiffs would have no choice but to publish the letter to their staffs for investigative purposes. Plaintiffs pointed out that the New York City restaurant business is highly competitive, that Flynn knew that, and that plaintiffs lost large sums of money in food and investigation expenses in relying on Flynn's false statements.

Plaintiffs in the second action, the "Da Nico" action, asserted twenty-four separate causes of action, including claims for negligent and intentional infliction of emotional distress, libel and negligent misrepresentation. The facts involved in the Da Nico action are similar to those alleged in the Chez Josephine action except that the Da Nico plaintiffs alleged an additional instance of fraud. The Da Nico plaintiffs claim that, between Flynn's letter and the apology letters, Flynn placed a

Defendant Flynn, a Columbia University Business School professor, engineered a creative, albeit costly, research project to test the responsiveness of New York City restaurants, their owners and their employees to putative customer allegations of food poisoning.

(Continued on page 16)

Flynn on The Hot Seat In "Mulberry Street"

(Continued from page 15)

phone call to Annette Sabatino ("Sabatino"), mother of Da Nico restaurant owner Nicholas Criscitelli ("Criscitelli"), during which he repeated the details of the food poisoning incident and supplied Sabatino with a false address. Plaintiffs unsuccessfully tried to send flowers to the fictitious address. Subsequently, the New York City Department of Health conducted an investigation, forcing restaurant employees to submit to stool analyses. An issue of fact was presented as to who contacted the Department of Health.

The Appellate Division affirmed an earlier trial court decision in all respects except as to the claims for punitive damages, which the Appellate Division held should have been dismissed.

Plaintiffs' claims for negligent infliction of emotional distress had been dismissed in both actions by the trial court, from which no appeal was taken. The trial court held that plaintiffs had not properly alleged that defendants breached a duty owed directly to plaintiffs, which endangered the plaintiffs' physical safety or caused them to fear for their physical safety.

Although the Appellate Division affirmed the dismissal of most of plaintiffs' intentional infliction of emotional distress claims (in the Da Nico action because the claims were duplicative of their libel claims, and in the Chez Josephine action because the Court could not determine which of the plaintiffs had actually received the letters), it sustained the claims of Jean-Claude Baker, owner of Chez Josephine, and Frank Valenza, owner of Two Two Two, who had each supplied the Court with detailed accounts of their personal experiences.

The Appellate Division explained at length that the factual allegations contained in the affidavits of Baker and Valenza were sufficient to allow a jury to decide whether the defendants' conduct was "outrageous" for purposes of an intentional infliction of emotional distress claim. The Appellate Division pointed to plaintiffs' averments that Baker sought psychiatric care and slipped into a deep depression when he received Flynn's letter, and that Valenza suffered heart problems and agitation because he thought that his restaurant might be "destroyed" because of Flynn's letter. The Appellate Division also agreed with the trial court that the letters, though sent to different individuals, when taken together, could amount to a "campaign of harassment" sufficient to support an emotional distress claim.

The defendants in both actions argued that the "single instance rule" applied to plaintiffs' libel claims and that plaintiffs therefore had to plead special damages. The Appellate Division agreed and affirmed the dismissal of most of plaintiffs' libel claims because plaintiffs did not specifically allege actual or special damages. However, the Appellate Division allowed some of the Da Nico plaintiffs' claims to proceed on a theory of libel *per se*. The Appellate Division reasoned that, because there is a factual dispute as to whether Flynn called Sabatino on the telephone and because there is confusion about who contacted the Department of Health, plaintiffs' claims were thereby removed from coverage of the single instance rule as to those counts.

The Appellate Division affirmed the Da Nico plaintiffs' allegations of negligent misrepresentation finding that Flynn engineered his letter to elicit a response from plaintiffs, with the knowledge that plaintiffs would rely upon the letter to their detriment. In fact, the Supreme Court in the Da Nico action believed that plaintiffs' allegations could have supported a claim for *fraudulent* misrepresentation given that "Flynn's statement was intentionally false, and not merely negligently made and that Professor Flynn intentionally sought reliance of Criscitelli and his restaurant on that false statement." The Appellate Division consequently upheld the trial court's *sua sponte* decision in the Chez Josephine action to allow plaintiffs leave to amend to add claims for negligent and fraudulent misrepresentation.

While the trial court had declined to find privity between Flynn and the plaintiffs for purposes of plaintiffs' negligent misrepresentation claim, the Appellate Division believed that privity did exist because Flynn "by thrusting himself into the business affairs of the recipients solely to elicit an undefined appropriate response, potentially created the basis for the requisite privity, in that the nature of the response, crafted in justifiable reliance on these letters, created a relationship."

Court Rejects Punitive Damages Claims

Although the Appellate Division emphasized that Flynn's alleged conduct could lead to unpredictable and dangerous results — noting the recent suicide of a famous French chef whose restaurant had been downgraded in res-

(Continued on page 17)

Flynn on The Hot Seat In "Mulberry Street"

(Continued from page 16)

restaurant guidebooks — it was nevertheless adamant that plaintiffs not be allowed to recover for punitive damages. The trial court had originally limited plaintiffs' recovery for punitive damages to their negligent misrepresentation claims. However, the Appellate Division, pointing out the long-standing policy of deterrence behind punitive damages, felt strongly that defendants' conduct in this instance was not directed at the general public and was not malicious enough to warrant any recovery for punitive damages. The Appellate Division stated that Flynn's project was "just a research project even though ill-considered, [that was] directed at private parties, and that there is no suggestion that Flynn was seeking maliciously to hurt the targets of his study." The Appellate Division therefore dismissed plaintiffs' claims for punitive damages in their entirety and limited plaintiffs' compensatory damages to provable pecuniary losses.

The Chez Josephine and Da Nico actions will now return to the trial court for further proceedings on plain-

tiffs' remaining emotional distress, libel and negligent and fraudulent misrepresentation claims. In the words of Dr. Seuss, Flynn may have felt his letter made "a story that *no one* could beat" when he said that he "saw it on Mulberry Street." But defendants may have learned the hard way that there comes a time to "stop telling such outlandish tales [and] stop turning minnows into whales."

Plaintiff 164 Mulberry Street is represented by John C. Theodorellis, Law Offices of Arnold N. Kriss. Plaintiff Chez Josephine is represented by Elliot L. Lewis Law Office of Thomas R. Moore and Law Office of Joseph M. Lichtenstein, P.C.

Professor Flynn and Columbia University are represented by George A. Davidson of Hughes Hubbard & Reed LLP and Arthur M. Toback of Toback, Hyman & Bernstein LLP.

Susan Stevens is an associate at Coudert Brothers LLP in New York.

New Mexico Supreme Court Rules that One Scholar's Criticism of Another Is Not Defamatory

By Gregory P. Williams and Jim Dines

The New Mexico Supreme Court upheld summary judgment for an anthropologist who had been sued for defamation by a fellow scholar. *Fikes v. Furst*, 81 P.3d 545 (N.M. 2003).

The defendant had made negative comments about plaintiff to two members of their shared academic community. In ruling for defendant, the court considered the academic context in which the statements were made, and testimony that such statements were not uncommon in the academic world. The court held that although the statements may have been defamatory on their face, the recipients did not in fact understand them to be defamatory, and thus there could be no recovery for defamation.

Angry Words between Scholars

Dr. Peter Furst (defendant) was an anthropologist who studied the Huichol Indian community in Mexico. Dr. Jay Fikes (plaintiff) also studied the same community.

The two scholars had a long-standing feud regarding each other's work, and each was publicly critical of the other. Eventually, Dr. Fikes filed a defamation lawsuit against Dr. Furst arising in part out of statements made by Dr. Furst to two other scholars.

Dr. Bruce Bernstein, a museum curator, testified that "on more than one occasion" Dr. Furst "went through a litany of reasons why Dr. Fikes was unqualified" to work on an envisioned project regarding the Huichol Indians. Dr. Furst also told Dr. Bernstein that the University of Michigan "disowned" Dr. Fikes, "didn't want anything to do with him," and was "sorry they had ever given him or provided him with a doctor's degree." A similar statement was made by Dr. Furst to another scholar in the field, Joan O'Donnell.

The trial court granted summary judgment for Dr. Fikes on the defamation claims, but the Court of Appeals reversed, holding that there were questions of fact precluding summary judgment. *See Fikes v. Furst*, 2003-NMCA-

(Continued on page 18)

New Mexico Supreme Court Rules that One Scholar’s Criticism of Another Is Not Defamatory

(Continued from page 17)

006, 133 N.M. 146, 61 P.3d 855. Specifically, the Court of Appeals ruled that there were factual issues for the jury to resolve as to whether Dr. Bernstein and Ms. O’Donnell understood Dr. Furst’s comments about Dr. Fikes to be defamatory. A required element of defamation in New Mexico, as elsewhere, is that the recipient of the communication understood it to be defamatory.

On appeal to the Supreme Court, Dr. Furst argued that the Court of Appeals had erred in reversing the summary judgment. Specifically, he argued that Dr. Bernstein and Ms. O’Donnell did not attribute a defamatory meaning to the statements, notwithstanding the ordinary meaning of the words Dr. Furst used.

Court: Consider the Context

The Supreme Court determined that in the academic context in which the statements were made, Dr. Bernstein and Ms. O’Donnell did not understand the comments to be defamatory. This academic context was key to the Court’s ruling.

The Court noted that

“[s]ome statements that may seem plainly defamatory to an outside observer may be understood by the intended recipient in a completely different way.”

The Court further stated that

“[c]riticism of the work of scholars is generally commonplace and acceptable in academic circles. Thus, statements that may in appear in isolation to be defamatory may in fact be particularly appropriate or acceptable criticism when made in an academic setting.”

The Court focused on testimony from Dr. Bernstein and Ms. O’Donnell, who testified that the statements made were typical in the anthropological community and “not outside the range of what goes on in academic talk.” The Court held that this testimony constituted prima facie evidence that the recipients of the communications did not attribute a defamatory meaning to the statements. Because Dr. Fikes did not rebut this showing, summary judgment was proper.

This opinion is noteworthy in that the New Mexico Supreme Court had never before considered what it means for a recipient to understand a statement to be defamatory. In making its decision, the Court relied upon 3 *Restatement (Second) of Torts* § 563 (1977). New Mexico’s Uniform Jury Instruction regarding this element of defamation (UJI 13-1008 NMRA 2003) is based on this section of the *Restatement*.

As a part of the same decision, the Court upheld summary judgment for defendant on claims based on a claim of tortious interference with contract.

Plaintiff was represented by David Matthew Overstreet and James Nathan Overstreet of Overstreet & Associates, P.C., in Alamogordo, New Mexico. Defendant was represented by Michael W. Brennan and M. Eliza Stewart of Madison, Harbour, Mroz & Brennan, in Albuquerque, New Mexico.

Gregory P. Williams and Jim Dines are media attorneys with Dines & Gross, P.C. in Albuquerque, New Mexico.

The Court focused on testimony that the statements made were typical in the anthropological community and “not outside the range of what goes on in academic talk.”

Order Now!

**MLRC 50-STATE SURVEY
2003-04:
MEDIA LIBEL LAW**

With updated reports on libel law in the Federal Circuits and an outline of English libel law.

\$175

For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to www.medialaw.org

Scott O'Grady Misappropriation/Lanham Act Case Settles During Trial

By Chip Babcock

Scott O'Grady was an air force pilot shot down over Bosnia in 1995. He safely parachuted from his plane, evaded capture for six days and was ultimately rescued by the United States Marines. He returned to the United States amidst much publicity and authored an autobiographical book entitled *Return with Honor*. He also signed a movie deal with Orion Pictures but the film was never made. In addition, O'Grady began providing motivational speeches centered on his experiences in Bosnia as a client of The Washington Speaker's Bureau.

Shortly after O'Grady was rescued, an independent film producer, John Davis, began working on a movie which he titled *Behind Enemy Lines*. It was inspired by the O'Grady experience but from the first draft forward its only resemblance to the O'Grady story was that a U.S. airman was shot down over Bosnia, evaded capture and was ultimately rescued by the Marines within a several day period. The film was ultimately released on November 30, 2001 and was successful. A day before the movie was released, O'Grady appeared on a nationally syndicated program, *Hot Ticket*, reviewed the movie and gave it a "Hot" rating saying that he was entertained.

Twentieth Century Fox, the movie studio which released *Behind Enemy Lines*, spent approximately \$40 million dollars promoting the film. Of that amount, the company spent between \$60,000 and \$120,000 on a special programming event with The Discovery Channel. That event took place two days before the movie was released and included the sponsorship of a one hour documentary entitled *Behind Enemy Lines: The Scott O'Grady Story*.

On this particular night, the documentary which had been produced by the BBC and acquired by Discovery was sponsored or "brought to you by" the new Twentieth Cen-

tury Fox movie *Behind Enemy Lines*. Several months later O'Grady sued Twentieth Century Fox and The Discovery Channel with two claims: first, that Twentieth Century Fox had "misappropriated" his life story with the making of the film *Behind Enemy Lines* and secondly, that advertising on The Discovery Channel during the airing of the documentary was a misappropriation of his name or likeness for a commercial purpose and was false advertising actionable under the Lanham Act because the programming event suggested that the movie was O'Grady's real life story and that he endorsed the movie.

The case was filed in the Eastern District of Texas, Texarkana Division and the Defendants filed motions for summary judgment. The United States Magistrate Judge granted Twentieth Century Fox's motion regarding the misappropriation claim regarding the movie holding that

O'Grady sued Twentieth Century Fox and The Discovery Channel with two claims: ... that Twentieth Century Fox had "misappropriated" his life story ... and secondly, that advertising ... during the airing of the documentary ... suggested that the movie was O'Grady's real life story and that he endorsed the movie.

O'Grady had no claim for a movie which was a fictional account of his life story even though admittedly inspired by his experiences. The court, however, denied the motion with respect to the special programming event on The Discovery Channel.

The case proceeded to trial and in January 2004 a ten person jury was selected. Following jury selection, the Court ordered the parties to mediation and the case settled. The settlement is confidential.

Twentieth Century Fox was represented by Chip Babcock, Nancy Hamilton and Cedric Scott of the law firm of Jackson Walker L.L.P. The Discovery Channel was represented by Laura Handman, Gary Bostwick and Constance Pendleton of Davis Wright Tremain LLP.

Scott O'Grady was represented by George Bowles, Peter Flynn and Roy Hardin of Locke, Liddell & Sapp in Dallas, Texas.

Chip Babcock is a partner with Jackson Walker LLP.

New Jersey Court Rules Plaintiff Must Plead Actual Malice with Specificity to Defeat Fair Report Privilege

By Arlene M. Turinchak

A New Jersey Appellate Court has held that the state common law fair report privilege can be defeated by a showing of actual malice. But in a far-reaching twist, the court went on to hold that facts evidencing actual malice must be included in the complaint or it is subject to dismissal for failure to state a claim. *Darakjian v. Hanna*, 2004 WL 21073 (N.J. Super. A.D. Feb. 5, 2004).

Writing for a unanimous three-member panel, Judge Howard Kestin ruled that “To permit a defamation action against press persons or entities to survive on the basis of a mere allegation of knowledge of falsity or reckless disregard affords insufficient breathing space to the critical rights protected, in the public interest, by the First Amendment, and to the fair-report privilege which serves the same fundamental policies.”

Newspaper Reported Comments Made at Public Board Meeting

The case arose out of a newspaper article that recounted comments about plaintiff Fran Darakjian made by a citizen at a Board of Education meeting. In the complaint, plaintiff did not allege that the newspaper incorrectly reported the comments but, instead, sought to impose liability on the media defendants on the theory that they knew, or should have known, the comments were false.

Media Defendants *Pascack Valley Community Life* and its parent North Jersey Media Group, moved for a dismissal for failure to set forth a cause of action under the public eye aspect of the fair report privilege. Essentially, *Community Life* argued that the fair report privilege was only defeated by a showing that the report was not fair and/or accurate; that actual malice was irrelevant. The trial court denied the motion, finding that malice could defeat the privilege, although the court

declined to determine whether the malice on which it relied was actual malice or common law malice.

The Appellate Division reversed, dismissing the action against the media defendants. In dismissing the complaint, the court expressly declared that the fair report privilege could be defeated by actual malice, something that was only implied by the leading New Jersey Supreme Court case on the issue, *Costello v. Ocean County Observer*, 136 N.J. 594, 607, 619-20, 643 A2d 1012, 22 Media L. Rep 2129 (1994).

Plaintiff Must Plead Actual Malice with Factual Specificity

On the other hand, the court found that a “bare conclusory assertion” in a complaint that the defendant “knew and/or reasonably should have known that the statement” was false is an insufficient pleading.

A complaint that fails to set forth “factual contentions offered to substantiate the assertion” is subject to dismissal for failure to set forth a cause of action. It was on this basis the court dismissed the complaint against the media defendants.

Also, in dicta, the court rejected an argument the plaintiff raised for the first time on appeal – that the report was not fair and accurate because it did not include all the statements made at two public meetings.

The court held that the newspaper has the right and obligation to put the facts of the article in context, what constitutes context however, is a decision left to the press and cannot be dictated by the court.

Plaintiff was represented by Robert M. Mayerovic of North Bergen, N.J.

Arlene M. Turinchak of McGimpsey & Cafferty in Franklin, N.J. represented the media defendants in this case.

“To permit a defamation action against press persons or entities to survive on the basis of a mere allegation of knowledge of falsity or reckless disregard affords insufficient breathing space to ... the fair report privilege.”

Bare Allegation That Non-Diverse Corporate Officer Was “Responsible” for “Content” of Broadcast is Sufficient To Overcome Fraudulent Joinder Argument

By Jay Ward Brown

Adding to the line of cases in the Third Circuit in which courts have refused to “pierce the pleadings” when evaluating an assertion of fraudulent joinder in response to a motion to remand, the Western District of Pennsylvania has remanded a removed libel case to state court based solely on the conclusory allegation that a non-diverse corporate officer was “responsible” for the “content” in question. *Joyce v. NextMedia Operating, Inc., et al.*, No. 03-319 (W.D. Pa. Feb. 5, 2004).

Pennsylvania Judge Sued Broadcaster

Plaintiff Michael T. Joyce is a judge of the Pennsylvania Superior Court. According to the complaint, Erie radio station WJET broadcast a series of remarks to the effect that Judge Joyce had parked his car in a space reserved for the handicapped, displayed a permit, and then went roller-blading. Judge Joyce, represented by Richard Sprague, filed suit for defamation, false light and intentional infliction of emotional distress – actually two suits, against two different sets of station-related defendants.

In one of the two lawsuits, Judge Joyce named as defendants (1) the out-of-state corporation that operates WJET and five other Pennsylvania radio stations, (2) the out-of-state entity that owns the FCC licenses, and (3) a corporate officer of the operating company, a Pennsylvania resident. Because the corporate officer’s duties do not include supervision of the content of the radio broadcasts, nor did he in any way participate in or have any advance knowledge of the particular broadcast in question, defendants removed the action to federal court on the ground that he had been fraudulently joined and his citizenship should be ignored for purposes of determining diversity of the parties.

Judge Joyce moved to remand the case to state court – the state trial court over which he sits as an appellate judge. The federal judge afforded plaintiff’s counsel the opportunity to depose the corporate officer, which plaintiff’s counsel declined to do, and defendants submitted an affidavit establishing the relevant facts.

Judge Refused to Pierce Allegations of the Complaint

While acknowledging the prospect that the claims against the corporate officer were without merit, the federal district judge concluded that he was not permitted to

rely upon the officer’s uncontested affidavit to controvert a conclusory allegation in the complaint to the effect that the corporate officer was “responsible” for the “content” of the program in question – a fact that the affi-

Because the allegations of the complaint created the “possibility” that the corporate officer had responsibility for the content of the program, the federal court concluded he was not fraudulently joined.

dativ established was plainly not true. Because the allegations of the complaint created the “possibility” that the corporate officer had responsibility for the content of the program, the federal court concluded he was not fraudulently joined. The court rejected authority from other circuits that permits a more meaningful “piercing” of the allegations of the complaint when evaluating the claims against the non-diverse defendant.

In so holding, Senior District Judge Maurice B. Cohill, Jr. gave short shrift to the defendants’ argument that, if a finding of fraudulent joinder can be avoided simply by making the conclusory allegation that some non-diverse officer or management employee of the corporate defendant has some measure of “responsibility” for the conduct at issue, undisputed factual evidence to the contrary notwithstanding, then it is hard to imagine a case in which removal based on diversity jurisdiction cannot be avoided by artful pleading on the part of the plaintiff.

The remanded action now likely will be consolidated with the second lawsuit (against the radio station’s corpo-

(Continued on page 22)

Allegation that Corporate Officer Was “Responsible” For Broadcast “Content” Is Sufficient To Overcome Fraudulent Joinder Argument

(Continued from page 21)

rate parent and the disk jockey), in which the defendants’ preliminary objections are pending. Although plaintiff moved for recovery of attorney’s fees in connection with his motion to remand, the federal court rejected that request, concluding that defendants’ position was “colorable, although ultimately unsuccessful.”

Plaintiff is represented by Richard Sprague and colleagues from Sprague & Sprague in Philadelphia.

Jay Ward Brown is a partner with Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. He represented the defendants in this case together with Gayle C. Sproul of the firm’s Yardley, PA office.

MLRC MediaLawLetter Committee

- David Bralow (Co-Chair)
- Bruce Rosen (Co-Chair)
- Robert Balin
- Jim Borelli
- Jay Ward Brown
- Peter Canfield
- Thomas Clyde
- Robert Dreps
- Judy Endejan
- Jon Epstein
- Charles Glasser, Jr.
- Richard M. Goehler
- Karlene Goller
- Steven D. Hardin
- S. Russell Headrick
- Russell Hickey
- David Hooper
- Jonathan Katz
- Debora Kristensen
- Eric Lieberman
- Daniel Mach
- John Paterson
- Deborah H. Patterson
- Mark J. Prak
- William Robinson
- Laurence B. Sutter
- Charles D. Tobin
- Paul Watler

10th Cir. Upholds Do-Not-Call Registry

On February 17, the 10th Circuit Court of Appeals held that the federal do-not-call registry is a valid commercial speech regulation. *Mainstream Marketing Systems, Inc. v. Federal Trade Commission*, 2004 WL 296980 (10th Cir.).

The national registry allows individuals to register their phone numbers on a “do-not-call” list which prohibits most commercial telemarketers from calling those numbers and authorizes regulators to fine violators up to \$11,000 per infraction. The FTC and the Federal Communications Commission (FCC) currently share enforcement responsibilities. See 16 C.F.R. § 310.4(b)(1)(iii)(B) (FTC rule) and 47 C.F.R. § 64.1200(c)(2) (FCC rule),

The decision by Judge Edel reverses two lower court rulings that were consolidated on appeal. One from the district court of Colorado held that the registry was an unconstitutional restriction on the First Amendment rights of the telemarketing industry. See *Mainstream Marketing Services, Inc. v. F.T.C.* 284 F.Supp.2d 1266 (D. Colo. 2003).

The MediaLawLetter will publish a full analysis of the decision in the March issue.

MLRC 2003 Annual Dinner Transcript Now Available

**“In the Trenches Revisited”
11/12/03**

***To view, please visit our
web site***

www.ldrc.com

Newspaper Is Statutorily Immune from Liability for Publishing Name of Juvenile Sex Offender

By Michael M. Conway and Miki Vucic

An Illinois trial court ruled this month that a daily newspaper was absolutely immune from liability for publishing the name of a juvenile sex offender who had failed to register with law enforcement authorities under the Illinois version of Megan's Law (requiring the registration and publication of the addresses of convicted sex offenders). *Doe v. Kankakee Daily Journal Company*, Case No. 03-L-52 (Cir. Ct Kankakee County, Illinois, Feb. 3, 2004). The court dismissed a suit brought by a minor against the *Kankakee Daily Journal* for damages.

Newspaper Published Names of Sex Offenders

The plaintiff, styled John Doe in the litigation, admitted in the complaint that he was a juvenile sex offender, but alleged that the newspaper's publication of his name in an article entitled "Kankakee Co. Keeps An Eye On Sex Offenders" violated the Illinois Juvenile Court Act (705 ILCS 405/1 *et seq.*) which, with certain exceptions, forbids the public disclosure of the identities of juvenile offenders.

The plaintiff argued for an implied right of action for damages under that Act. The plaintiff did not claim that the article was false as to him, but rather that the disclosure of his identity conferred a cause of action for damages.

As permitted under Illinois state practice, the *Journal* filed both a motion to dismiss as a matter of law — that no implied right of action existed — and a motion under Section 2-619(a)(9) of the Civil Practice Act which authorizes the dismissal if any other affirmative matter defeats the claim. The *Journal* argued that, under the First Amendment principles of *Bartnicki v. Vopper*, 532 U.S. 514 (2001) and similar precedent, the newspaper could not be held liable for the publication of truthful information lawfully obtained.

The evidentiary record on the motion established that the Kankakee County Sheriff's Department had provided a *Journal* reporter with a list, initially compiled by the Illinois State Police, of sex offenders who were required to register in Kankakee County. The list purported to identify those offenders who were delinquent in registering. The plaintiff's name was on the list and was published.

Plaintiff's Action Barred By Statute

The circuit court, however, found a different basis for its ruling. While Doe relied on the Juvenile Court Act, the court held that any "implied cause of action" based upon these facts would have to be based upon a statute not cited in the complaint, The Sex Offender and Child Murderer Community Notification Law, 730 ILCS 152/101 *et seq.* In section 120, this

statute allows the Department of State Police to disclose to "any person likely to encounter a sex offender," specified information about the offender including name, address, date of birth, and the nature of the offense.

The court found that this was a more specific statute governing the subject matter than the general provisions of the Juvenile Court Act and therefore controlled.

Having rechanneled the complaint into a different statutory basis, the court then held that any implied cause of action in that statute was barred by the absolute immunity provision in section 130 of the act. This provision grants immunity from civil or criminal liability to any person who provides information relevant to the procedures of the statute. The immunity reached the *Journal* because the statute conferred immunity to any "secondary release of any of this information legally obtained in conjunction with the procedures set forth in this Law."

(Continued on page 24)

Given the increased frequency with which newspapers publish lists of sex offenders, the immunity provision provides an important level of protection for journalists who accurately report the information provided by law enforcement authorities.

Newspaper Is Statutorily Immune from Liability for Publishing Name of Juvenile Sex Offender

(Continued from page 23)

The circuit court reached this outcome even though it held that the Sheriff's Department's release of the juvenile's name was "contrary to the provisions" of the statute, although the release would have been proper if the plaintiff were an adult. Nonetheless, because the immunity is so sweeping, even if the release of the juvenile's identity did not comport with the statutory scheme, the newspaper was immune from any civil liability.

Given the increased frequency with which newspapers publish lists of sex offenders, the immunity provision provides an important level of protection for journalists who accurately report the information provided by law enforcement authorities.

Michael M. Conway and Miki Vucic, of the Chicago office of Foley & Lardner, represented the Kankakee Daily Journal in this case.

JUST PUBLISHED

2004 MLRC BULLETIN

**MLRC'S ANNUAL REPORT ON
TRIALS AND DAMAGES
2004**

**To order contact us or visit our website
www.medialaw.org**

Order now!

**MLRC 50-STATE SURVEY 2003-04:
MEDIA LIBEL LAW**

With updated reports on libel law in the Federal Circuits and an outline of English libel law.

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

\$175

For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to www.medialaw.org

Texas Appeals Court Affirms Denial of Summary Judgment in Public Official Libel Case

By William Ogden

A Texas appeals court has affirmed the denial of summary judgment in a public official libel case, finding that the record presents fact issues of actual malice and substantial truth. *The Hearst Corporation, et al. v. Jack Skeen, Jr., et al.*; No. 2-03-069-CV, 2004 WL 221298 (Tex. App.—Fort Worth) (February 5, 2004).

The case concerns a newspaper article entitled “Justice Under Fire” published in the *Houston Chronicle* on June 11, 2000, written by *Chronicle* reporter Evan Moore. The article surveys a number of controversial criminal prosecutions originating in Smith County, Texas. Following a subheadline that reads “‘Win at all costs’ is Smith County’s rule, critics claim,” the article then examines a series of cases in which defense lawyers raised charges of suppressed evidence, falsified testimony, or other prosecutorial misconduct. The article includes commentary by both confidential and attributed sources, including defense lawyers, a former Smith County district attorney, and the director of a national non-profit organization dedicated to assisting criminal defendants who are wrongly accused.

District Attorney and Former Assistants Suing Over Houston Chronicle Article

Plaintiffs in the case are Jack Skeen, the District Attorney of Smith County, and two former assistants. Following lengthy and protracted discovery into the court records of more than a dozen criminal prosecutions and appeals, the *Chronicle* moved for summary judgment on multiple grounds, including (1) actual malice was negated as a matter of law, (2) the article was substantially true, (3) the article was privileged as a fair report of judicial proceedings and official acts, and (4) much of the commentary in the article was protected opinion.

The trial court denied summary judgment. The *Chronicle* then filed an interlocutory appeal under the Texas statute allowing media defendants to appeal summary judgment denials in libel cases. TEX. CIV. PRAC. & REM. CODE § 51.014(6).

Summary Judgment Denied on Interlocutory Appeal

In an opinion delivered February 5, 2004, the Fort Worth Court of Appeals affirmed the trial court’s denial of summary judgment, finding that there were fact questions raised as to actual malice, substantial truth, and the fair report privilege.

The opinion begins by reciting Texas law approving a theory of recovery for libel based on the publication “as a whole.” Under this theory, even though all individual statements in the article are literally or substantially true, a publication can nonetheless be held to convey a false and defamatory impression by omitting or juxtaposing facts. *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116 (Tex. 2000). The court then cites several examples of omitted facts which plaintiffs claim created a false impression as a whole. For example, the article comments on the district attorney’s refusal to prosecute the son of a deputy sheriff on drug violations, quoting another former district attorney who questioned why the DA’s office would avoid the prosecution.

The court found a question of falsity arising from the fact that the article failed also to report that the D.A. had referred the case to the attorney general for possible conflicts, since the accused deputy’s son was a primary witness in several pending prosecutions. The article further reports on several cases in which some allegations of misconduct precede Skeen’s tenure as District Attorney. While the article clearly states those cases arose in a prior administration, the court found that the publication as a whole “suggests” that Skeen might have some complicity, and omits to fully explain his lack of direct involvement.

After finding some evidence of falsity, the court then finds some evidence of actual malice. Again, the court opted for the most elastic statements of Texas law in finding a fact question. The court notes that malice can be proved through circumstantial evidence, and that a libel defendant cannot automatically insure favorable results by his own testimony that he believed his statements were literally true. Relying again more on omitted facts, rather than the published facts, the court concludes that “an omission can be evidence of actual malice if the plaintiff proves that the defendant knew or strongly suspected that it could create a substantially false impression.” Slip op. at 4.

By discounting the reporter’s lengthy affidavit which described his sources and his research in meticulous detail, and by applying a circumstantial evidence standard in reliance on omitted facts, the court then accepts several of the plaintiffs’ mischaracterizations of the record as sufficient evidence to raise a question on actual malice. For example, the court cites to the deposition testimony of an editor, who

(Continued on page 26)

Texas Appeals Court Affirms Denial of Summary Judgment in Public Official Libel Case

(Continued from page 25)

claims she was “perturbed” to receive a lengthy letter from Skeen denying the charges shortly before publication. The court holds that the editor’s being “perturbed” was some evidence of doubt in the article’s accuracy, when in fact the editor was “perturbed” because Skeen had waited until very shortly before publication to submit a thorough response in writing.

The court also finds evidence of malice in the reporter’s quoting other sources who characterized the district attorney as having a “rule” or “policy” to “win at all costs.” Since the article only surveyed approximately a dozen prosecutions, and since the district attorney’s office had handled over 10,000 cases during his tenure, the court found some evidence that the reporter had actual awareness that any characterization of a “rule” or “pattern” was false on so small a statistical sample.

Finally, the court also denied the *Chronicle’s* fair report privilege defense. Misapplying the common law privilege, the court concludes that any fair report privilege is waived because the statements in the article were “republished.” The court holds that constitutional and statutory privileges are inapplicable since there is some evidence of actual malice.

Appellate Courts Applying a More Lenient Standard in Public Official Cases

The opinion follows several other recent Texas cases which appear to dilute constitutional safeguards, and is further evidence of the mischief created by the Texas Supreme Court’s acceptance of “libel as a whole” in *Turner v. KTRK Television, Inc.*, supra.

The Texas Supreme Court recently found no evidence of actual malice as a matter of law in a product disparagement case involving Forbes magazine. *Forbes, Inc. v. Granada Biosciences, Inc.*, 2003 WL 22999362 (Tex. 2003); see also MLRC *MediaLawLetter* Jan. 2004 at 3. However, one year earlier the Texas Supreme Court found sufficient evidence of actual malice in another public official case brought by a district judge against the host of a local access channel call-in talk show. *Bentley v. Bunton*, 94 S.W.3d 561 (Tex. 2002).

Following the court’s acceptance of a more liberal “libel as a whole” standard in *Turner*, and the affirmance of an actual malice finding in *Bentley*, a number of intermediate appellate courts appear to be applying a more lenient standard in public official cases, finding evidence of malice or falsity where none existed before.

A pair of companion cases recently found evidence of falsity and malice in libel claims brought by a physician against a newspaper and television station, based on their reports that he was a party to a malpractice suit by a former patient, when in fact he had settled and been dismissed from the case before the trial began. Despite the reporter’s testimony that they were unaware of the doctor’s settlement, and despite the fact that the plaintiff-doctor was named in the original malpractice petition and was in fact the operating physician charged with malpractice when trial proceeded

against the hospital, the court found sufficient evidence to create a fact issue, both as to falsity and malice. *Script Texas Newspapers v. Belalcazar*, 99 S.W.3d 829 (Tex. App.—Corpus Christi 2003, pet. denied); *Entravision Communications Corp. v. Belalcazar*, 99 S.W.3d 393

(Tex. App.—Corpus Christi 2003, pet. denied).

In a case now pending before the Texas Supreme Court, another Texas court of appeals found a fact question as to actual malice when an alternative weekly newspaper published a satirical parody which poked fun at a local district attorney and juvenile court judge. *New Times, Inc. v. Isaacks*, 91 S.W.3d 844 (Tex. App.—Fort Worth 2002, pet. granted). The court found sufficient evidence to present an issue as to whether a reasonable reader would interpret the satirical article as straight news.

Plainly, Texas law is in flux on the issues of actual malice and the truth of a publication “as a whole.” Decisions from the intermediate appellate courts and the state supreme court will bear close observation in the years to come.

William Ogden and Joel White of Ogden, Gibson, White, Broocks & Longoria, LLP, Houston, Texas, represented The Hearst Corporation together with Greg Coleman and R. Bruce Rich, of Weil Gotshal & Manges.

The opinion follows several other recent Texas cases which appear to dilute constitutional safeguards, and is further evidence of the mischief created by the Texas Supreme Court’s acceptance of “libel as a whole” in Turner v. KTRK Television, Inc.,

Eleventh Circuit Hears Appeal in *Morris v. PGA*: Are There Property Rights in Real Time Golf Scores?

By George D. Gabel, Jr.

The dispute between Morris Communications Corporation (“Morris”) and the PGA Tour, Inc. (“PGA Tour”), over Internet media restrictions was argued to the Eleventh Circuit Court of Appeals on January 14, 2004. The outcome will significantly impact the ability of news organizations to timely report facts from their source via the Internet. Indicative of its significance, hundreds of news organizations joined in an *amicus* brief asking the Eleventh Circuit to reverse the district court’s determination that PGA Tour has a protectible property right in the real-time golf scores displayed at PGA Tour events. *Morris v. PGA Tour*, 235 F. Supp. 2d 1269 (M.D. Fla. 2002) (Judge Schlesinger).

PGA Restricts Reporting of Scoring Information

The facts of this dispute can be simply stated. As a condition of access to media center at its events, PGA Tour requires on-line news organizations to agree to delay their reporting of scoring information until at least “thirty minutes after the actual occurrence of the shots.” Also, on-line news organizations may not syndicate scoring information. These restrictions are set forth in PGA Tour’s media credentials. Importantly, because golf is played over a large geographic area (*i.e.*, an 18-hole golf course) complete scores for all competitors are available only in the media center. PGA Tour regulations also prohibit other organizations from gathering scores from the course.

Thus, the effect of PGA’s restriction is that it enables PGA Tour to monopolize the publication and syndication of real-time golf scores on its own Internet website. In other words, the restriction eliminates competition from other on-line news organizations for the timely reporting of these facts. See David Bralow, *MLRC Media Law Letter*, “PGA Tour Can Limit Redistribution of Real-Time Golf Scores,” at 7-9 (January 2003) (describing underlying facts).

Lawsuit Began as an Antitrust Case

Morris’ lawsuit began as an antitrust case — Morris claimed that PGA Tour’s media restrictions violated Section 2 of the Sherman Act — but intellectual property issues ground the district court’s opinion. Specifically, the district court cited two U.S. Supreme Court cases which recognized the right of commodity exchange members to control the dissemination of ticker tape information to non-members: *Board of Trade of the City of Chicago v. Christie Grain and Stock Company*, 198 U.S. 236 (1905), and *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). In these “ticker cases” the Supreme Court determined that the exchange’s information was “akin to trade secrets” and gave rise to a property right that the exchanges could enforce against third parties.

Citing to the “ticker cases,” the district court held that PGA Tour has a property right to golf scores until they enter the public domain. According to the district court, the public domain in this case is outside the physical boundaries of PGA Tour events. That is, golf scores displayed at PGA Tour events are protectible because they do not enter the public domain until they are published off-site. Based on (a) this physical conception of the public domain, (b) the “ticker cases,” and (c) the evidence that PGA Tour expends resources to collect and display golf scores at its events, the district court found a protectible property interest. Grounded on this finding, the district court held that PGA Tour’s media restrictions were reasonably necessary to protect a property right and, thus, justified by legitimate business reasons (a common defense in Section 2 cases). In sum, the district court granted summary judgment to PGA Tour finding that the protection of its alleged property rights was a complete defense to Morris’ antitrust claims.

Morris and the news organizations represented by the *amicus curiae* have made two basic arguments to the

Citing to the “ticker cases,” the district court held that PGA Tour has a property right to golf scores until they enter the public domain.

(Continued on page 28)

Eleventh Circuit Hears Appeal in *Morris v. PGA*

(Continued from page 27)

Eleventh Circuit urging reversal. Simply stated, Morris' position is that the district court's quasi-intellectual property has no basis in law.

First, golf scores are not "akin to trade secrets." At its events, PGA Tour displays real-time golf scores to hundreds of reporters in the media center and, without restriction, to thousands of spectators. PGA Tour has no interest in keeping the scores secret; to the contrary, the value of golf scores is derived by their broad dissemination. The "ticker cases" are simply not applicable.

Indeed, neither party even cited to the ticker cases in their pleadings nor did PGA Tour assert trade secret protection. Also, the "ticker cases" are no longer controlling in light of the Supreme Court's subsequent decision in *Erie Railway Company v. Tompkins*, 304 U.S. 64 (1938), which eschewed a federal common law.

Second, the district court's opinion cannot be reconciled with the Supreme Court's decision in *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 499 U.S. 340 (1991), which rejected the "sweat-of-the-brow" theory of copyright protection. In *Feist*, the Court determined that the compiler of a telephone directory had no protectible interest in facts notwithstanding the expenditure of resources to collect the information. In pertinent language, the Court held:

That there can be no valid copyright in facts is universally understood. The most fundamental axiom of copyright law is that no author may copyright his ideas or the facts he narrates The same is true of all facts – scientific, historical, biographical, and news of the day. They may not be copyrighted and are part of the public domain available to every person.

Id. at 499 U.S. at 345-46 (citations omitted).

This is not to say that PGA Tour alleged copyright protection or that copyright, *per se*, was the basis for the district court's decision. But *Feist* applied the Copyright Act of 1976 which created a broad and *preemptive* scheme of federal intellectual property protection. 17

U.S.C. § 101 *et seq.*; See also *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 1997) (analyzing scope of common-law "hot news" protection in light of copyright preemption).

As such, the district court was without authority to bypass Congress and fashion a new federal common-law intellectual property right to mere facts (*i.e.*, golf scores). As *Feist* indicates, the "public domain" is not defined by geographical boundaries; rather, it is comprised of information not protected by a cognizable intellectual property right – *e.g.*, copyright, patent, trademark, or trade secret protection.

Both Sides Faced Difficult Questions at Argument

This district court's erroneous finding of an intellectual property right, Morris believes, is now squarely before the Eleventh Circuit. The three judges assigned to this case are Chief Judge J. L. Edmondson, Joel F. Dubina, and Emmett Ripley Cox. At the oral argument, both sides faced difficult questions.

First, Judge Dubina asked Morris whether this is an antitrust case, an intellectual property case or a First Amendment case? And if this is an antitrust case, why should the Court compel PGA Tour to give Morris golf scores "for free" which PGA Tour has gathered at its own expense?

Morris responded that while antitrust claims lie at the core of this case, the district court's summary judgment depends on a finding that golf scores are PGA Tour's intellectual property, and the First Amendment principle is one of prior restraint. Much like a valid patent confers limited antitrust immunity, here PGA Tour's "property interest" in golf scores immunized it from Section 2 liability.

Morris believes, however, that golf scores displayed to hundreds of reporters in the media center, and thousands of spectators at PGA Tour events, are in the public domain as soon as they are made on the course. More to the point, Morris believes that it is impossible to "free-ride" on factual information which is in the public domain. Once the fiction of an intellectual property right over the golf scores is removed from this case, it should be clear that PGA Tour's conduct violates Section 2.

Simply stated, Morris' position is that the district court's quasi-intellectual property has no basis in law.

(Continued on page 29)

Eleventh Circuit Hears Appeal in *Morris v. PGA*

(Continued from page 28)

Additionally, Morris does not gainsay that PGA Tour expends considerable resources to collect and display golf scores at its events. But it does so because keeping score is essential to its sport, for competitors and spectators alike. PGA Tour events earn hundreds of millions of dollars each year and media coverage contributes directly to these earnings. If the PGA Tour did not keep score there would be no point in playing the tournament. The PGA Tour's enhancements to the scoring system have been made to enhance the attractiveness of the sport to fans, advertisers, and broadcasters. Indeed, the record in the case shows that the PGA Tour developed the "real-time" scoring system long before the Internet ever came into the picture.

Furthermore, the assertion that PGA Tour gives scores to the media "for free" is incorrect because it ignores the other half of the historical bargain. In simple terms, PGA Tour has always invited news organizations to its events in order to exchange value: newsworthy facts in exchange for media publicity. Having made that bargain, PGA Tour cannot lawfully change the rules and require news organizations to now delay the reporting of facts so that PGA Tour can monopolize the real-time Internet market for that information.

Second, the panel asked Morris whether its claims implicate PGA Tour's ability to sell exclusive television rights. In other words, if Morris' antitrust claims are valid, why couldn't someone with a television camera also demand access to PGA Tour events.

The answer lies in the effect of the restriction. Arguably, PGA Tour has a legitimate business interest in protecting its ability to license an exclusive television broadcast because that broadcast enjoys copyright protection. 17 U.S.C. § 101 (copyright protection applies to broadcast). In stark contrast, the restrictions challenged by Morris concern just scores that are public domain facts, not the broadcast of the tournaments themselves or even a description of the action.

The PGA Tour's restrictions do not protect intellectual property; rather, they are the means by which PGA Tour has eliminated competition from news organizations.

Third, Chief Judge Edmondson asked PGA Tour whether it could plausibly base a free-riding defense on a "sweat-of-the-brow" theory in light of *Feist*. PGA Tour responded that the intellectual property issues raised by Morris are irrelevant. Rather, according to PGA Tour, the issue here is simply "free-riding" and does not depend on the existence of intellectual property.

Emphasizing that it collects golf scores at considerable expense, PGA Tour argued that it has no obligation to open its events to its competitors. Notwithstanding whether the facts are in the public domain, PGA Tour contends, it has a legitimate right to be the exclusive supplier of real-time golf scores.

At bottom, the Eleventh Circuit will have to resolve whether news organizations can be accused of taking a "free-ride" on the facts they collect at private events. The district court granted summary judgment in the belief that golf scores were PGA Tour's intellectual property, but PGA Tour's arguments on appeal do not rely (or defend) that finding. This begs the question, does PGA Tour's free-riding defense, when stripped of its intellectual property foundation, warrant the summary dismissal of Morris' antitrust claims. An answer from the Eleventh Circuit is expected within six to nine months.

PGA Tour was represented by Jeffrey A. Mishkin of Skadden, Arps, Slate, Meagher & Flom, LLP, New York, New York; and James M. Riley of Rogers, Towers, Bailey, Jones & Gay, Jacksonville, Florida.

George D. Gabel, Jr. is a partner with Holland & Knight in Jacksonville, Florida. He represented Morris Communications Corporation together with Jerome W. Hoffman, Tallahassee, Florida; Steven L. Brannock and David C. Borucke, Tampa, Florida.

The Eleventh Circuit will have to resolve whether news organizations can be accused of taking a "free-ride" on the facts they collect at private events.

Massachusetts Trial Court Holds Single Publication Rule Applies To Internet Publication

In a case of first instance in Massachusetts, a superior court held that the single publication rule applies to libelous statements generally accessible on the Internet. *Abate v. Maine Antique Digest*, 2004 WL 293903 (Mass.super. Jan. 26, 2004). Last month, *MediaLawLetter* reported on recent cases in Georgia and Mississippi where courts drew the same conclusion. See *MediaLawLetter*, January 2004 at 9, 11, discussing *McCandliss v. Atlanta Journal-Constitution*, 2004 WL 35763 (Ga.App.) and *Lane v. Strang Communications Co.*, No.1:02cv313DD (N.D.Miss.).

In *Abate*, Justice Janet Sanders relied on case law from other jurisdictions for the proposition that the single publication rule must be applied to Internet publications in order to avoid an “endless retriggering” of the statute of limitations. Otherwise, online publishers would be exposed to an onslaught of litigation thereby “inhibiting the open dissemination of information and ideas.”

The publication in question first appeared on the website of Maine Antique Digest in March 1996 and has appeared there continuously since that time. Under G.L.c. 260 §2A, a plaintiff has three years from the date that his cause of action accrues. In Massachusetts, a cause of action for libel accrues on the date of publication and there is an established single publication rule for traditional hard copy publications.

Abate argued that the court should have tolled the statute of limitations because he did not discover the article’s existence until nine months before bringing suit and the web site was “inherently unknowable” until the recent boom in Internet users. The court rejected this notion as plainly wrong, noting that the Internet “was no longer a novelty by the late 1990’s.”

**TO RECEIVE THE
MEDIALAWLETTER BY E-MAIL**

**Please Contact:
Kelly Chew
kchew@ldrc.com**

Playboy and Netscape Settle Web Trademark Case

Playboy Enterprises and Netscape Communications settled a 5-year-old lawsuit over keyword-based banner advertisements just one week after the Ninth Circuit reversed a lower court grant of summary judgment in favor of Netscape. See *MediaLawLetter*, January 2004 at 17.

The settlement cuts short an opportunity for the Ninth Circuit to consider an interesting issue in trademark and Internet law. In her concurring opinion for the Ninth Circuit, Judge Marsha Berzon was highly critical of the “initial interest doctrine” as applied in cyberspace, suggesting that rehearing en banc on the issue was warranted.

In 1999, Playboy brought suit against the now-defunct Excite and Netscape Communications search engines for displaying banner ads for competing adult-oriented web sites whenever a user would search for the terms “playmate” and “playboy.”

2004 NAA/NAB/MLRC CONFERENCE

Alexandria, Virginia
September 29, 30 and October 1, 2004

**Sponsorships for the
2004 Conference are
being solicited.**

Any firm interested in providing underwriting for the Conference should contact Sandy Baron at MLRC.

DMCA Safe Harbors May Require Careful – If Not Strict – Compliance

By Michael Fleming

The safe harbor protection under the Digital Millennium Copyright Act did not protect AOL from all claims in a copyright infringement action, the Ninth Circuit held in mid-February, partially reversing a district court decision. *Ellison v. Robertson and America Online Inc.*, No. 02-55797, 2004 WL 235466 (9th Cir. Feb. 10, 2004), reversing in part and affirming in part, *Ellison v. Robertson*, 189 F. Supp. 2d 1051 (C.D. Cal. 2002).

Although the decision by Judge Harry Pregerson seems to strike a blow against Internet providers' use of the safe harbor provisions of the DMCA, the reasoning of the opinion may be subject to criticism for its suggestions about duties of the service provider that may not necessarily be justified by the text of the statute.

Plaintiff argued that AOL had failed to fully comply with the conditions applicable to the safe harbors under § 512.

Copyright Infringement Claim Against Internet Poster and AOL

Author Harlan Ellison brought suit against a poster of materials to a Usenet newsgroup alleging he had uploaded copies of the author's short stories to the newsgroup. He also sued America Online, alleging direct, contributory and vicarious infringement of those same copyrighted works, basing those claims on AOL's redistribution of the same Usenet newsgroup materials via the AOL service.

AOL asserted that it qualified for the DMCA safe harbor limitation of liability under 17 U.S.C. § 512(a). This particular safe harbor is designed to offer, in most instances, a nearly complete liability shield for entities such as Internet service providers where the defendant has merely retransmitted material that came from another source on the Internet. The district court granted summary judgment in favor of AOL, among other grounds, based on the safe harbor defense.

Plaintiff Argued AOL Failed to Comply with Safe Harbor Conditions

On appeal, plaintiff argued that AOL had failed to fully comply with the conditions applicable to the safe harbors under § 512, and argued further that his contributory in-

fringement claim should stand because AOL should be held to have knowledge that the infringing materials were available over AOL servers.

Both arguments proceeded from problems with AOL's implementation and maintenance of the Section 512(c)(3) DMCA Notice and Takedown procedure. The undisputed facts were that AOL, some months prior to the incidents, displayed a notice on the AOL site stating where a copyright owner could e-mail a notice to AOL of possibly infringing materials, and had also filed a notice with the Copyright Office stating the e-mail address – both conditions are required to use the 512(c) safe harbor.

However, just prior to the incidents, AOL changed the e-mail address of its copyright notice agent. While it appears from the opinion that AOL had updated the e-mail address information displayed on its own

Web site, it had not yet sent an updated notice to the Copyright Office concerning the new e-mail address. When the plaintiff's attorney sent a copyright infringement notification to AOL, he apparently sent it to the old address — by then a dead address that neither forwarded to anybody at AOL nor bounced back a non-receipt notice to the sender. When AOL failed to respond to the e-mails sent by Ellison's attorney, Ellison in turn sued AOL.

These circumstances hurt AOL on two fronts — in the standing of the contributory infringement claim, as well as the viability of the safe harbor defense. As to the contributory infringement claim, the court held that, in effect, there was a sufficient question of fact as to whether AOL's non-diligence in maintaining the Copyright Office's directory of the e-mail address, and the resulting inability of Ellison to give notice to AOL, should be held against AOL. The court held that AOL should be held to constructive knowledge of the notice of infringement because AOL made it too difficult for Ellison to give notice to AOL. With that constructive knowledge, there would be a sufficient basis to bring a claim for contributory infringement, because the court

(Continued on page 32)

DMCA Safe Harbors May Require Careful Compliance

(Continued from page 31)

found that all of the other elements of the claim were well-stated.

The safe harbor defense was also potentially scuttled. Rather than begin its analysis by looking at the individual safe harbors on their own, the court went first to a lesser-known part of Section 512 — the ‘Conditions of Eligibility’ found at Section 512(i):

“The limitations on liability established by [Section 512(a) — (d)] shall apply to a service provider only if the service provider ... has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of a policy that provides for the termination, in appropriate circumstances, of subscribers and account holders of the service provider’s system or network who are repeat infringers.”

Jury Could Conclude AOL Had Not Implemented Policy

The court concluded that

“AOL allowed notices of potential copyright infringement to fall into a vacuum and to go unheeded; [and] that fact is sufficient for a reasonable jury to conclude that AOL had not reasonably implemented its policy against repeat infringers.”

Such a conclusion could be subject to some criticism. The essence of Section 512(i) seems to focus not on how the service provider responds or treats copyright owners, but rather on how the service provider deals with its own subscribers and users.

There is no allegation that AOL had failed to promulgate a policy to its own subscribers, and moreover AOL’s own subscribers were not even involved with this incident. Co-defendant Robertson posted his infringing materials to a Usenet server that is not part of AOL — AOL’s Usenet servers had simply automatically uploaded the infringing materials to the AOL Usenet system, just as the Usenet system is designed to do.

Thus, even if AOL had received the notice about Ellison’s claims, there was no subscriber for AOL to have terminated. (In fact, once AOL did get actual notice of

the claims as a result of being sued, AOL chose to shut off its feeds from the particular Usenet group that had the postings — a blunt but effective method.)

Further, the court proceeded to state that if the jury concluded that AOL was not blocked from using safe harbors under 512(i), then the particular safe harbor AOL would qualify for — *as a matter of law* — is the one at Section 512(a), the safe harbor for transitory communications. One feature of the 512(a) safe harbor is that it does not mention the copyright owner notice and takedown procedure — that requirement only appears explicitly in another of the safe harbors, 512(c) (involving materials posted on a service provider’s own servers but at the direction of its user), and is somewhat incorporated into one of the other safe harbors at 512(b) (involving the short-term caching of materials by a service provider).

In short, 512(a) protection seemingly does not require that the service provider set up a system that allows damaged copyright owners to give notice to the service provider. Yet, even though there is no mention of the notice and takedown procedure in 512(a), the court used evidence of how poorly AOL implemented its 512(c) procedure to present a question of fact that AOL’s entire copyright infringement prevention system was unreasonably implemented. That would be enough for this court to conclude that AOL might have been unreasonable in implementing its obligations under 512(i) — and hence would be a dispositive factor against AOL using *any* of the safe harbors.

The possible practical ramifications of this decision are not entirely clear. Maybe the court has now suggested that, in effect, in order to qualify for 512(a) protection the service provider needs to set up the 512(c) notice and takedown procedure — and do it correctly! But, Congress did not impose such a requirement within the text of 512(a), and it is hardly clear how some of the processes in 512(c) are applicable where the service provider is merely transmitting information rather than storing it on its own servers.

Alternatively, maybe the court is suggesting that although taking advantage of Section 512(a) may not require implementing some form of a 512(c) notice system, if a service provider has chosen to tell the world

(Continued on page 33)

DMCA Safe Harbors May Require Careful Compliance

(Continued from page 32)

that it has a 512(c) notice system, then whatever happens on the 512(c) system will be imputed to the question of the reasonability of the service provider's entire system of terminating its own subscribers or users — possibly triggering the 'no safe harbor' condition of 512(i).

Practice Tips

Of the two alternatives above, one is potentially erroneous; while the other is troubling in how it seems to create a very broadly defined 'reasonable implementation' standard — importing concepts from many different parts of the statute — that one might argue goes beyond Congress' intent.

Section 512(n) states Congress' rule of construction that the safe harbors should each be analyzed on their own criteria, and that a failure to meet one of the safe harbors should not affect a determination under a different safe harbor. Although 512(i) applies across all of the safe harbors, to import facts concerning compliance with a duty under 512(c) into a determination that 512(a) protection should be lost seems to be outside the statutory intent.

Similarly, in a case involving a different DMCA concern, the 512(h) subpoena power, another appellate court admonished its district court for ignoring the differences between 512(a) and 512(c). *See Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.*, 2003 U.S. App. LEXIS 25735, 69 U.S.P.Q.2D 1075 (D.C. Cir. 2003) (512(h), which requires use of 512(c) notices, not applicable where the service provider is only providing services described under 512(a)).

To the degree that this decision fails to appreciate the differences between the 512(a) and 512(c) safe harbors or tries to import 512(c) duties into the 512(a) safe harbor, Section 512(n) and the *Verizon* case could be instructive to the court if it should have reason to rehear this matter.

However, AOL might have avoided the result by simply being more diligent in updating its notices and filings. Safe harbor defenses, as a rule, tend to be interpreted narrowly and relatively strictly, since many courts are reluctant to shut out a damaged party on a seeming technicality.

Therefore, service providers that wish to take advantage of the DMCA safe harbors should be especially careful in implementing and maintaining all systems, notices, filings and processes — even where those things may not be technically or logically related to a particular safe harbor or practice of the service provider — and particularly where one might be considered a tempting target because of deep pockets. Unfortunately, this may lead to more direct attorney involvement in the day to day operation of the service provider than one might normally like.

But, the nuances of the ever-more-controversial DMCA seem to be getting more and more inscrutable as time goes by, and that is usually a call for more lawyers.

Plaintiff was represented by Charles Petit, Urbana, Illinois, and Glen Kulik, John Carmichael and Brigit Connelly of Kulik, Gottesman and

Mouton LLP, Sherman Oaks, California. AOL was represented by Daniel Scott Schecter and Belinda Lee of Latham & Watkins, Los Angeles.

Michael Fleming is special counsel at Faegre & Benson LLP in Minneapolis.

The nuances of the ever-more-controversial DMCA seem to be getting more and more inscrutable as time goes by.

JUST PUBLISHED

2003 MLRC BULLETIN

**MLRC 2003 REPORT ON
SIGNIFICANT DEVELOPMENTS**

To order contact us or visit our website www.medialaw.org

Update: Cal. Court Affirms Narrow Sec. 230 Interpretation on Rehearing

On rehearing, a California appellate court reissued its controversial ruling on the scope of Section 230 immunity. *Barrett v. Rosenthal*, 114 Cal. App.4th 1379, 9 Cal. Rptr.3d 142 (Cal. App. Feb. 3, 2004). Rejecting the decision in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997), the court held that Section 230 does not apply when the defendant asserting immunity knew or had reason to know that the content at issue was defamatory. See MLRC *MediaLawLetter* Nov. 2003 at 57.

The defendant in this case is not an Internet service provider but a “user” who selected allegedly defamatory e-mails and republished them on an Internet newsgroup. Although the statute appears to apply equally to a “provider” or “user” of interactive computer services, the

decision by Judge Kline of the First Appellate District holds that Congress did not intend to abrogate the common law principle that one who republishes defamatory matter originated by a third person is subject to liability if he or she knows or has reason to know of its defamatory character.

Plaintiffs were represented by Christopher E. Grell, Richard F. Rescho, Ian P. Dillon, Law Offices of Christopher E. Grell, Oakland. Defendant was represented by Mark Goldowitz and Jesper Rasmussen of the California Anti-SLAPP Project. Amicus Curiae in support of defendant were represented by Lee Tien, Electronic Frontier Foundation, San Francisco, and Ann Brick, American Civil Liberties Union Foundation of Northern California.

Summary Judgment for eBay under Sec. 230 Affirmed

Another California Appellate District affirmed dismissal of libel and related claims in favor of Internet auction site eBay in a more routine application of Sec. 230. *Grace v. eBay, Inc.*, 2004 WL 214449 (Cal.App. Feb. 5, 2004) (unpublished).

Plaintiff was the successful bidder on items offered for sale on eBay by a third party. The third party posted a negative feedback comment about plaintiff, stating he “should be banned from ebay!!!! dishonest all the way!!!!” Plaintiff asked that the posting be removed and eBay refused. He then brought an action against eBay

for libel, unfair business practices and breach of contract (a claim dropped by plaintiff).

Judge Croskey, in the Second District, affirmed that the claims were barred by Sec. 230, rejecting plaintiff’s argument that “since defendant does not offer a connection to the internet as a whole, it cannot be an interactive computer service provider” covered by the statute.

Plaintiff was represented by Lisa Grace-Kellogg. Defendant was represented by Michael G. Rhodes and Andrea S. Bitar of Cooley Godward.

Just Published! Order Now!

50 State Survey 2003-2004: MEDIA PRIVACY AND RELATED LAW

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

\$175

Please visit www.ldrc.com for ordering information

Canadian Court Takes Jurisdiction in Internet Libel Case

Ramifications May Be Similar to Gutnick

By Paul Schabas and Ryder Gilliland

On January 27, 2004 the Ontario Superior Court in Toronto released a decision in an Internet libel case that may have ramifications similar to *Gutnick v. Dow Jones* for U.S. publishers. *Bangoura v. The Washington Post et al*, [2004] O.J. No. 284 (S.C.). (The decision is available online at: www.canlii.org/on/cas/onsc/2004/2004onsc10181.html).

Justice Romain Pitt, accepted jurisdiction over a libel action commenced against *The Washington Post* despite the fact the newspaper had no connection to Ontario, and the plaintiff only moved to Ontario years after the articles sued upon were originally published. The decision raises the prospect of plaintiffs commencing libel actions against U.S. publishers in Canada to take advantage of libel laws which, like England, generally do not require proof of fault and also favor plaintiffs by putting the onus on defendants to prove truth.

The articles were written by a Washington-based reporter, together with foreign correspondents in Ivory Coast and Kenya – and these reporters were also each named individually as defendants in the case. At the time, the *Washington Post* had only seven paid subscribers in Ontario. It was available free of charge over the Internet for fourteen days following publication and subsequently, by paying a fee to access the *Post's* online archive. Only one person (anywhere) had ever accessed the articles sued upon from the paid archive: Plaintiff's Ontario-based lawyer.

Canadian Jurisdiction Standards

Ontario courts apply a two-staged analysis to determine whether to accept jurisdiction. First, the court decides whether or not the action has a “real and substan-

tial” connection to the jurisdiction. If not, the court must decline jurisdiction. However, even if the court finds that there is a real and substantial connection, it may refuse to accept jurisdiction on the basis of *forum non conveniens*, i.e. even though the action could be heard in the jurisdiction, there is another forum which is better suited to the trial of the action, having regard to issues such as location of the evidence, witnesses and general convenience.

Ontario courts consider eight factors when determining whether an action has a real and substantial connection to the forum:

1. The connection between the forum and the plaintiff's claim.
2. The connection between the forum and the defendant.
3. Any unfairness to the defendant in assuming jurisdiction.
4. Any unfairness to the plaintiff in not assuming jurisdiction.
5. The involvement of other parties to the suit.
6. The court's willingness to recognize and enforce a foreign judgment rendered on the same jurisdictional basis.
7. Whether the case is interprovincial or international in nature.
8. Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

Justice Pitt's reasons center in particular around two findings: (i) that the plaintiff should be entitled to recover for damage to his reputation in Ontario where he resides, and (ii) that the *Post* is an internationally known newspaper that should be prepared to defend libel actions anywhere in the world. This second finding is quite startling, and troubling. As the judge states:

Admittedly, the defendants have no connections to Ontario, but the *Washington Post* is a major news-

(Continued on page 36)

The decision raises the prospect of plaintiffs commencing libel actions against U.S. publishers in Canada to take advantage of libel laws which, like England, generally do not require proof of fault and also favor plaintiffs by putting the onus on defendants to prove truth.

Canadian Court Takes Jurisdiction in Internet Libel Case

(Continued from page 35)

paper in the capital of the most powerful country in a world now made figuratively smaller by, *inter alia*, the Internet. Few well-informed North Americans (including Canadians) do not encounter, at least indirectly, views expressed in the Post. The Post is often spoken of in the same breath as the New York Times and the London Telegraph.

Frankly the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided.

...the Post is a newspaper with an international profile, and its writers influence viewpoints throughout the English speaking world. I would be surprised if it were not insured for damages for libel or defamation anywhere in the world, and if not, then it should be.

His first point is also troubling. Since Bangoura only came to Ontario years after the publication, it is difficult to see how he had a reputation to be damaged in the province. The judge, however, seemed to be influenced by the fact that Bangoura was seemingly “stateless,” and should be allowed to sue where he now lives.

Conclusion

The decision is being appealed to the Ontario Court of Appeal. However, if it stands, it could be more troubling for US publishers than the Australian decision in *Gutnick*. In *Gutnick* the plaintiff had a pre-existing reputation in Australia and at least an argument that Australian subscribers to *wsj.com* might have read the article. In addition, prospective U.S. plaintiffs can much more easily sue in Canada which is right next door (Toronto is about a one-hour flight from any city in the Northeast or Midwest) rather than far away Australia.

Kikélola Roach of *Roach Schwartz & Associates* represents the plaintiff

Paul Schabas and Ryder Gilliland of Blake, Cassels & Graydon LLP in Toronto, represent The Washington Post defendants.

Non-Media Libel Case in Canada Cites Place of Publication for Jurisdiction

On February 2, 2004, the Ontario Superior Court ruled it has jurisdiction to hear defamation and related claims against a New York investment company. *Trizec Properties, Inc. v Citigroup Global Markets Inc.*, Court File 03-CV-253286CM1.

Plaintiffs, a Toronto business executive and his companies, sued Citigroup over statements made by a stock analyst in a telephone conference call and in a “Research Note” sent to clients. In the Research Note, the analyst criticized company management, citing a “complete absence” of corporate governance. The analyst distributed the Note to 1,153 clients – only nine in Ontario. The Note was available on the Web to over 100,000 subscribers, 1,300 of whom were in Ontario, although there was no evidence at this stage that anyone in Ontario actually accessed the Note.

Rejecting defendants objections to jurisdiction and forum, the court concluded that plaintiffs’ interest in protecting their Ontario reputations and publication in Ontario justified taking jurisdiction in the case. As to choice of law, the court held that New York law applies to claims for injurious falsehood, interference with contract and negligence since these torts were committed in New York. But the defamation claims would be governed by Ontario law because “in actions for defamation, the applicable law is the law of the jurisdiction where the publications were received or accessed.” *Trizec Properties* at ¶ 63.

Plaintiffs are represented by Ronald G. Slaght QC and Linda Fuerst. Defendants are represented by Paul Schabas and Ryder Gilliland of Blake, Cassels & Graydon LLP in Toronto.

Canadian Developments in Seizure of Reporter's Materials

Anti-terror Law to Come Under Constitutional Scrutiny; Ontario Court Applies Privilege Protecting Confidential Sources

By **Damion K.L. Stodola**

In a move that troubled many in the Canadian media community, Canadian federal police raided a Canadian reporter's home and office hoping to uncover information about a source who leaked to a reporter information from a Canadian security dossier on Maher Arar, a Canadian citizen deported by U.S. officials to Syria in 2002.

The Royal Canadian Mounted Police ("RCMP"), which admitted having kept the journalist under close scrutiny for at least a month prior to the raid, seized the journalist's rolodex, address books, and other materials. The journalist, Juliet O'Neill, and CanWest, owners of the *Ottawa Citizen*—in which the leaked information was published—are challenging the constitutionality of the warrant and of the statute upon which the warrant was issued.

Two warrants were issued on the basis of alleged violations of Canada's Security and Information Act (the "Act"), which criminalizes the communication, receipt and retention of information relating to Canada's national security issues, including information classified as "official secrets." A violation of the Act carries a sentence of up to 14 years in prison. The Act was initially adopted in 1939 during World War II but it was rarely, if ever, used against media defendants. (In 1978, journalists for the *Toronto Sun* were charged under the Act's predecessor statute for allegedly publishing classified information obtained from the RCMP about KGB activities in Canada. *R. v. Toronto Sun Pub'g Co.* (1979), 98 D.L.R. (3d) 524 (Ont. Prov. Ct.). The judge in that case dismissed the charges on grounds that the allegedly "secret" information had been previously published.) Its ambit was significantly broadened in 2001 in response to the September 11 World Trade Center attacks.

As amended, the Act provides sweeping investigatory powers to law enforcement officials whenever acts "prejudicial to the safety or interests of the State" are committed. Theoretically, unpopular speech or speech inciting protest could be interpreted as prejudicial to Canada's security or economic interests and thereby justify the enforcement provisions of the Act. Moreover, a news report identifying weaknesses in Canada's borders would theoretically run afoul of the Act's prohibition against communicating to potential terrorists information useful to carry out a potential attack.

As amended, the Act provides sweeping investigatory powers to law enforcement officials whenever acts "prejudicial to the safety or interests of the State" are committed.

The practical effects of the Act are indeed onerous for the media: journalists must seek out legal counsel more frequently the minute they receive any information which might qualify as an "official se-

cret." Equally chilling is the prospect of lengthy and expensive legal proceedings to quash meritless warrants.

Canada's leading print, TV and radio media outlets have requested permission to intervene in the case, including the *Globe & Mail*, *Toronto Star*, CTV, and the Canadian Broadcasting Corporation. A selection of the pleadings is available at: www.gowlings.com/news/index.asp.

Lawyers argue that the search warrants were issued contrary to Ms. O'Neill's and CanWest's constitutional free press rights. Likewise, a constitutional challenge to the Act's overbroad language is being submitted as well.

Search warrants typically must meet a reasonableness standard under Canada's *Charter of Rights of Freedoms* ("Charter"). Because of its important role, the media is entitled to "special consideration" in determining the constitutional reasonableness of a search warrant. *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421, 533. However, doubt as to the extent of those special considerations has resulted in mixed results for media defendants. Early caselaw suggested that the

(Continued on page 38)

Canadian Developments in Seizure of Reporter's Materials

(Continued from page 37)

State had to demonstrate that a warrant against a media entity was being sought only as a matter of last resort. See *Pacific Press v. R.* [1977] 5 W.W.R. 507 (B.C. Sup. Ct.) (quashing warrant seeking reporters' notes for purposes of identify protesters because government was unable to prove that it had attempted to locate the information through other channels).

The Supreme Court, however, later held that the failure of police to demonstrate the exhaustion of all other remedies is not constitutionally required. *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421; *Canadian Broadcasting Corp. v. New Brunswick*, [1991] 3 S.C.R. 459. The cases before the Supreme Court involved the seizure of video tapes of public demonstrations which had already been broadcast. Ms. O'Neill's materials relating to her leak were kept confidential. Of course, the contexts are very different – Ms. O'Neill's materials allegedly concerned matters of national security.

Ontario Court Quashes Warrant Seeking Journalist's Confidential Source

The importance of confidential sources was alluded to in the Supreme Court's decision in *Lessard*, and most recently by an Ontario court in a decision – ironically issued the same day the RCMP raided Ms. O'Neill's home – quashing a search warrant for a journalist's notes relating to a confidential source. *R. v. National Post, et al.*, No. M86/02 (Ont. Sup. Ct., Jan. 21, 2004) (Benotto, J.) available at <http://www.canlii.org/on/cas/onsc/2004/2004onsc10117.html>.

In this case, a reporter was ordered to produce to authorities a leaked document and the envelope that contained it. The journalist received the document only upon a promise of confidentiality to his source. Underscoring the importance of news gathering to the Charter's free press guarantee, Benotto, J. noted that a judge must consider a warrant's effect on the media's ability to fulfill its function.

Citing examples of the public interest in protecting the media's ability to uncover political and corporate wrongdoing, he noted the importance of confidential sources:

“[t]o compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information.”

As such, Charter values, including those relation to the freedoms normally associated with the press, must be considered a judge's decision to issue a warrant. *Id.*

The Canadian Supreme Court's only decision on the existence of a reporters' privilege for confidential

sources has much in common with the approach adopted by most lower courts in the United States after *Branzburg v. Hayes* – claims for testimonial privileges are decided on a case by case basis and balance the freedom of the press against the need and relevance

of the information being sought in testimony. See, e.g., *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (reporter ordered to testify about confidential source to labour relations board).

Judge Benotto's decision in *R. v. National Post* provides strong constitutional language protecting reporters' from the issuance of warrants which seek to identify confidential sources.

Richard G. Dearden of Gowlings, and Michael Edelson and David Paciocco of Edelson & Associates are representing CanWest and Juliet O'Neill.

In *R. v. National Post*, Scott C. Hutchison, Sarah Gray, and William Rolls of the Attorney-General's office represented the Crown. Marlys Edwardh and John Norris of Ruby & Edwardh represented the *National Post*.

Damion Stodola is an associate in the New York office of Coudert Brothers LLP.

**An Ontario court in a decision –
ironically issued the same day the
RCMP raided Ms. O'Neill's home –
quashing a search warrant for a
journalist's notes relating to a
confidential source.**

Don King's Libel Suit Against New York Lawyer Can Go Forward in London

Motion to Set Aside Service in the U.S. Denied

On February 6, 2004, a London trial court ruled that a libel suit by boxing promoter Don King against New York lawyer Judd Burstein, boxer Lennox Lewis and a Nevada-based promotions company can go forward in England, denying defendants' motion to set aside service abroad. *Don King v. Lennox Lewis, Lion Promotions and Judd Bernstein*, No. HQ03 X03064 (High Court Feb. 6, 2004). The decision is available online through www.courtservice.gov.uk.

At issue are statements by Burstein accusing Don King of anti-Semitism that were made in the context of an ongoing New York litigation between the parties, and which were published on U.S. boxing websites. The court also held that at the preliminary stage the alleged defamatory statements by Burstein could be attributed to his clients, Lewis and Lion Promotions, under the theory that they directed or endorsed the statements as part of their litigation strategy against King.

The decision appears to combine the worst of *Gutnick* with England's notorious accommodation of forum shopping. The decision cites with approval the holding of *Gutnick v. Dow Jones*, that a statement on the Internet is "published" for purposes of a libel suit where ever it is downloaded. Moreover, on the motion there was apparently no direct evidence that anyone in the UK even read the articles. The court accepted as proof of publication witness statements that the websites "are popular and frequently accessed by people interested in boxing within this jurisdiction." ¶ 26.

The decision also seems to allow a blatant case of forum shopping – at least at the initial stage of litigation. Although there is no real connection between the alleged defamatory statements and England, the court held that because Don King is well-known in England and the defamation was "published" in England, he is entitled to rely on the general presumption that England is the "natural forum" to try the dispute.

New York Litigation

New York lawyer Judd Burstein represents heavyweight champion Lennox Lewis and Lion Promotions in an ongoing lawsuit in New York against boxing promoter Don King alleging that he interfered with an agreement reached with Mike

Tyson to have the fighters meet again in a rematch. Lewis had soundly defeated Tyson in a 2002 fight. This lawsuit seeks \$35 million in compensatory damages and ten times that in punitive damages. King countersued Lewis for interfering with licensing agreements King had with HBO.

Controversy Was Covered in U.S. Newspaper and Websites

On July 4, 2003, the New York Daily News published a column by sports writer Tim Smith who talked to King about the Lewis litigation. Under the headline "No ifs ands or bouts" Smith reported that :

After months of harsh, and failed, negotiations with some of his high-profile clients and former clients, boxing promoter Don King broke his silence and came out verbally swinging yesterday. In a wide-ranging interview, King took shots at Lennox Lewis and the heavyweight champ's lawyer, Judd Burstein "What they

(Lewis and Burstein) have done is despicable and reprehensible," King said. ... "I'm hurt and humiliated that Lewis would prostitute his name with that shyster lawyer. Everything Burstein has claimed has been fabricated.

A copy of the article is available online at www.nydailynews.com/sports/v-pfriendly/story/97871p-88591c.html

On July 9th Smith reported in his column that "Burstein felt the [shyster] comment was anti-semitic." Burstein was also quoted saying "Unfortunately, this is not first time I have encountered such bigotry by Don."

The controversy was also covered by two U.S. websites www.fightnews.com and www.boxingtalk.com – and these statements form the basis of King's English libel action.

In a statement entitled "My Response to Don King" published in July 2003 on fightnews.com, Burstein stated that:

I have read Don King's recent interviews with Tim Smith and others with great amazement. But for his

(Continued on page 40)

King's Libel Suit Against NY Lawyer Can Go Forward in London*(Continued from page 39)*

plainly anti-semitic remark – calling me a ‘shyster lawyer’ – I would have been merely amused by his desperate and ridiculous charges. Unfortunately, this is not the first time I have encountered such bigotry by Don.... Don apparently believes that insulting Jews is appropriate conduct (indeed, he reportedly has even playfully imitated Hitler during a press conference)....

That same month boxingtalk.com published an interview with Burstein about the “ongoing verbal warfare” between the two. Burstein repeated his claims against King, adding “He is quite plainly an anti-semitic and that kind of conduct and attitude has no place in the modern world.... [I]t’s not an isolated incident and I’ve seen him play the race card before”

King commenced his libel action in London on October 2, 2003.

Internet Posting is Published Where Downloaded

In denying defendants’ motion to set aside service, Mr. Justice Eady noted that “the common law currently regards the publication of an Internet posting as taking place when it is down-loaded.” ¶ 15 citing *Godfrey v. Demon Internet* [2001] QB 201; *Loutchansky v. Times Newspapers Ltd.*, [2002] QB 783 at [58]; and *Gutnick v. Dow Jones Inc.*, [2002] HCA 56 at [44].

He also found that King “has a substantial reputation in England,” including frequent appearances on the media, in advertisements, and through his management and promotion of British boxers, including, at one time, defendant Lennox Lewis. ¶ 23-24. Of “particular concern” is that King also has friends in the “Jewish community in England.” ¶ 25

As to forum, Judge Eady concluded that in seeking to vindicate his reputation in England “the courts of this jurisdiction would appear to be the natural forum.” ¶ 20 Without addressing the full merits of whether England or New York is the more convenient forum for the suit, the judge observed preliminarily that King would have a number of UK witnesses on his reputation in the country and on his links to Jewish charities in London.

In addition, the fact that King’s action would not likely survive under U.S. defamation law counted in favor of England as the appropriate forum. ¶ 37

Finally, as to defendants’ objection that “there has never been another case where a United States resident obtained

permission to serve out against another United States resident in respect of a United States based publication,” Judge Eady responded that:

It seems to me that this misses the point about the nature of internet publications and the fact that English law regards the particular publications which form the subject matter of these actions as having occurred in England. ¶ 39

Burstein is reportedly considering filing a declaratory judgment action in New York to enjoin this case from proceeding in London.

Don King is represented by Desmond Browne QC of 5 Raymond Buildings and the firm Morgan Lewis & Bockius. Judd Bernstein and the other defendants are represented by James Price QC of 5 Raymond Buildings and the firm Forbes Anderson.

Alberta Court Awards Damages in Stock Chat Room Libel Case

On January 29, 2004, an Alberta, Canada trial court awarded \$75,000 (Cdn) to a company and its president over a series of anonymous e-mails posted on a group of chat rooms discussing publicly traded stocks. *Vaquero Energy Ltd. v Weir*, 2004 ABQB 68. Available online at: www.alberta.courts.ab.ca/jdb/2003-/qb/civil/2004/2004abqb0068.pdf

The e-mails accused the company president of being “insane, retarded and managing the company for his own benefit” and compared him to Hitler, Saddam Hussein and Osama bin Laden. The court accepted the testimony of a computer forensics expert who traced the e-mails to the computer of defendant, a financial consultant. Defendant denied sending the e-mails and argued that others in his office must have sent the e-mails, but the court found sufficient circumstantial evidence that the e-mails were sent by defendant.

The corporate plaintiff recovered \$10,000 general damages; the individual plaintiff \$40,000 generals and \$25,000 punitive.

Plaintiff was represented by Tony G. Bell of Burnet, Duckworth & Palmer LLP. Defendant was represented by C. Richard Jones of Vipond Jones LLP.

Wall Street Journal Wins Harrods Libel Case

On February 17th, after hearing two days of testimony, a jury in London returned a verdict in favor of the *Wall Street Journal* in a highly publicized libel suit brought by Harrods department store. *Harrods Ltd. v Dow Jones & Co.*, HQ02 X01736 (High Court, jury verdict Feb. 22, 2004) (Eady, J.)

On March 31, 2002 Harrods published a gag press release on its website stating that the store, privately owned by Mohammed Al Fayed, was going to “float shares” to the public. The release was signed “Loof Lirpa” (April Fool spelled backward). Another gag press release the next day explained that Al Fayed was planning to build a floating version of the store that would be docked on the Thames. The *Wall Street Journal* was fooled by the first press release and published an item on April 1st that the store was planning to go public. The next day it published a correction.

At issue in the libel suit was an April 5 follow up article published only in the U.S. edition of the *Journal*. The article, entitled “The Enron of Britain?” discussed the gag. The *Journal* argued it was intended as a humorous response.

Prior to the libel action being commenced in London, Dow Jones sued in New York under the Declaratory Judgment Act to obtain an order enjoining Harrods from suing in London. The motion was denied by a federal district court in New York in October 2002. In a lengthy opinion, Judge Victor Marrero noted that while Harrods’ claim was frivolous by U.S. standards, a declaratory judgment was not the appropriate device to protect the newspaper. *Dow Jones v. Harrods*, 237 F.Supp.2d 394 (S.D.N.Y. 2002), *aff’d*, 346 F.3d 357, 31 Media L. Rep. 2402 (2d Cir. 2003). See also *MediaLawLetter* Oct. 2002 at 29; October 2003 at 23.

The trial in London began on February 16, 2004. According to news reports, Harrods argued that the comparison to Enron was “an extraordinary attack” on the store. Dow Jones argued that the article was a tongue in cheek response to Harrods’ April Fool press release; that there was no evidence that anyone in England had even read the article; that Harrods suffered no damages; and that it sued because owner Al Fayed could simply “not take a joke.”

The jury reportedly voted 10-2 in favor of Dow Jones.

The *Wall Street Journal* was represented by Gavin Millar QC, Doughty Street Chambers, and Mark Stephens of Finers Stephens Innocent. Harrods was represented by James Price QC, 5 Raymond Buildings, and the law firm Kendall Freeman.

The Right of Reply in Europe – A Bold Resolution or a Resolution Re-bowled?

By Timothy J. Pinto

The Council of Europe is currently finalising a draft recommendation on a right of reply rule designed to cover online publications. The draft is available online through www.coe.int/media.

The Council of Europe was set up after the Second World War to achieve a greater unity between its members by defending human rights, parliamentary democracy and the rule of law. It is based in Strasbourg and currently has 45 Member States. The United States and Canada have, amongst others, been granted observer status. The Council has been responsible for 193 legally binding treaties and also a large number of (non-binding) recommendations to Member States.

Although the Council of Europe is currently finalising a draft recommendation on “the Right of Reply in the New Media Environment,” its interest in the matter is not new. In 1974 it passed Resolution (74) 26 - On the Right of Reply – Position of the Individual in relation to the Press (the “1974 Resolution”). This recommends to Member States that individuals be given “an effective possibility for the correction, without undue delay, of incorrect facts relating to him which he has a justified interest in having corrected, such corrections being given, as far as possible, the same prominence as the original publication.” (article 1). Consequently, individuals should be given “a means of redress, whether legal or otherwise, such as a right of correction, a right of reply or a complaint to press councils.” (article 4(iii)).

It is recommended that all natural or legal persons as well as other bodies irrespective of nationality or residence, with the exclusion of the state and other public authorities, have the right (article 4(i)). Importantly, the 1974 Resolution applies to “any means of communication for the dissemination to the public of information of a periodical character, such as newspapers, broadcasting or television.” (article 4(ii)).

At the request of the person concerned, the medium in question “shall be obliged, without undue delay, to make public the reply which the person concerned has

(Continued on page 42)

The Right of Reply in Europe

(Continued from page 41)

sent in.” (Appendix, clauses 2 and 4). There are exceptions such as where the reply is: (a) not sent within a reasonable time, (b) excessive in length, (c) not limited to the correction of facts, or (d) contrary to the legally protected interests of a third party. (Appendix, clause 3).

Many continental European countries have codified a right of reply – and it is a well-known feature in the media law landscape of Germany and France. The UK has never adopted the European Council’s 1974 right of reply recommendations, although a voluntary and less robust form exists through the Press Complaints Commission

The Draft Recommendation Extends Right of Reply to the Web

The draft recommendation is stated to be necessary due to the adoption of a number of major technological developments since 1974 – clearly the Internet. The draft’s recitals state that “the right of reply is a particularly appropriate remedy in the on-line environment due to the possibility of instant correction of contested information and the technical ease with which replies from concerned parties can be attached to it.” As with the 1974 Resolution, only factual inaccuracies are covered, not opinions.

One unresolved issue is which websites will be subject to the new Right of Reply. The Draft Explanatory Memorandum explains that in the hard copy world regular publication, or “periodicity,” is generally required for there to be a right of reply. In this context, the reply would be likely to reach the same public which had seen the contested information. The notion of periodicity is less relevant to online publications which are updated whenever there is something new on which to report.

Newspaper and news service websites which disseminate information to the public and are frequently updated and edited are certainly encompassed in the Draft Recommendation. But it is less clear whether the Draft Recommendation would apply to the websites of NGO’s, political organizations and other entities that publish information to the public, or to the burgeoning

realm of personal blogs that contain a mix of public and personal information, or to search engines which are not “edited” in the journalistic sense of the word but may contain information or links to information.

Practical Implications

In some circumstances, a newspaper’s or website’s publication of a reply can be a cheap and easy solution for complainants. In contrast to the costs and time of legal proceedings, the right of reply is an attractive solution. However, there is a consequent burden for publishers in terms of cost, time, content space and resources. Content space will not be such a problem for online publishers (where a link could be implemented between the contested information and the reply). Moreover, online

publishers should not need to spend much time in posting an email reply onto their website once a system is in place. The real difficulty lies in a system which compels people to publish material which they do not wish to.

One unresolved issue is which websites will be subject to the new Right of Reply.

Radical Change or Much Ado About Nothing?

Whatever the final draft of the recommendation looks like, it will be up to member governments to implement the right of reply accordingly. Although the recommendation will not be binding on Member governments, there is potential for an individual who is not provided with an adequate remedy to take a government to task in the European Court of Human Rights for failure to provide an adequate right of reply (as part of an argument based on Articles 8 (right to private life) and 10 (freedom of expression) of the Convention).

Although publishers may be concerned about how the proposed recommendation will affect their business, it is not something that should be particularly surprising. For off-line publishers, the draft recommendation provides little different from the 1974 Resolution.

The 1974 Resolution was directed to all media (albeit of a periodical character) and so may have applied to online news publishers in any event. Under the draft recommendation (which could be adopted by the end of 2004), there will be no doubt that online news services

(Continued on page 43)

The Right of Reply in Europe

(Continued from page 42)

are subject to the right. To what extent smaller, private or special interest websites are covered is yet to be seen. However, there will probably be opportunity for such publishers to argue that the right does not apply to their websites if they are not frequently updated and/or edited or if they do not disseminate information to the public.

The next important step on the draft recommendation will be a meeting in May 2004 of the Steering Committee

on the Mass Media with all 45 Council of Europe Member States represented. The Group will meet again in June to try to finalize the draft, which might then be adopted by the Committee of Ministers before the end of 2004.

Timothy Pinto is media and entertainment lawyer at Taylor Wessing in London.

Austrian Journalist Wins Appeal to European Court of Human Rights over Defamation Conviction

By Anastasia Heeger

An Austrian journalist's description of a politician as a "closet Nazi" was protected opinion, the European Court of Human Rights has ruled, rejecting a determination by the Austrian courts that the comment was defamatory. *Scharsach and News Verlagsgesellschaft v. Austria*, Application no. 39394/98 (ECHR Nov. 13, 2003) (available online at <http://hudoc.echr.coe.int>).

The case involved a 1995 article by Hans-Henning Scharsach in the weekly magazine *News*, which is owned and published by News Verlagsgesellschaft mbH. In a story entitled "Brown instead of Black and Red?," Scharsach criticized the inclusion of right-wing politician Jörg Haider's Austrian Freedom Party (FPÖ) in a coalition government. Scharsach described several FPÖ members as "old closet Nazis," including Barbara Rosenkranz, an FPÖ official, who is a member of the Austrian National Assembly and the wife of a right-wing politician who publishes an extreme right-wing publication.

Rosenkranz filed a private prosecution for defamation under Austria's Media Act against the reporter and magazine. In 1998 a regional court convicted both; fining the reporter 60,000 Austrian Schillings (approximately

\$5,500) or 20 days in prison (suspended for a three year probationary period). The magazine was fined approximately \$2,750.

The court held that "closet Nazi" was an unproven statement of fact that implied Rosenkranz was involved in neo-Nazi activities. On appeal, Scharsach argued that the term "closet Nazi" was actually coined by a leading FPÖ politician to describe party members who publicly

claim support for democracy, but actually fail to dissociate themselves from neo-Nazi ideas. The description was appropriate, Scharsach argued, since Rosenkranz approved her husband's activities and, on some level, contributed to

the editing of her husband's xenophobic magazine.

The Vienna Court of Appeal dismissed the appeal and upheld the regional court's judgment. Scharsach and the publishing company then appealed to the European Court of Human Rights, arguing that the conviction and fines infringed on their right to freedom of expression under Article 10 of the European Convention on Human Rights.

Both parties stipulated that the defamation judgment was an "interference" of Scharsach's right to freedom of expression under Article 10. The primary issue for the court was whether the interference was "necessary in a

(Continued on page 44)

Austrian Journalist Wins Appeal to European Court of Human Rights over Defamation Conviction

(Continued from page 43)

democratic society” – a country’s affirmative defense to a claimed Article 10 violation.

The European Court of Rights held that the Austrian courts had failed to take sufficient account of the political context in which the term “closet Nazi” was used when assessing its meaning. ¶37.

“Considering that Mrs Rosenkranz’s name in the article was mentioned together with other FPÖ politicians in the phrase criticising their failure to dissociate themselves from the extreme right, i.e. to take a stand against extreme-right positions, the Court considers that the term ‘closet Nazi,’ which appears in inverted commas in the article, taken in its context, was to be understood ... [as] describing a person who had an ambiguous relation to National Socialist ideas.” ¶38.

The Court further noted that the Austrian courts had “never examined” whether “closet Nazi” could have been considered fair comment. Considering the defamation plaintiff’s relationship to a well-known right-wing politician, that she had not disassociated herself from his views, and had, in fact, publicly criticized the Austrian law banning Nazi activities, the Court found there were sufficient facts to conclude that the reporter and newspaper “published what may be considered to have been their fair comment, namely the ... personal political analysis of the Austrian political scene.” ¶ 40 Therefore the article was “a value judgment on an important matter of public interest.”

The Court concluded that the Austrian courts had overstepped the “margin of appreciation” for restricting speech and therefore violated Article 10. The Court awarded the applicants approximately \$25,000 in costs and compensatory damages.

The reporter and newspaper were represented by the firm Lansky, Ganzger & Partner, in Vienna. The government of Austria was represented by Ambassador H. Winkler, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

Anastasia Heeger is a student at Brooklyn Law School and was an intern at MLRC in the summer of 2003.

MLRC’S LONDON CONFERENCE

**MOCK APPELLATE COURT
ARGUMENT ON RIGHT OF REPLY
AVAILABLE ONLINE AT
WWW.LDRC.COM**

With Judge Pierre Leval, U.S. Court of Appeals for the Second Circuit; Mr. Soli Sorabjee, Attorney General of India; Mr. Justice Michael Tugendhat, High Court England & Wales.

Counsel: Floyd Abrams and Geoffrey Robertson, QC.

Order Now!

**MLRC 50 State Survey:
EMPLOYMENT LIBEL AND
PRIVACY LAW 2004**

\$175

**For ordering information on
the most current editions, go to
www.medialaw.org.**

Closure of Voir Dire in Martha Stewart Trial Was Error

By Alia Smith

On February 18, 2004, the Second Circuit Court of Appeals vacated District Judge Miriam Cederbaum's order closing *voir dire* in the trial of Martha Stewart, holding that the substantial media coverage of the case simply was not enough to warrant wholesale closure of *voir dire*. *In re ABC, Inc. et. al.*, 2004 WL 299175 (2d Cir. Feb. 18, 2004). The holding reinforces the public's First Amendment right of access to *voir dire* established by the Supreme Court in *Press-Enterprise v. Superior Court of California*, 464 U.S. 501 (1984), and makes clear that parties seeking closure must make a specific factual showing that a defendant's fair trial rights would be infringed before closure is granted.

The District Court's Order

Just days before jury selection was to begin on January 20, Judge Cedarbaum entered an order – without providing the press with notice or an opportunity to be heard – ruling that *voir dire* would be closed and that redacted transcripts of the proceedings would be released the following day. A coalition of media organizations, including ABC, American Lawyer Media, Associated Press, Bloomberg, CBS, CNN, Fox, Gannett, the *Daily News*, Dow Jones, NBC, *Newsday*, the *New York Post*, the *New York Times*, Reuters, and the *Washington Post*, filed a motion the following day, asking Judge Cedarbaum to vacate or modify her order, on the grounds that, under the Supreme Court's decision in *Press-Enterprise v. Superior Court of California*, 464 U.S. 501 (1984) ("*Press Enterprise I*"), the press and public have a First Amendment right of access to attend *voir dire*.

The district court rejected the motion, finding that the intense publicity surrounding the trial warranted closure, because, in the trial judge's view, openness would inhibit juror candor. The media coalition immediately appealed to the Second Circuit and asked for expedited review. The Court granted expedited review, agreeing to hold a hearing on the matter on Monday, January 26. *Voir dire* was completed, however, on Friday, January 23.

Closure Order "Capable of Repetition Yet Evading Review"

In its February 18 order, the Second Circuit panel – comprised of Judge Katzmann (who authored the opinion), Judge Parker and Judge Preska (sitting by designation) – first addressed the mootness question. It held that this matter was "capable of repetition yet evading review" because "orders closing criminal trials in general, and *voir dire* proceedings in particular, are almost always in effect for only a short time and therefore generally cannot be fully litigated before the closed proceedings have terminated; and it is reasonably likely that members of the media will continue to seek access to *voir dire* sessions in high profile criminal cases, such as this one, where the district court might fear that many venire members will have preconceived notions about one or more of the defendants."

Intense publicity surrounding the trial warranted closure, because, in the trial judge's view, openness would inhibit juror candor.

Transcripts Are Not an Adequate Substitution for Physical Presence at Court Proceedings

Turning to the merits, the Court first outlined the nature of the First Amendment right of access to *voir dire* as established by the Supreme Court in *Press Enterprise I*. The Court noted that the media coalition had been deprived of its First Amendment right of access despite the Government's contention that Judge Cedarbaum's order "merely deprived [the media] of the contemporaneity and the color and texture of the texture of the *voir dire* proceedings."

The right of access includes the right to be physically present, not merely a right to later-released transcripts, the Court held. "[O]ne cannot describe an anguished look or a nervous tic. The ability to see and to hear a proceeding as it unfolds is a vital component of the First Amendment right of access – not, as the government describes, an incremental benefit." The Court allowed that in some cases, where the right of access is properly overcome to protect, for example, a right to a fair trial, release of a transcript might be the best available substitute. But the availability of the substitute "does not somehow allow for a more lenient balancing test."

(Continued on page 46)

Closure of Voir Dire in Martha Stewart Trial Was Error

(Continued from page 45)

Intense Media Scrutiny Alone Cannot Justify Closure

The Court next found that the district court's factual findings were inadequate to justify closure of the proceedings. First, there was no record evidence suggesting that any member of the media had conducted themselves improperly in the case. Second, the district court's finding that many prospective jurors may have prejudged the defendants was not a sufficient reason to close the proceedings entirely. If the potential for prejudgment alone "were sufficient to warrant closure, then courts could routinely deny the media access to those cases of most interest to the public, and the exception to openness would swallow the rule."

Finally, the Court held that nothing about the nature of the securities case against these defendants was likely to inhibit juror candor. Unlike

United States v. King, 140 F.3d 76 (2d Cir. 1998), where lawyers intended to probe the racial attitudes and biases of prospective jurors, "no similarly sensitive or contentious lines of questioning were here identified by the district court."

Prospective jurors were not likely to feel "especially chilled" when asked about "distrust in corporate leadership or a distaste for the niceties of home decorating." (The Court also rejected the Government's argument that potentially sensitive questions about sexism might cause juror inhibition, because the district court did not make any such finding and because, in any event, a review of the *voir dire* transcripts did not reveal any discussion of gender bias or "other socially polarizing issues.")

The extent and degree of media coverage in this case, which the Second Circuit found was really the *only* reason the district court had closed the proceedings, simply was not enough to warrant closure. If the fact of intense publicity were sufficient, "the First Amendment right of access [would be] meaningless; the very demand for openness would paradoxically defeat its availabil-

ity." Moreover, there was no showing that the defendants' fair trial rights would be jeopardized by closure. Indeed, "in general, openness acts to protect, rather than to threaten, the right to a fair trial." That the government (rather than the defendants) initiated the request for closure and fought for closure on appeal underscored that openness was unlikely to infringe the defendants' fair trial rights.

Closure Order Not Narrowly Tailored

Finally, the Court found that even if the district court had made adequate factual findings, the closure order

here would still fail because the lower court did not "adopt a narrowly-tailored method of protecting the defendants' fair trial rights" for two reasons. First, if the district court wanted the jurors' names to remain anonymous, it could have accomplished this simply by referring to jurors by number, rather than by name.

Second, even assuming that the lawyers were going to ask sensitive questions, "we fail to see why the media had to be barred from the entirety of *voir dire* proceedings," rather than only those particularly "sensitive" portions.

Assistant U.S. Attorney Deborah E. Landis represented the government before the Second Circuit.

Alia Smith is an associate with Levine Sullivan Koch & Schulz in New York. She and David Schulz, a partner in the firm, represented the media coalition in this case.

If the fact of intense publicity were sufficient, "the First Amendment right of access [would be] meaningless; the very demand for openness would paradoxically defeat its availability."

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

Media Law Resource Center, Inc.
80 Eighth Avenue, Ste. 200
New York, NY 10011

Ph: 212.337.0200
ldrc@ldrc.com

News Organizations Battle for Access in *People v. Michael Jackson*

By Theodore J. Boutrous, Jr. and Julian W. Poon

A coalition of major media organizations, including NBC, CBS, Fox News, ABC, CNN, CourtTV, The Associated Press, *Los Angeles Times*, and The New York Times, is battling on several fronts to ensure maximum public access to the records and proceedings in the high-profile felony prosecution of singer Michael Jackson on child-molestation and related charges that were filed on December 18, 2003.

On the eve of the formal filing of felony charges, attorneys for the media coalition wrote to the Santa Barbara County District Attorney, inquiring whether the warrant, supporting affidavit, and return associated with the search warrant executed on Jackson's Neverland Ranch on November 18, 2003, had been filed yet with the court, as required by California Penal Code § 1534, and seeking access to these warrant-related records, which had been sealed (along with the magistrate's statement of reasons for sealing the records) for 45 days following the November 17 issuance of the warrant. Several days after the letter to the Santa Barbara District Attorney was sent, the District Attorney and Jackson's defense lawyers stipulated to the continued sealing of these warrant-related documents at least until Jackson's January 16, 2004 arraignment, with the approval of Presiding Judge Thomas R. Adams of the Santa Barbara Superior Court.

The media coalition responded by filing a formal motion to unseal these search warrant records on January 7, 2004. The motion relied on the First Amendment to the United States Constitution, Article I, Section 2 of the California Constitution, California statutory and common law, and the California Rule of Court governing the sealing and unsealing of court records. Five days later, the coalition followed up with a formal opposition to a "gag order" request by the District Attorney that would have basically prevented the prosecution and defense, any potential witnesses, and other potential trial participants from communicating anything of substance to the media or public.

Shortly thereafter, a formal brief in support of the coalition's request to televise and/or photograph the January 16 arraignment hearing was filed, in an un-

successful attempt to sway the court's earlier ruling rejecting such a request by the media organizations themselves. At Jackson's January 16 arraignment hearing, the California state trial judge presiding over Jackson's trial—Judge Rodney S. Melville of the Santa Barbara Superior Court—heard oral argument from the media coalition's attorneys on both the motion to unseal and the opposition to the "gag order" request. Judge Melville agreed to release some of the search warrant records, albeit with heavy redactions, and to the exclusion of the 82-page supporting affidavit, which he stated was incapable of being redacted in an intelligible form. He also granted the District Attorney's "gag order" request, albeit with some modifications—most notably a "safe harbor" provision the boundaries of which have yet to be defined.

Pursuant to his January 23 written findings and order confirming his January 16 ruling from the bench, Judge Melville on February 2 released 55 pages of partially redacted search warrant and arrest warrant materials that had been sealed and withheld from the public since Santa Barbara authorities conducted their well-publicized November 18 search of Jackson's Neverland Ranch. The materials did include transcripts of a telephonic request for additional search warrant authority made to a magistrate while officers were executing the November 18 search, as well as portions of inventories of property seized by the authorities during that search, which included the locations from which many of these items of property were seized, but heavy redactions left large segments under seal and excluded almost the entirety of the affidavit in support of the search warrant.

In anticipation of a court hearing in this case on February 13, the coalition renewed its earlier request under California Rule of Court 980 to televise and/or photograph the court proceedings. Judge Melville denied the request without conducting a hearing and without issuing a statement of decision. The coalition also filed formal oppositions to the District Attorney's attempts to seal documents and records related to the execution of search warrants directed at seven telephone service providers, to the search of one of Jackson's private investigator's Beverly Hills office, to a search of 12 hard drives from three computers seized from Jackson's Neverland Ranch, and to the search of two additional residences in Calabasas

Battle for Access in *People v. Michael Jackson*

(Continued from page 47)

and Los Angeles. It also formally opposed attempts by both the prosecution and defense to file their briefs on the defense's assertion of attorney work-product protection over several seized items under seal.

At the February 13 hearing, Judge Melville heard arguments on these issues and announced that he would release some of search-warrant-related records sought by the coalition, but indicated he would first review the records and make redactions before releasing the materials. Based on an emergency request by the District Attorney, the court refused to release, either to the defense or the media, records related to two search warrants, and ordered that these materials will remain under seal for at least 30 additional days. The court also ordered the parties' briefing on the attorney-work-product issues unsealed in their entirety, and shortly after the hearing released a transcript of an in-camera hearing concerning those two search warrants. The court is expected to issue soon its written findings and ruling concerning this latest round of unsealing and access efforts by the media coalition in this case.

Lastly, the media coalition has for now successfully fended off attempts by Santa Barbara County officials to levy disproportionately burdensome and discriminatory parking fees on the media to cover non-media-related expenses, such as added costs for policing, street-cleaning, and additional staff and administrative time and expenses. After writing to the County Counsel and appearing at the County Board of Supervisors's meeting convened to consider County officials's proposal to increase parking fees dramatically on certain days and just for members of the media, attorneys for the coalition were able to persuade the County Board of Supervisors to refrain, for the time being, from imposing such fees.

*Theodore Boutros is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Co-Chair of the firm's Media Law Practice Group and Julian Poon is an associate in the firm's Los Angeles office. They are counsel of record for the media organizations in *People v. Michael Jackson*.*

California Appellate Court Upholds 'No Cameras' Ruling in Peterson Trial

In an order issued on February 11, 2004, the California 1st District Court of Appeals issued a final order denying a petition by Court TV, ABC, NBC, Fox and KNTV requesting camera access to the courtroom in the Scott Peterson murder trial. The petition, filed February 10, followed retired Alameda Superior Court Judge Alfred A. Delucchi's ruling a week earlier that cameras would unduly burden the court's ability to conduct a fair trial by making witnesses and jurors "antsy."

On appeal, the broadcast media petitioners argued that Delucchi failed to adequately consider the public's First Amendment rights. Peterson is accused of killing his 27-year-old pregnant wife, Laci, shortly before Christmas Day 2002. If convicted of murder, he could be sentenced to death. Attorneys argue that televising the trial would have a cathartic affect on the community. Prosecution and defense attorneys both opposed the media request, arguing that cameras in the courtroom would only serve to transform the trial into a media circus.

MLRC 2003 Annual Dinner Transcript Now Available

**"In the Trenches Revisited"
11/12/03**

**To view, please visit our
web site**

www.ldrc.com

Texas Attorney General Rules that State Access Law Limits HIPAA Privacy Rule

By Joel White

On February 13, 2004, Texas Attorney General Greg Abbott ruled that HIPAA's Privacy Rule does not make information confidential for purposes of the Texas Public Information Act ("PIA"). The ruling is available online at: www.oag.state.tx.us/opinions/or50abbott/ord-681.htm

Newsgathering Dispute with Police Led to Ruling

The ruling resulted from a dispute between the Lubbock, Texas *Avalanche-Journal* and the Lubbock Police Department. In April 2003, the *Avalanche-Journal* reported that the police planned to withhold information about murders and traffic fatalities from the public. Attorneys for the police department and the newspaper agreed to request clarification from the Texas Attorney General, who is responsible for enforcement of the PIA in addition to advising government agencies. The Attorney General agreed to write a formal opinion, rather than an informal "letter ruling" in order to address the effect of HIPAA's Privacy Rule on state law in general.

State Law on Access

Entities covered by the PIA must therefore release information if its release is required under state law. The attorney general noted that entities covered by HIPAA may disclose protected health information to the extent that such disclosure is "required by law," citing 45 C.F.R. 164.512(a)(1). Abbott also noted that the preamble to HIPAA's Privacy Rule specifically cites the Freedom of Information Act as an example of when disclosure may be required by law, and that the stated purpose of section 164.512(a) was to avoid any obstruction to a covered entity's ability to comply with its existing legal obligations. Accordingly, he reasoned that the PIA, like FOIA, is one such "existing legal obligation" which makes disclosure "required by law." If information must be disclosed by the PIA or the FOIA, HIPAA's Privacy Rule does not exempt the information from disclosure.

Abbott announced his decision at a Freedom of Information Foundation of Texas board meeting, stating "What this

means is, governmental bodies who have been using HIPAA as a shield just lost that protection."

Entities covered by the PIA include nonprofit corporations that are eligible to receive funds under the federal community services block grant program, as well as organizations that are supported in whole or in part by public funds. Many hospitals and other medical providers are therefore included. The ruling makes clear that they must comply with the PIA, which incorporates a different set of privacy laws than HIPAA's Privacy Rule. For example, the PIA incorporates the Emergency Medical Services Act, which protects most EMS patient health information from public disclosure, but allows public release of the patient's age, sex, occupation, city of residence and nature of injury or illness.

***"What this means is,
governmental bodies who have
been using HIPAA as a shield
just lost that protection."***

Under HIPAA's Privacy Rule, only a general one word summary of the patient's condition (such as "stable" or "critical") and the patient's

location in the health care facility are provided, and then only to persons who ask for the patient by name. The patient must be given an opportunity to object to the release even of this limited information.

The decision applies only to requests for information made pursuant to the PIA. A governmental agency that is subject to both the PIA and HIPAA's Privacy Rule may continue to comply with the Privacy Rule unless the request is specifically made under the PIA.

HIPAA's Privacy Rule Does Not Apply to Police departments

The ruling also clarifies that HIPAA's Privacy Rule does not apply to police departments, which are not entities covered by HIPAA: "A police department is not ...a health plan, a health clearinghouse, or a health care provider that transmits any health information in electronic form in connection with a transaction covered by the rules as defined in the Privacy Rule."

Records created by a police officer, including records that document an individual's medical condition, are not subject to the Privacy Rule, nor does the De-

(Continued on page 50)

Texas Attorney General Rules that State Access Law Limits HIPAA Privacy Rule

(Continued from page 49)

partment of Health and Human Services have authority to control a non-covered entity's use or subsequent disclosure of such information. If the police officer receives medical records or confidential physician-patient communications from a health care facility, however, state law may prohibit disclosure to the public, unless the disclosure is consistent with the purpose for which the officer received the information.

The decision did not resolve whether fire department "first responders" are covered entities under HIPAA. While first responders routinely provide medical care, they may not transmit health information in electronic form for billing or administrative purposes and therefore may not be covered by HIPAA's Privacy Rule. However, when responding to PIA requests for health information, they must comply with the PIA, rather than the Privacy Rule.

The decision also explained that with respect to a "hybrid entity," or an entity whose business activities include both covered and non-covered activity, HIPAA only applies to the health care component of the entity. In other words, the fact that a fire department contains a first responder's unit does not make the fire department as a whole subject to HIPAA or the Privacy Rule. If a university provides hospital facilities, the disclosure provisions of the Privacy Rule apply only to the hospital and not the university.

Texas statutes contain numerous protections for medical information. Separate statutes protect hospital health care information, medical records, mental health records, and information about Medicaid recipients. Texas common law also protects from public disclosure information that is intimate or embarrassing and in which the public has no legitimate interest, including medical records. Previous attorney general rulings have also found privacy protection for a person's illnesses, use of prescription drugs, handicaps and operations.

HIPAA's Privacy Rule arguably does little in addition to these preexisting laws to protect patient privacy. However, confusion over HIPAA's Privacy Rule and

which entities are covered by it have frequently made news reporting difficult. State universities, for example, have refused to provide information about football player injuries, and police departments have refused to provide routine information on crimes and fatalities even though they are not subject to HIPAA or the Privacy Rule.

Texas AG to Conduct Preemption Analysis

As a general rule, HIPAA's Privacy Rule preempts a contrary provision of state law. 42 U.S.C. 1320d-7 (2003); 45 C.F.R. 160.203 (2003). A state law is "contrary" if an entity covered by HIPAA would find it

impossible to comply with both the State and federal requirements, or the State law is an obstacle to HIPAA's objectives. There are numerous exceptions to this general rule, however, so it is difficult to determine which

State laws are affected by HIPAA's Privacy Rule.

The Texas Legislature has charged the Texas Attorney General's Office with the task of determining which statutes are preempted by HIPAA. Texas Health and Safety Code section 181.251. That analysis is due no later than November 1, 2004, and will contain recommendations for legislation to make Texas laws consistent with HIPAA. While we can therefore expect changes in Texas medical privacy laws, those changes should not affect the attorney general's ruling that government agencies (including publicly funded entities) must comply with the PIA.

Gary McLaren of Richards, Elder, Srader, Phillips & McLaren represented the *Avalanche-Journal*. Ogden, Gibson, White, Broocks & Longoria submitted briefs on behalf of the *Houston Chronicle* and the Freedom of Information Foundation of Texas.

Joel White is a partner in Ogden, Gibson, White, Broocks & Longoria LLP in Houston, Texas.

Confusion over HIPAA's Privacy Rule and which entities are covered by it have frequently made news reporting difficult.

Alabama Supreme Court Rules that a Public Corporation Is Subject to State's Open Records Law

By James P. Pewitt

On January 16, 2004, the Supreme Court of Alabama released a unanimous decision applying, for the first time, the State's open records law to a public corporation. *Water Works and Sewer Bd. Of the City of Talladega v. Consolidated Publishing, Inc.*, No. 1020228, 2004 WL 68538 (Ala. Jan. 16, 2004).

Missing Money

Consolidated Publishing, Inc., publisher of *The Daily Home*, a newspaper distributed in Talladega County, Alabama, sought access to records relating to the disappearance of \$91,000 in funds of the local water works and sewer board. The board refused to release the records, contending that, because it is a public corporation and not a subdivision of state, county, or municipal government, it is not required to comply with Alabama's open records law. Section 36-12-40 of the Alabama Code gives every citizen a right to inspect and take a copy of any public writing of the State.

The trial court had ruled that the board was, in fact, subject to the open records law, but that some of the records sought by Consolidated fell within previously recognized exceptions to the law and were therefore shielded from disclosure.

On appeal, the Alabama Supreme Court affirmed the trial court's ruling that the board was subject to the open records law. Noting that the law was to be construed liberally in favor of the public, the court first acknowledged that there has been considerable confusion over the status of local utility boards.

Such public corporations "were initially authorized by the Legislature as a means for municipalities to finance improvements to their utilities infrastructure without running afoul of constitutional and statutory debt limitations, as well as to shield municipalities from the large financial obligations that often accompany such utilities projects."

Yet, the court continued, public corporations have typically maintained close relationships with the municipalities that create them. In this case, for example, the court pointed out that the board operated out of City Hall and that its members are selected by the Talladega City Council.

(Continued on page 52)

Order now!

MLRC 50-STATE SURVEY 2003-04: MEDIA LIBEL LAW

With updated reports on libel law in the Federal Circuits and an outline of English libel law.

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

\$175

For ordering information on the most current editions, including the 2002-2003 edition currently in stock, go to www.medialaw.org

Alabama Court Rules that a Public Corporation Is Subject to State's Open Records Law

(Continued from page 51)

Alabama's public records law covers "public writings," which the Alabama Supreme Court has previously defined to mean "such a record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status or condition of such business and activities can be known by our citizens."

The court in this case wrote that the term "public officer" included officers and servants of counties and municipalities. The court held that, because the board was established by the City, operated out of City Hall, appointed by the City Council, and performed a municipal function, its employees are public officers for purposes of the open records law. Quoting an advisory opinion issued by the court in 1938, it wrote that, "The mere fact that [the board] is a corporation does not deprive it of the qualities of a governmental agency."

Narrower Exceptions?

The court then turned to the issue of whether the records sought by Consolidated fell within exceptions to the open records law. Under *Stone v. Consolidated Publishing, Inc.*, 404 So. 2d 678 (Ala. 1981), courts in Alabama are to apply a rule of reason or balancing test when dealing with records requests, and some otherwise public records can be withheld if a court finds that they are recorded information received by a public officer in confidence, sensitive personnel records, records relating to a pending criminal investigation, or records the disclosure of which would be detrimental to the best interests of the public. In the present case, the court held that some of the records sought by Consolidated did fall within an exception, and some did not.

Of particular interest, however, to practitioners in Alabama was the court's approach. The court construed the exception for pending criminal investigations by reference to a statute passed by the Legislature in 1998 on law enforcement investigative reports, finding it to have essentially codified the scope of that particular exception. Thus, what was previously a loose, judge-made exception, the contours of which were defined only on a case-by-case basis, is now arguably narrower and statutorily defined.

Alabama has adopted many statutes addressing records of various kinds. The court's opinion suggests that those

seeking access to public records in Alabama might be able to use these statutes in an appropriate case to narrow the scope of the exceptions to Alabama's open records law.

The board is represented in the case by Steven Adcock in Talledega, Alabama; Charles Gaines of Gaines, Gaines & Rasco P.C. in Talladega, Alabama; and J. N. Montgomery of Stringer, Montgomery & Montgomery, also in Talladega, Alabama. Consolidated is represented by Elizabeth Parsons of Blair and Parsons in Pell City, Alabama, and Dennis Bailey and Hendon Debray of Rushton, Stakely, Johnston & Garrett, P.A. in Montgomery, Alabama.

James P. Pewitt is a partner with Johnston Barton Proctor & Powell LLP in Birmingham, Alabama.

Supreme Court Denies Review of Secret Deportation Proceeding

The Supreme Court declined to hear an appeal arising from the now publicized, but still shrouded, deportation case against Mohamed Kamel Bellahouel. *M.K.B. v. Warden*, 2004 WL 324470 (U.S. February 23, 2004). Bellahouel asked the court to hear his claim that the secrecy surrounding his deportation violates the public's First Amendment right of access to judicial proceedings. The petition did not deal with the merits of the deportation proceeding.

Bellahouel, an Algerian immigrant married to a U.S. citizen, was detained for immigration violations in October 2001 and held for five months as a material witness in the post 9/11 investigation. According to news reports, he may have waited on the terrorist hijackers in a restaurant in Miami in the weeks before the September 11 attack.

In an extraordinary example of government secrecy, deportation proceedings against Bellahouel were kept secret by the federal district court in Miami and the 11th Circuit Court of Appeals which sealed every filing and ruling in the case. The *Miami Daily Business Review* learned of the proceedings through a clerical error by the appellate court.

The response of U.S. Solicitor General Theodore Olson to the cert. petition is filed under seal. A redacted reply brief will be made public. The Court also denied a motion by the Reporters Committee for Freedom of the Press to intervene in the case.

New Jersey Judge Orders Release of Malpractice Payment Notices

By Dina L. Sforza

A New Jersey Superior Court judge has required the state to release to the media medical malpractice settlement and award notices that are required by statute to be confidentially presented to a medical discipline panel. *North Jersey Media Group Inc. v. State of New Jersey*, L-5771-03 (N.J. Super. Ct. Jan. 23, 2004). Assignment Judge Sybil R. Moses of Bergen County ordered the State to provide the notices to *The Record* of Hackensack, a daily newspaper circulating in northern New Jersey.

New Jersey law requires insurers to notify the State of any payment made on behalf of practitioners relating to a medical malpractice judgment, settlement, or arbitration award. Upon receiving the notices, the Medical Practitioner Review Panel (MPRP) is required to investigate the facts leading to the payment and determine if discipline is appropriate.

In August 2003, *The Record* filed a lawsuit against the New Jersey Division of Consumer Affairs and the MPRP under New Jersey's Open Public Records Act, N.J.S.A. 47:1A-1, *et seq.*

(OPRA) and the common law, seeking disclosure of the malpractice payment notices. *The Record* sought the documents to evaluate the various arguments in the ongoing debate about the medical malpractice insurance crisis in New Jersey and to evaluate the effectiveness of the MPRP.

In its lawsuit, *The Record* argued that the notices are public records and thus releasable. However, because statutory confidentiality provisions exempted the disclosure of the notices under the OPRA, *The Record* pursued its common law claim for access to the notices. It argued that the public's interest in disclosure of the notices outweighed the State's interest in maintaining their confidentiality, especially in light of the recent passage of the New Jersey Health Care Consumer Information Act, L. 2003, c. 96 (NJHCCIA).

The NJHCCIA directs the creation of practitioner profiles, which will contain information regarding practitioners, including any malpractice payouts made in the last five years. The NJHCCIA also amends the confidentiality statutes to permit release of the information contained in

the payment notices. While the NJHCCIA goes into effect in June 2004, there is no requirement that the profiles be accessible to the public at that time. Because of the uncertainty surrounding when the information will publicly be available, *The Record* sought immediate release of the payment notices.

In opposing *The Record's* common law claim, the State argued that the mere existence of statutory confidentiality provisions shielding the notices precludes all common law claims to access. Judge Moses rejected this argument, finding that the existence of confidentiality statutes is just one of the factors to be considered in balancing the respective interests under the common law, and that the NJHCCIA evinces the Legislature's intent that the information contained on the notices be made public.

The existence of confidentiality statutes is just one of the factors to be considered in balancing the respective interests under the common law

Under Judge Moses' ruling, the State has until February 23, 2004 to release the notices to affected practitioners, who will then have thirty days to dispute the accuracy of the information before they are released to *The Record*.

The State of New Jersey, Division of Consumer Affairs and Medical Practitioner Review Panel were represented by Deputy Attorney General Steven N. Flanzman.

Dina L. Sforza is in-house counsel for The Record and represented the newspaper in this case.

**MLRC 2003 Annual Dinner
Transcript Now Available**

**“In the Trenches Revisited”
11/12/03**

**To view, please visit our web site
www.lsrc.com**

DC Circuit Rejects First Amendment Right To Accompany Troops In Battle

By Adam Rappaport

The First Amendment does not require the Pentagon to permit reporters to accompany troops in battle, the U.S. Court of Appeals for the D.C. Circuit held this month. *Flynt v. Rumsfeld*, 2004 WL 190072 (D.C. Cir. Feb. 3, 2004). This is believed to be the first federal appeals court decision holding that journalists do not have a right of access to the military in combat.

Larry Flynt Sued to Accompany Troops

Soon after the American military began operations in Afghanistan in October 2001, *Hustler* magazine publisher Larry Flynt requested that the Pentagon permit correspondents from the magazine to accompany ground troops on combat missions and that it permit access to the theater of military operations. Then-Pentagon spokeswoman Victoria Clarke responded that access was not possible because American troops then in Afghanistan were involved in special operations, making it “very difficult to embed media,” and later added that the Pentagon’s decisions on media access were controlled by Department of Defense Directive 5122.5. This directive provides that field commanders should be instructed to permit journalists to ride on military vehicles and in aircraft when possible, and allows for pool coverage when space is limited or areas to be visited are very remote. It also limits access in certain situations, such as special operations, and restricts media communications where, for example, such communications would pose a security risk.

Flynt filed suit, arguing that the directive was unconstitutional on its face, and that it had been improperly applied. The district court dismissed the case without addressing the merits, finding the as-applied claims unripe because DOD never made a final decision on his request, and declining to exercise its discretion to consider the facial challenge.

No Constitutional Right to “Embed” with Troops in War

The D.C. Circuit, however, addressed the merits of the lawsuit, declaring itself unpersuaded by Flynt’s position. The court first noted that it was not entirely clear what right Flynt believed was being violated. Based on statements made at oral argument, the court construed Flynt’s claim as

asserting a constitutional right to go into battle with the military – “essentially what is currently known as embedding” – that it construed as different from “merely a right to cover war.” There is no government rule that prohibits the press from generally covering a war, the court found, and, “[a]lthough it would be dangerous, a media outlet could presumably purchase a vehicle, equip it with the necessary technical equipment, take it to a region in conflict, and cover events there.”

Turning to the facial challenge, the court found no basis for Flynt’s claim that members of the press possess a First Amendment right to travel with troops into combat and be accommodated by them, subject only to reasonable security and safety restrictions. Repeating language from its recent decision in *Center for National Security Studies v. Department of Defense*, 331 F.3d 918 (D.C. Cir 2003), *cert. denied*, 2004 WL 46645 (Jan. 12, 2004), the court concluded that neither it nor the Supreme Court has ever applied *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), outside the context of judicial proceedings in criminal matters. In all other areas, the court observed, the Supreme Court has applied the general rule of *Houchins v. KQED*, 438 U.S. 1 (1978) — that the First Amendment does not mandate a right of access to government information or information within the government’s control.

Even if the rationale of *Richmond Newspapers* were applied, Flynt’s claim “would fail miserably,” the court went on to observe. *Richmond Newspapers* was based on the long history of public access to criminal trials, and the court found that no comparable history exists to support a right of media access to troops in combat. Furthermore, Directive 5122.5 only imposes reasonable limitations on media access to the military, the court concluded.

The court similarly rejected Flynt’s as-applied claims, noting first that he never alleged that *Hustler* was treated differently than other media outlets. And even if there were an underlying constitutional right of access, the application of the directive to *Hustler* in this case would not have violated it, the court concluded.

Hustler was represented by Paul L. Cambria, Jr. and Roger W. Wilcox, Jr. of Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP in Buffalo, New York.

Adam Rappaport is an associate at Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C.

University of California Regents Ordered to Disclose Meeting Transcripts & Investment Info

By Karl Olson

All three levels of the California court system have told the University of California Regents — not once, but twice — that they can't hide venture capital performance results and investment decisions about their multi-billion dollar pension system from the public.

The California Supreme Court pounded the last nail in the Regents' legal coffin on January 12, 2004. The high court upheld two lower court rulings forcing the Regents to disclose transcripts and minutes of illegally-closed meetings at which the Regents discussed the under-performance of their investment portfolio and decided to fire their entire internal equity staff. *Coalition of University Employees v. Regents of University of California*, 2003 WL 22717384, 32 Media L. Rep. 1212 (Cal. Super. Jul 24, 2003).

The Regents — in a shifting series of unsuccessful arguments — first claimed they had properly closed the meeting because they were discussing investments. But Alameda County Superior Court Judge James Richman said that argument didn't wash because the Regents weren't discussing any particular investments.

Rebuffed once, the Regents then claimed their meeting was properly closed because they were discussing "personnel matters." Again, Judge Richman said no: the Regents hadn't discussed any employees by name, so the meeting should have been open, he ruled.

The Regents appealed Judge Richman's ruling to the Court of Appeal and California Supreme Court, arguing that the need for confidentiality in personnel matters was "greater" when they were discussing 11 employees than if they'd discussed one. Both appellate courts upheld Judge Richman's ruling in one-sentence rulings.

Transcripts released January 12 after the Supreme Court's ruling confirmed what the plaintiffs in the lawsuit — the Coalition of University Employees, Charles Schwartz and the *San Jose Mercury News* — had said

all along: the Regents were fighting disclosure just to avoid embarrassment.

The transcripts offer a rare public glimpse into serious bureaucratic damage control at the highest levels. A top University official, Senior Vice President Joseph P. Mullinix, said at the illegally-closed October 29, 2002 meeting, "We thought that there was some modest chance that we could meet with the faculty subcommittee and talk to the staff and talk to the Regents without having this on the middle of the *Chronicle*." UC Regent Judith L. Hopkinson responded, "It's going to be there anyway."

Mullinix responded, "We're going to meet with the staff on Election Day (Nov. 5, 2002)." Another Regent, Peter Preuss of La Jolla, responds, "The *Chronicle* will be full of other stuff." Regent Hopkinson then warns, "I've got news for you. The staff is going to call the *Chronicle* anyway....So meet with the unions. Meet with everybody you can because it's going to be out on the street and it will be a mess."

That prompts another Regent, Norman Pattiz, to tell UC officials, "put together some talking points." Then Regent John J. Moores, the owner of the San Diego Padres, tells UC Treasurer David Russ, "David, I think you need to provide at least a one-sentence cover for why we're doing this. If the word's going to get out — and I don't think we want to say that we're doing it because we're embarrassed to find out we lost 3 billion dollars."

Regent Moores goes on to say that Wilshire Associates — an outside investment firm to whom the Regents pay \$38,000 a month which has recently been censured by the New York Stock Exchange and is being investigated by the SEC for illegal trading — has "done a fine job for us, a terrific job if truth be known," even though, "Everybody caught hell...There were a lot of bad articles written."

The embarrassing disclosures about the Regents' bad investment decisions and illegally-closed damage con-

(Continued on page 56)

Transcripts released January 12 after the Supreme Court's ruling confirmed what the plaintiffs had said all along: the Regents were fighting disclosure just to avoid embarrassment.

University of California Regents Ordered to Disclose Meeting Transcripts & Investment Info

(Continued from page 55)

trol meetings came after the Regents used seven lawyers — five from the UC General Counsel's office and two from an outside law firm in San Francisco — in their fruitless battle against public disclosure. Earlier in the lawsuit, the Regents were forced to disclose losses in their venture capital portfolio after arguing, again unsuccessfully, that the performance of their venture capital funds were "trade secrets" exempt from disclosure.

The Regents unsuccessfully appealed that ruling to the Supreme Court as well.

UC fought against disclosure of the venture capital returns even after the nation's largest pension fund, the California Public Employees' Retirement System (CalPERS), had agreed to disclose performance results after being sued by the *Mercury News* last year. UC claimed that venture capital returns were "trade secrets" even though CalPERS and every other public pension fund were disclosing the same information.

The Regents' obstinate fight against disclosing public records — and employment of expensive outside counsel to take two appeals to the California Supreme Court — comes at a strange time. Tuition at UC campuses may be raised by as much as 30 percent and enrollment may be cut as the state fights to close a yawning \$15 billion deficit. But the Regents' desperate fight against disclosure indicates that some things are more important to the powerful, politically-connected Regents than avoiding tuition increases or enrollment cuts: and avoiding any bruises to the Regents' and top UC officials' egos is certainly one of them.

The UC Regents were represented by Jerome Falk and Steven Mayer of Howard Rice Nemerovski Canady Falk & Rabkin in San Francisco and Chris Patti, James E. Holst, John F. Lundberg, Steven G. Rosen and Maria Shanle of the General Counsel's office.

Karl Olson is a partner at Levy, Ram & Olson in San Francisco. He represented the plaintiffs in this suit against UC and CalPERS along with Erica Craven of his firm and Judy Alexander of Winn & Alexander in Capitola.

Lawsuit Testing Limits of SEC's Power Over Publishers Continues

In a case with possibly far-reaching implications for publishers who carry financial news and stock recommendations, a federal court in Baltimore denied a financial/investment publisher's motion to dismiss a lawsuit brought by the Securities and Exchange Commission. *SEC v. Agora, Inc., et al.*, No. MJG-03-1042 (D. Md. Jan. 7, 2004).

The SEC claims that Agora, Inc. is liable under federal securities laws for knowingly publishing false information about a publicly-traded company that was the subject of one of its stock tips even though the enforcement agency acknowledges that defendants had no financial interest in the company's stock. See *MLRC MediaLawLetter*, September 2003 at 50.

District Court Judge Marvin Garbis rejected defendants' argument that dismissal of the action is warranted because anti-fraud provisions of the federal securities law do not apply to parties engaged in disinterested First Amendment protected activity. Rather, the court held that the "in connection with" element of Rule 10b-5 is satisfied when someone "utilizes a device" that causes investors to purchase or sell a corporation's securities. Judge Garbis stated that although constitutional issues may arise in later phases of the case, presently "none are ripe for decision."

Bruce Sanford and Bruce Brown of Baker & Hostetler LLP in Washington, D.C. represent Agora, Inc. and its affiliates in this case.

**TO RECEIVE THE
MEDIALAWLETTER BY E-MAIL**

**(Or Add Others From
Your Organization to Our List)**

**Please Contact
Kelly Chew
kchew@ldrc.com**

Rare Rejection of Reporter's Privilege by New Jersey Court

By Dina Lynn Sforza

In a rare rejection of the newsperson's privilege in New Jersey, a trial court judge hearing a criminal case ordered a reporter for *The Record* of Hackensack to testify and identify the source of information for an article about a criminal defendant's arrest. However, mindful of the state's strong shield law (N.J.S.A. 2A:84A-21) the judge required several potential non-media sources to testify before requiring the reporter to do so. *State v. Daley*, Ind. No. 02-08-0993-I (N.J. Super. Ct. 2004).

Reporter Subpoenaed for Suppression Hearing

Passaic County Superior Court Judge Ernest M. Caposela ordered Justo Bautista, a reporter for *The Record*, a daily newspaper circulating in northern New Jersey, to testify in a pre-trial suppression hearing. In January 2002, Mr. Bautista had written an article about defendant's arrest, and included information from an unidentified police source regarding the circumstances leading up to the arrest. Bautista reported that a "concerned citizen" had given the police information that led to a ten-day investigation into defendant and his activities. The defendant's house was searched, resulting in the seizure of significant quantities of marijuana, as well as weapons.

Defendant filed a motion to suppress the evidence, challenging the validity of the information that led to the search of defendant's house. During the suppression hearing, the police officers' testimony regarding the events leading up to the search and arrest varied significantly from the newspaper article. The police testified that a confidential informant, not a concerned citizen, provided the information that led police to defendant, and that such information was received by police only shortly before the search and arrest, not ten days prior.

The defendant subpoenaed the reporter, seeking to compel him to identify the source of the information appearing in the article. The newspaper filed a motion to quash under the Shield Law, which grants newspersons a privilege against testifying about any information received in the course of newsgathering, including the identity of sources.

Defendant opposed the newspaper's motion, citing the rarely invoked exception in New Jersey's Shield Law for defendants in criminal matters, which is intended to protect the constitutional right of criminal defendants to obtain evidence necessary to their defense.

Under the exception, the privilege will yield and the reporter will be compelled to testify if the defendant establishes by a preponderance of evidence that (1) the information is relevant, material and necessary to its defense, (2) it could not be obtained by any less intrusive means, (3) the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and (4) that the request is not overbroad, oppressive or unreasonably burdensome.

The trial judge found the information relevant, material and necessary to the defense, as it related to the reasonableness of the totality of the circumstances that led to the search of defendant's house.

Weighing heavily in the court's determination was the seriousness of the charges and the amount of prison time the defendant faced if convicted.

Defendant Required to First Pursue Less Intrusive Means

However, prior to compelling the reporter's testimony, the court required the defendant to pursue all less intrusive means for obtaining the information. In this case, the defendant called to testify each police officer that could have been the source of the information to the reporter. After each officer denied being the source, the judge ruled that defendant had satisfied its burden of exhausting less intrusive means, and that the value of the information to defendant's constitutional right to a fair trial outweighed the importance of shielding that information from disclosure. Weighing heavily in the court's determination was the seriousness of the charges and the amount of prison time the defendant faced if convicted. Ultimately, the reporter could not recall the identity of the source, but testified that it was most likely a narcotics officer.

The criminal defendant was represented by Miles Feinstein of Clifton, N.J. and the Passaic County Prosecutor's Office was represented by Sumana Mitra.

Dina Sforza is in-house counsel for the Record and represented the newspaper in this case.

Malicious Prosecution Claim Against Newspaper Publisher Survives Summary Judgment

In an unusual case, a federal district court in Nebraska denied a newspaper publisher's motion for summary judgment seeking dismissal of malicious prosecution and intentional infliction of emotional distress claims. *Lynch v. Omaha World-Herald Company*, 2004 WL 138468 (D. Neb. Jan. 27, 2004). (Bataillon, J.)

In March 2000, the Omaha World-Herald complained to the FBI that plaintiff "hacked" and altered the website of one of its newspapers, the North Platte Telegraph. Plaintiff was indicted for intentionally accessing a protected computer without authorization and recklessly causing damage in violation of 18 U.S.C. § 1030(a), a federal "anti-hacking" statute. The criminal case was subsequently dismissed in August 2001.

In denying summary judgment the court found there was sufficient evidence that the publisher intentionally misled the FBI and federal prosecutors about the nature and severity of the event to secure a criminal prosecution.

Gag Goes Wrong

Plaintiff Stephen Lynch, a New York financial analyst, decided to play a joke on his wife for her birthday. He created a phony headline on the website of the North Platte Telegraph, his wife's hometown newspaper, stating she was "wanted for sex crimes." Plaintiff contended that he believed the edits were only viewable on his personal computer screen; however, he had actually gained direct access to the Web page without using an identification number or password. The headline appeared on the site for approximately 90 minutes until the newspaper's webmaster removed the material.

Criminal Proceedings Lacked Probable Cause

In denying summary judgment, the district court concluded there was no probable cause for the original criminal action against plaintiff — notwithstanding the grand jury indictment. The court noted that "If an informant knowingly makes or gives misleading information, or fails to give the prosecutors all the facts, or persuades or induces the officer's decision, that informant can be held liable for malicious prosecution."

Specifically, the court found that the publisher misled prosecutors by claiming the site could not have been innocently altered — in fact the publisher knew that the web security system was "woefully deficient"; that it withheld weblogs and hard drives that showed Lynch used "legitimate paths to the webserver"; that it falsely claimed Lynch had repeatedly attempted to "hack" into the site; and that it exaggerated its damages to secure jurisdiction under the federal statute.

Plaintiff is represented by Matthew F. Heffron of Fitzgerald, Schorr, Omaha, Nebraska. The Omaha World-Herald is represented by Elizabeth M. Callaghan and Michael C. Cox of Koley, Jessen in Omaha.

Order Now!

50 State Survey 2003-2004:

MEDIA PRIVACY AND RELATED LAW

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

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

\$175

**For ordering information go to
www.medialaw.org**

Criminal Statute Prohibiting Disclosure of Complaints about Police Held Constitutional

Judge Disregards Magistrate, Dismisses Suit Over Editor's Arrest

A Florida federal court granted summary judgment to a former Key West police chief on a §1983 action brought by a newspaper editor stemming from the editor's arrest under an obscure Florida statute that restricts discussing reports of police misconduct. *Cooper v. Dillon*, Civil No. 01-10119 (S.D. Fla. order Feb. 6, 2004) (King, J.). The court dismissed the editor's complaint, holding that the statute is a content neutral time, place and manner restriction.

Newspaper Editor Arrested for Publishing Story about Police

In May 2001, Dennis Reeves Cooper, editor of the free weekly newspaper, *Key West The Newspaper*, filed a complaint with the Florida Department of Law Enforcement ("FDLE") against a Key West internal affairs officer for failing to investigate whether a member of the Key West police force lied in a traffic court proceeding. Pursuant to Florida state law, an investigation was opened into the complaint and Cooper, as the complainant, received notice of the investigation.

After receiving notice of the investigation, Cooper published two articles about it in his newspaper. On June 15, a front page story was headlined "FDLE Now Investigating Police Internal Affairs Scandal Here. Chief Dillon Given 45 Days to Respond to Coverup Allegations." A week later the newspaper published an editorial under the headline "What Will Police Chief Dillon Tell the FDLE?"

That same day Police Chief Dillon obtained an arrest warrant for the editor for violating Fla. Stat. § 112.533 which provides in relevant part:

Any person who is a participant in an internal investigation, including the complainant, ... who willfully discloses any information obtained pursuant to the agency's investigation, including, but not limited to, the identity of the officer under investigation, the nature of the questions asked, information revealed, or documents furnished in connection with a confidential internal investigation of an agency, before such complaint, document, action, or proceeding becomes a public re-

(Continued on page 60)

Order Now!

MLRC 50 State Survey: EMPLOYMENT LIBEL AND PRIVACY LAW 2004

TOPICS INCLUDE: *Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort*

\$175

For ordering information on the most current editions, go to www.medialaw.org.

Criminal Statute Prohibiting Disclosure of Complaints about Police Held Constitutional

(Continued from page 59)

cord as provided in this section commits a misdemeanor of the first degree [Investigations are presumed complete after 45 days.]

Cooper surrendered to police that evening and spent three hours in jail. The prosecution was subsequently dropped.

Following his arrest, Cooper filed a § 1983 action against Dillon, seeking damages for the arrest and a declaration that the statute was unconstitutional.

Prior Statute Held Unconstitutional

A prior version of the statute that applied to “anyone” discussing a “non-public” investigation, (Fla. Stat. § 112.533(3)), was held unconstitutional in *Hickox v. Tyer*, Civil No. 87-8327 (S.D. Fla. Oct. 15, 1990) (unpublished). In 1990, the statute was revised to apply only to participants in the investigation, including the complainant. In 1998, the section was renumbered to Fla. Stat. § 112.533(4) and was amended by adding a sentence providing that “a sheriff, police chief, or other head of a law enforcement agency, or his or her designee, is not precluded by this section from acknowledging the existence of a complaint, and the fact that an investigation is underway.” See 1998 Fla. Laws 98-249 (amending Fla. Stat. § 112.533).

MLRC 2003 London Conference Transcripts Now Available

**Developments in UK, European and
International Libel, Privacy &
Newsgathering Laws (September 22-23)**

To view, please visit our web site

www.ldrc.com

Magistrate Recommended Finding for Plaintiff

On November 12, 2003, Magistrate John J. O’Sullivan recommended finding for plaintiff. He found the statute was “an ‘outright, direct ban on speech’ concerning the single topic of an investigation into a law enforcement officer, and ‘this single topic can only be justified by the content of the speech.’” *Quoting Baugh v. Judicial Inquiry and Review Commission*, 907 F.2d 440, 444 (4th Cir. 1990). Magistrate O’Sullivan concluded that there was no compelling interest to criminalize disclosure of complaints against the police, citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), where the Court held unconstitutional a Virginia statute that subjected newspapers to criminal punishment for publishing the contents of confidential judicial inquiry proceedings.

District Court Judge Upholds Statute

On February 10, 2004, however, federal district court judge Lawrence J. King upheld the statute. In a surprisingly brief analysis of the constitutional issues, Judge King reasoned that the statute only restricted disclosure of information “obtained pursuant to the agency’s investigation” and not disclosure of information already within the complainant’s knowledge or obtained independently. Moreover he concluded that the statute served compelling government interests of protecting the investigative process, the reputation of law enforcement officers, and the privacy interests of complainants and witnesses. Finally, the court noted that since the restriction can last up to 45 days it only “restricts speech for a very limited amount of time.”

Plaintiff plans to appeal to the 11th Circuit Court of Appeals. The decision appears to be a completely erroneous application of grand jury secrecy rules, which can prevent the disclosure of what transpires or will transpire before a grand jury, to a state administrative proceeding.

Plaintiff was represented by Michael R. Barnes of Key West and James K. Green of West Palm Beach. Defendant Gordon Dillon was represented by Michael T. Burke of Johnson Anselmo Murdoch Burke & George in Fort Lauderdale.

Legislative Affairs Update: Congress Considers Indecency Bills

By Kevin Goldberg

In the short time since the Super Bowl, only one thing has been on the media's (and its attorneys') minds: should Carolina Panther's Coach John Fox have gone for the two point conversion so early or should he have played it safe. Actually, the Super Bowl controversy is all about the alleged indecency of the halftime program. Capitol Hill is already on the bandwagon, speeding up its review of two bills that were already proposed and scheduling several hearings that will provide a platform for predictable rants against the media.

HR 3687 and HR 3717 (Broadcast Decency Enforcement Act of 2004)

- These bills were originally a response to events on televised awards shows in the past year and the FCC's decision not to initiate any enforcement actions. Several complaints were filed with the FCC after Bono, the lead singer of the band U2, uttered a certain four letter word beginning with "F" upon receiving an award. The FCC later ruled that stations carrying the program without a delay used to cover his outburst would not be fined because the word was not used in a sexual context, rather as an "enhancer" or an adjective. Ditto for spoiled rich kid Nicole Richie, who used a word of identical length, starting with "S", on another music awards show.
- This outraged many members of Congress who sought not only to change the breadth of the agency's indecency rules but also the depth of its enforcement actions.
- Enter Rep. Doug Ose (R-CA) who introduced HR 3687 on December 8, 2003. This bill seeks to amend Title 18 of the United States Code to declare profane, and subject to liability if broadcast, the "7 dirty words" used by George Carlin in his famous monologue.
- Not to be outdone, Rep. Fred Upton (R-MI) introduced the Broadcast Decency Enforcement Act (HR 3717) on January 21, 2004. That bill does not expand the FCC's authority to act, but will certainly make that agency's actions resonate. HR 3717 allows the FCC to impose a penalty of up to \$275,000 for each violation or each day of a continuing violation, and \$3 million total, for any broadcast of obscene, indecent or profane language.
- Though these bills were introduced before the Super

Bowl, they certainly received piercing attention after Janet Jackson's halftime performance. One hearing was scheduled well before the big game. On January 28, 2004, the House Telecommunications and Internet Subcommittee held a hearing entitled "Can You Say that on TV? An Examination of the FCC's Enforcement with Respect to Broadcast Indecency." This hearing involved testimony from four witnesses: David H. Solomon, Chief of the FCC's Enforcement Bureau; L. Brent Bozell, President of the Parents Television Council; William J. Wertz, Executive Vice President of the Fairfield Broadcasting Company; and Bob Corn-Revere, a Washington attorney. Within a week of the infamous "wardrobe malfunction," two hearings had been scheduled for February 11, 2004. The same Telecommunications and Internet subcommittee will hold a hearing on HR 3717, with a vote held the following day. Also on February 11, 2004, the Senate Committee on Commerce, Science and Transportation held a hearing entitled "Protecting Children from Violent and Indecent Programming" at which all five FCC Commissioners testified.

Database and Collections of Information Misappropriation Act (HR 3261)

- Introduced by Rep. Howard Coble (R-NC) on October 8, 2003, this bill seeks to extend copyright protections to proprietary databases that exist in electronic format in an effort to curb copying of facts contained therein (in a way that may or may not contradict Supreme Court precedent set in the 1991 case of *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, where the Court held that bare facts cannot be copyrighted).
- The bill creates a civil liability (but no criminal penalty) for anyone who makes publicly available a "quantitatively substantial part of the information in a database generated, gathered, or maintained by another person, knowing that such making available in commerce is without the authorization of that person" if:
 - The database was generated, gathered or maintained through a substantial expenditure of financial resources or time;

(Continued on page 62)

Legislative Affairs Update

(Continued from page 61)

- The unauthorized making available in commerce occurs in a time sensitive manner and inflicts injury on the database or a product or service offering access to multiple databases; and
 - The ability of other parties to free ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.
 - There are certain exceptions which allow for copying if:
 - The same information was independently generated or gathered;
 - The information was taken by a nonprofit educational, scientific or research institution for nonprofit educational, scientific or research purposes;
 - The offending organization has simply hyperlinked to the database;
 - The information was made available for the primary purpose of news reporting, dissemination or comment; or
 - The database was generated by a federal, state or local government or pursuant to federal, state or local government regulations;
 - The bill passed the House Judiciary Committee by a 16-7 vote on January 21, 2004 after passing the Subcommittee on Courts, the Internet, and Intellectual Property by a 10-3 vote on October 16, 2003.
 - This legislation is backed by large database companies such as Reed Elsevier (owner of LexisNexis) and Thomson (owner of Westlaw). However, many large businesses and Internet Service Providers, such as AT&T, Comcast, Yahoo, Google and Amazon oppose the bill, as does the United States Chamber of Commerce, which wants to let businesses regulate themselves through the use of private contracts. These groups, and others, will next take the fight to the House floor, though no floor vote has been set.
- of legislation-related issues. These materials include issue and legislative briefs, and authorization and appropriation products. Citizens, scholars, journalists, librarians, businesses, and many others have long wanted access to CRS reports via the Internet. Despite the fact that the CRS is a taxpayer-funded service, the results of its research are available to the public only if a citizen requests certain information from his or her Congressman.
- Earlier, MLRC reported that Representatives Mark Green (R-WI) and Chris Shays (R-CT) had removed access offered through their websites to CRS documents.
 - On November 21, 2003, Rep. Shays introduced HR 3630, which requires the Congressional Research Service to make available:
 - Congressional Research Service Issue Briefs.
 - Congressional Research Service Reports that are available to Members of Congress through the Congressional Research Service website and
 - Congressional Research Service Authorization of Appropriations Products and Appropriations Products.
 - These documents must be available to the public within thirty to forty days after they are made available to Congressmen through the CRS website
 - Because the bill was introduced so late in the legislative session, the Committee on House Administration has not taken any action. It appears unlikely that a hearing or vote will occur, however, because that committee's chairman, Rep. Bob Ney (R-OH) is opposed to this legislation, saying, that CRS' main goals in producing documents must be "preserving direct member relationships with constituents ... safeguarding the confidentiality of CRS communications with congressional offices, and ... ensuring that CRS products and resources are focused on the needs and agenda of Congress." The public obviously receives only secondary consideration in this equation.

Congressional Research Accessibility Act (HR 3630)

- The Congressional Research Service ("CRS") is considered the top source for nonpartisan objective evaluation

Kevin M. Goldberg is a partner at Cohn and Marks LLP in Washington, D.C. and Chairman of the MLRC Legislative Committee. For more information on any legislative or executive branch matters, please feel free to contact him at (202) 452-4840 or kmg@cohnmarks.com.

FCC Fines News Station & Radio Broadcaster for Indecency

By Kathleen Kirby

In recent months, it has been hard to escape news about allegedly indecent broadcast programming. Radio shock jocks, Bono's use of the F-word on the Golden Globes, and the Super Bowl halftime performance have given both Congress and the Federal Communications Commission (FCC) fodder as they promise to take every available action to curb the media's "race to the bottom."

Television & Radio Stations Fined for Airing Indecent Material

Without the fanfare surrounding Congressional hearings, proposals as to what specific words should be banned from our nation's airwaves, calls for the return of family hour and debate about whether or not Janet and Justin planned the Super Bowl flash, the FCC issued, for what appears to be only the second time ever, a fine against a television station for the broadcast of indecent material.

The sanction came not as the result of the use of one of George Carlin's seven dirty words or a sitcom whose sexual innuendo crossed the line, but for program material aired during San Francisco television station KRON's morning newscast.

The case involved an interview with performers from the stage production of "Puppetry of the Penis," who appeared in capes but were otherwise naked beneath. The FCC received a viewer complaint alleging that, during the interview, one of the performers exposed his penis while preparing to demonstrate "genital origami." In response to the Notice of Inquiry it received from the FCC, the station licensee argued that, while the penis was in fact fully exposed on camera, the brief exposure was accidental, unintentional, and part of the news coverage of the stage production.

In addition, the licensee maintained that the show's hosts repeatedly suggested that parents might want to prevent their children from viewing the interview. The FCC, however, found that while the actual exposure was fleeting

(in that it occurred for less than a second), the manner in which the station presented the material was intended to pander to, titillate, and shock viewers. In addition, the agency said that the station failed to take adequate precautions to ensure that no actionably indecent material was broadcast despite its awareness that the interview involved performers who appeared nude. The FCC (by vote of all five Commissioners) determined that the station should be fined the maximum \$27,500. *Young Broadcasting of San Francisco, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04-16 (2004).

On the same day, the FCC proposed its largest single fine ever against a radio broadcaster for sexual material aired on a morning show. The morning show "Bubba the Love Sponge," broadcast by Clear Channel in four Florida cities, included segments discussing sex and drugs that the FCC determined were "designed to pander to, titillate and shock listeners." The offending material included a song about testicles, a discussion about oral sex, and skits involving children's cartoon characters, such as George Jetson and Scooby-Doo, discussing sex and drugs.

The segments ran 26 times and the Commission imposed a \$27,500 penalty for each one—a total fine of \$715,000. *Clear Channel Broadcasting Licenses, Inc.*, Notice of Apparent Liability for Forfeiture, EB-02-IH-0261 (2004).

The FCC, however, found that while the actual exposure was fleeting (in that it occurred for less than a second), the manner in which the station presented the material was intended to pander to, titillate, and shock viewers.

Indecent Speech Is Constitutionally Protected

Unlike obscene speech, which has no First Amendment protection, indecent speech has limited protections. The U.S. Supreme Court upheld Congress' authority to regulate indecent speech in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The FCC defines an indecent broadcast as one that includes "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." The FCC

(Continued on page 64)

FCC Fines News Station & Radio Broadcaster for Indecency

(Continued from page 63)

prohibits indecent broadcasts during most hours of the day, but licensees may air indecent material between the “safe harbor” hours of 10:00 p.m. to 6:00 a.m., when children under the age of 17 are less likely to be in the listening or viewing audience.

Currently, each violation of the Commission’s indecency rules may result in a fine of up to \$27,500—the base amount of an indecency fine is \$7,000—and may provide the basis for non-renewal of a station’s license or other harsh regulatory sanctions. Indecency enforcement is based on complaints from the public.

FCC Policy Guidelines for Broadcasters

In April 2001, the Commission released a *Policy Statement* to provide guidance to broadcasters on compliance with the agency’s indecency case law. The *Policy Statement* describes the agency’s approach to indecency determinations and describes the enforcement process. The principal factors that have proved significant in FCC’s indecency decisions to date are:

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

The agency emphasizes that in assessing these factors, the overall context of the broadcast in which the disputed material appeared is critical.

While many assume that the FCC distinguishes news broadcasts from any other for potential liability for indecency, it never has done so. In the KRON case, the FCC flatly rejected the station’s claim that the allegedly indecent material was part of *bona fide* news coverage.

FCC Will Also Look at Indecency on Television

It is clear that there has been a significant change in the wind regarding indecency regulation and enforcement. While radio programming has long been the target of FCC

sanctions, FCC Chairman Michael Powell has announced that the agency has now opened “another front” by focusing on indecency on television. The five FCC Commissioners, rather than just the agency’s Enforcement Bureau, have been involved in recent indecency decisions.

And the stakes are higher—although the agency traditionally has viewed all of the indecent material in one program to be a single violation, the Commissioners have now stated their willingness, and demonstrated their ability, to find licensees liable for repeated violations during a single program—with an accompanying increase in fines. The FCC has asked Congress for authority to impose higher fines for indecency violations, and legislation has been introduced to up forfeitures.

Finally, and perhaps most significantly, although the FCC has never imposed more drastic sanctions than fines for indecent broadcasts, the Commissioners have made clear that fines are not the only enforcement mechanism available to the agency for violations of its indecency rules—it has now explicitly warned broadcasters that it will consider license revocation for serious violations.

It is clear that there has been a significant change in the wind regarding indecency regulation and enforcement.

Congressional Hearings

These efforts to clean up the airwaves have engendered significant political and public support. In a January hearing, federal lawmakers were pleased to hear that the FCC was considering reversal of the Enforcement Bureau’s recent decision not to fine stations as a result of Bono’s use of the F-word on the Golden Globes. In that case, complaints were filed against NBC and its station affiliates after U2 lead singer Bono made the statement “this is fucking brilliant” upon receiving a Golden Globe award.

The statement was broadcast live in many parts of the country. The Enforcement Bureau held that no violation of the FCC’s indecency rules had occurred because the statement was fleeting, and because Bono used the word “fucking” as “an adjective or expletive to emphasize an exclamation” and not to “describe sexual or excretory organs or activities.” *Memorandum Opinion and Order, In the Matter of Complaints Against Various Broadcast Li-*

(Continued on page 65)

FCC Fines News Station & Radio Broadcaster for Indecency

(Continued from page 64)

censes Regarding their Airing of the Golden Globe Awards Program, DA-03-3045.

While the Bureau's decision is consistent with FCC precedent, all signs point to the Commissioners overturning the decision on the basis that the sexual meaning of some words, however used, is unmistakable.

Super Bowl Incident

Similarly, FCC Chairman Michael Powell wasted no time in launching an investigation of the Super Bowl halftime incident, which he termed "classless, crass and deplorable." The FCC has indicated that it received over 200,000 complaints following Janet Jackson's performance with Justin Timberlake.

On February 11, NFL Commissioner Paul Tagliabue and Mel Karmazin, President and Chief Operating Officer of Viacom, Inc. (parent of CBS, which broadcast the Super Bowl), testified before the House Energy and Commerce Subcommittee on Telecommunications and the Internet about the halftime show.

The Chairman of that Committee, Rep. Fred Upton (R-MI) has introduced legislation, H.R. 3717, "The Broadcast Decency Enforcement Act," that would increase the base forfeiture amount for indecency violations to \$275,000 and the maximum fine to \$3,000,000. A similar bill has been introduced in the Senate (S. 2056).

FCC Commissioners Pledge Vigorous Enforcement

Each of the five FCC Commissioners testified at the same February 11 hearing (following an appearance that morning before the Senate Commerce Committee), pledging to vigorously enforce existing indecency rules, unanimously asking Congress to increase fines and to affirm the Commission's ability to revoke licenses for repeated indecency violations, and calling upon not only broadcasters, but cablecasters, to take steps to increase family friendly programming content. Chairman Powell sent letters to the National Association of Broadcasters, the National Cable Television Association, NBC, ABC, CBS and Fox urging self-regulation in the area of indecency, industry-wide response to public discontent, and delay of all live, unscripted broadcasts.

The Broadcast Decency Enforcement Act passed unanimously out of subcommittee. Interestingly, a number of amendments to the bill were withdrawn, but could be reinstated when the bill is considered by the full committee, currently scheduled for March 2. Among them:

- Starting mandatory revocation proceedings after three or more indecency violations.
- Considering an indecency violation a "serious factor" in license-renewal consideration.
- Basing fines on a percentage of a licensee's gross revenues.
- Including a "sense of the Congress" provision urges the broadcast industry to adopt a family hour and resurrect their code of conduct. The language could be broadened to include cable, perhaps asking cable operators to offer G-rated tiers. The amendment would

amount to a "prod" rather than a legal mandate, given the First Amendment questions it raises

- Expanding the indecency definition and rules to include depictions of excessive violence.

Given the current climate, it is likely the Commission will take more of a per se approach in analyzing indecency complaints.

- Fines that take into account a station's ability to pay.
- Making networks (rather than station licensees) liable for 90% of a station's indecency fine if the infraction happens during a network broadcast (effectively forcing networks to absorb the total increase in indecency fines).
- Requiring the FCC to provide an indecency "annual report" to Congress detailing its enforcement record.
- Forcing stations fined for indecency infractions to air more kid-focused PSAs—such as drug-, alcohol-, and tobacco-abuse messages, as part of the indecency penalty.
- Requiring cable operators to inform viewers of their channel-blocking rights via bill stuffers.
- Requiring broadcasters to keep a recording of all broadcasts for at least 180 days (viewers have been expected to provide their own supporting material for indecency complaints).
- A tenfold increase in indecency fines on nonregulated entities, which includes individuals like Janet Jackson.

(Continued on page 66)

FCC Fines News Station & Radio Broadcaster for Indecency

(Continued from page 65)

The current fines are \$11,000 per incident and \$87,500 per continuing violation.

- Requiring networks to show the “content” rating after every commercial break and add an audio component.

A follow-up House hearing, scheduled to include representative from the networks, Clear Channel and Pappas Television, is currently scheduled for Thursday, February 26. In addition, Rep. Doug Ose (R-CA) has introduced a bill, H.R. 3687, “The Clean Airwaves Act,” that would amend the Title 18 of the U.S. Code to provide automatic punishment where certain words the legislation lists and defines as “profane” are uttered in broadcasts. That bill has been referred to the House Judiciary Committee. See Kevin Goldberg’s *Legislative Update*, above at page 61.

The FCC historically has taken a cautious approach to indecency enforcement, given First Amendment considerations. In 1989, National Public Radio broadcast a tape-recorded telephone conversation between New York mobster John Gotti and an associate. The expletive-laced conversation generated an indecency complaint with the FCC. The commission eventually determined the broadcast was not indecent based on its context as a nationwide news story about organized crime.

Broadcasters Beginning to Tread More Carefully

Similarly, the frontal nudity depicted in a broadcast of the film *Schindler’s List*, or the expletives used in the broadcast of *Saving Private Ryan* were considered in their full context and found not to be patently offensive. The FCC has stressed in several of its orders that it would be inequitable to hold a licensee responsible for indecent language when “public events likely to produce offensive speech are covered live, and there is no opportunity for journalistic editing.”

Given the current climate, it is likely the Commission will take more of a *per se* approach in analyzing indecency complaints. While Congressional posturing regarding broadcast indecency is ongoing, it is clear that the FCC has sharpened its enforcement blade, broadcasters are beginning to tread more carefully, and we may see constitutional challenges in court. Stay tuned.

Kathleen Kirby is of counsel at Wiley Rein & Fielding LLP in Washington, D.C.

SAVE THE DATES

**2004 NAA/NAB/MLRC
CONFERENCE**

Alexandria, Virginia
September 29, 30 and October 1, 2004

Sponsorships for the Conference are being solicited.

Any firm interested in providing underwriting for the Conference should contact Sandy Baron at MLRC.

ANNUAL DINNER 2004

NOVEMBER 17, 2004

New York City

©2004

**MEDIA LAW RESOURCE CENTER, INC.
80 Eighth Avenue, Suite 200
New York, NY 10011**

BOARD OF DIRECTORS

Harold W. Fuson, Jr. (Chair)
Dale Cohen
Stephen Fuzesi, Jr.
Katherine Hatton
Henry Hoberman
Ralph P. Huber
Kenneth A. Richieri
Elisa Rivlin
Susan E. Weiner
Bruce Johnson (ex officio)

STAFF:

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