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MEDIALAWLETTER

Reporting Developments Through February 29, 2008

RETURN TO TABLE OF CONTENTS

BusinessWeek Wins Trial Over Alleged Breach of Confidentiality

Jury Found No Promise to Source

By Pierre Davis

A federal district court in Seattle, and a unanimous jury, have returned a full defense verdict for The McGraw-Hill Companies, Inc., publisher of *BusinessWeek* Magazine, and *BusinessWeek* Senior Writer Michelle Conlin, ruling after a week-long trial that Ms. Conlin made no promise of confidentiality or anonymity to Plaintiff Peter Tilton during an interview for a story appearing in the May 10, 2004 issue of *BusinessWeek*, as he and his therapist had alleged. *Tilton v. The McGraw-Hill Companies, Inc., d/b/a "BusinessWeek" and Michelle Conlin*, No. C06-98RSL. (W.D. Wash. 2007)

As a result, Tilton's claims for promissory estoppel and invasion of privacy, the only claims remaining at the time of trial, were dismissed in their entirety.

Background

In 2004, Mr. Tilton, then an executive at Microsoft Corp., agreed to be interviewed by Ms. Conlin for a *BusinessWeek* story she was writing on family dynamics in the workplace. Mr. Tilton agreed to participate in a telephone interview along with his therapist Brian DesRoches, who had written a book on family dynamics being replicated in the workplace and whose name appeared in the resulting *BusinessWeek* article without complaint.

The article, entitled "I'm a Bad Boss? Blame My Dad," was published in the May 10, 2004 issue of *BusinessWeek*, and included Tilton's name, indicating that he was a director-level employee at Microsoft. The article opened with a description of an incident in which Tilton yelled at colleagues during a meeting at Microsoft and slammed his fists against a white-board. The article closed by referencing Tilton, mentioning that his "parents tried to send him to a pipe-smoking guy in seventh grade," and noting that he had been seeing an executive coach, who had helped him address his issues.

In his suit, filed a year and a half later in Washington state court, Tilton claimed that Mr. Tilton's participation in the interview was contingent on Ms. Conlin's agreement not to publish his name, position or employer in the resulting article. Tilton claimed that the publication of his name or other identifying information as in the article caused the loss of his job and his divorce, and ruined his career and his physical and mental health.

Plaintiff asserted claims for breach of contract, breach of promise, negligent performance of contract, invasion of privacy, outrage, and negligent infliction of emotional distress. Defendants removed the case to the District Court for the Western District of Washington on diversity grounds. The case was assigned to Judge Robert S. Lasnik and set for jury trial.

Pre-Trial Rulings

Prior to trial, Judge Lasnik, who had imposed sanctions severely limiting the types of damages available to Tilton, ruled that, as a result of plaintiff's significant discovery abuses, even if Tilton received a favorable judgment, he would not be entitled to an award of "economic" damages. Although this effectively mooted Plaintiff's breach of contract claim, Judge Lasnik did allow Tilton to substitute a promissory estoppel claim for his breach of contract claim. As a result of this substitution of an equitable claim for a legal one, Judge Lasnik informed the parties prior to trial that the jury would be rendering only an advisory opinion on the promissory estoppel claim (although he only told the jury this after the verdict).

Prior to the commencement of trial, the defendants successfully moved for summary judgment on Tilton's negligent infliction of emotional distress claim. Judge Lasnik ruled that applying a negligence standard to a newsgathering media defendant when the facts printed were true, rather than false and/or defamatory, would have an impermissible chilling effect.

Trial

Tilton was then permitted to proceed to trial on his promissory estoppel, invasion of privacy and outrage claims. The trial proceeded from December 4-11, 2007 and, included testimony offered by the parties, DesRoches, Tilton's former wife, as well as from two journalism experts and a number of psychologists and therapists who had examined or treated Mr. Tilton.

At the end of plaintiff's case, defendants successfully obtained judgment as a matter of law dismissing plaintiff's outrage claim. Judge Lasnik ruled that, even if the conduct about which plaintiff complained occurred, it was not outrageous. Thus, only plaintiff's promissory estoppel and invasion of pri-

(Continued on page 4)

RETURN TO TABLE OF CONTENTS

BusinessWeek Wins Trial Over Alleged

(Continued from page 3)

vacy claims remained.

As the court made clear when instructing the jury, plaintiff's invasion of privacy claim rested on whether the underlying promise of confidentiality and/or anonymity had been made. Neither Tilton nor his therapist, DesRoches, presented any documentary evidence that confidentiality or anonymity had even been discussed, let alone that Ms. Conlin had agreed to it, and instead offered only their oral testimony that Ms. Conlin had repeatedly made such promises before and during her interview of Mr. Tilton.

Ms. Conlin testified that she made no such promise, nor was confidentiality or anonymity even discussed. Unlike the plaintiff's presentation, Ms. Conlin's oral testimony was corroborated by documentary evidence, including her copious notes of all of her interviews for the story, including interview notes of dozens of other people, some very high profile, willing to be included in the story. Defendants' journalism expert, Tom Goldstein, professor at the U.C. Berkeley School of Journalism, testified that Ms. Conlin's prodigious note-taking was "awesome."

Importantly, Ms. Conlin's notes invariably indicated when a source requested and/or was promised confidentiality or anonymity. Ms. Conlin testified that she made it a practice to indicate in her notes when a source requested confidentiality or anonymity due to the importance of such a promise in the journalism field and the consequences that breaking such a promise would have on her career as a reporter.

Both a unanimous jury and the court concluded that Ms. Conlin made no promise of confidentiality or anonymity. Based on the jury's advisory finding, and for reasons Judge Lasnik explained on the record, the Court found for defendants on plaintiff's claim for promissory estoppel.

As a result of the jury's finding, plaintiff's claim of invasion of privacy necessarily failed, and a verdict was therefore rendered for defendants, dismissing the case in its entirety.

Tilton filed no appeal before expiration of the deadline to do so.

BusinessWeek

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Full Table of Contents
Cover Story
European Cover Story
Up Front
Readers Report
Corrections & Clarifications
The Great Innovators
Books

I'm A Bad Boss? Blame My Dad

More execs are studying their family pasts to root out workplace dysfunction

For Peter Tilton, the office revelation came last February. He was sitting in a conference room at company headquarters, meeting with the group he managed, when an "incompetent" colleague began needling him about his own progress on a project. Tilton felt the trip wire go off, the raw rush that made him feel as if he were slipping into a state of adolescent siege.

Pierre M. Davis is Associate General Counsel with The McGraw-Hill Companies, Inc. Barbara E. Schlain, Vice President and Associate General Council The McGraw-Hill Companies and Gavin W. Skok, and John D. Lowery, Riddell & Williams, Seattle, represented the defendents at trial. Plaintiff was represented by Camden Hall.

RETURN TO TABLE OF CONTENTS

MLRC's Annual Study of Media Trials Published This Month

Fewest Verdicts Since 1980 - Media Defendants Win Four, Lose One

Published this month, MLRC's annual study of media trials reviews and analyzes the trials of 2007 – together with media trial data for the last 28 years. The past year saw the lowest number of verdicts in libel, privacy and related claims since the study began in 1980. In 2007 there were only five verdicts. Media defendants won four out of five verdicts, continuing the trend of increasing success rate in trials. The damage award in the one loss was a relatively modest $305,250. The Bulletin analyzes damage awards over the years of the study, including state-by-state breakdowns.

The record low number of verdicts in 2007 is a continuation of a long-term downward trend in media trials. In the 1980s, the first decade of the study, there was an average of 26.8 verdicts a year. That declined to 18.8 in the 1990s. This decade the average has further declined to an average of 10.8 verdicts a year.

The media's success rate at trial has steadily increased over the study period. In the 1980s, media defendants won 36.6% of the verdicts. In the 1990s media defendants won 40.4%. And this decade media defendants have won 54.5% of the verdicts.

Verdicts in 2007 – Defense Wins

Germak v. Sieber, No. 329 of 2000 (Pa. C.P., Juniata County jury verdict Feb. 16, 2007). Plaintiff, a school board attorney and former district attorney, sued a local newspaper for libel over a letter to the editor that criticized him for holding meetings designed to "undermine the present administration." The 12-member jury reached a unanimous verdict in favor of all the defendants. *Defense Counsel:* Scott C. Etter, Miller, Kistler, Campbell, State College, Pa. *Plaintiffs' Counsel: pro se* (previously Ronald Katzman, Goldberg, Katzman & Shipman, Harrisburg, Pa.)

Stephens v. Dolcefino et al., No. 199943183 (Tex. Dist. Ct. jury verdict Feb. 15, 2007). Plaintiffs, Houston Deputy Controller William Stephens and policeman Ray Jordan, sued KTRK-TV for eavesdropping for videotaping their conversation in a hotel courtyard with Houston City Controller Lloyd Kelley. After a two-week trial, the jury found for the station and reporters. *Defense Counsel:* Chip Babcock, Bob Latham John Edwards, Jackson Walker, Houston; Tanya Menton, ABC, Inc. *Plaintiffs' Counsel*: Marc L. Hill, Mosser Mallers PLLC, Dallas (representing Jordan) and Terry Yates, Yates Law Offices, Houston (representing Stephens)

Tilton v. McGraw Hill Companies, Inc., et al., Civil No. 06-00098 (W.D. Wash. jury verdict Dec. 11, 2007). Plaintiff sued for promissory estoppel and intentional infliction of emotional distress claiming that a *BusinessWeek* reporter had promised not to identify him in an article entitled "I'm a Bad Boss? Blame My Dad." *Defense Counsel*: Gavin W. Skok, John D. Lowery, Riddell & Williams, Seattle. *Plaintiffs' Counsel*: Camden Hall, Seattle (See article on p. 3)

Weber v. Lancaster Newspapers, Inc., et al., No. CI-98-13401 (Pa. C.P., Lancaster County jury verdict July 31, 2007). Plaintiff, a law firm associate at the time of publication, sued two Pennsylvania newspaper publishers for libel over articles that discussed her involvement in a domestic dispute. After a seven-day trial and 50 minutes of deliberation, the jury found for the defendants. *Defense Counsel*: John C. Connell, Archer & Greiner, P.C., Haddonfield, N.J. (for Ledger Newspapers); George C. Werner, Barley Snyder LLC, Lancaster, Pa. (for Lancaster Newspapers, Inc.) *Plaintiffs' Counsel*: Ralph D. Samuel and Lynn Malmgren, Ralph D. Samuel and Co., P.C., Philadelphia

(Continued on page 6)

(Continued from page 5)

Verdicts in 2007 – Plaintiff Wins

Kerrick v. Monitz, No. 2995-C-2004 (Pa. C.P., Luzerne County directed verdict for plaintiff Oct. 11, 2007).
In a private figure trial, plaintiff sued a local newspaper for erroneously naming her as a suspect in a murder case. The court held that the statements in the article were negligent as a matter of law, so the only issue for the jury was damages. After eight days of testimony and two and a half hours of deliberation, the jury awarded $16,500 for harm to plaintiff's reputation; $51,250 for emotional distress; and $237,500 for economic losses. After the verdict, the parties settled. *Defense Counsel*: Niles S. Benn, Benn Law Firm, York, Pa. *Plaintiffs' Counsel*: Cletus Lyman, Lyman & Ash, Philadelphia.

Mistrials

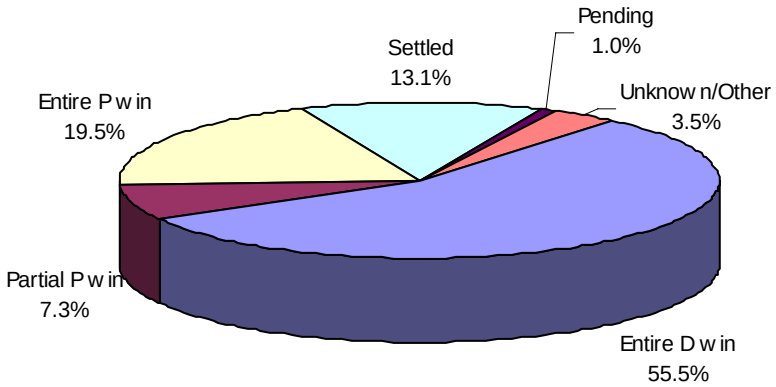
One case ended in a mistrial because of a deadlocked jury. *Mandel v. The Boston Phoenix, Inc. II*, Civ. No. 03-10687 (D. Mass. mistrial declared Dec. 11, 2007). The case was originally tried in 2004 under a negligence standard and the jury awarded plaintiff $950,000. In 2006, the First Circuit reversed and remanded for retrial, holding that plaintiff, a former prosecutor, was deemed a private figure on an inadequate record at the summary judgment stage. *See* 456 F.3d 198, 34 Media L. Rep. 2272 (1st Cir. 2006). On remand, the district court concluded that plaintiff was a public figure and the case was tried under the actual malice standard.

Other Findings

– Over the 28 years of the Study defendants ultimately won 55.9% of trials when the results of post-trial motions and appeals are factored in (318 of 569).

– Plaintiffs won 19.5% of the trials (111 of 569), meaning that the initial damages amount awarded survived post-trial motions and appeals, if there were any. Plaintiffs partially won 7.4% of cases (42 of 569) – walking away with some damages, but less than the amount initially awarded at trial.

– The average damage award after post-trial motions and appeals in cases that were not settled was $556,000, while the median of final awards is $100,000.



RETURN TO TABLE OF CONTENTS

California Court Grants TRO to Disable WikiLeaks Website

In an unusual ruling that has gained attention in the mainstream press and blogosphere, a California federal district court granted an ex parte order restraining publication of a website accused of publishing illegally leaked confidential bank documents. *Bank Julius Baer & Co. Ltd. et al v. Wikileaks et al*, 3:08-cv-00824 (N.D. Cal, Feb. 15, 2008) (White, J.).

Background

WikiLeakS.org describes itself as an anonymous and "uncensorable" version of WikiPedia, for "mass document leaking" and whistleblowing. The website allows users to anonymously post documents along with summaries and comments. The website is registered through Dynadot, LLC.

Bank Julius Baer, a Swiss banking group, sued WikiLeaks, Dynadot and John Doe defendants in federal court in San Francisco alleging that the website published stolen bank documents. The anonymous poster of the material stated that the documents showed that the Bank was engaged in illegal money laundering in its Cayman Islands branch.

Injunctions

The Bank requested a broad order to render the website inoperable. Dynadot, the domain registrar in the U.S., apparently agreed to the request and stipulated to a permanent injunction preventing it from operating the WikiLeaks.org website – thereby making that domain name inoperable. Wikileaks did not have counsel at the hearing and the court granted a broad temporary restraining order against WikiLeaks preventing it from posting or disseminating Baer's documents. The TRO also extended to website developers, operators and host service providers, and also the DNS providers, ISP's, domain registrars and "anyone else responsible or with access to modify the website."

The court's order effectively shut down the entire website in the U.S. and not just publication of the Bank documents. However, the order has been somewhat ineffective, as the website is still available through its original website's Internet Protocol address and foreign country "mirror sites."

A hearing is scheduled for February 29. The ACLU and Electronic Freedom Foundation have applied to intervene on behalf of Wikileaks.org.

In an amicus brief filed with the federal court on behalf of 12 media groups, the order was compared with the unsuccessful attempt by the Nixon administration to prevent the release of secret documents related to the Vietnam War in the famous Pentagon Papers case. In the Pentagon Papers case, the Supreme Court found that national security was not a compelling enough interest to overcome the presumption against prior restraints. Amici argue that the commercial interests of Baer are thus clearly not compelling enough to mandate the website be shut down.

Another argument put forth by amici is that section 230 of the Communications Decency Act protects both Dynadot and WikiLeaks from any liability. Since the Bank documents posted on WikiLeaks was from a former employee and not by WikiLeaks or Dynadot, they are immune from liability. Amici argue that continuing to post the information even after it has been requested that it be taken down does not destroy the immunity both Dynadot and WikiLeaks have under section 230.

Wikileaks is still available online at the following IP address: 88.80.13.160.

Bank Julius Baer is represented by Lavely & Singer in Los Angeles.

RETURN TO TABLE OF CONTENTS

New York Court Dismisses Right of Publicity/Libel-in-Fiction Claim

Novel Used Plaintiff's Name as Title Character

By Kevan Choset

A New York state judge has dismissed a 2006 lawsuit alleging that a young adult novel defamed and violated the right of publicity of a private individual with a name similar to that of the novel's title character. *Sugarman v. Apostolina and Simon & Schuster*, No. 101750/06 (Sup. Ct. N.Y. Co. Jan. 14, 2008).

The author, Michael Apostolina, knew the plaintiff, Merri Sugarman, and he conceded that he had used Ms. Sugarman's name as the character in the title of the book *Hazing Meri Sugarman*. Nonetheless, the Court found that because the fictional Meri Sugarman did not identify the plaintiff, her claims must be dismissed.

The case has implications for writers of fiction in any medium, who have traditionally turned to friends, family members, acquaintances, and even total strangers as inspiration for, among other things, character names. In particular, it provides strong precedent for the notion that a writer can safely use the name of a real person for that of a character – even the title character – in a work of fiction.

From a common sense perspective, it is obvious that the mere confluence of name cannot give rise to a Section 50/51 violation in the context of a fictional work.

Background

Defendant Apostolina, in his research for a screenplay-turned-novel about sorority girls, spoke with, among other people, plaintiff Merri Sugarman, a friend of a friend who had once been in a sorority. Like the other people Apostolina spoke to, Sugarman told him general facts about sororities, pledge week, etc. Apostolina also told Sugarman that he loved her name, "Merri Sugarman," and wanted to use it for a character in the screenplay (later book) he was working on; Sugarman agreed that he could use the name.

While a factual dispute later developed as to whether Sugarman withdrew her consent for Apostolina to use her name, all parties agreed to the facts concerning plaintiff Sugarman's resemblance to the fictional character. Other than the use of the name Meri Sugarman (defendant Apostolina had removed one of the 'r's from "Merri" in an attempt to appease plaintiff), the only thing that plaintiff had in common with the fictional character was that she was once in a sorority. In fact, plaintiff acknowledged that other than the similarity of her name to that of the fictional character, she would not have associated the character with herself.

Defamation Claim

Given the strong case law in New York requiring that a fictional character be so similar to the plaintiff that any reader would believe they were one and the same, it was clear from the start that plaintiff had significant roadblocks to her defamation claim.

Right of Publicity Claim

While refusing to withdraw her defamation claim, plaintiff primarily pressed the alleged violation of her right of publicity found in Sections 50 and 51 of New York State's Civil Rights Law. That statute prohibits the use of a person's "name, portrait or picture… for advertising purposes or for the purposes of trade" without written consent, and plaintiff claimed that by using her name for the title character of the book *Hazing Meri Sugarman*, defendants violated the statute. To further support her claim, plaintiff noted that the book became a series, with the Meri Sugarman character continuing, and that the author promoted various merchandise on his website which featured the Meri Sugarman name.

New York's right of publicity statute specifically prohibits using an individual's "name," without, on its face, re-

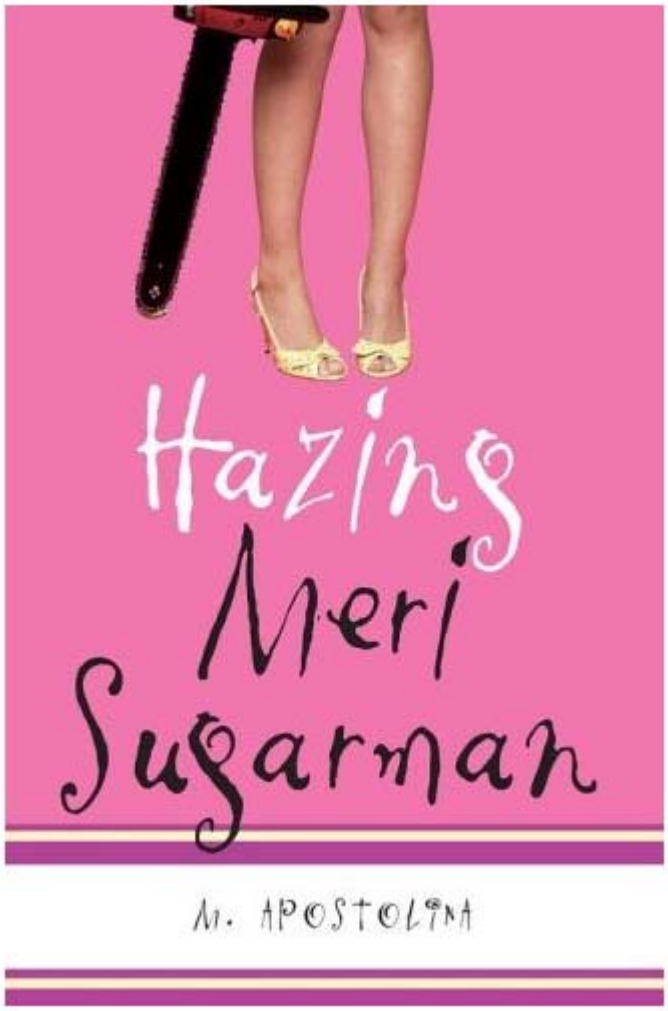
(Continued on page 9)

RETURN TO TABLE OF CONTENTS

New York Court Dismisses Right of Publicity/Libel-in-Fiction Claim

(Continued from page 8)

quiring any further showing that the "named" individual actually identifies the plaintiff. From a common sense perspective, it is obvious that the mere confluence of name cannot give rise to a Section 50/51 violation in the context of a fictional work, lest every Harry Potter or Bridget Jones have a colorable claim. Nonetheless, the case law on this subject has been rather thin, with only a few cases referring to it, the most substantive of which was a 1954 criminal court case. In that case, *People ex rel. Maggio v. Charles Scribner's Sons*, 205 Misc. 818, 822-23 (City Ct. 1954), arising out of the book and film *From Here to Eternity*, the Court held that:



> While Section 50 prohibits the use of the name of any living person for purposes of advertising or trade, it is obvious that in a work of fiction there is always the probability that, no matter what name is used, there is always some living person with that name. Therefore, the mere use of such name is insufficient to constitute a violation of the statute…. To violate the statute, the name must be used in such a context as to unequivocally point to and identify the complainant. The use of the word "name" in the statute, in association with the words "portrait" or "picture" clearly indicates that this was intended.

Trial Court Decision

Defendants' summary judgment motion was heard before Justice Debra James, the same judge who denied HBO's motion to dismiss a right of publicity claim in *Nieves v. HBO* arising out of a documentary series in which the image of the plaintiff, a passerby, was used. In Nieves, Justice James held that there was a question of fact as to whether there was a "real relationship" between plaintiff and the TV series in which her image was used, thereby rejecting the argument that any use of plaintiff's likeness in HBO's series did not constitute a use in "trade" or "advertising."

Without citing to *Nieves* or addressing the "advertising" versus "editorial" distinctions in the case before her, Justice, Judge James, in a brief opinion citing to Maggio, held that because "there [were] no other feature[s] of the novel which would allow a reader to relate the novel to the plaintiff," besides the similarity of names, both the defamation and right of publicity claims must be dismissed. In support of her ruling, she quotes the above relevant section from *Maggio*, and the case therefore stands as a recent precedent for the proposition that the use of "name" in New York's statute necessarily incorporates the need for a confluence of "identity."

Elizabeth A. McNamara and Kevan Choset, of Davis Wright Tremaine LLP, represented the defendants. Plaintiff was represented by Howard I. Blau of Blau & Kayman.

RETURN TO TABLE OF CONTENTS

Fair Report Privilege Applied to Dismiss Lawyer's Libel Complaint

Prosecutor's Statements to Reporter Covered by the Privilege

A federal court in Pennsylvania granted summary judgment to a Pennsylvania newspaper on a libel claim over a series of articles discussing disciplinary and criminal charges against a lawyer. *Hudak v. Times Publishing Company*, No. 06-104, 2008 WL 219250 (W.D. Pa. Jan. 25, 2008) (McLaughlin, J.).

The trial court easily concluded that the newspaper's description of the charges against the plaintiff – stating that he was charged with "theft" and "stealing" client funds – was a fair and accurate summary of the indictment and court proceedings. But the court also considered the more nuanced question of whether publication of a statement made by a prosecutor in a one-on-one interview was a reporter was similarly within the scope of the privilege. Adopting a broad reading of the privilege, the court held that it was protected under Pennsylvania law.

Background

The plaintiff, Joseph Hudak, is a criminal defense lawyer in Pittsburgh. According to his complaint, a series of trial scheduling conflicts caused him to miss several court dates. These mishaps led to a contempt citation, disciplinary proceedings and, most seriously, criminal charges for theft of client funds. The case went to trial and Hudak was acquitted. (Hudak then filed a civil rights complaint against the prosecutor, which was dismissed in December 2007.)

The *Erie Times-News* covered the story, beginning with a March 26, 2005 article headlined "Lawyer faces theft charges." The paper published four more articles on the subject, concluding with a July 11, 2006 article headlined "Hudak found innocent in theft case."

Hudak sued the newspaper for one count of libel based on the five newspaper articles.

Fair Report Defense

The district court first held that the repeated references in the news articles that plaintiff was charged with "theft" and "stealing" were fair and accurate summaries of the criminal charges brought against him.

A closer question was whether the quote from the prosecutor was privileged. In a one-on-one interview with a *Times-News* reporter, the prosecutor stated about Hudak: "Some folks clearly were not only defrauded of money, they were not provided adequate representation. That's a one-two punch on the whole system."

The court found no Pennsylvania case squarely holding that a statement made in such an interview is privileged, but it relied on the reasoning of the Third Circuit Court of Appeals in *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir. 1981), to adopt a broad interpretation of the privilege under Pennsylvania law. In *Medico*, the court held that unpublished leaked FBI documents were within the scope of the privilege based on Pennsylvania law and the underlying policy rationales for the privilege.

The district court concluded that the interview in this case was likewise a report of official action.

> Here, it is undisputed that, following Plaintiff's formal arrest on criminal charges, defendant Thompson went to the District Attorney's office in her capacity as a reporter for the Times for the express purpose of eliciting an official comment on the charges. She met with Mr. Foulk, face-to-face, in his office, asked him to officially comment on the case for purposes of publication, and recorded his statement directly. Mr. Foulk, as District Attorney of Erie County, is the chief law enforcement officer of the county and is *the* official voice with respect to matters pending before his office. While his on-the-record comments were made in the context of an informal, one-on-one meeting with Ms. Thompson, they served the same purpose as a press release or press conference.

The Times Publishing Company was represented by Craig A. Markham, of Elderkin, Martin, Kelly & Messina, in Erie, P. Plaintiff represented himself.

RETURN TO TABLE OF CONTENTS

Great Success! for Borat in Alabama Courts

Forum Selection Clause Requires Transfer to New York

By Gray Borden

The Alabama Supreme Court recently vacated a trial court's refusal to dismiss claims against Sacha Baron Cohen, Twentieth Century Fox Film Corporation and other entities involved with the production and distribution of the film *Borat: Cultural Learnings of America for Make Benefit of Glorious Kazakhstan*, and touched off a flurry of activity resulting in the dismissal and transfer of two lawsuits filed by individuals who allege to have been duped into participating in the film. *Ex parte Sacha Baron Cohen* 2008 WL 162598 (Ala. Jan. 18, 2008).

Photo by Michael Bulcik/SKS Soft GmbH

Supreme Court Decision

Alabama's high court vacated a trial court order refusing to enforce the forum-selection clause in the standard consent agreement signed by every participant in the film. Kathie Martin, an "etiquette coach" featured in the *Borat* film, sued in her home state rather than abiding by the forum-selection clause in the consent agreement.

The defendants, including Cohen, Twentieth Century Fox, MTV Networks and Comedy Central, filed motions to dismiss on the basis of the forum-selection clause in favor of New York County, New York. Alabama Circuit Court Judge Caryl P. Privett denied the motions to dismiss, ruling that One America Productions, Inc., the signatory on the consent agreement, could not enforce the choice of forum because it had not registered to do business in Alabama as required by the state's "door closing" statute.

The defendants argued they were exempted from that statute because the production of the film was interstate commerce, and any activity in Alabama was merely incidental to the interstate purpose. Martin countered that the contract involved intrastate commerce in that it was executed in Alabama and the entirety of her performance occurred within the state.

The Alabama Supreme Court sided with the defendants. Despite characterizing Cohen's behavior as "boorish and offensive," Justice Michael F. Bolin held in his opinion that the door closing statute did not apply to One America Productions because the primary purpose of the consent agreement---—the production and international distribution of the film—constitutes interstate commerce.

Within a few days of the Supreme Court's decision, the Circuit Court of Jefferson County dismissed *Martin v. Sacha Baron Cohen et al.*, CV-2006-7333. Judge Privett granted the defendants' motions to dismiss Martin's claims for fraud, unjust enrichment, invasion of privacy and intentional infliction of emotional distress over allegations that the consent agreement and its forum-selection clause were fraudulently induced, invalidly executed, lacked consideration and were seriously inconvenient. The dismissal is without prejudice to Martin's right to bring her claims in the courts of New York County.

Federal Lawsuit

Following in Martin's footsteps, a number of individuals featured in the film's "dinner scene" also sued over their involvement in the movie, but chose to file in the Northern District of Alabama. *Streit et al. v. Sacha Baron Cohen et al.*, CV-2007-J-1918, was assigned to Judge Inge P. Johnson. The *Streit* defendants, most of whom were defendants in the *Martin* action, filed a motion to transfer the case pursuant to the forum-selection clauses in the identical consent agreements signed by each plaintiff.

In the wake of the Supreme Court's opinion in the *Martin* case, Judge Johnson granted the defendants' motion and transferred the *Streit* lawsuit to the Southern District of New York. The *Martin* and *Streit* plaintiffs may still attempt to pursue their claims—but not in the Alabama court system.

Gray Borden is an associate at Lightfoot, Franklin & White, LLC. Along with partners Banks Sewell, William Brooks and Terry McCarthy, he represented Sacha Baron Cohen,

RETURN TO TABLE OF CONTENTS

Illinois Supreme Court Dismisses Claims Over Newspaper Ad

Ad Did Not State Objective Facts about Competitor

By Damon Dunn

The Illinois Supreme Court recently reversed an appellate holding that a retailer's newspaper advertisement was defamatory and ordered the case dismissed. *Imperial Apparel, Ltd., et a.l v. Cosmo's Designer Direct, Inc. and Chicago Sun-Times, Inc*. No. 103331 (Ill. Feb. 7, 2008) (Karmeier, Freeman, Fitzgerald, Kilbride, Garman, Burke, JJ.). Plaintiffs Imperial Apparel, Ltd. and its two owners, Cyril and Paul Rosengarten, had sued their competitor, Cosmo's Designer Direct, Inc., and the *Chicago Sun-Times* over the advertisement.

The appellate court had reinstated portions of the case in the belief that the ad conveyed unstated defamatory facts suggesting plaintiffs were selling imitation clothing. The Illinois Supreme Court, however, agreed with the defendants that the ad was protected under the First Amendment because it used "loose, figurative language that no reasonable person would believe presented facts."

The Plaintiffs' Complaint

The five-count complaint alleged causes of action for defamation *per se* and *per quod*, as well as for commercial disparagement. According to the complaint, Cosmo's competed with Imperial in the discount men's clothing business by regularly advertising a "3 for 1" sale, that is, three items for the price of one. To compete, Imperial adopted a similar 3 for 1 sales pitch. Cosmo's retaliated with a new advertisement under the banner, "WARNING! Beware of Cheap Imitators Up North . . ."

The advertisement opened with "We all know, there is only one 'America' in the world and only one '3 for 1' in the Midwest, and in both cases it was the original thinking of an Italian that made them famous." The ad then proceeded to mock an entity by the name of "Empire" for attempting to "covet" Cosmo's original concept. Plaintiffs' alleged that Cosmo's plea that Empire should "start being kosher," coupled with an allusion to a "hail storm of frozen matzo balls," denigrated the honesty and ethnicity of Imperial's owners. Plaintiffs' chief quarrel was with the third paragraph of the ad, which stated:

> *"It is laughable how with all the integrity of the 'Iraq Information Minister', they brazenly attempt pulling polyester over your eyes by conjuring up a low rent 3 for imitation that has the transparency of a hookers come on...but no matter how they inflate prices and compromise quality, much to their dismay, Cy and his son Paul the plagiarist still remain light years away from delivering anything close to our '3 for 1' values."*

The Procedural History

The circuit court dismissed the entire complaint, finding that the advertisement did not convey verifiably false facts. The plaintiffs appealed, however, arguing that the text implied that they were dishonest. The appellate court initially affirmed in part and reversed in part, but subsequently vacated the original opinion and published a modified opinion.

The appellate court agreed that the advertisement generally constituted protected opinion, but excepted the third paragraph. The appeals court held that this passage "appear[s] to be based on facts concerning the quality of Imperial's goods which have not been stated" and reasoned that "[w]hether Imperial was selling imitation goods of inferior quality is certainly capable of objective verification." *Id.* The appellate court did affirm dismissal of the individual plaintiffs' defamation *per quod* claims for lack of special damages, but reinstated Imperial's corporate claim for special damages, as well as the commercial disparagement count.

After the defendants moved for rehearing, the appellate court issued a modified opinion which made one important change by affirming the dismissal of the *per se* defamation

(Continued on page 13)

RETURN TO TABLE OF CONTENTS

Illinois Supreme Court Dismisses Claims Over Newspaper Ad

(Continued from page 12)

counts under the Illinois innocent construction rule. The appellate court reasoned that, "[b]ecause the statements in Cosmo's ad do not refer to Imperial by name or give the last names of the individual plaintiffs, they could reasonably be interpreted as referring to someone other than the plaintiffs." Otherwise, the initial opinion was unchanged.

The appellate court denied Imperial's petition for rehearing on the innocent construction ruling. After the Illinois Supreme Court accepted the defense petition for review, the plaintiffs cross appealed.

The Illinois Supreme Court's Opinion

The Illinois Supreme Court affirmed the trial court's dismissal of the complaint in a unanimous opinion written by Justice Karmeier (Justice Thomas abstaining). The Court rejected the appellate court's interpretation of the advertisement, finding instead that Cosmo's was simply trying to convey that Imperial copied its sale and that customers could get more for their money at Cosmos.

"The Court seemingly has held open the possibility that Illinois advertisers, unlike publishers, will not always enjoy full first amendment protection for their speech."

Initially, the Court observed that commercial competitors are generally privileged to interfere with each other's prospective business relationships but may not use "improper competitive strategies that employ fraud, deceit, intimidation, or deliberate disparagement." Assuming that plaintiffs' defamation claims satisfied this threshold, the Court next outlined the various constitutional limitations on common law defamation jurisprudence, depending, for example, on the plaintiff's status, whether a media defendant is involved and whether the speech addressed a public concern. The Court concluded that while opinions may be actionable under certain circumstances, the First Amendment protects speech that cannot be reasonably interpreted as stating an actual fact.

Interestingly, while the Court agreed that the First Amendment protection for nonfactual statements applied to defamation claims against media defendants like the *Sun-Times*, it questioned whether the lower courts should have automatically assumed the same rule for the newspaper's advertiser. The Court believed that "[w]hether the privilege afforded by the first amendment to statements that are not factual also extends to statements made by one private party about another on a matter of purely private concern is unsettled." It conceded that extending such protection across the board would serve an "important value in first amendment jurisprudence" by reducing ambiguity and the potential for self-censorship, but ultimately chose to pass over the question and assume that the privilege was valid "for the purposes of the present case." Consequently**,** the Court seemingly has held open the possibility that Illinois advertisers, unlike publishers, will not always enjoy full First Amendment protection for their speech.

With respect to the advertisement at issue, however, the Court disagreed with the appellate court's belief that an ordinary reader would perceive that the ad made objectively verifiable assertions about the plaintiffs' business. The Court pointed out that the text was "artless, ungrammatical, sophomoric and sometimes nonsensical." Despite the unflattering comparisons and the charge that the plaintiffs "inflate prices and compromise quality," the Court nevertheless concluded that:

> [T]hese are merely subjective characterizations lacking precise and readily understood meaning. In the context of discount clothing sales, no reasonable person would regard them as anything other than colorful hyperbole aimed at capturing the reader's interest and attention.

The Supreme Court declined to infer defamatory facts, chiding the appellate court that it "thought a reasonable reader might interpret the ad as stating actual facts about the plaintiffs themselves, but did not specify what those actual facts might be." The Court also fundamentally disagreed

(Continued on page 14)

RETURN TO TABLE OF CONTENTS

Illinois Supreme Court Dismisses Claims Over Newspaper Ad

(Continued from page 13)

with the lower appellate court's belief that the advertisement accused plaintiffs of selling imitations or passing off polyester suits as wool. The Court explained that the references to "imitators" actually accused the plaintiffs of imitating Cosmo's "3 for 1" sale concept. While verifiable, this fact could not support a defamation claim because it was also true:

> The appellate court also believed that a reasonable reader might interpret the ad as stating actual facts about the originality of the goods. In reality, the ad says nothing whatever about the originality of the clothing Imperial sells. When the ad refers to imitators, imitations, plagiarism and "coveting your neighbor's concepts," it is talking about Imperial's appropriation of Cosmo's "3 for 1" sales concept. That Imperial got the idea for its "3 for 1" sale from Cosmo's is a verifiable fact. Because it is undisputably true, however, it cannot be the basis for a defamation claim.

The Court appreciated that the plaintiffs resented the advertisement's tone, but observed that "epithets aimed at ethnic or religious groups fall within the protection of the First Amendment."

Finally, the Court found the First Amendment question was conclusive of the entire case because "a determination that language is not actionable under the First Amendment not only is fatal to plaintiffs' defamation claims, it precludes them from obtaining recovery under any of the other common law and statutory claims they asserted in their complaint." Consequently, the Court did not address the subsidiary questions on appeal and did not expressly resolve the appellate split on whether Illinois should recognize the tort of commercial disparagement. Instead, the Court affirmed the judgment of the trial court, while affirming the appellate court in part and reversing the appellate court to the extent that it permitted any of the claims asserted in the complaint to proceed.

Damon E. Dunn and Eric D. Bolander of Funkhouser Vegosen Liebman & Dunn, Ltd., Chicago, represented The Chicago Sun-Times, Inc. Imperial Apparel, Ltd., Cyril Rosengarten and Paul Rosengarten were represented by Edward W. Feldman and Jennifer E. Smiley, Miller Shakman & Hamilton, LLP, Chicago, Illinois. Cosmo's Designer Direct, Inc. was represented by James M. Wolf, Wolf & Tennant, Chicago, Illinois.

RETURN TO TABLE OF CONTENTS

California Appeals Court Establishes Test for Revealing Anonymous Internet Poster

Another Win for Anonymous Internet Posters

In another win for anonymous posting on the Internet, a California Court of Appeals ruled that a libel plaintiff was not entitled to obtain the identity of an anonymous Internet poster. *Krinsky v. Doe*, No. H030767, 2008 WL 315192 (Cal. App. 6th Dist., Feb. 6, 2008) (Elia, Rushing, Premo, JJ.). The decision overruled a trial court order to compel the discovery of the anonymous poster.

Trial Court

Yahoo! hosts many message boards on a variety of topics. On one particular board devoted to financial matters, ten users posted messages about a Florida company's corporate officers. Some of the nastier messages involved one of the corporate officers, Lisa Krinsky. Although other officers were also derided, only Ms. Krinsky sued the anonymous posters for claims of defamation and tortious interference.

She sought to compel Yahoo! to disclose the identities of the posters by serving the company with subpoenas for all ten posters. Yahoo! then notified each poster that it was going to disclose their identities unless a legal objection was filed. One of the anonymous posters, Doe 6, moved to quash the subpoena.

In the trial court, Doe 6 sought to quash the subpoena because plaintiff's claims were insufficient to overcome his First Amendment rights and that plaintiff's injunctive relief request was an invalid prior restraint. The trial court failed to determine whether the speech was protected and instead found that the speech may have violated federal securities laws (by trying to allegedly "pump and dump" the stock). The trial court thus denied Doe 6's motion, and Doe 6 appealed.

Court Analyzes Different Tests

Before examining the issue of whether Doe 6's identity should be revealed, the court expressed the importance of not only free speech, but the ability to speak anonymously on a variety of subjects. With this in mind, the court delved into the issue of determining how to balance anonymous free speech rights against a plaintiff's interest in pursuing a claim by revealing the identity of an anonymous poster.

The court first rejected plaintiff's attempt to pose the test of revealing Doe 6's identity as akin to the test of when a reporter must reveal a confidential source. The court then moved on to analyzing the tests produced by other courts. It quickly disposed of the "good faith" standard from *In Subpoena Duces Tecum to America Online, Inc.*, 52 Va. Cir. 26 (Va. Cir. 2000), finding it too deferential to plaintiffs.

Next the court addressed the test articulated in *Dendrite Int'l Inc. v. John Doe No. 3*, 775 A.2d 756 (N.J. Super. 2001). *Dendrite* applied a four part test, whereby the plaintiff must attempt to notify the defendant, identify the statements that are allegedly actionable, and provide evidence to establish a prima facie case. If a plaintiff has met these steps, the court must then balance the strength of plaintiff's case against the First Amendment rights of the anonymous defendant.

The court also looked to a case from a federal court in California that used two of the steps from the *Dendrite* test, *Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005). This condensed *Dendrite* test was formulated as follows: (1) plaintiff must show sufficient evidence for each fact that is necessary for their claim, and (2) if enough evidence has been shown, the court then balances the harm that each party would suffer if the court ruled against them. *Id.*

The final test analyzed was the Delaware Supreme Court's test in *Doe v. Cahill*, 884 A.2d 451 (Del. 2005). *Cahill* requires the plaintiff to show that he could defeat a summary judgment motion and also must make reasonable attempts to notify the anonymous defendant. Some courts have followed *Cahill* by substituting the summary judgment standard with a motion to dismiss standard.

Court's New Test

After analyzing each of these tests, the court developed its own test. Rejecting the use of procedural labels like summary judgment or motion to dismiss, and also rejecting the *Dendrite* requirement of identifying actionable state-

(Continued on page 16)

RETURN TO TABLE OF CONTENTS

California Appeals Court Establishes Test for Revealing Anonymous Internet Poster

(Continued from page 15)

ments, the Court explained that different jurisdictions have different standards for these motions. These different standards would alter the analysis of when an identity must be revealed, and the Court sought a more uniform way of making that determination.

The Court did agree with requiring the plaintiff to notify the anonymous defendant of the subpoena to the ISP. However, the requirement from *Cahill* that a plaintiff post a message in the location on the Internet of the allegedly actionable postings was not adopted by the Court. This step is futile, the Court reasoned since the Internet location may no longer be available and ISPs provide their users of warnings that their identities may be revealed.

Instead, the Court held that the plaintiff must establish a prima facie case of defamation. The court was careful to note that this requirement meant that plaintiff only had to provide evidence of facts that were accessible to them. An example of an element that plaintiff would not have to show would be providing evidence of actual malice, which the Court explained is impossible without an individual's identity.

Test Applied

Although the plaintiff had obviously met the notification requirement (as Doe 6 was contesting the subpoena and thus was aware of it), she failed to provide evidence of a *prima facie* case for either of her claims. Since she had not pleaded the securities law violations, the court refused to consider whether she had evidence of those.

As for a prima facie showing of defamation, the court applied Florida libel law to determine that while the statements might have been juvenile and crude, none of them could be construed as assertions of fact and thus were not actionable.

The plaintiff also failed to demonstrate a *prima facie* case of tortious interference. Since the Court found that that claim was based solely on the alleged defamatory nature of the statements, no *prima facie* case for the claim was established.

The Hoyle Law Firm and Arlene Fickler and Lawrence T. Hoyle, Jr., Steefel, Levitt & Weiss and Barry W. Lee and Amy B. Briggs, San Francisco, for Defendant. DeSimone & Huxster and Gerry DeSimone, Agoura Hills, Robert Wayne Pearce, for Plaintiff.

RETURN TO TABLE OF CONTENTS

Court Grants Talk Radio Station's Anti-SLAPP Motion

Harsh Criticism of School Were Not Statements of Fact

By Amanda Leith

A California Superior Court has held that a radio talk show in which the host repeatedly criticized the curriculum, demographics and administrators of an Los Angeles charter school constituted protected opinion. *Academia Semillas Del Pueblo et al. v. McIntyre et al.*, No. BC369626 (Los Angeles Sup. Ct. Jan. 10, 2008) (Lopez, J.).

The court granted the host and the radio station's special motion to strike pursuant to California's anti-SLAPP statute, Cal. Civ. Proc. Code §425.16, and has invited them to submit their costs and attorneys' fees.

Background

During the summer of 2006, KABC Radio host Doug McIntyre criticized charter school Academia Semillas del Pueblo, arguing that it is an inappropriate use of public funds and should be closed. In several segments regarding the school and its principal, Marcos Aguilar, McIntyre quoted from the school's website, charter, and Aguilar's public statements in arguing that Aguilar and the school followed a separatist philosophy and rejected *Brown v. Board of Education*.

McIntyre also cited government documents to support of his statements that it had "zero Black, White or Asian students" and that it had received poor rankings from the Los Angeles Unified School District and the State of California. McIntyre used colorful hyperbole during his broadcasts, describing the school as a "madrasa" and a "reconquista grade school." After the initial broadcasts, an unidentified caller made a bomb threat to the school, resulting in its evacuation by the authorities.

The school and Aguilar sued McIntyre, KABC and various ABC entities, asserting claims for slander, false light invasion of privacy, negligence, tortious interference with their relationship with a school sponsor, and, based on the bomb threat, incitement of others to make racially-motivated threats of violence against the school in violation of California's Unruh Civil Rights Act.

Plaintiffs contended that listeners understood McIntyre's use of terms like "racist," "separatist," "radical," "dangerous," and "madrasa" to mean that the school "train[s] paramilitaries . . . in weaponry or military guerilla tactics" and that the principal is "a racial terrorist seeking armed and non-armed resistance and overthrow of the United States government." Plaintiffs also asserted that, by using "select trigger words and 'code' words aimed at a targeted audience," McIntyre put out an "express and implied call to arms" that purportedly incited listeners to threaten "to burn down and bomb the School." Defendants filed a special motion to strike.

Decision

Upon reviewing the full transcripts of four of McIntyre's broadcasts, the court rejected the plaintiffs' contentions and held that "no reasonable listener would have concluded that Mr. McIntyre was seriously and *literally* maintaining that Academia Semillas del Pueblo was a reconquista grade school, a madrasa, was aiming to train the next generation of Aztec revolutionaries, or to mount an attempt to secede from the United States."

The court concluded that these comments, and other references to "racists" and "terrorists," were "merely an expression of subjective opinion by one who believed that the underlying mission of the school was not deserving of public or private funding." The court also found that the plaintiffs had "completely ignor[ed] the First Amendment doctrine providing protection to statements that cannot reasonably be interpreted as stating actual facts."

While the court recognized that statements concerning the school's demographics and rankings could constitute actionable factual statements, it held that any inaccuracies were negligible and did not produce a more damaging effect in the mind of the average listener than the literal truth would have. Thus, the fact that the demographic report that McIntyre referenced actually reflected that a single black

(Continued on page 18)

RETURN TO TABLE OF CONTENTS

Court Grants Talk Radio Station's Anti-SLAPP Motion

(Continued from page 17)

student was enrolled did not render his report that the school had no whites, blacks or Asians materially false.

The court similarly rejected the Unruh Act claim on the ground that the radio broadcasts at issue were protected speech. While recognizing the exception for speech that incites violence, the court held that nothing in McIntyre's statements could be characterized as being "directed or intended toward the goal of producing imminent lawless conduct," or likely to produce such conduct, and that the exception therefore did not apply.

The court granted the defendants' anti-SLAPP motion in its entirety and held that they are entitled to recover their attorneys' fees and costs as provided by the statute, with the amount to be determined.

The defendants were represented by Seth Berlin, Ashley Kissinger, Amanda Leith and Adam Platt of Levine Sullivan Koch & Schulz, L.L.P. KABC-AM Radio was also represented by Jacquelyn J. Orr of Citadel Broadcasting Corp. (which now owns the station), and the ABC entities were represented by Jean Zoeller of ABC, Inc. The plaintiffs were represented by Daniel J. Bramzon of the Law Offices of Daniel J. Bramzon & Associates and James J. Moneer of the Law Offices of James J. Moneer.

RETURN TO TABLE OF CONTENTS

Celebrity Doc's Libel Suit Dismissed

No Evidence Of Constitutional Malice

By Rachel F. Strom

The New York State Appellate Division once more comes to the rescue. Last month the Appellate Division, First Department reversed a lower court's decision, and affirmed the principle that a mistake does not amount to constitutional malice. In *Kipper v. NYP Holdings Co., Inc.*, 2008 WL 255388 (1st Dep't Jan. 31, 2008), the First Department dismissed a libel lawsuit brought by Dr. David A. Kipper against NYP Holdings, Inc., the publisher of the *New York Post*. The court held that the plaintiff, a public figure, could not possibly show an issue of fact as to constitutional malice simply because the *Post*'s article contained an error.

Background

Plaintiff David A. Kipper is a well-known "celebrity doctor," who made his reputation not only by treating famous patients but through his own long-standing television and movie career. As Dr. Kipper himself noted, he has appeared on television as a medial commentator over one hundred times. Further, he is a member of the Screen Actors Guild and the American Federation of Television and Radio Artists. He even has a fledgling film career, appearing as a doctor in several feature films including *As Good As It Gets*, *Primary Colors*, *Shallow Hal*, and appearing as himself in *Jackass: The Movie*.

But, in 1998, it was not his television and movie career that gained the attention of the *Los Angeles Times*. Instead, as part of an exposé about the treatment of stars in Hollywood, the *Times* published a series of three articles about Dr. Kipper's alleged practice of detoxifying his famous, drug-addicted patients in luxury hotels with limited medical supervision and with an allegedly illegal opiate-based medicine called buprenorphine. After these Pulitzer Prize-winning articles were published, the Medical Board of California, a state agency responsible for licensing and disciplining medical doctors, began to investigate Dr. Kipper.

The Board's investigation into Dr. Kipper's detoxification practices culminated with the Board filing a formal Accusation against Dr. Kipper in November 2003, charging him with eleven causes for discipline. On December 4, 2003, as part of its continuing coverage of Dr. Kipper's controversial detoxification practices, the *L.A. Times* reported on the Accusation.

The LA Times *and* Post *Articles*

On the evening of December 6, 2003, the *LA Times* carried on its newswire service a lengthy 98-paragraph article entitled, "Harsh Reality of 'Osbournes' No Laughing Matter: The hit show's star says that he was 'wiped out' on drugs ordered by a physician investigated for overprescribing for others," which reported that John "Ozzy" Osbourne had claimed to the newspaper that Dr. Kipper had overprescribed medicine to Osbourne and that Osbourne's distracted, bumbling appearance on the reality show, *The Osbournes*, was due to this overmedication. It also reported that "The state medical board last week *moved to revoke* Kipper's license, accusing him of gross negligence in his treatment of other patients." (emphasis added.)

On the same evening, the *New York Post* picked up the *L.A. Times* newswire article and decided to publish its own, much condensed, 8-paragraph article on Osbourne's accusations against Dr. Kipper. The *Post* article, however, contained an error, which stated: "Last week, the state medical board *revoked* Kipper's license, accusing him of gross negligence in his treatment of other patients, according to the Los Angeles Times." (emphasis added). Nearly eight weeks later, Dr. Kipper's attorney in California contacted the *Post* to request a retraction, which the *Post* promptly published.

The Lower Court's Decision

Nearly a year after the *Post* article was published, Dr. Kipper brought suit against NYP Holdings in New York State court. After extensive discovery, Dr. Kipper and NYP Holdings both moved for summary judgment. NYP Holdings argued that Dr. Kipper was a public figure, who bore the burden of bringing forth clear and convincing evidence that its error was published with constitutional malice, and that Dr. Kipper had failed to point to *any* such

(Continued on page 20)

RETURN TO TABLE OF CONTENTS

Celebrity Doc's Libel Suit Dismissed

(Continued from page 19)

evidence. Dr. Kipper argued that the article was false, and claimed that mere falsity was sufficient to meet his burden on a summary judgment motion, particularly because the *Post* could not recall, some years after the article was published, exactly how the error made its way into the article.

On May 11, 2007, the New York State Supreme Court for the County of New York issued a Decision and Order granting in part and denying in part NYP Holdings' motion for summary judgment. Specifically, the court held that Dr. Kipper was "unquestionably a public figure," because, "[h] is detoxification practice has been written about extensively in the media; he has appeared as a doctor in several films, including one in which he portrays himself; he has appeared as a medical expert more than 100 times on television. . . . He is quintessentially 'the publicized person [who] has taken an affirmative step to attract public attention.'" *Kipper v. NYP Holdings, Inc.*, 15 Misc.3d 1136(A), 841 N.Y.S.2d 820 (Table) (Sup. Ct. N.Y. Co. May 11, 2007) (quoting *James v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976)).

The court also re-affirmed the long-standing rule that a mistake cannot in and of itself constitute constitutional malice.

The court, however, stated that it could not grant summary judgment in NYP Holdings' favor because there was a "factual issue presented of how the misstatement found its way into the Article," and because "*Defendant* has not met its burden of proof that, as a matter of law, that [sic] the Article's misstatements were published without knowledge of falsity and without a reckless disregard for the truth." (emphasis added.) (The court did grant defendant's motion as to the claim brought by Dr. Kipper's professional corporation and dismissed that company's causes of action. The court also denied plaintiff's motion for summary judgment).

The Appeal

NYP Holdings appealed the decision and order arguing that the lower court improperly placed the burden of proving the absence of actual malice on the defendant, when the law is clear that, on a summary judgment motion, a public-figure plaintiff bears the burden to bring forth clear and convincing evidence from which a jury could find that the defendant acted with constitutional malice in publishing an allegedly defamatory statement. And NYP Holdings argued that because Dr. Kipper had failed to bring forth *any* evidence that it had acted with the requisite constitutional malice, summary judgment should be entered in its favor. The plaintiff did not cross move either as to the denial of his motion for summary judgment or on the issue of plaintiff being found to be a public figure.

In a decision and order dated January 31, 2008, the Appellate Division, First Department reversed the lower court's decision and order and held that there was no evidence of actual malice in the record and NYP Holdings was entitled to summary judgment as a matter of law. In its decision, the appellate court stated "The omission of the words 'moved to' from the sentence concerning the actions of the California Medical Board with respect to plaintiff does not, without more, demonstrate defendant's malice toward plaintiff. Indeed, plaintiff does not claim, much less show, that defendant knowingly published a falsity about him in an effort to harm his reputation. He alleges, instead, that defendant acted recklessly, carelessly and/or negligently in not determining the veracity of statements it made about him; but negligence alone does not constitute malice." In so holding, the First Department placed the burden of proof precisely where it belonged – on Dr. Kipper's shoulders. The court also re-affirmed the long-standing rule that a mistake cannot in and of itself constitute constitutional malice.

Defendant NYP Holdings, Inc. was represented by Slade R. Metcalf, Katherine M. Bolger and Rachel F. Strom of Hogan & Hartson LLP, New York City. Dr. Kipper was represented by David Jaroslawicz, Elizabeth Eilender and Robert J. Tolchin of Jaroslawicz & Jaros, Esqs., New York City.

RETURN TO TABLE OF CONTENTS

Minnesota Court of Appeals Issues Two Opinions on Public Official/Figure Doctrine

By Leita Walker

Both a former college dean and a volunteer fire captain must show actual malice to prevail on defamation claims, according to two recent opinions of the Minnesota Court of Appeals. In the first opinion, the court held that a former state university dean who was a key player in a public controversy regarding anti-Semitism at the university was a limited-purpose public figure. *Lewis v. University Chronicle*, No. CX-05-5539, slip op. (Minn. Ct. App. Jan. 25, 2008). In the second, the court held that a volunteer fire captain qualified as a public official for purposes of his suits (consolidated on appeal) against the fire chief, the city, and six firefighters. *O'Donnell v. City of Buffalo*, No. A07-203, slip op. (Minn. Ct. App. Feb. 5, 2008); *O'Donnell v. Rathbun*, No. A07-606, slip op. (Minn. Ct. App. Feb. 5, 2008).

Lewis v. University Chronicle

Lewis arose out of an article published in October 2003 in the Saint Cloud State University (SCSU) student newspaper. The article accused the plaintiff-appellant, a tenured professor and former dean, of being anti-Semitic and claimed he had used racial slurs and made derogatory comments.

The article followed up on a class action lawsuit that three faculty members and a former student had brought against SCSU for religious discrimination and retaliation. Although the parties eventually settled, the plaintiffs in the lawsuit made specific allegations against the appellant in his position as dean of the College of Social Sciences (COSS), and the suit ultimately played a part in termination of appellant's deanship. After his termination, the former dean contemplated bringing an age-discrimination suit against SCSU, and the article at issue in the defamation case was specifically pegged to that impending possibility.

The former dean initially brought his defamation claim against SCSU and the state college and university system. That case was dismissed because SCSU had no control over the student paper's editorial content, prompting the former dean to sue the newspaper itself. The district court granted the newspaper's motion for summary judgment, and the Court of Appeals affirmed.

There were two main issues on appeal: whether the former dean was required to show actual malice, and if so, whether he had done so.

In answering the first question affirmatively, the Court of Appeals did not resolve the still-open question of whether a university professor is a public official. Rather, it affirmed the district court's holding that the former dean qualified as a limited-purpose public figure because (1) a public controversy existed, (2) the former dean played a meaningful role in the controversy, and (3) the alleged defamatory statements were related to the controversy.

The court acknowledged that mere participation in the litigation of a private dispute does not turn an individual into a limited-purpose public figure. However, it found that, for purposes of the first factor, the public controversy was not that a discrimination lawsuit had been filed but that there existed "allegations of anti-Semitism, discrimination at SCSU based on anti-Semitism, and retaliation against those who opposed it."

As to the second factor, the court found that the former dean played a meaningful—and voluntary—role in the controversy, in part because he chose to lead COSS and because he had an opportunity to publicly comment on the lawsuit. The court also found it significant that the former dean was named not only in the discrimination lawsuit but also in a 2001 report that addressed anti-Semitism at SCSU.

Having found that the former dean was a limited-purpose public figure, the Court of Appeals went on to find that he had failed to meet his burden of showing actual malice. The court rejected the former dean's arguments that he could show actual malice merely by pointing to the newspaper's failure to corroborate a source's statements when the source was obviously biased. More persuasive, according to the court, were affidavits from the reporter and her editor that they did not believe they were publishing falsehoods. The court held that the source's story was not so implausible that it demanded further investigation. The court did state in dicta, however, that "[w]ere a negligence standard applicable here, we conclude that this case would present a jury question."

(Continued on page 22)

RETURN TO TABLE OF CONTENTS

Minnesota Court of Appeals Issues Two Opinions on Public Official/Figure Doctrine

(Continued from page 21)

Marshall H. Tanick and Teresa J. Ayling, of Mansfield, Tanick & Cohen, P.A., represented the former dean; Mark R. Anfinson represented the defendant student newspaper.

O'Donnell v. City of Buffalo, O'Donnell v. Rathbun

The two *O'Donnell* cases, which were consolidated on appeal, arose out of a letter that six volunteer firefighters wrote to the fire chief and that the fire chief shared with his superiors and advisors. The letter criticized the plaintiff-appellant's performance and requested his removal from the position of fire captain. The lower court had granted summary judgment for the fire chief and the City of Buffalo, Minnesota, and the Court of Appeals affirmed this decision. However, the intermediate court reversed the dismissal of the fire captain's claims against the six individual firefighters.

At issue in both cases was whether the lower court correctly concluded that the fire captain was a public official. The Court of Appeals held that it had, stating that the duties of a fire captain "are such that the public has an independent interest in reviewing his qualifications and performance, beyond its interest in the qualifications and performance of other firefighters or other government employees."

Having found that the fire captain was a public official, the court went on to find that he had failed to prove that the fire chief acted with actual malice in sharing the letter with the city administrator, assistant fire chiefs, and advisory fire board. The fire captain did not present any evidence indicating that the fire chief republished the letter knowing it contained false statements, and the court held that mere speculation that the fire chief republished the letter because he feared that the fire captain wanted to take over his job was not sufficient.

However, the court found that the fire captain had met his burden regarding actual malice as to the individual firefighters. The fire captain had presented affidavits and deposition testimony that showed the firefighters had no factual basis for making at least some of the statements at issue. The court therefore held that the fire captain had established a prima facie case of defamation against the firefighters and that the district court erred in dismissing that case.

In additional to the public official/actual malice inquiry, the court addressed the defendants-respondents' argument that various statements in the letter were nonactionable opinion. It rejected the argument as to at least two statements:

> 2. He has a habit of not following the Standard Operating Guides or Procedures that are mandatory in the department. Firefighters have had multiple truck response issues with him.
>
> . . . .
>
> 4. He lacks responsibility on a fire/rescue scene. Many Buffalo firefighters refuse to go in to (sic) any burning structures with Captain Jay O'Donnell because of his unsafe practices. He neglects some safety issues and has impulsive actions that impact the members around him.

The court found that these statements were sufficiently factual to be proven true or false.

Finally—and unnecessarily—the court found that even if the fire captain could prove actual malice on the part of the fire chief, his claims against the fire chief and city were barred by the doctrine of qualified privilege.

William B. Butler of William B. Butler, PLLC, represented the fire captain. Julie Fleming-Wolfe represented the fire chief, the city, and the six individual firefighters.

Leita Walker practices media law and intellectual property law in Minneapolis, Minnesota, at DCS member firm Faegre & Benson LLP.

RETURN TO TABLE OF CONTENTS

Dutch Supreme Court Protects Statements of Opinion About Second World War Controversy

Press Protections Extend to Online Writer

By Jens van den Brink

The Dutch Supreme Court last month issued a very interesting decision in a libel case growing out of a 50 year old controversy about activities during the Second World War. *Van Gasteren v. Hemelrijk* (Jan. 18, 2008).

Background

On May 24, 1943, during the Nazi occupation of Holland, Louis Van Gasteren killed Walter Oettinger, a Jewish man who had been hiding in Van Gasteren's house in Amsterdam. In 1944 Van Gasteren was sentenced to four years' imprisonment for manslaughter. After the war Van Gasteren was granted a pardon and he went on to become a noted documentary filmmaker in Holland. Van Gasteren had said that he killed Oettinger because he would have exposed Van Gastern and other members of the Dutch Resistance. Others have claimed that Van Gasteren killed Oettinger for his money. This topic has caused a public discussion that still continues to date as well as several libel suits.

In 1990 journalist Bart Middelburg wrote about the story in the newspaper *Het Parool*, casting doubt on Van Gasteren's explanation of the killing. Van Gasteren sued for libel. The Supreme Court found in favor of Van Gasteren, finding that the news articles contained an implicit accusation that Van Gasteren had committed "a (common) robbery and murder." In a judgment dated January 6, 1995, the Supreme Court concluded that the publications were unlawful towards Van Gasteren.

The controversy about the killing did not end with this judgment of the Supreme Court. Van Gasteren had applied for government benefits under Holland's Extraordinary Pension Act 1940-1945 (*Wet Buitengewoon Pensioen*) (WBP), which provides a special pension for anyone who participated and was injured in the Dutch resistance against the German occupation. In legal proceedings instituted by Van Gasteren, the Central Appeals Tribunal ruled in 1997 that the request for a pension was rightfully refused and that the killing of Oettinger was not an act of resistance within the meaning of the WBP.

A few months later, in a portrait about him on the Dutch national broadcasting television program *het Uur van de Wolf*, Van Gasteren repeated his claim that killing Oettinger had been necessary in the interest of the Resistance.

Open Letter on the Internet

On November 2, 1999 journalist Pamela Hemelrijk published an "Open Letter to the Supreme Court" on the Internet, which begins as follows:

"*Dear Supreme Court,*

I am writing to you on a subject matter which, if I may believe the lawyers, I can never mention again. Well, I may do so but, according to these lawyers, I will immediately be sued for enormous damages, which case I am definitely going to lose. Why am I bound to lose this case? Because I am not allowed to drag up the past of movie maker Louis van Gasteren anymore. … Strangely enough, Louis himself can drag up his past as much as he likes …"

In the letter, Hemelrijk expressed her doubts about Van Gasteren's statement that he was a member of the Resistance and that killing Oettinger was a result thereof.

I know better than to speculate about Van Gasteren's real motives to kill this person in hiding. It is an established fact, though, that this person in hiding owned a

(Continued on page 24)

RETURN TO TABLE OF CONTENTS

Dutch Supreme Court Protects Statements of Opinion About Second World War Controversy

(Continued from page 23)

> *small fortune of money, which he carried with him day and night … Just like me, the Supreme Court is also aware that shortly after the murder witnesses have seen Louis with a large amount of money, which looked like it had been in the water. If I remember well, he was busy hanging the bank notes out to dry. But I am not going to speculate about Louis van Gasteren's real motives. I know better than that. Let the readers draw their own conclusions …"*

In 2001Van Gasteren sued Hemelrijk, claiming that she acted unlawfully by repeating allegations which the Supreme Court had found libelous in the *Het Parool* judgment.

Pending the appeal proceedings in 2005, the WBP Chamber of the Pension and Benefits Board confirmed that Van Gasteren's pension application had been rightfully refused.

Supreme Court Judgment

The Supreme Court balanced two fundamental rights – on the one hand freedom of expression; and on the other, the right to a person's honor and reputation and the respect for his privacy. The Supreme Court ruled that Hemelrijk's freedom of expression prevailed, and denied Van Gasteren's claims. The judgment contains a number of important statements about press issues.

Definition of Press

Did the open letter fall under the scope of the freedom of press? Pursuant to established case law of the European Court of Human Rights, the press has a special position as a public watchdog. The Supreme Court argued that, partly because of the rise of the Internet, no exact definition of press can be given. Nowadays, private persons can also easily address the public. With the open letter Hemelrijk addressed a very wide audience and expressed her doubts about the act of resistance claimed by Van Gasteren. Hemelrijk acted in the public interest and the Court of Appeal has rightfully put the private online letter on a par with a press publication.

Protection for Opinion

The next question was whether the open letter could be put on par with a traditional opinion column. It is generally accepted in Dutch and ECHR case law that opinion columns have to meet less strict requirements than normal publications. A column justifies stronger wordings, the blowing up of a topic and a simplifying approach. The Supreme Court not only confirmed this principle, but extended it to opinion-forming publications in general. In the view of the Supreme Court, it is not the label "column" but the contents that matter.

Encouraging a Public Debate

The Supreme Court furthermore stated that it is relevant that Van Gasteren once again sought publicity himself in *het Uur van de Wolf* and wrongfully created the impression that he had been rehabilitated. The Court of Appeal rightfully considered that there were compelling reasons of public interest which justified that the open letter was brought to the attention of the public. Next, the Supreme Court emphasized that the question whether or not these compelling reasons were actually a pre-requisite to justify the open letter need not be commented on because the open letter – unlike what the Supreme Court had read implicitly in the *Parool* publications – contains no accusation of murder and robbery and Van Gasteren's resistance claim is only "exposed in a cynical and provocative manner."

Conclusion

This judgment provides a boost for the freedom of the press. First of all by its acknowledgment of the more flexible regime for columns, and by the inclusion of opinion-forming publications in general in that regime.

Furthermore, the Supreme Court has rightfully refused to give an exact definition of "the press." This is a topical matter because many people, including the current Dutch Minister of Justice, argue that the codification of the right of journalists to protect their sources requires a definition of "journalist," which will probably result in an unnecessarily strict definition.

This judgment gives people who support the codification of the right of to protect sources, but oppose an exact definition of the term "journalist" a strong lobby tool. If there is a discussion on who is a journalist, it should be left up the courts to decide with regard to the specific facts of a case. For more information on this topic, I refer to the contribution in the previous newsletter about the *Voskuil* judgment. *See MLRC MediaLawLetter*, Jan. 2008 p. 27.

Jens van den Brink is a lawyer with Kennedy Van der Laan in Amsterdam, the Netherlands. The defendant Paula Hemelrijk was represented by Eberhard van der Laan of the same firm.

RETURN TO TABLE OF CONTENTS

French President and Wife Win Damages Over Airline Advertisement

Ad Infringed Exclusive Rights To Their Image

By Jean-Frédéric Gaultier

In two summary decisions given on February 5, 2008, a President of the Paris Civil Court ordered the low-cost airline Ryanair to pay one Euro to French President Sarkozy and 60,000 Euros to his wife, Mrs. Carla Bruni Tedeschi, on the grounds of infringement of their absolute and exclusive rights to their image.

Nothing is surprising in the fact that it was held that the image of the couple was used in an improper manner. This decision is, however, worthy of note, 1) in that it is the first time for almost forty years that a French President in office has initiated legal action related to the use of his image and, 2) the size of the award made to Bruni.

With Ryanair, all my family can attend my wedding

Background

Ryanair placed in a newspaper a promotional offer for plane tickets illustrated with a photograph of President Sarkozy and Mrs. Carla Bruni – official fiancée when the advertisement was published, officially married when the decision was given - with the following caption: "*With Ryanair, all my family can attend my wedding*". In two separate claims, President Sarkozy and Mrs. Bruni requested the Court to rule that this use of their photograph without their authorisation and with purely advertising purposes infringed their rights to their image.

Decisions

In two separate decisions (one for Sarkozy, one for Bruni), the Court upheld the claims, awarding in damages one Euro to the president, and 60,000 Euros to his wife. Publication of the Bruni decision in the newspaper in which the advertisement had been published was also ordered.

The Court's finding that "Mr Nicolas Sarkozy, whatever his status and renown, has exclusive and absolute rights to his image" (the same applies to Bruni) is in line with case law. This abrupt wording requires some clarification. What is absolute and exclusive is one's right to make commercial use of one's own image. It is, however, less and less disputed that freedom of communication includes the right to communicate images.

The exclusive rights to one's image is thus limited by freedom of communication. This freedom to communicate images is itself limited when the publication of one's image damages one's dignity. Courts will assess whether the context in which the image is published is legitimate, e.g. whether it amounts to an invasion of privacy, or to defamation, or to twisting the context in which the image was taken. In this matter, the photograph of the presidential couple was apparently taken during a press conference. Ryanair took the photograph out of the context in which it was taken, and used it for purely non-informational advertising purposes. It is therefore not at all surprising that Ryanair should have been found liable.

More open to criticism is the amount awarded to Bruni and the reasons set out by the court for granting this amount. The court first stated that damages 1) exist without it being necessary to prove a causal link between the breach of image rights and said damages and, 2) depend upon the person whose image is used. The court further stated that Bruni is a top model and singer, that her relationship with President Sarkozy is irrelevant, and that her profession only must be taken into account in assessing the harm that she suffered.

The court concluded "the patrimonial damages result from the use of Mrs Bruni Tedeschi's photograph for advertising purposes without the price having been paid." In the Sarkozy

(Continued on page 26)

RETURN TO TABLE OF CONTENTS

French President and Wife Win Damages Over Airline Advertisement

(Continued from page 25)

decision, the court very briefly ruled that "*in view of his status*," harm suffered can be compensated by damages of one Euro.

Were Bruni merely a top model and singer as she claimed, the amount of 60,000 Euros may be justified if that were the price usually paid by media to use her image. However, the context in which the advertisement was published cannot be disregarded. Ryanair did not use a photograph of Bruni alone, but one of the couple, and the presidential fiancé (now presidential husband) was awarded one Euro for the use of the same photograph "in view of his status."

In addition to feeling sorry for seeing a couple being so unequally treated after a few days of marriage, one may consider that the court contradicted itself. The advertisement was quite obviously referring to the public announcement made by President Sarkozy that he was contemplating marriage with Bruni. The advertisement was not referring to Bruni's professional status but to her premarital one, "in view of the status" of her presidential husband. The couple should have been treated equally.

As in the case of Sarkozy, it seems that the prejudice suffered by Bruni was of a moral nature – to be associated with a promotion for cheap air tickets - rather than the loss of profits claimed by Bruni. In these circumstances, the announcement of the wedding being public – the wedding actually took place a few days before the decision was rendered - and the couple having largely publicized their relationship, it seems that 60,000 Euros is going too far. This amount is more like the kind of punishment ordered by the criminal courts.

In a word, stating that the harm arose from the fact that "the price was not paid" is, at best, clumsy.

Jean-Frederic Gaultier is a partner with Clifford Chance in Paris.

RETURN TO TABLE OF CONTENTS

Sexually Violent Predator Act Proceedings Presumptively Open To The Public

By William L. Chapman

In December 2007, the New Hampshire Supreme Court overturned a lower-court ruling that substantially limited public access to sexually violent predator proceedings, holding that such proceedings are presumptively open to the public. *New Hampshire v. DeCato*, No. 2007-178 (N.H. Dec. 18, 2007) (Dalianis, Duggan, Hicks, JJ., Broderick, C.J.).

The *Concord Monitor* and *Union Leader* challenged the lower court ruling and, on appeal, were joined by the Reporters Committee for Freedom of the Press, which filed an amicus brief.

Background

In 2006, New Hampshire, like at least 17 other states, enacted a law for the civil commitment of sexually violent predators (the "Act"). The legislature, in doing so, found that "existing involuntary commitment procedures for the treatment and care of mentally ill persons are inadequate to address the risk … sexually violent predators pose to society," and it established a "civil commitment procedure for the long-term care and treatment of sexually violent predators." N.H. rev. Stat. 135-E:1. The Act took effect on January 1, 2007, and is silent on whether court proceedings are public.

Lower Court Proceedings

William DeCato was the first person the State sought to commit under the Act. He had been convicted of a sexually violent offense, one count of aggravated felonious sexual assault, and given a nine-year sentence. On the last day of his imprisonment, the State filed a petition alleging that he was a sexually violent predator and seeking to have him civilly committed. The lower court held a probable cause hearing that initially was open to the public while it considered several legal arguments advanced by the parties. Thereafter, at the request of both parties, the court closed the remaining portion of the hearing, during which it took evidence on the issue of probable cause. The court found there was probable cause to have the defendant evaluated by a State multi-disciplinary mental health team, which the Act required as the next step in the proceedings.

At that stage of the proceedings, the *Concord Monitor* and *Union Leader* petitioned for access, relying on the New Hampshire Constitution. In ruling on the petitions, the court held that the proceedings were not presumptively open to the public, and it permitted only limited access:

> … [t]estimony and information which has been traditionally provided in open proceedings, such as testimony from investigating officers and victims, shall be open. However, portions of the proceedings in which testimony from treating physicians and/or counselors shall be elicited shall remain closed, and documents related to such testimony shall remain under seal. Similarly, opening and closing statements from the parties shall remain closed to the extent that they are anticipated to reference testimony or documents that must remain confidential.

Following the multi-disciplinary team's evaluation, which concluded that the defendant met the definition of a sexually violent predator, the court held a second probable cause hearing, only portions of which were public. It again found probable cause, continued the defendant's confinement, and set the case for trial.

But shortly before trial, the State withdrew the petition and the defendant was released from confinement. The only explanation the State offered was that it did not have sufficient evidence to prove that the defendant was a sexually violent predator. The public, thus, was left to wonder why the State brought the case in the first instance, why the multi-disciplinary team reached its conclusion, and why the lower court found probable cause on two separate occasions.

The Right of Access in New Hampshire

(Continued on page 28)

RETURN TO TABLE OF CONTENTS

Sexually Violent Predator Act Proceedings Presumptively Open To The Public

(Continued from page 27)

For thirty years New Hampshire has been in the vanguard of states in opening judicial proceedings and records. *See Thompson v. Cash*, 117 N.H. 653 (1977) (ruling that deposition of sitting governor that had been filed with the court was open to the public on grounds of long-standing tradition and court policy). The New Hampshire Supreme Court, thereafter, anchored the right of access firmly in two provisions of the New Hampshire Constitution: one provides that "the public's right of access to governmental proceedings and records shall not be unreasonably restricted;" and the other provides that the "liberty of the press" shall be "inviolably preserved." *See Petition of Keene Sentinel*, 136 N.H. 121 (1992).

More recently, like the United States Supreme Court, the New Hampshire Supreme Court adopted the "experience and logic test" to determine which court proceedings are presumptively open to the public. *See The Associated Press v. State of New Hampshire*, 153 N.H. 120 (2005).

Appeal

In analyzing whether proceedings under the Act are presumptively open to the public, the Supreme Court agreed with the *Concord Monitor* and *Union Leader* that the lower court had misapplied the experience and logic test. The lower court analogized the Act's proceedings to involuntary civil commitment proceedings, which have always been closed to the public.

The Supreme Court ruled this was error, listing four reasons why involuntary civil commitment proceedings were "too dissimilar." First, they are not jury trials (the Act permits either party to ask for a jury trial); second, they are conducted in district or probate court (the Act vests exclusive jurisdiction with the superior court); third, they may be instituted by any "responsible person" (the Act only permits the State to institute suit); and fourth, they are for the "mentally ill and disabled" (the Act applies only to those "who do not have a mental disease or defect that renders them appropriate for involuntary [civil commitment]").

The Supreme Court agreed with the *Concord Monitor* and *Union Leader* that the lower court had misapplied the experience and logic test.

Instead, on the experience prong of the test, the Supreme Court ruled that proceedings under the Act were similar to "New Hampshire's prior laws for commitment of sexual predators," which dated back to 1949 and were open to the public. Under the logic prong of the test, the court underscored the public's important oversight role:

> Thus, it is particularly important that the citizens of New Hampshire be able to hold their government accountable for the integrity of proceedings under the SVPA. To enhance the quality and safeguard the integrity of SVPA proceedings, public access must include more than simply the information whether certain persons are committed; it should include the factual basis that led the court to commit or release them.

The case has been remanded to the lower court for further proceedings. In those proceedings, the *Concord Monitor* and *Union Leader* will seek access to (i) sealed pleadings filed by the parties, (ii) transcripts of the evidentiary portions of the two probable cause hearings that were closed to the public, and (iii) court orders, or portions thereof, that were sealed.

In an unusual role reversal, in the lower court the State, joined with the defendant in requesting that all the proceedings be closed, but on appeal filed a brief in support of the position of the *Concord Monitor* and *Union Leader*.

William L. Chapman, of Orr & Reno, P.A., in Concord, New Hampshire, represented the Concord Monitor. Kathleen C. Sullivan, of Malloy Sullivan, represented the Union Leader.

RETURN TO TABLE OF CONTENTS

Jury Finds New York Times Did Not Violate Freelancer's Copyrights By Republishing His Photos In Web Edition

By Tom Curley

A federal jury has sided with *The New York Times* in a copyright infringement action brought by a freelance photographer who alleged that the newspaper had no right to publish approximately one hundred of his photographs in the *Times'* web edition.

The jury trial in *Dallal v. New York Times Co.*, 03 CV 10065 (S.D.N.Y.), concluded in December 2007 with a unanimous verdict for the *Times*. However, a post-trial motion with respect to a small portion of the case involving print re-uses for which the *Times* did not contest liability – more on that later – delayed resolution of the judgment until mid-February.

Background

The trial arose out of the publication on the web site of *The New York Times* photographs created by the plaintiff Thomas A. Dallal while on assignment for the newspaper. The plaintiff, a freelancer for the *Times* from 1994 until 2002, alleged that the newspaper used his photographs without permission in its web edition. The complaint sought damages in the amount of $52.5 million.

The Hon. Alvin K. Hellerstein of the Southern District of New York granted summary judgment for the *Times* in May 2005, which was reversed by the Second Circuit. *Dallal v. New York Times Co.*, 2006 WL 463386 (2d Cir. Feb. 17, 2006).

At a trial which began in late November, the plaintiff contended that he had only given the *Times* permission to publish his photographs in its print editions and that web publication exceeded the scope of his authorization.

The plaintiff argued that language he placed on his invoices to the *Times* requesting payment after his assignments were shot was binding on the *Times* and that this invoice language precluded web publication of any of his photos.

In all, at trial the plaintiff claimed that 98 of his photos were infringed by their publication on the *Times'* web site and he sought a maximum statutory damage award of $150,000 for each of those registered works.

For its part, the *Times* contended that the plaintiff knew and agreed that his photographs would be published in its print *and* web editions and that such use was consistent with the parties' communications and course of dealing with each other, as well as with *Times'* dealings with its other freelance photographers.

As for the invoices for payment that the plaintiff submitted following completion of his photo assignments, the *Times*, argued that it never agreed to be bound by whatever restrictions might have been included after the fact on the plaintiff's invoices.

Copyright Trial

The case was tried before an eight-person jury over four days. The *Times* put three independent defenses to the jury: (1) publication of the plaintiff's photographs in the web edition of the *Times* was authorized pursuant to an oral or implied license granted by the plaintiff; (2) publication was permitted in any event as a privileged revision to a collective work under Section 201(c) of the Copyright Act; and (3) even if the *Times* did not at the time have a right to publish his photographs on its web site, the plaintiff was equitably estopped from asserting his claims after years of accepting assignments knowing that his works were being published on the web.

… the jury returned a general verdict in favor of the *Times* finding it not liable for infringement

After several hours of deliberation, the jury returned a general verdict in favor of the *Times* finding it not liable for infringement with respect to any of the 98 works.

While, as discussed above, the infringement action and

(Continued on page 30)

RETURN TO TABLE OF CONTENTS

Jury Finds New York Times Did Not Violate Freelancer's Copyrights By Republishing His Photos In Web Edition

(Continued from page 29)

trial primarily concerned photographs published in the web edition of the newspaper, the plaintiff also claimed that the *Times* had re-used certain of his photos in other ways without properly compensating him.

Consistent with the arrangement the *Times* had with its freelancer photographers at the time, if a freelancer's photo was re-published by the newspaper or sold as a print following its initial publication, the freelancer was expected to receive some additional compensation for this re-use beyond the original assignment fee.

Given the multi-year working relationship between the *Times* and the plaintiff, the *Times* acknowledged that there may have been instances in which the plaintiff was entitled to an additional payment which he had not timely received. The plaintiff asserted ten such instances at trial and the *Times* did not contest that the plaintiff was owned compensation for these ten re-uses.

As the Court noted, "When plaintiff initially complained to the *Times* about the infringement, the *Times* admitted to these re-uses and offered plaintiff a customary amount for the print, advertising, and/or sale infringement of" the ten photos.

Prior to suit and after, the plaintiff rejected the *Times* offers of compensation for these works as inadequate. As a result, a short second phase of the trial was held in which the same jury was asked determine the amount of statutory damages the *Times* owed Plaintiff for just these ten works.

The plaintiff argued again for the maximum statutory damage award of $150,000 for each of the ten works. The jury awarded him $125,000 in total.

Following that jury award, however, the *Times* moved the court to have the award set aside on the basis that it was excessive and was the product of an inflammatory closing argument.

In a decision in late December Judge Hellerstein agreed, giving the plaintiff a choice between a reduced award of $50,000 in damages or a new trial on damages with respect to the ten works in the second phase of the trial.

In ordering the reduction of the jury award by sixty percent, the Court described the plaintiff's summation in phase two of the trial thusly:

> Plaintiff's "closing argument consisted almost entirely of personal attacks on defense counsel, complaints about the objections raised (which were largely appropriate and frequently sustained), and the nature of the defendant as a large corporation." … Plaintiff "told the jury that defense counsel was telling jurors 'a lie to your face'" … and "also bizarrely suggested that if plaintiff had the option of 'flogging the defendants' as statutory damages, 'dismember[ing] them one arm for each infringement,' then perhaps … [plaintiff] would have gone for that.'"

In February, the plaintiff having declined to consent to the remittitur, the Court ordered a new trial in July solely on damages with respect to the ten works at issue in phase two of the trial.

The Times was represented by Robert Penchina, Thomas Curley and John B. O'Keefe of Levine Sullivan Koch & Schulz, L.L.P and by George Freeman, assistant general counsel of The New York Times Company. The plaintiff was represented by Eric Vaughn-Flam and Gena L. Zaiderman of Sanders Ortoli Vaughn-Flam Rosenstadt LLP.

RETURN TO TABLE OF CONTENTS

Karaoke Needs Separate License to Display Lyrics With Music

Visual Display of Song Lyrics Not a Fair Use

In an interesting copyright decision, the Ninth Circuit rejected a fair use argument made by the manufacturer of a karaoke device over the visual display of song lyrics. *Leadsinger, Inc. v. BMG Music Publishing*, 512 F.3d 522 (9th Cir. Jan. 2, 2008) (O'Scannlain, Smith, Mosman, JJ.). The manufacturer had previously obtained the rights to reproduce the music.

The Ninth Circuit held that it also needed a synchronization license to display images of song lyrics in timed relation with recorded music.

Background

Leadsinger manufactures a "microphone" karaoke device which has recorded songs imbedded in a microchip in the microphone. When the microphone is plugged into a television, the lyrics of the song appear on screen as the song is playing, enabling users to sing along with the lyrics.

In 2004, a licensing dispute arose between Leadsinger and BMG Music Publishing, which owns and administers music copyrights. Leadsinger had previously obtained a compulsory license under § 115 of the Copyright Act to reproduce the music. BMG then asserted that Leadsinger must also obtain rights to have the lyrics to a song displayed while the song is playing.

Leadsinger brought a declaratory judgment action arguing that it was (1) entitled to use the lyrics under § 115's mechanical license, or (2) the display of the lyrics along with the music was fair use. The district court dismissed Leadsinger's action.

§ 115 Claim

On appeal, the Ninth Circuit first addressed the § 115 argument by analyzing whether the lyrics' display was a "phonorecord" and thus subject to § 115. The Ninth Circuit found that the lyrics were audiovisual because they are "a series of related images" that are "presented sequentially." Even though they are also literary works, this did not prevent them from being audiovisual because the court found that audiovisual and literary works are not mutually exclusive. Since § 115 only applies to "phonorecords," which cannot be audiovisual, § 115 does not apply to the separate display of lyrics.

The court further found that Leadsinger did not have the right under a § 115 compulsory mechanical license to reprint lyrics in accompanying materials to the karaoke machines.

Fair Use

The Ninth Circuit was skeptical from the outset about Leadsinger's fair use argument. It had argued that the display of lyrics "teaches singing," but it failed to develop this argument on appeal and the Ninth Circuit failed to see any educational purpose to karaoke.

Using the four factors enunciated in § 107, the court first found that Leadsinger's use was solely commercial. That it may possibly help a customer learn lyrics was not relevant. What an end user may do with the information should not be considered, and instead Leadsinger's commercial motive was indicative of the character of use.

The next factor is the nature of the work. Clearly, the lyrics were creative expression and the court noted that that is the type of work that copyright aims to protect. The third factor also weighed heavily in favor of BMG because Leadsinger was copying the entire work as opposed to just using small pieces. Finally, with respect to the impact on the market, Leadsinger argued that there is no market for song lyrics standing alone, citing the general industry practice where record companies reprint lyrics together with recordings without a reprint license. The Ninth Circuit found this recording industry practice was irrelevant to the "distinctly different context of karaoke."

Considering all the factors, the court found that Leadsinger was not engaged in fair use. Having failed on both arguments, the court affirmed denial of Leadsinger's declaratory judgment action and also denied Leadsinger motion for leave to amend, finding that "amendment would be futile."

Leadsinger was represented by Anthony H. Handal, Brown Rudnick Berlack Israels LLP, New York. BMG was represented by Karen R. Thorland, Loeb & Loeb LLP, Los Angeles.

RETURN TO TABLE OF CONTENTS

Pennsylvania Enacts New Open Records Law

By Michael Berry

On February 14, 2008, Pennsylvania's Governor signed legislation enacting a new Right to Know Law. The newly enacted legislation dramatically overhauls Pennsylvania's open records law, which had been widely regarded as one of the most restrictive in the country.

Under the old Right to Know Law, the definition of public records is highly restrictive, the exemptions are defined broadly, and the burden of proving that records should be disclosed is on the requester.

The new law expands public access to records, creates a new Office of Open Records, and modifies the process for making requests and appealing denials. Indeed, in the future, the government will bear the burden of proving that records are not public.

In light of that shift, however, the new law includes a host of new exemptions. The substantive and procedural provisions of the new law will take effect on January 1, 2009. Here is a thumbnail description of the new law, which runs over 50 pages in print.

The Presumption of Access and Expanded Scope of Disclosure

The most important aspect of the new law is that it unambiguously presumes that any record in the possession, custody, or control of a government agency that relates to the agency's activities is a public record. The burden of proving that a record is not publicly accessible lies squarely with the government. The new law also expands the number of government entities that must publicly disclose their records and also extends to private entities that perform government functions.

For the first time, the Law covers legislative agencies, including the Pennsylvania General Assembly and the judiciary, although their disclosure obligations are more narrow than the requirements for executive branch and independent agencies.

At its core, the new law guarantees that the public has access to all government financial records, subject to several very limited exceptions. The law broadly defines "financial records" and mandates the Treasury Department to post state contracts (or summaries of contracts) worth at least $5,000 on its website. These measures go a long way to ensuring that the use of taxpayers' money and resources is truly transparent.

The new law does not provide the same transparency in other areas. It contains over 30 different provisions exempting various kinds of information from disclosure, and many of those provisions contain multiple exemptions. Several reflect common exemptions in state open records laws (for example, documents relating to homeland security and individuals' medical records). Others stem from the old law, including a broad criminal investigation exception. The new law also includes some troubling exceptions, with several that may give rise to substantial litigation if the government attempts to apply them broadly. For example, the new law exempts:

> Telephone numbers, email addresses, marital status, and even the name of someone's spouse;
>
> Documents "identifying the name, home address or date of birth of a child 17 years of age or younger";
>
> Records that reflect "the internal, predecisional deliberations of an agency, its members, employees or officials," including deliberations relating to "contemplated or proposed policy or course of action," as well as "any research, memos or other documents used in the predecisional deliberations"; and
>
> Records relating to "a noncriminal investigation," including complaints, "investigative materials," and records that "reveal the institution, progress or result of an agency investigation."

The new law also provides limited exceptions to some of the exemptions – for instance, a predecisonal document must be disclosed if it was presented at a meeting subject to Pennsylvania's Sunshine Act. And, if exempted information can be redacted, the government must produce a redacted public record.

(Continued on page 33)

RETURN TO TABLE OF CONTENTS

Pennsylvania Enacts New Open Records Law

(Continued from page 32)

Office of Open Records

The newly created Office of Open Records will provide a clearinghouse of information on implementing, enforcing, and exercising rights under the law. From a legal perspective, its most important responsibilities will be issuing advisory opinions interpreting the law and adjudicating appeals when Right to Know requests are denied.

Process for Requests / Appealing Denials

Once an agency receives a request, it generally must respond within five business days. (Under the old law, state agencies were given ten days to respond to requests.) In responding to a request, the government must produce a public record "in the medium requested if it exists in that medium." Otherwise, the record will be produced in the medium in which it exists, although the law permits electronic records to be printed on paper at the requester's expense.

The agency may charge "reasonable" duplication fees, and, for "complex and extensive data sets," agencies may charge "the reasonable market value of the same or closely related data," although the law exempts the press and nonprofit researchers from this provision.

When a request is denied, the requester may file an administrative appeal. If, however, there is no response, a request will be deemed denied, and the requester may seek judicial review immediately.

The route of an administrative appeal is determined by the agency that received the request and the type of document at issue. For most records, administrative appeals are directed to the Office of Open Records, but, when a request is denied by either the legislative or judicial branch, appeals must be filed with those branches. In contrast, if the request involves "criminal investigative records," the appeal is filed with the local district attorney or the Pennsylvania Attorney General. The parties also will have the option of mediating their disputes through a program to be developed by the Office of Open Records.

During administrative appeals, third parties may be permitted to intervene if they can show a "direct interest" in the contested record. All administrative appeals must be decided within 30 days. After the administrative appeal is decided, the losing party, including a government agency, may seek judicial review.

Conclusion

The new law is a marked improvement over the old law, particularly in light of the new presumption that records are open and the wider access to agencies' records. Nevertheless, the transition to the new law may prove to be a rough one as the government, courts, and litigants navigate the significant changes in its substance and procedure.

Michael Berry is an attorney in the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P.

RETURN TO TABLE OF CONTENTS

Bloggers And Prior Restraints

Cases Put Pressure on Traditional First Amendment Protections

Although prior restraints are extraordinarily rare, several courts have recently attempted to enjoin speech on the internet. The most striking example is this month's order in the WikiLeaks.org case (see page 7), but there are other recent unpublished cases involving bloggers shut down by courts. These cases involve people blogging about personal and public issues in a new medium that continues to put pressure on traditional First Amendment analysis and protection.

Blogging A Divorce

There is nothing new about spouses exchanging heated words during a divorce proceeding. What is new, with the advent of the Internet, is the ability to spread those words around the world. A recent divorce case from Vermont has garnered attention because of a bizarrely acrimonious blog created by the soon to be ex-husband.

Claiming that his wife abruptly left him after nine years of marriage and a recent cross-country move, William Krasnansky turned to the internet to air his grievances. His blog, lookatmypugs.livejournal.com, is a "work of fiction" that chronicles a failed marriage and impending divorce. In addition to his own writings, which are undoubtedly inspired by real life, he has also included quotes from his wife's diary and scanned copies of passages from it.

Claiming the blog was defamatory and a form of harassment, the estranged wife Maria Garrido asked a Vermont family court judge to order her husband to take down the blog. The judge agreed to do so without actually determining whether the blog was defamatory or an invasion of privacy.

The husband, however, refused to take it down. After another hearing the family court judge narrowed the order to only forbid the husband from posting his wife's diary entries. The judge recognized there may be a copyright infringement claim, but acknowledged that determining infringement was beyond the family court's jurisdiction.

Battling Ex-Spouses

The *MediaLawLetter* previously noted another prior restraint arising out of the bitter divorce dispute between Kristen Rhoad and ex-husband Phil Haberman. See "The Perils of Blogging: Harassment Law, Prior Restraints Applied to Fringe Bloggers," *MediaLawLetter*, Dec. 2006 at 36.

The couple met online (ironically) and divorced after a short marriage. Rhoad took to the web in a blog called "The Rhoad Warrior" to "warn" other women about her ex – accusing him about lying about his military record and "scamming" other women. Haberman accused his ex-wife of harassment and cyberstalking. A family court judge issued a spousal restraining order against Rhoad – but added an injunction ordering her to remove, or cause to be removed, all postings about her ex. The judge apparently gave short shrift to Rhoad's claim that all the information on the blog was true.

Rhoad appears to have disregarded the order and her accusations against her ex-husband have also been posted to numerous third party blogs. When the battle caught the attention of the media, Haberman tried but failed to get an injunction against the Sarasota, Florida weekly newspaper *Creative Loafing* to stop it from publishing an article about the controversy. But Family Court Judge Robert B. Bennett granted a new order against Rhoad – now living in California – directing her to remove postings from a list of websites where her accusations appear. These include newspaper run blogs and forums from the *Las Vegas Review-Journal* and the (weekly) *Dallas Observer*.

After the order was ignored, and Rhoad failed to appear for a contempt hearing, Judge Bennett issued an arrest warrant – though it is not clear whether that can be enforced in California. *Haberman v. Rhoad*, No. 2006 DR 007754 SC (Fla. Cir. Ct., Family Div. order Jan. 29, 2008).

Custody Battles Online

Retired Reverend Anne Grant, a former director of a shelter for battered women, created the blog "Custody Scam" (custodyscam.blogspot.com), where she accused the Rhode Island Department of Children, Youth and Families ("DCYF") of mishandling a child custody case -- a clear issue of public concern, at least for the mainstream press.

She accused DCYF of removing a child from her mother's care and placing her with her father, who had been accused of sexual

(Continued on page 35)

RETURN TO TABLE OF CONTENTS

Bloggers And Prior Restraints

(Continued from page 34)

abuse. On the blog, Grant published a photograph of the girl and her sister, but did not identify them by name.

The family court judge overseeing the custody dispute ordered DCYF to "advise" Grant that she should take down her blog post on the dispute.

> DCYF, as temporary custodian of the children, is to advise Anne Grant, author of ww.custodyscam.blogspot.com, to remove any and all written and pictorial information pertaining to the children in the above matter, from the inception of publication to the present and henceforth, and to cease publication of the blog as it pertains to these children. That mother and father are ordered to facilitate cooperation in this process.

DCYF warned that if Grant did not comply, the agency would bring the matter back before the family court. Grant took down the blog post. She tried to appeal the family judge's order but the Rhode Island Supreme Court declined to review the case.

'Liberty City Seven' Gag Order

A more commonly accepted limit on speech gag orders that restrict the speech of litigants and counsel. However, a federal judge in Florida recently extended a gag order to a blog that was commenting on a criminal case.

The "Liberty City Seven" are men from Miami who were charged with attempting to aid al Qaeda in terrorist plots against the Sears Tower in Chicago and the FBI building in Miami. In their recent trial in a Florida federal court, one of the men, Lyglenson Lemorin, was acquitted. There was a mistrial for the other six defendants.

Following the mistrial, the judge imposed a gag order pending retrial of the remaining defendants. The gag order applied to witnesses, defendants, counsel – and the acquitted defendant Lemorin and his trial lawyer John DeFabio. A new lawyer was engaged to challenge the gag order against Lemorin. The lawyer, David O. Markus, publishes the "Southern District of Florida Blog" where he analyzes cases of interest before federal courts – including the Liberty City Seven case.

On January 10, the federal district judge hearing the criminal case extended the are gag order to "DeFabio's agents." In caution Markus assumed that this included him and shut down his blog.

After shutting down the blog, Markus filed a motion to clarify whether in fact he was an "agent." In the interim, another blog, "Justice Building", stepped in to continue discussing the case while the motion was pending.

On January 24, the district court judge ruled that Lemorin's lawyers cannot publicly discuss facts relating to the underlying criminal charges. David Markus filed an appeal to the Eleventh Circuit to overturn the gag order on First Amendment grounds.

RETURN TO TABLE OF CONTENTS

FCC Revises Indecency Fine Over 2003 Show 'Married by America'

Fines Only For Stations Where Complaints Were Made

The FCC this month revised an indecency fine over the 2003 reality show "Married By America." *In the Matter of Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married By America" on April 7, 2003*, No. EB-03-IH-0162 (FCC Feb. 22, 2008). The FCC had originally proposed fining 169 Fox affiliates $7,000 each (a total of $1,183,000) for airing the show. The FCC reaffirmed its finding that the show was revised the fine to cover 13 stations where complaints were actually made, reducing the fine to $91,000.

Background

In the spring of 2003, Fox stations aired the unscripted reality show *Married by America*. The premise of the show was that singles would have their friends and family select possible grooms or brides for them, and then viewers would vote on the individual best suited for them to marry.

The episode in question featured bachelor and bachelorette parties for the potential grooms and brides. The FCC describes the material in question as involving strippers, whipped cream, dancing, and naked, but pixilated, body parts. An example of what occurred at the parties: "She [a stripper] is then shown lying topless on a couch, cupping her breasts with her hands as a bride-to-be straddles her." As the FCC describes it, the show bounced between the bachelor and bachelorette parties, each with provocative scenes.

FCC Fine

In 2004, the FCC issued a Notice of Apparent Liability to 169 stations that aired the *Married by America* episode. Stations then filed their responses with the FCC. After considering the responses, the FCC issued its forfeiture order on Feb. 22. The order comes just as the five year time limit to collect fines is set to expire.

Determining whether the stations violated the FCC's indecency standard, the Commission utilized its three part test stemming from *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978): is the material indecent, as defined by the FCC, was it "dwelled upon" and finally, whether the material was presented in such a way as to pander and titillate.

The Commission had no difficulty finding that the episode "describe[d] or depict[ed] sexual or excretory organs or activities." Overt activities, such as licking whipped cream and suggestive dancing, constituted "sexual activities." The FCC also found that the material displayed sexual organs, even though they were pixilated. Despite the television stations' argument to the contrary, the FCC found that "full exposure" of sexual organs has never been required.

The stations also argued that even if the material was indecent, it was only fleeting. Judging the scenes to comprise six minutes of airtime, the Commission rejected the fleeting argument. Instead, the FCC found that the show had dwelled upon the sexual material. Indeed, as the FCC pointed out, the focus of the entire episode was to entice the would-be brides and grooms into sexual encounters with the strippers.

The premise for the episode also led the Commission to find that the material was "presented in a pandering and titillating manner"

The FCC also rejected a vagueness and overbreadth defense. The indecency test is not vague as it is fairly the same as the one announced by the Supreme Court in *FCC v. Pacifica*. The overbreadth argument also failed, for two reasons. First, mandating that indecent material not be shown before 10 p.m. is not overbroad as it still allows plenty of hours when adults are watching television to air indecent material. Second, the FCC found that the V-chip was not a viable alternative to indecency regulation, and thus there were no alternatives that rendered the test overbroad.

Separate from the indecency and constitutional issues, the Fox affiliates argued that they could not be held liable because they did not have time to review the program. In this respect, they argued that a reality show with audience participation was more like a live event than a scripted series. However, the FCC found that even if they did not have the luxury of several weeks of pre-broadcast review as they do with scripted series, they still had enough time to review.

RETURN TO TABLE OF CONTENTS

Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

By Peter Bartlett

September 11 and Beyond

The world watched in horror as the events of September 11 unfolded. Since then London, Spain, Bali and many other places have been attacked. Many other places have feared that they are next on the list.

Since September 11, we have seen levels of security that we would not previously have contemplated. Entering office buildings, sporting venues, airports continually confirms to us that the world has changed. Anti-terrorist legislation has been introduced in many countries.

Some say that aspects of that legislation go too far.

The threat of a terrorist attack and the war on terror create some novel issues for journalists and in turn their lawyers.

Extensive media coverage of terrorism, through newspapers, television, radio and the Internet, remains a motivation for terrorist attacks. In the words of political analyst Walter Laqueur, "classic terrorism is propaganda by deed, and propaganda is impossible without the use of the media."[1] Given the global nature of contemporary media, international and domestic terrorists have the opportunity to spread their propaganda more widely, endeavouring to gain the attention of governments and the public far beyond the immediate area of their target.[2]

Frighteningly, the modern terrorist is aware that the visual medium of television, with its immediacy and capacity to reach millions of people, should dominate their planning. The attacks on the World Trade Centre are examples of this. The method, timing, scope and target of these attacks were planned to gain maximum media coverage. The terrorists could have struck at night, but instead chose to strike in broad daylight, not only to cause as many deaths as possible, but also to highlight the spectacular images of fire and smoke.[3] The first plane hit the north tower at 8:46 a.m. and the second hit the south tower approximately 17 minutes later, at 9:03 a.m..[4] This provided the media networks time to have their cameras trained on the smoke billowing from the north tower at the precise moment the second plane struck. The television footage of the second plane hitting the south tower has been aired countless times. Moreover, the vision of the buildings imploding has become another devastatingly destructive image etched into the mind of the public. After days of watching these catastrophic events live on television, it seemed as if it were happening in our own backyard. As one commentator highlighted, "From the terrorists' point of view the attack on America was a perfectly choreographed production aimed at American and international audiences."[5]

An added tragedy of September 11 is that the media, doing their job and graphically reporting the news, lifted the profile of al Qaeda and Osama bin Laden.

The media lawyers' role is to advise the client on the legal issues. Do media lawyers have a duty to raise any related ethical issues, including:

Should the media afford terrorists 'front page' coverage, even if this might encourage future terrorist attacks?
The likelihood of media-savvy terrorists manipulating the media;

Should journalists be allowed to keep their sources confidential, even if information they have would help police to prevent a terrorist attack?

Racial prejudices of journalists;
The need to control terrorists' access to information;
Covering terrorist kidnappings: What if the victim is a colleague or a friend?

Competition for profits and finding 'the scoop';
Guantanamo Bay;

Media coverage after an alleged terrorist is charged.

Should the media afford terrorists 'front page' coverage, even if this might encourage future terrorist attacks?

It is clear that "terrorism and the media are bound together in an inherently symbiotic relationship, each feeding off and exploiting the other for their own purposes."[6]Margaret Thatcher once observed that the media supplies "the oxygen of publicity on which [terrorists] depend."[7]

From a terrorist's perspective, terror without publicity achieves relatively little. Terrorism is often a desperate action of the weak,[8] therefore it is "only by spreading the terror and outrage to a much larger audience [that] terrorists gain the maximum leverage that they need to effect fundamental political change."[9] Recently, television (and to a lesser extent other forms of media) has allowed the general public to watch terrorist activities as they unfold, and/or the immediate aftermath. Consequently, the media has increased the terrorists' power, as "without the media's coverage, the act's impact is arguably wasted, remaining narrowly confined to the imme-

(Continued on page 38)

RETURN TO TABLE OF CONTENTS

Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

(Continued from page 37)

diate victim(s) of the attack, rather than reaching the wider target audience at whom the terrorists' violence is actually aimed."[10]

The terrorists' want, or need, for media coverage raises one of the major ethical issues for the media and their lawyers – whether or not to provide terrorist organisations with the benefits of front page and headline coverage.

On one hand, many fear that the front page coverage that terrorism currently attracts provides violent groups with the opportunity to have their ideology heard globally. Just as frighteningly, such extensive international coverage may encourage other groups to perpetrate attacks, as they become aware of the global attention that terrorism will attract.

On the other hand, many journalists argue that "what the public needs from the media, more than ever in the age of terror, is fewer ethical gatekeepers and more reporters."[11] Even though such journalists understand the power that the media affords terrorists, they assert that the public has a right to be informed. In other words, according to democratic freedoms, the profession should not be restricted from reporting important world events. "The public's right to information [is a] fundamental principle of journalism."

The point was well made in my country. *The Australian* newspaper, in its editorial on 10 November 2005, asserts:

> We believe our first responsibility is to our readers, who have a right to know absolutely everything we can find out for them about the terror threat and Australia's response to it. Obviously, there are other responsibilities that can moderate this, including national security and respect for the legal rights of individuals, including their right to a fair trial. But the right of our readers to the best of our reporting and analysis, as unfiltered by other considerations as possible, has always been paramount.[12]

The ethics of journalists are relevant here. There are generally recognised standards that judge the news value of a story. If a story has strong news value according to those recognised standards, then prima facie it should be published prominently unless there is a 'clear and present danger' that overrides the duty to publish.

Such a situation would be very rare. I have seen it twice: where there was a threat to poison a city's water supply, and where there was an extortion threat against Qantas. In both cases the media delayed publication for 24 hours at the request of the authorities. In both cases the extortionist was apprehended within that time frame.

The threat of media-savvy terrorists manipulating the media.

As a result of excessive media attention, "for the media-savvy terrorist, the conditions are ripe for exploitation."[13] Astute terrorist organisations find their own niche ways to use the media to spread their propaganda. An example is al Qaeda's use of al Jazeera[14], an Arab-language news channel, to air their dogmatic ideology. Through al Jazeera, al Qaeda has created a persona surrounding Osama bin Laden, who has become the international face of terrorism in the West.

Other examples of terrorist organisations manipulating the media are the many small Islamic terrorist groups who attribute their own terrorist attacks to al Qaeda, having learned that this will ensure the benefits of front-page coverage.

A further fear is that sometimes the statements of masterminds of terror, which are disseminated around the world, are coded messages that are understood by their supporters around the world. If true, this would be manipulation of the media at its best. However, many believe that this is highly unlikely.

Finally, the U.S.A., which has been described as a "media centre,"[15] is a particular target for terrorist exploitation of the media. If an attack is on U.S. soil, or the victims are US citizens, then the violence will certainly gain more global attention, and terrorists know this. For example, in 1985, TWA flight 847 was hijacked by Lebanese Shi'a. During the first few days of the hostage crisis, the perpetrators released all hostages that were not of U.S. citizenship, retaining only 39 American men.[16] Consequent public demand led to live coverage of the events throughout the entire 17-day crisis. During this period, the three major U.S. television networks (ABC, NBC and CBS) aired nearly 500 news segments concerning the developing hostage situation.[17] It appears that the hijackers cleverly chose to retain Americans to harness the maximum media coverage.

Spin doctors are paid to manipulate the news to put the best possible spin on a story for their clients. It often takes a lot of time for a reporter to cut through the spin, to get the real story. There are many examples of reporters not having the time or energy to get through the spin.

Terrorists, their lawyers and even the law enforcement agencies seek to use the media. On very rare occasions the media lawyer can suggest that there is perhaps another side that could be heard or

(Continued on page 39)

Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

(Continued from page 38)

another argument that could be considered.

Should journalists be allowed to keep their sources confidential, even if information they have would help police to prevent a terrorist attack?

Many argue that terrorist laws do not strike the correct balance between protecting the administration of justice and recognising the ethical obligation of journalists to protect confidential sources.

There are now serious sanctions under anti-terrorism legislation for not informing police of information that journalists have about terrorism. Law enforcement agencies can seek to compel journalists to produce documents or disclose sources. This can place the journalist, the media company and the lawyer in a difficult ethical position.

Media lawyers need to assist journalists to protect their sources. In the rare situation where there is a "clear and present danger" to public safety, the journalist, the media company executives and the lawyer would need to carefully review the options.

Racial prejudices of journalists.

Has 9/11 resulted in media coverage of issues being more anti Muslim than they would have been prior to 9/11?

Some would argue that what actually constitutes a terrorist attack can be difficult to categorise, as "one man's terrorist is another man's freedom fighter." Sometimes it may be difficult to decide who is and who is not a terrorist or what is or is not a terrorist attack!

Where the media lawyer sees unbalanced reporting pre-publication, is there an obligation to mention it?

This is a difficult issue for a lawyer. Any personal prejudices we may have should not come into our advice. Our charter is to advise the client on the relevant legal issues, the legal risks. Our charter is not to advise on editorial issues unless they are relevant to legal issues. That said, our media clients rely on the strength of their masthead or brand name. The reputation of that brand name could be damaged by unbalanced reporting. In the rare occasion where we are particularly concerned about an unbalanced article pre-publication, we may feel inclined to say something to the in-house lawyer or editorial executive. We would feel more inclined to say something if we have a very strong relationship with that in-house lawyer or executive.

The need to control terrorists' access to information.

A further ethical issue for journalists and media lawyers is that reports of terrorist activities, and more importantly the police response to terrorism and detail of police investigations, can give terrorists information which they would otherwise not have had. For example, on 4 November 2005 *The Australian* newspaper ran a story on the alleged terrorists in Melbourne and Sydney (ignoring the request of the Australian Federal Police to not run the story), which led to one of the key suspects evading capture for a few days and destroying what might have been vital evidence of his involvement in illegal activities.[18]

This is more an editorial decision rather than one for the media lawyer.

Covering terrorist kidnapping: What if the victim is a colleague or a friend?

Kidnapping has long been used by terrorists. Like any other kind of terrorism, kidnapping attracts media coverage. However, reports in the media often make it more difficult to negotiate the victim's release.

The pressure intensifies when the person kidnapped is a journalist.[19] For example, when Associated Press reporter Tina Susman was kidnapped in Somalia, Judith Matloff (a journalist working for Reuters in South Africa) was asked by a mutual friend at Associated Press not to report anything on the kidnapping of Susman, fearing publicity could endanger negotiations. Matloff did not publish anything about the kidnapping. Susman was eventually released unharmed.

Should the media lawyer raise such issues with Media Executives?

I would have thought that if the media lawyer has a strong view, the media executive would welcome hearing it even if he or she does not agree with that view.

Competition for "the scoop."

Hoffman writes in *Inside Terrorism* that "as the [TWA flight 847] hostage crisis dragged on day after day, at times with seemingly little or no progress towards a resolution, the vast media resources deployed for just this one story had to find or create "news" to justify the expense of continued presence."[20]

Except in extraordinary circumstances, I do not think that this raises ethical issues for the lawyer.

Guantanamo Bay

(Continued on page 40)

RETURN TO TABLE OF CONTENTS

Ethics Corner: The Ethical Issues That Terrorism Poses To Media Lawyers

(Continued from page 39)

Should journalists restrict the exposure they give to people held in Guantanamo Bay?

Should they restrict coverage of conditions at Guantanamo Bay? Should they restrict exposure of alleged human rights abuses to that disclosed in the US Supreme Court?

This is a paper on ethics, not politics. The war on terror has placed huge pressure on law enforcement agencies. Their track record is pretty good. That said, if there is evidence of human rights abuses or evidence that allege terrorists do not have appropriate access to independent legal advice, the media has a duty to publish that material and media lawyers have a duty to assist the media by alerting them to legal and associated risks.

Media coverage after an alleged terrorist is charged

In January this year, the head of the Australian Federal Police claimed that the public's right to free speech should be delayed after a person is charged, to ensure a fair trial. He claimed that the right of the alleged offender to the presumption of innocence should take precedence over the public interest in knowing how the investigation was conducted and over the media's right to freely discuss elements of the crime and the police investigations. He added that the media's coverage was often inaccurate or ill informed.

Political leaders have distanced themselves from this claim and there have been calls for the police chief to resign. The comments do illustrate, however, the tension between law enforcement agencies focussed on protecting the public and in so doing, their aversion to undue publicity and the media seeking to keep the public informed. The media lawyers' role is to advise the media how far reporting of such issues can go, without breaching any terrorism related legislation or contempt laws.

Conclusion

The police and security forces around the world face extraordinary challenges. Their track record is impressive.

There are occasions, rare occasions, when journalists (sometimes advised by internal or external counsel) quite properly consider whether a story should be delayed or spiked permanently, as part of the war on terror. Terrorism attacks or threats and related police investigations raise novel issues. The media and media lawyers need to consider on rare occasions, not just the legal risks but the potential consequences that may follow from that article or broadcast.

Peter Bartlett is a partner with Minter Ellison in Australia. Ollie Howard assisted in the preparation of this article.

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RETURN TO TABLE OF CONTENTS

MLRC Calendar

PLEASE VISIT WWW.MEDIALAW.ORG FOR MORE INFORMATION

May 15-16, 2008
Legal Frontiers in Digital Media
2008 MLRC/Stanford Digital Media Conference
Stanford University, Stanford, CA

September 17-19, 2008
NAA/NAB/MLRC Media Law Conference
Chantilly, VA

November 12, 2008
MLRC ANNUAL DINNER
New York City

November 13, 2008
*MLRC Defense Counsel Section Annual Meeting and LUNCH
(tentative date)

RETURN TO TABLE OF CONTENTS