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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through February 28, 2009

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First Circuit Holds Truth Not an Absolute Defense in Private Figure/Private Concern Case

Massachusetts Law Provides for Liability for Malicious Statements; Rehearing Requested

In a startling ruling, a unanimous three-judge First Circuit panel hearing an employment libel case held that truth is not an absolute defense in private figure / private concern cases under Massachusetts law. *Noonan v. Staples, Inc.*, No. 07-2159, 2009 WL 350895 (1st Cir. Feb. 13, 2009).

The plaintiff in the case, a former Staples salesman, was fired for padding his expense reports. A Staples manager sent an e-mail to approximately 1,500 employees stating "It is with sincere regret that I must inform you of the termination of Alan Noonan's employment with Staples. A thorough investigation determined that Alan was not in compliance with our [travel and expenses] policies."

Even if true the e-mail could be actionable if published with intent to harm the plaintiff

The First Circuit found that even if true the e-mail could be actionable if published with intent to harm the plaintiff. In an opinion written by Judge Torruella, and joined by Judges Lipez and Wallace (sitting by designation from the Ninth Circuit), the court relied on a Massachusetts state statute last amended in 1902 entitled "Truth as justification for libel." The statute provides that:

> The defendant in an action for writing or for publishing a libel may introduce in evidence the truth of the matter contained in the publication charged as libellous; and the *truth shall be a justification unless actual malice is proved*. Mass. Gen. Laws ch. 231, § 92.

The opinion considers at some length the construction of the statute, concluding that given its age the phrase "actual malice" must refer to "malevolent intent or ill will." In contrast, the constitutional implications of the decision were dealt with in a short footnote. The court noted a more recent decision by the Massachusetts Supreme Court holding the statute unconstitutional when applied to private figure cases involving a matter of public concern. *See Shaari v. Harvard Student Agencies, Inc.*, 427 Mass. 129, 691 N.E.2d 925, 927 (Mass.1998). But it rejected defendant's argument that falsity is required in all defamation cases, finding "this argument is not developed now and was not raised in the initial briefing." 2009 WL 350895 at *5 n. 7.

Although the Supreme Court has never addressed the constitutional standards for private figure / private concern claims, MLRC is not aware of any other recent case holding that truth is not an absolute defense. The issue of liability for true statements has come up ironically in the context of criminal libel statutes. Many state criminal libel statutes were written to provide that truth was a defense if the statements were made with good motives and justifiable ends.

Several state criminal libel statutes have been struck down for failing to provide for truth as an absolute defense. The most recent decision is *Parmelee v. O'Neel*, 186 P.3d 1094 (Wash. App. 2008). The appeals court held that the archaic state criminal libel statute was facially unconstitutional and overbroad because it "prohibits true speech and false speech made without actual malice." The court in *Parmelee* reached the constitutional issue even though it was apparently not raised at trial under its authority to consider "manifest constitutional errors for the first time on appeal."

Staples filed a motion for rehearing en banc on February 27, 2009. Briefs in support of the motion are due before March 6. A media amicus effort is being coordinated by Robert Bertsche of Prince, Lobel, Glovsky & Tye, LLP who can be contacted for further information.

Seventh Circuit Affirms Summary Judgment for *Freakonomics*

Innocent Construction Rule Applied to Criticism of Academic

By Laura M. Leitner

On February 11, 2009, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment dismissing a libel suit brought against HarperCollins Publishers LLC and Steven Levitt, the publisher and author respectively of the best-selling book *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything*. The action was brought by John Lott, a controversial academic and economist, who considered a passage in the book about his theory on gun control laws to be defamatory *per se*. In *Lott v. Levitt*, No. 07-3095, 2009 WL 322148 (7th Cir. Feb. 11, 2009), in an opinion by Judge Evans, the court upheld the dismissal of plaintiff's complaint, holding that plaintiff had waived his choice of law argument, and that the passage was reasonably capable of an innocent construction, and thus, was not defamatory *per se*.

To the extent that Lott was complaining about an academic attack on his ideas, the court said, he should publish a rebuttal, not file a lawsuit.

Factual Background

Freakonomics (written by Levitt and Stephen Dubner, who was not a defendant in this case) is a best-selling book about economics, but it does not involve the usual academic and technical analysis. Instead, it sets out to redefine the way people view the modern world, by following whatever random curiosities occur to its authors. It asks questions such as: "What do schoolteachers and sumo wrestlers have in common?", "Why do drug dealers still live with their moms?", and "How is the Ku Klux Klan like a group of real estate agents?" The book does not conclusively resolve these questions, but seeks to entice the reader to ask more of them. Along the way, it employs a "treasure-hunt" approach, relying on storytelling, statistics and history to explore various social phenomena.

Lott is an economist and author of several books on gun control. He is an advocate of the view that less stringent gun control laws lead to less crime. The book addressed this theory, and stated that other scholars had been unable to replicate his results.

Procedural Background

Lott's primary cause of action was for libel *per se* based on the passage. Lott claimed that the passage amounted to an accusation that he had falsified his results. Lott also brought a second cause of action solely against Levitt based on an e-mail sent by Levitt to an economist in Texas regarding Lott's economic theories.

The defendants moved to dismiss, and on January 11, 2007, the district court dismissed with prejudice the first count on the grounds that under the Illinois Innocent Construction Rule, the words complained of did not have an exclusively defamatory *per se* meaning. But Judge Ruben Castillo of the U.S. District Court for the Northern District of Illinois denied the motion to dismiss as to the second count (relating to the email). On July 27, 2007, a few days before very extensive discovery was to end leading up to a trial in October, Lott and Levitt agreed to settle the second count. On that same date, however, Lott moved for reconsideration of the dismissal of his first cause of action (which had occurred over six months previously), and on July 30, 2007, he filed a motion for leave to file an amended complaint, arguing for the first time that Virginia (not Illinois) law applied. The district court denied both motions and dismissed the action in its entirety on August 23, 2007. Lott appealed from the judgment dismissing the case.

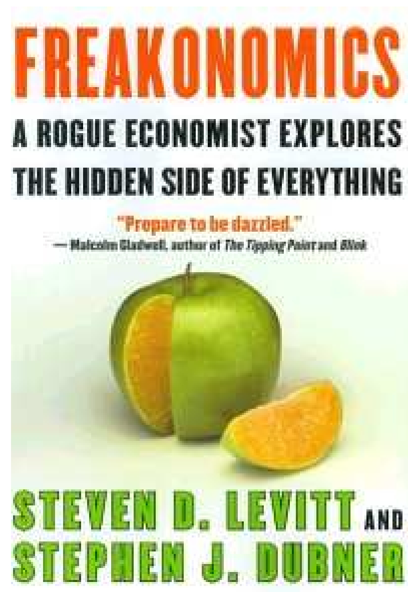
The Decision

The Seventh Circuit first examined the choice of law issue, and held that Lott had waived his argument that Virginia law should apply by stating in his initial response to the defendants' motion to dismiss that he agreed that Illinois law should apply. Lott also cited Illinois cases in that response, without citing a single Virginia case. The Seventh Circuit, in finding that Lott was now bound by the decision to apply Illinois law, noted that "[t]he principle of waiver is designed to prohibit this very type of gamesmanship – Lott is not entitled to get a free peek at how his dispute will shake out under Illinois law and, when things don't go his way, ask for a mulligan under the laws of a different jurisdiction."

Having determined that Illinois law applied, the court then refused to "water down" Illinois' innocent construction rule by adopting Lott's argument that a defamation claim should be permitted to proceed if it was reasonably susceptible of a defamatory interpretation. Instead, the court followed the recent reaffirmation of the innocent construction rule by the Illinois Supreme Court in *Tuite v. Corbitt*, 866 N.E.2d 114 (Ill. 2006). That rule provides that if a statement has any reasonable, non-defamatory meaning, then a court must accept that non-defamatory meaning and the statement cannot be defamatory *per se*. The court noted that this was particularly appropriate in defamation *per se* claims, where damages are presumed.

The court then found that the book was capable of an innocent construction. Because *Freakonomics* was written for lay people, not academics, and because it could be interpreted to mean that others had tried to reach the same conclusions as Lott "using different models, data, and assumptions", it did not necessarily imply that Lott had falsified his data. Rather, the court found that the passage could be read to mean that Lott disagreed with other scholars on the relationship between guns and crime. The court also focused on the fact that the passage describes Lott's "idea", "theory", and "hypothesis" without mentioning his methodology or data; the court said that in this context, the statement was logically read as "a critique on [Lott's] theory, rather than an accusation of falsifying data." To the extent that Lott was complaining about an academic attack on his ideas, the court said, he should publish a rebuttal, not file a lawsuit.

Finally, the court held that Lott could not state a claim for defamation *per quod* because he had failed to plead special damages. Accordingly, the court unanimously affirmed the district court's dismissal of the case.



Laura M. Leitner is an associate at Hogan & Hartson LLP in New York City. Defendants HarperCollins Publishers LLC and Steven Levitt were represented by Slade R. Metcalf of Hogan & Hartson LLP, New York City, Gail C. Gove (formerly of Hogan & Hartson LLP, New York City), and David P. Sanders of Jenner & Block L.L.P., Chicago. John Lott was represented by Paul E. Freehling and Mark Johnson of Seyfarth Shaw LLP, Chicago.

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October 1-2, 2009

Stationers' Hall, London

International Developments in Libel, Privacy Newsgathering and New Media IP Law

Keynote Address: Lord Hoffmann, House of Lords
Speech by Justice Ruth McColl, Supreme Court New South Wales Australia
In-House Counsel Breakfast on practice and management issues
Delegates receptions on September 30th and October 1st

Discussion topics include:

- Liability for third-party content posted online in the UK and Europe
- Libel Terrorism Protection Acts and enforcement of judgments
- The right to be left alone in public – the continuing evolution of the Princess Caroline privacy decision
- Reporting on terrorism: How has the fight against terrorism impacted reporting?
- Fair use and fair dealing in the digital media environment

Registration Materials Will Be Sent to MLRC Members in March

For information contact Dave Heller at dheller@medialaw.org

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Virginian-Pilot Wins Libel Trial on Directed Verdict

Plaintiff Failed to Present Sufficient Evidence of Falsity or Negligence

By Brett A. Spain

In January, a Virginia trial court granted the equivalent of a directed verdict in favor of the *Virginian-Pilot* newspaper in a libel case over an article reporting allegations of misconduct against the owner of homes for mentally disabled adults. *Erb v. Landmark Communications*, (Virginia Beach Cir. Ct. Jan. 15, 2009).

After the plaintiff presented his case over three days of trial, Judge Patricia L. West granted the newspaper's motion to strike the case, finding no evidence of falsity or negligence to send the case to the jury.

Background

The plaintiff, John Erb, filed suit seeking $7 million, including $350,000 for punitive damages, based upon a story that appeared in *The Virginian-Pilot*. This story concerned the licensing of group homes for adults with mental disabilities. In Virginia, the care for mentally disabled adults has primarily been left in the hands of private individuals operating group homes pursuant to licenses received from the state. The story that led to the lawsuit reported on four homes in the Hampton Roads area that were operating under a "provisional license," a status which may lead to a revocation.

The plaintiff is the owner and executive director of Silver Lining, one of the four homes discussed in the article. At the time the article was written, Silver Lining was operating under a provisional license after having been cited for a number of violations of the state regulations. These violations included both minor administrative issues as well as two serious allegations that the plaintiff had inappropriately touched a resident on his upper thigh, and that the plaintiff and his home failed to provide medical care in the period leading up to the death of another resident.

Conceding that the first allegation had been made, the plaintiff did not sue the newspaper based on the reporting of that allegation. Rather, the lawsuit focused on the allegations regarding the death of the resident. The plaintiff identified two statements as being false and defamatory: "State officials also found that Erb and staff did not properly follow procedures in the death of a resident at the home on May 17th," and "An investigator found that Erb did not seek medical care for the resident leading up to his death."

The court granted summary judgment as to the first statement based upon investigation reports provided by the state, but denied summary judgment as to the second statement, finding that a factual issue existed as to whether the plaintiff was responsible for failing to provide medical care to the resident given that he was not in town on the day that the resident died.

Directed Verdict for Newspaper

After three days of trial in Virginia Beach Circuit Court, which began on January 13, 2009, the court granted the newspaper's motion to strike finding that the plaintiff had failed to provide sufficient evidence from which a jury could conclude that the allegedly defamatory statement was false or that the newspaper acted with negligence in publishing the statement.

During the trial, the plaintiff conceded that the state investigator had found that the "Provider" had failed to provide medical care in the three weeks leading up to the resident's death. The plaintiff also conceded that the investigation reports showed that the term "Provider" meant either the plaintiff or the plaintiff and his staff.

Although the newspaper argued that the plaintiff was a limited purpose public figure based upon his petitioning activities against local and state officials in which he claimed that the state was retaliating against him after illegally removing another resident from his home, the court avoided that issue and determined that, even under a negligence standard, the plaintiff had failed to provide sufficient evidence to show that the newspaper acted negligently.

Conrad M. Shumadine and Brett A. Spain of Willcox & Savage, P.C., Norfolk, Virginia, represented Landmark Communications, publisher of the Virginian-Pilot. Plaintiff acted pro se.

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New MLRC Bulletin Examines Media Trials and Damages in 2008

Long-Term Trend of Fewer Trials, Increasing Media Victory Rate Continues

The long-term trend of fewer media libel and privacy trials and an increasing defense victory rate, continued in 2008, according to the latest edition of MLRC's annual Report on Trials and Damages. Published this month, MLRC Bulletin 2009:1 analyzes the media libel and privacy trials of 2008 and the statistical trends in trials since 1980 when MLRC began compiling trial data.

There were only six media libel trials in 2008, tying the previous low number of trials in a single year, reached in 2002. This past year, media defendants won three and lost three trials.

Trials of 2008 -- Defense Verdicts

Dixon v. Martin, (Texas Dist. Ct. jury verdict July 11, 2008).

A Texas state court jury returned a verdict in favor of the publishers of a local newsletter over statements accusing plaintiff, an ordained minister and local public official, of giving out "beer and $" to get votes for a local political candidate.

Donnell v. Lake County Record-Bee, (Cal. Super., Small Cl. Ct. bench verdict Dec. 3, 2008).

A smalls claims court judge ruled in favor of a local newspaper sued over a guest commentary that accused a home association board of acting illegally.

Flippen v. Gannett Co., Inc., (Ohio C.P. jury verdict Sept. 26, 2008).

On Ohio state jury returned a verdict in favor of a local newspaper in a private figure libel suit over an article that erroneous reported that plaintiff was indicted for unlawful sexual contact with a minor.

Trials of 2008 – Plaintiff Verdicts

Gardner v. Stokes, (Mont. Dist. Ct. jury verdict Sept. 17, 2008).

A Montana state jury returned a $3.8 million verdict in favor of two public figure plaintiffs, (prominent local business owners) in their libel claim against a radio station owner who accused plaintiffs of bank fraud and perjury in connection with a prior property dispute between the parties. A defense motion for a new trial is pending.

Maynard v. Tribune-Star Publ. Co., (Ind. Cir. Ct. jury verdict July 24, 2008).

An Indiana state jury returned a $1.5 million verdict in favor of a public official policeman over newspaper articles reporting allegations that he abused a women during a traffic stop by suggesting she could get out of a ticket by exposing herself to him. The jury awarded $500,000 in compensatory damages and $1 million in punitive damages (75 percent of which goes to a violent crime victims' fund under Indiana law.) An appeal is pending.

Mazetis v. Enterprise Publishing Co., (Mass. Super. Ct. jury verdict Dec. 9, 2008).

A Massachusetts state court jury awarded a public official court officer $28,000 in damages over a newspaper article that suggested plaintiff refused to help and was rude to a handicapped lawyer. A defense motion for judgment notwithstanding the verdict is pending.

Increasing Success Rate at Trial

MLRC's Report on Trials and Damages shows a trend of increasing success at trial for media defendants. In the 1980s, media defendants won 36.8 percent of verdicts; that rose to 40.4 percent in the 1990s and has continued to rise to 53.6 percent so far this decade.

At the conclusion of all proceedings – after trial, post-trial motions, and appeals – defendants totally won in 56.6 percent of cases, meaning that plaintiffs ended up with no damages in these cases. In 6.8 percent of cases, plaintiffs ended up winning some damages, but less than the amount initially awarded at trial. And plaintiffs fully won 19.1 percent of cases, meaning that the initial damages amount awarded to them after trial survived through to the end of the case.

Results of cases in MLRC's Trial database, as reported in this year's Report on Trials and Damages.

New York Court Applies Broad Protection for Opinion in Dismissing Libel Action against Hearst

By Jonathan Donnellan and Courtney O'Connor

The New York State Appellate Division, Third Department reversed a trial court order denying Hearst's motion to dismiss a defamation action against the *Albany Times Union*. Bonanni v. Hearst Communications, Inc., No. 505007 (NY App. Div. 3d Dep't Jan. 29, 2009). The appellate court found that, under New York law, the context of an article can lend even apparently factual statements the character of opinions, thereby protecting them from defamation suits.

Background

Plaintiff William Bonanni, a police officer for the City of Albany, sued Fred LeBrun and the *Albany Times Union* for defamation stemming from two columns authored by LeBrun. The first column was titled "This Police Officer's Departure Would Be Plus for Department" and called for Bonanni's dismissal from the police force because he drank alcohol before going on duty in late 2006. The column cited the allegation that Bonanni reported for duty under the influence of alcohol and Bonanni's history of administrative leave and suspension from the police force, including for an off-duty beating of a college student and the accidental shooting death of a bystander during a police chase of a suspect.

The second column was titled "Police Union Should Accept Chief's Alcohol Policy." The gist of the second column was LeBrun's opinion that the Albany police union should accept the Chief of Police's policy that police officers cannot drink alcohol within eight hours of going on duty. LeBrun also stated that the union should not block the Chief's attempt in a then-pending arbitration to fire Bonanni for violating the alcohol policy. The second column again raised the issue of Bonanni's intoxication at work, reiterated that Bonanni spent many years on administrative leave or suspension, and called for Bonanni's removal from the police force.

Bonanni's lawsuit alleged that statements in the columns were false and published with actual malice. Specifically, Bonanni alleged that he was defamed by LeBrun's assertions that he was intoxicated at work, that a police officer, and that he did not deserve the support of the police union. Defendants moved to dismiss the complaint for failure to state a cause of action, asserting, among other things, that the statements made in the columns were non-actionable opinion.

In its order denying the motion to dismiss, the trial court identified one statement from each column that it determined was factual. Specifically, the trial court latched onto (1) "an allegation that plaintiff showed up drunk for his regular work shift" and (2) a statement that plaintiff "blew twice the legal limit one night when he came to work." The court found that because these statements are factual and alleged to be defamatory, they are sufficient to sustain a cause of action for defamation with regard to their respective articles. The court denied defendants' motion to dismiss without analyzing any additional statements challenged by Bonanni. Defendants appealed.

Defendants argued on appeal that the trial court erred by reviewing individual, isolated statements to determine whether they are fact or opinion without regard for context. Under New York's constitution, which contains broader protection for opinion than federal law, the context of an article can transform seemingly factual statements into non-actionable opinion. Defendants contended that proper analysis of challenged statements must take into account the content and tone of the entire article as well as the broader social context surrounding the article.

Regarding the immediate context, defendants argued that the "Commentary" caption alongside LeBrun's name and photograph signaled readers that the articles were expressions of opinion. LeBrun's advocacy for Bonanni's discharge and acceptance of the new alcohol policy similarly alerted readers that the columns were not objective news accounts. Regarding the broader context, Defendants pointed to the intense media coverage and public debate over Bonanni's violation of the city's new zero-tolerance alcohol rule and to Bonanni's status as a notorious figure on the Albany police force, having been subject to criticism, investigation, and criminal charges for past conduct. The context, defendants argued, would signal to the reader that the challenged statements are opinion, not fact.

Plaintiff countered that the immediate context of the articles indicated that LeBrun was setting forth facts

Appellate Division Decision

In a unanimous decision, the New York State Appellate Division, Third Department applied the context-driven analysis advocated by Defendants, reversed the trial court, and granted the motion to dismiss. The court cited the "commentary" label on the columns and various statements within the columns as signaling that the tenor was one of opinion. The court concluded: "considering the overall context of the articles, as well as the broader social context in which the articles were published – which the record discloses included years of widespread television and print media coverage of the allegations of misconduct by plaintiff – a reasonable reader would understand and conclude that LeBrun was offering his own opinions about plaintiff rather than an objective news reporting."

Hearst was represented by Jonathan R. Donnellan, Eva M. Saketkoo and Courtenay B. O'Connor of the Hearst Office of General Counsel. Plaintiff was represented by David Brickman of David Brickman, P.C.

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New Jersey State Court Dismisses Defamation/Invasion of Privacy Claims Arising out of "Hot chicks with Douchebags" Book

By Wendy K. Szymanski

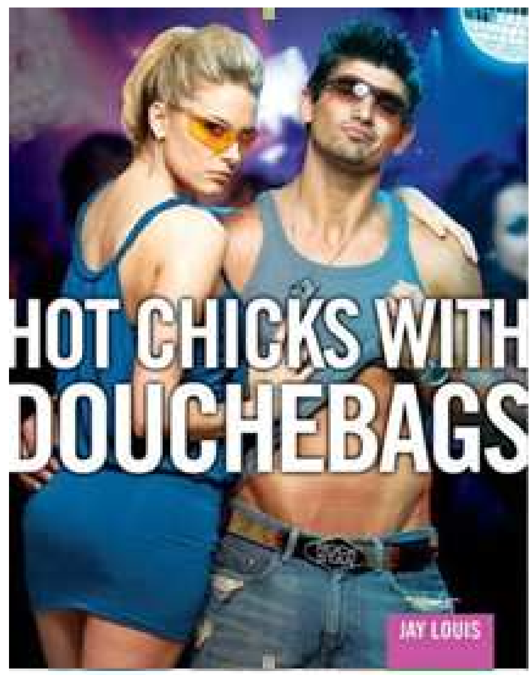
A New Jersey State Court judge has dismissed a lawsuit brought by three women whose photographs were included in a recent pop-culture book entitled "Hot Chicks with Douchebags". *Gorzelany v. Simon & Schuster, Inc.*, No. BER-L-7775-08 (Super. Ct. Bergen Co. Feb. 6, 2009). The photographs, which were taken in a public nightclub, were used to illustrate satirical commentary on club culture. While clearly posing for the pictures, plaintiffs had not signed any releases in connection with the photos. On a pre-discovery motion to dismiss, the court found that all of their claims – including defamation, infliction of emotional distress and privacy – failed as a matter of law. The court recognized that satirical commentary, even if distasteful, is not actionable.

Background

The "Hot Chicks" Book is based on the popular website of the same name. In both, Jay Louis, the author, takes a satirical look at club culture through a particular conceit: exposition on photographs of women, the titular "hot chicks", with men that the author deems to be "douchebags." The Hot Chicks Book expands upon the internet site and is a humorous and light-hearted look at club culture, focusing in particular on the lengths to which young men will go in order to attract women. Thus, the author examines "the performative role-playing of the peacocking male," and contains sections on the "History of Douchebaggery," "Nine Telltale Signs You're Turning Douchenese, I Really Think So" and "The Categories of Modern Douchebaggery."

The book is illustrated throughout with photographs of nightclub habitués. Those of the three plaintiffs were taken at Club Bliss, a nightclub in northern New Jersey. Inside the Book, two of the plaintiffs appear in a single photograph with a male companion stretched out across their laps. The accompanying text describes a type of man the author calls a "Federbag," a moniker derived from Kevin Federline, who the author states "hopes to appeal to hotties" through reappropriation of a culturally validated celebrity image.

In the photograph, an unidentified man sprawls across plaintiffs, smirks contentedly, and spreads his arms wide in a self-congratulatory gesture that frames the two attractive women who happily mug for the camera. The third plaintiff blows a kiss at the camera as she poses beneath a disco ball on a crowded dance floor next to a man whose arm is draped across her shoulders. This photograph illustrates a section of the book that humorously spoofs 12 Step Programs by recounting the steps to be taken in order to assist a man in halting his "attempt[s] to attract a mate through the use of excessive products, gels, colognes, and general sleazy demeanor" and return to "[a] real-world authenticity where collars stay down and specialty male body perfumes do not present themselves as viable personal hygiene products."



Plaintiff's photograph illustrates Step 5, which counsels readers to "Leave New Jersey." The text in the Book does not identify or comment on any of the plaintiffs themselves.

The plaintiffs nonetheless brought suit against Simon & Schuster, Inc., the author, Club Bliss, Clubitup.com (an online website that had posted the photographs at issue), and an assortment of John Does. The complaint included claims for defamation, invasion of privacy, negligent and intentional infliction of emotional distress, conspiracy to

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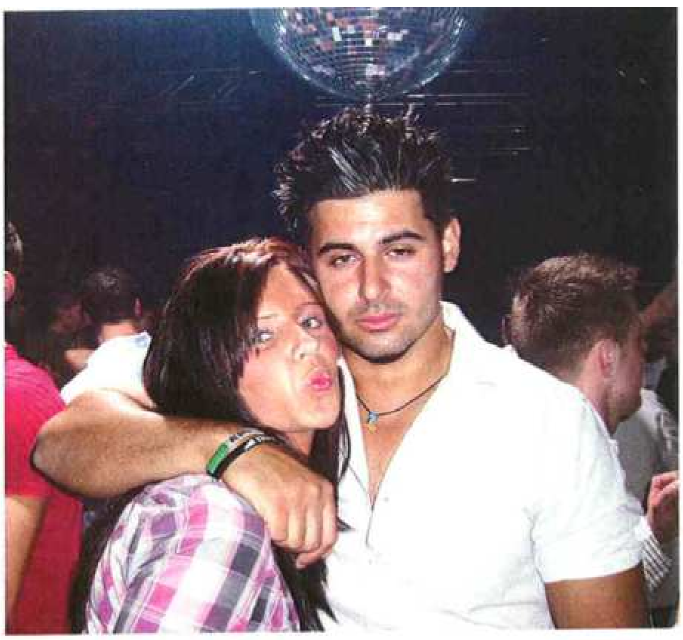
commit fraud, unfair competition, and "humiliation". Defendants Simon & Schuster, Jay Louis and Club Bliss moved to dismiss the complaint in its entirety.

Opinion

On February 6, 2009, Judge Menelaos Toskos issued an opinion dismissing the complaint with prejudice. The court held that there was no actionable defamation as the book, including the use made of plaintiffs' photographs, was clearly intended as humorous social commentary. The court quoted extensively from the book, and asked "would a reasonable person believe that Jean-Paul Sartre stated 'man is condemned to be douchey because once thrown into the world he is responsible for every douchey thing he does'?" Accordingly, the court found that, although some might find it vulgar and tasteless, the book was obviously intended as satirical humor. The court concluded that, as such, it is absolutely privileged under the First Amendment as protected expression of opinion.



As additional independent grounds for dismissing the defamation claim, the court noted that the Book makes no express mention of plaintiffs, and found that the book accordingly is not "of and concerning" plaintiffs and additionally not reasonably susceptible of a defamatory meaning as it made no statement of fact.

As to the plaintiffs' invasion of privacy claim, the court held that as the photographs were taken in a public place, nothing "private" had been exposed to the public eye. (Although plaintiffs seemed to argue alternately in their papers that their invasion of privacy claims were for false light, misappropriation and publication of private facts, the court treated their claim as the latter.) The court additionally noted that a reasonable person would also not find the publication of the photographs offensive, as the photographs themselves were not objectionable, nor was the fact that plaintiffs patronized a night club. Accordingly, the court held that the invasion of privacy claim were untenable.

The court gave short shrift to plaintiffs' remaining claims. Judge Toskos held that defendants had not come close to engaging in outrageous intentional conduct so extreme as to go beyond all possible bounds of decency, and thus dismissed the claim for intentional infliction of emotional distress. He dismissed the claim for negligent infliction of emotional distress on the grounds that plaintiffs could not demonstrate that defendants acted with actual malice as defendants had published only opinion, which was not capable of being proven true or false.

The conspiracy to commit fraud claim failed on the grounds that there had been neither a false statement by defendants nor reasonable reliance thereon by plaintiffs. Plaintiffs' unfair competition claim was dismissed on the ground that they had not engaged in any business activity with which defendants competed, and the "humiliation" claim as it is not a recognized cause of action in New Jersey.

This decision reaffirms the principle that editorial use of photographs of private individuals, even in the absence of consent and even in what some might find to be a tasteless manner, is nonetheless protected under the First Amendment.

Defendants Simon & Schuster Inc., Simon Spotlight Entertainment and Jay Louis were represented by Elizabeth A. McNamara and Wendy K. Szymanski, Davis Wright Tremaine LLP. Defendant Club Bliss was represented by Steven C. Schecter. Charles Ingenito of Festa & Ingenito, L.L.C. represented plaintiffs.

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Pennsylvania Appeals Court Affirms Judgment For Broadcaster

Reaffirms Court's Gatekeeping Role on Summary Judgment

By Michael K. Twersky & Tanya Johnson

The Pennsylvania Superior Court has rejected a broad reading of a 2007 actual malice decision by the Pennsylvania Supreme Court, *Weaver v. Lancaster Newspapers, Inc*., 926 A.2d 899 (Pa. 2007), and reaffirmed that the trial court must act as a gatekeeper in summary judgment proceedings involving public officials and actual malice.

In affirming summary judgment in favor Fox29 WTXF-TV and investigative reporter Jeff Cole, the court reaffirmed the well-established First Amendment rule that public official plaintiffs (in this case, three police officers) must meet the clear and convincing standard of proof in order to survive summary judgment on the issue of actual malice.

Background

The case arose from a May 24, 2006 broadcast by Cole that reported on security concerns at the Philadelphia International Airport. The report questioned whether police staffing at a security post, which was manned by an officer on weekdays but not on weekends, posed a security risk to the public. During his two-month investigation for the broadcast, Cole conducted dozens of hours of surveillance of the post, reviewed official police documents concerning staffing of the post, and interviewed city officials. Although Cole tried to interview the police officer plaintiffs, they refused to speak with him on camera.

Shortly after the broadcast aired, plaintiffs filed a complaint against Fox29 and Cole, alleging that the broadcast contained false and defamatory statements. *Mingacci v. Fox 29 WTXF TV*, No. 110136 (Ct. Comm. Pl. Feb. 5, 2008) (Memorandum Opinion). The trial court ultimately granted summary judgment in favor of the defendants, holding that plaintiffs had not "shown actual malice 'with convincing clarity' to put the matter to a jury." *Id.* at 1 (citing *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 514 (1984)).

On appeal, plaintiffs made a novel argument based on the 2007 Pennsylvania Supreme Court decision in *Weaver*. Relying on *dicta* in *Weaver*, plaintiffs asserted that they were not required to meet the clear and convincing evidence standard at the summary judgment stage and that the trial court did not have a "gatekeeper" role that should have prevented the case from going to trial.

The Weaver Case

At issue in *Weaver* was whether the trial court was required to consider, for actual malice purposes, the defendant newspaper's decision to publish a letter to the editor containing allegedly false information after the author of the letter had already been sued for defamation, putting the defendant newspaper on notice of that the letter contained allegedly false information. The trial court granted summary judgment to the defendants based on lack of clear and convincing evidence of actual malice, and the appellate court affirmed. The Pennsylvania Supreme Court, however, reversed, holding that evidence of the republication of the letter was relevant to the actual malice inquiry and that the trial court, in considering defendants' motion for summary judgment, was required to consider that republication. *Weaver*, 926 A.2d at 905.

In *dicta*, the *Weaver* Court addressed the argument raised by the newspaper defendant that the trial court's role as a gatekeeper during the summary judgment stage takes on heightened importance in a defamation case in order to prevent the jury from improperly deciding First Amendment issues. *Id.* at 907-08. The Court, however, stated that the defendant had conflated the trial court's gatekeeping role – which is "intended to prevent issues from reaching the factfinder when there are no material facts in dispute" – with an appellate court's duty to independently examine the full record in defamation cases in order to "avoid any forbidden intrusion on the field of free expression." *Id.* at 907 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

In *Mingacci*, the plaintiffs relied on that language to argue that summary judgment had been improperly granted, essentially arguing that the trial court had no gatekeeper role at all in actual malice summary judgment motions.

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Superior Court's Opinion

Defendants urged the Pennsylvania Superior Court to reject that interpretation of *Weaver*, asserting that trial courts are required by controlling precedents of the United States Supreme Court and Pennsylvania appellate courts to apply the clear and convincing standard at the summary judgment stage, and that *Weaver* did not alter this standard. Indeed, defendants argued that the Pennsylvania Superior Court could not overrule the U.S. Supreme Court's decision in *Bose* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), which required the trial court to apply the clear and convincing standard for actual malice at the summary judgment stage.

On December 31, 2008, the Pennsylvania Superior Court affirmed the trial court's grant of summary judgment in favor of defendants, agreeing with them that *Weaver* did not alter the standard that plaintiffs must meet to defeat summary judgment. *See Mingacci v. Fox 29 WTXF TV*, No. 562 EDA 2008, at 12 (Pa. Super. Dec. 31, 2008) (Memorandum Opinion).

The Superior Court held that *Weaver* "casts no doubt" on the holdings of prior cases defining the trial court's role at the summary judgment stage of a defamation case. *Id.* at 12. The Superior Court specifically rejected plaintiffs' argument that *Weaver*'s distinction between the proper roles of the trial and appellate courts rendered it improper for the trial court to impose a heightened standard of review to the issue of actual malice at the summary judgment stage. *Mingacci*, 562 EDA 2008, at 11. The court emphasized that, "at no time did the [*Weaver*] Court indicate that an appellate court's independent analysis of constitutional questions should encroach upon the trial judge's obligation to ensure that a reasonable jury could find that a plaintiff has demonstrated actual malice by clear and convincing evidence." *Id.* at 11-12.

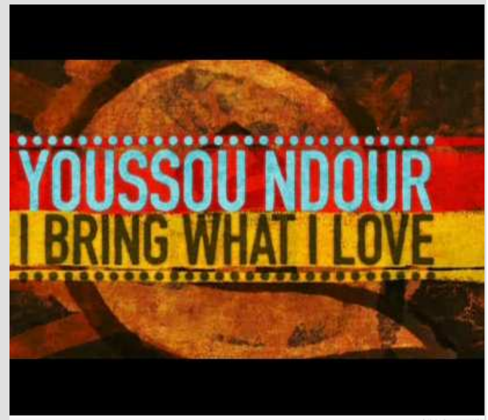
The *Mingacci* decision, while unpublished, signals that Pennsylvania courts are likely to reject an overbroad reading of the *dicta* in *Weaver* and reject any suggestion that *Weaver* abolished the gatekeeper role of the trial court in deciding actual malice summary judgment motions. The Pennsylvania Superior Court adhered to well-established First Amendment/actual malice decisions by the U.S. Supreme Court in reaffirming the significant burden for public official/public figure plaintiffs at the summary judgment stage. This burden provides a crucial procedural protection for media defendants and affords them the breathing space necessary to report about the actions of government officials.

Michael K. Twersky, a partner, and Tanya Johnson and associate, at Montgomery McCracken Walker & Rhoads, LLP in Philadelphia, represented the media defendants in this case.

Statutory Misappropriation Claim Against Documentary Filmmaker Dismissed

Use of Nine Second Video Clip Not Actionable

A New York trial court dismissed a statutory misappropriation claim against a documentary filmmaker and distributor over the use of a nine second video clip showing plaintiff at a press conference. *Diokahne v. 57th & Irving, Inc. et al.*, No. 115652/2008 (N.Y. Sup. Ct. Feb. 18, 2009) (York, J.). After viewing the film, the court held that the documentary was not "advertising" and, moreover, the appearance of plaintiff in the film was incidental and not actionable



Background

Plaintiff Bara Diokhane is a Senegalese artist and lawyer who served as a legal adviser to famed Senegalese singer Youssou N'dour in music business negotiations and as a producer of a number of defendant's music videos. N'dour terminated their business relationship in 1996.

In 2008, defendant Elizabeth Chai Vasarhelyi directed and produced a documentary called "Youssou Ndour: I Bring What I Love" that chronicles the experiences and controversy surrounding the release of N'dour's CD called "Egypt." Ndour sought to promote greater tolerance of Islam with the release, but faced resistance in Senegal due to his including Muslim themes in popular music and performing on Ramadan. The plaintiff appears for about nine seconds in the 102-minute movie, in a scene in which plaintiff sits near N'dour at a press conference.

After premiering at the Telluride Film Festival the weekend of Aug. 29-Sept. 1, 2008, the film began to receive publicity and plaintiff learned of his appearance in the film. In a letter dated Oct. 21, 2008, plaintiff wrote to the defendants and requested they cease using his image in violation of his privacy rights under New York Civil Rights Law Section 50. After receiving inconsistent responses from each of the defendants, plaintiff sued to enjoin the defendants' use of his image in the film and to obtain damages.

On December 15, 2008, the court denied plaintiff's request for a temporary restraining order, and in January considered the filmmaker and distributor's motion to dismiss. (Another distributor did not join the motion to dismiss and the court took no action as that defendant.)

Discussion

Under N.Y.C.R.L. § 51, "[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained...may maintain an equitable action in the supreme court against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain from use thereof." However, New York courts have construed the phrases "for advertising purposes" and "purposes of trade" to exclude newsworthy events or matters of public interest.

Because the documentary has generated widespread interest and acclaim, the court found it to be "clearly a matter of public interest." Although plaintiff argued that the documentary would qualify as a purpose of trade because of the defendants' profit motive in making the film, the court cited *Messenger v. Gruner + Jahr*, 94 N.Y.2d 436, 442-443 (2000), and said "the plaintiff's image is only actionable if 'the picture has no real relationship to the article or the article is an advertisement in disguise,'" Because neither of these applied, the court found that plaintiff's claim was not actionable.

As another basis for dismissal, the court also found that the plaintiff's appearance in the film qualified as "incidental use," as it was only for nine seconds in a 102-minute movie, and that was de minimus use and therefore not actionable. In addition, the court said that plaintiff's sitting near N'dour at the press conference where the plaintiff appears in the film limited his privacy in this context.

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House Subcommittee Convenes Hearing To Discuss Libel Tourism

Panelists Encourage Representatives to Work Toward an Effective Legislative Remedy

By Laurie A. Babinski

The House of Representatives kicked off the libel tourism debate in the 111th Congress with a February 12 hearing in the Subcommittee on Commercial and Administrative Law that established the need for a legislative remedy to combat libel tourism, which the problem created when foreigners sue Americans for defamation overseas (usually in London) to avoid the protections of the First Amendment.

Before Subcommittee Chairman Steve Cohen (D-Tenn.), who convened the hearing to set the stage for the reintroduction of his libel tourism bill in the 111th Congress, the panel, which included author Rachel Ehrenfeld, Washington, D.C. media lawyers Bruce Brown and Laura Handman, and New York University law professor Linda Silberman, testified about the differences between U.S. and U.K. law that allow libel tourists to circumvent U.S. free-speech protections and exploit plaintiff-friendly U.K. defamation law, the increasing frequency of libel tourism cases brought in English courts, and libel tourism's threat to the First Amendment. *Written testimony is available at* http://judiciary.house.gov/hearings/hear_090212.html.

The panelists also addressed how to craft an effective legislative remedy that truly deters libel tourists from suing in England based on flimsy connections to the forum while comporting with other constitutional requirements, such as due process, that limit the ability of U.S. courts to exercise jurisdiction over libel tourists who may have no connection to the U.S. other than filing suit against an American author overseas. "Countering the impact of libel tourism is not about second-guessing the British people for striking a different balance between freedom speech and reputation than we have," Bruce Brown told the subcommittee. "It is about making sure that foreign jurisdictions do not dictate to us how we should strike this balance for ourselves."

The discussion about how to draft a workable solution was based on the three bills – two in the House, one in the Senate – introduced last Congress in an attempt to combat the problem of libel tourism.

The first two bills, both dubbed the Free Speech Protection Act of 2008, were introduced by Rep. Peter King (R-N.Y.) (H.R. 5814) and Sen. Arlen Specter (R-Pa.) (S. 2977). *See* Kathleen Kirby and Shawn A. Bone, "Legislative Update: Libel Tourism Visits Capitol Hill, While Media Ownership Gets Its Day in the Senate," *MLRC MediaLawLetter, May 2008* at 5-6.

The identical bills would have created a cause of action to allow American authors to seek a declaratory judgment in a U.S. court as soon as a libel suit was filed against them overseas. They also would have allowed Americans to obtain substantial damages against foreign libel litigants, including treble damages if the author could prove by a preponderance of the evidence that foreign libel litigants "intentionally engaged in a scheme to suppress First Amendment rights." These preemptive mechanisms were made possible by an explicit grant of jurisdiction in U.S. courts over foreign libel litigants based only on the fact that the libel tourist sued an American citizen. Both bills remained stalled in committee at the end of the 110th Congress.

The third bill, H.R. 6146, sponsored by Rep. Cohen, affirmed that courts in the United States can decline to recognize foreign defamation judgments if they are inconsistent with the First Amendment. *See* "Another Bill Introduced to Limit Enforcement of Foreign Defamation Judgments," *MLRC MediaLawLetter, May 2008* at 4. It provided that: "Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States." The House passed the bill on suspension. *See* Bruce D. Brown and Laurie A. Babinski, "Legislative Update: House Passes Libel Tourism Bill; Chance of Senate Passage Slim," *MLRC MediaLawLetter, Nov. 2008* at 20. It moved to the Senate calendar, where it remained when the session ended.

With past efforts as a guide, several of the panelists encouraged Chairman Cohen to consider adding more "teeth" to his legislation. While the Chairman's previous bill was "a strong measure effectively codifying on a federal level the two state courts decisions in *Bachachan* [*v. India Abroad Publications*] and *Telnikoff* [*v. Matusevich*]," Handman explained to the subcommittee, "there are a number of concerns that the legislation, as valuable as it is, leaves unaddressed."

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The panelists specifically asked the subcommittee members to think beyond enforcement to a separate cause of action for declaratory judgment or damages or by simply adding an attorneys' fees provision that would allow the U.S.-based author or publisher to recover the fees they were forced to expend in defending an enforcement action. They also cautioned, however, that any cause of action would have to be drafted within constitutional limitations to avoid creating what Silberman characterized as "much too aggressive an assertion of U.S. jurisdiction."

Congressional attention to the issue came on the heels of the New York State legislature's passage of the "Libel Terrorism Prevention Act" last year. *See* Jason P. Criss, "New York Enacts Libel Tourism Protection Act," *MLRC MediaLawLetter, May 2008* at 3-4. New York and Illinois are the only two states in the country that have passed anti-libel tourism laws that allow state courts to assert authority over foreign citizens based on a libel judgment they have obtained abroad against a resident of the state. *See* Samuel Fifer, "The Accidental Libel Tourist," *MLRC MediaLawLetter, Nov. 2008* at 21-22.

The New York law was passed in reaction to a lawsuit filed in the U.K. by Saudi Khalid bin Mahfouz against Ehrenfeld for statements in her book alleging that bin Mahfouz had ties to terrorism. Ehrenfeld took a default judgment in England and then brought an action in New York seeking a declaratory judgment that the English judgment was unenforceable. The court declined, stating that it had no jurisdiction over bin Mahfouz since he had not tried to enforce the judgment in the United States. As Ehrenfeld told the subcommittee, "Until the new statute protected me . . . Mahfouz's English judgment hung over my head like a sword of Damocles and kept me up at night."

Only Sen. Specter has introduced libel tourism legislation in the 111th Congress. The bill, S. 449, which was introduced on February 13 and has been referred to the Senate Judiciary Committee, echoes his bill from the prior Congress. A bill sponsored by Rep. Cohen is expected to be introduced later this year.

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UPCOMING EVENTS

Legal Frontiers in Digital Media
@ Stanford University, Stanford, California
May 14 & 15, 2009

MLRC London Conference
International Developments in Libel, Privacy Newsgathering and New Media Law
October 1-2, 2009

MLRC Annual Dinner
November 11, 2009

First Amendment Speakers Bureau
Upcoming MLRC Institute Events

Feel free to e-mail us with any questions regarding MLRC's upcoming events @ MediaLaw@MediaLaw.org

The Other Side of the Pond: UK and European Law Update

Parliament Hearing; Iraq; ECHR Privacy Rulings; More Gloom From Ireland

By David Hooper

Ministry of Justice Moves to Reduce Costs in Defamation Cases

On 24 February the Minister of Justice, Barbara Prentice, issued a consultation paper (www.justice.gov.uk/publications/controlling-costs-in-defamation-proceedings.htm). The Minister said that the threat of excessive costs in libel action may force defendants to settle unwarranted claims. She noted that "*we need to ensure that people's right of freedom of expression is not infringed and that media organisations can continue to report on matters of public concern. The aim of the consultation paper is to ensure that costs are more proportionate and reasonable.*" The costs issues under consideration are:

- Limiting recoverable hourly rates by setting either maximum or fixed recoverable rates.
- Mandatory cost capping or mandatory consideration of costs capping in every case: and
- Requiring the proportionality of total costs to be considered on costs assessment conducted by the court.

It was also observed that 220 defamation cases are, on average, issued in the High Court each year and about 300 claims are settled before proceedings are issued. One would comment that while the first figure is a matter of record, the second figure may not be accurate simply because such a statistic is extremely difficult to gather, unless one asks all the right people who, in the nature of things, are unlikely to be known.

The importance of this consultation paper cannot be understated. Members of the MLRC may wish to download the consultation paper and to give serious thought as to whether they wish to make representations.

Committee on Culture, Media & Sport Hearing

On February 24, evidence was taken from a cross-section of claimant and defence lawyers with the position of media defendants being expounded by Marcus Partington, Legal Adviser to the Trinity Mirror Group and Chairman of the Media Lawyers' Association, Keith Mathieson of Reynolds Porter Chamberlain, and Tony Jaffa of Foot Anstey who represents many regional newspapers. Mr. Partington made the point that newspapers were being faced with claims in conditional fee agreement cases (CFAs) of up to £1,000 per hour. Mr. Partington said that in his experience claimants often prolong legal proceedings in libel cases in order to maximise costs and that the current system of CFAs designed to ensure that the poor could seek redress in the courts was being exploited by the rich and should be means-tested. He also made the point that in his belief, Carter-Ruck only lost about 2% of its CFA cases – the point being that the success fee of 100% seemed disproportionate to the number of CFA cases actually lost.

On this Carter-Ruck's representative, Mark Thomson, was somewhat cagey saying that information about their track record on CFAs was "*confidential*," although information on what proportion of CFAs were won by his firm would be provided on an anonymized basis to bodies investigating CFAs. Another of the claimant lawyers, Jeremy Clarke-Williams, of Russell Jones Walker was more forthcoming when he said that his firm had a CFA committee and they only took on cases which they were "*expected to win*" – a not unreasonable policy. But that being the case, is a 100% success fee really justified? It had always seemed to me that CFAs are not nearly as risky as claimant lawyers would have one believe. After all English libel claimants seldom lose.

However, the fact is that one can, on an assessment of costs, be told that the view taken of the risk of losing in the case by the advisers of a person represented under a CFA agreement, was that the case was 50/50. If that really is the case, in all but the most exceptional cases – for example, where a schoolteacher was unjustly accused of being a paedophile – no sane, well-advised person

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would launch into defamation proceedings where the chances were only 50/50 if they were paying with their own money and faced paying the other side's costs if they lost the action. Either the risk is *not* as great as represented or, alternatively, people with CFA agreements are now in the position that because of this funding regime they are able to take on actions which no person who was paying privately would, in their right mind, assume.

The video stream of the hearing is available online here. The evidence will be available in written form in about a week's time. Readers' attention is particularly drawn to the claim made by Mr. Thomson that "*our fee at the moment is about £400 an hour which is the standard*." Mr. Thomson then went on to muse "*my experience is that the reason why there are expensive litigations is because of the way the defendants run the cases, Most cases settle very quickly with little cost. It is when the defendants decide to defend cases that costs rise*."

That perhaps misses the point. Libel actions are very expensive – period - and claimant's advisers do more than their fair share in relation to such costs. It seems a little difficult to reconcile the evidence Mr. Thomson gave with what appeared to be a well-informed account of the bill of costs of over £800,000 submitted by Carter-Ruck when acting for the food store Tesco against the Guardian Newspapers in its graphically headlined article "*Luvaduck, it's Carter-Fuck*". In that case details were given of some £56,000 of costs incurred by a senior partner at Carter-Ruck charging at £500 per hour. Junior partners, it seems, do charge at £400 per hour at Carter-Ruck but they are the younger partners and partners at that firm tend to be appointed earlier in their career than many other firms. A full account of the Tesco case and the horrendous costs (£803,000 contrasted with damages of £10,000) can be found in the article by the Guardian's Editor, Alan Rusbridger, in the *New York Review of Books* "*The Chill in the Guardian*" (www.nybooks.com/articles/2245).

A rather different perspective on costs was put by Keith Mathieson who told the Committee of a case where a tennis player complained of being described as the worst professional tennis player – no doubt an unpleasant allegation but not the most complex or earth-shattering. Mr. Mathieson explained that Reuters had wanted to fight the case, but had thought better of the matter when it appeared that the likely level of costs for defending this case were estimated as being in the region of £1.2 million. Although the case settled four months before trial, the claimant's costs amounted to £235,000, whereas the defence costs were £31,000 – not exactly the Mark Thomson model.

Mr. Partington also drew attention to the fact that newspapers were facing claims in respect of articles in their online archives, which may have been published 10-20 years ago. It was something that needed urgent attention. Mr. Mathieson made the point that although things had improved following the Jameel case in relation to the Reynolds defence, claimants were able to trawl though all the papers relating to the creation of the article so that, for example, one email advocating caution could be seized upon as manna from heaven by the claimant's advisors.

Mr. Jaffa made the point that the costs of libel cases represented a threat which could put regional newspapers out of business. Not surprisingly, Mark Thomson indignantly refuted the suggestion from a Conservative MP on the Committee, Philip Davies, that CFAs were a "*racket*" whereby lawyers were able to "*double their money*" in cases they knew they were going to win. Mr. Thomson retorted that "*press standards have got worse and there are more victims*".

UK Libel Costs 140 times more than the European Average

In a recently published report called *A Comparative Study of Costs in Defamation Proceedings Across Europe* by the Centre for Social-Legal Studies at Oxford University commissioned by Associated Newspapers, a group of academics and lawyers practicing in 13 European countries examine the likely scale of costs in a number of libel actions based on an established set of facts if they were to take place in each of the countries. Not unexpectedly, England was the most expensive followed by Ireland.

Amongst the European countries examined were France, Italy and Germany. Even when one stripped out the costs of CFAs which are unknown in the rest of Europe, English costs were *ten times greater* than the next country, Ireland, which in turn was *four times greater* than the next country, Italy. If one took an average of the likely level of costs in the eleven countries excluding England and Ireland, one found that England was *140 times more costly* than the average. England on analysis fared worst in terms of legal costs, length of trial and number of lawyers used than all the other European countries, although it did take second place to Ireland when it came to the amount of damages awarded.

Attempt to Cover-up Why We Went to War with Iraq

On February 24, the Justice Secretary, Jack Straw, signed a certificate under Section 53 FOIA preventing the release of the Cabinet minutes of March 13 and 17 2003 when the legality of military action against Iraq without a second UN resolution and the justification for invading Iraq in the absence of the justification of self-defence or a UN resolution sanctioning the attack were debated. http://www.justice.gov.uk/news/announcement240209a.htm
http://www.justice.gov.uk/docs/foi-oral-statement.pdf

Jack Straw says that he proposes under Section 49 (2) FOIA to lay a report before Parliament. Not surprisingly, this decision caused a storm of protest not least because it was suspected that the Attorney General at the time, Lord Goldsmith, had changed his legal opinion at the behest of his political masters and in dereliction of his duties of independence. Furthermore, there was concern that in fact the decision to go to war had not been properly debated at all and had instead been effectively decided by the coterie of personal advisers sat on sofas in Downing Street.

The Information Commissioner and Information Tribunal had ruled that the Minutes *should* be disclosed. Rather than appealing the Tribunal's decision to the High Court, Jack Straw chose to take the unprecedented step of issuing a certificate vetoing the release of the papers. That itself is likely to be the subject of legal challenge. The Conservatives Shadow Justice Secretary did not oppose the decision taken by Mr. Straw, but has pressed for a full inquiry into the circumstances of the United Kingdom going to war – just as happened shortly after the Falklands campaign in 1983.

Needless to say, the British government has shown no enthusiasm for that suggestion either. The basis of Mr. Straw's decision is that the convention of Cabinet confidentiality and public interest in its maintenance are especially crucial, when the issues at hand are of the greatest importance. Confidentiality serves to promote discussion in the decision-making process. Disclosure of the Cabinet Minutes in this case jeopardizes that space for thought and debate at precisely the point when it has greatest utility. Cynics retort that these high-sounding phrases represent no more than a desperate attempt to cover up.

Allegations of Torture at Guantanamo Bay; UK Involvement?

This was the issue which arose starkly in the case of *R on the application of.Binyam Mohamed, the Secretary of State for Foreign and Commonwealth Affairs (2009) EWHC 152*. Binyam Mohamed ("BM") was an Ethiopian citizen who had been resident in the United Kingdom. He had been arrested in Pakistan in 2002 and held there until 2004. From there he had been extraordinarily rendered to Guantanamo via Morocco and had been tortured.

BM was charged with terrorist offences relating to a dirty bomb plot, but the charges were subsequently dropped. There had been various earlier proceedings and this case arose out of seven short paragraphs amounting to 25 lines in the report of the Court's judgment in those proceedings there was the summary of a report by the US government given to MI5 and MI6 on the treatment of BM and on the circumstances of him being held incommunicado. The English Court felt that this section was highly material to the question of whether BM had been subjected to torture or cruel, inhuman or degrading treatment.

There was, in the Judge's view, no sensitive information about sources and methods nor secret intelligence. The judgment of Lord Justice Thomas referred to the authorities underlining the importance of open justice and made the point that the court must do justice in public, unless it cannot otherwise be done or there are good reasons for disallowing such publicity. Representations were made by the press and on behalf of the English Press and of Associated Press and the New York Times and specifically by David Rose, a contributing editor at Vanity Fair, put in an 18 page statement as to why the earlier judgment should be published in full. His account of the case can be read at http://www.vanityfair.com/politics/features/2009/02/miliband-torture200902.

The court was evidently sympathetic to the publication of the redacted part of the earlier judgment on the basis that publication would end uninformed speculation as to what in fact happened and would facilitate debate as to whether or not BM's treatment was humane and would resolve the question of whether MI5 knew about any mistreatment of BM. The point was made that Article 10 of the European Convention of Human Rights was not just about freedom of expression. It was also about the right to receive and impart information, a right which is the *lifeblood of democracy*.

However, in view of the insistence of the Foreign Secretary that to do so "*is likely to result in serious damage to US national security and could harm existing intelligence information-sharing arrangements between our governments*"., the court felt bound to prevent the publication of the seven paragraphs. On no less than eight occasions in the Judgment there was reference to the *threats*. Subsequently, however, and despite the Foreign Secretary's advisers having had time to consider the judgment in draft, it transpired that there was no explicit threat – rather there was a lot of backsliding by the Foreign Secretary – whose earlier prospects of succeeding Gordon Brown had been dealt a blow by an unfortunate picture of him clutching a banana.

Those advising BM are now taking the case back to the Divisional Court for the court to determine whether or not it was properly given the picture of exactly what was the attitude of the United States government. The potential embarrassment for the British government is considerable.

In the meantime, BM has been released and is now at liberty in England subject to an obligation to report periodically to his local police station.

European Court of Human Rights Privacy Decisions

There have been three important decisions on the question of privacy. The first is *Reklos v. Greece* (Application No 1234/05). This concerned the taking of a picture of a newly-born child in a clinic with the aim of selling the picture to the proud parents. This baby was, however, in a sterile clinic and the parents were incensed. Unwisely, the photographer refused to hand over the negative. The Greek courts took the view that there had been no publication of the photo and that the private life of the baby was therefore *not* engaged.

The ECHR disagreed and awarded damages of €8,000, stating that "*the effective protection of the right to control one's image, presupposed in the circumstances of the case, concerned the consent of the person concerned when the picture was being taken and not just when it came to possible publication*". Therefore, the mere *taking* of the photograph infringed the child's Article 8 rights. The case could be of some significance in the analysis of image rights as the court stressed that a person's image revealed his or her unique characteristics and constituted one of the chief attributes of his or her personality.

The second case is *Armonas v. Lithuania* (Application 36919/02). This was a case of reckless behaviour by a newspaper which accused the complainant, who died in the course of the proceedings, of having AIDS and of having fathered a child with a lady who was described as "*notoriously promiscuous and already sick with this fatal disease*". He had been awarded the very modest sum of just under €3,000 and complaint was made to ECHR about the sum awarded.

The court felt that the sum awarded should not be theoretical or illusory, but should represent a right that was practical and effective. The court felt that the facts were incapable of properly contributing to a debate in a democratic society, but rather were making tawdry allegations about an individual's private life. Surprising, they only increased the award to €6,500 but the principles are there for all to see.

The third case is *Ku v. Finland* (Application 2872/02). In a case where the facts were not dissimilar to those in *Lunney v. Prodigy Services*, a false advertisement had been put on a dating website in relation to a 12 year old boy which was calculated to invite unwelcome sexual advances. Under the Finnish law in place before the adoption of European Directive 2002/58/EC, the complainant was unable to obtain disclosure from the ISP as to who had placed this advertisement. The ECHR ruled that Article 8 imposed *positive obligations* to protect privacy and in such circumstances to bring the miscreant to justice. The boy was awarded €3,000.

The BBC and FOIA

An interesting issue arose in *Sugar v. BBC* [2009] UKHL9 when an English solicitor sought access to the Balen report under FOIA which the BBC had commissioned on the question of whether its Middle East coverage was impartial. The BBC is subject to FOIA, unless the information is held for *the purposes of journalism, art or literature*.

The Information Commissioner ruled that this information *was* held for the purpose of journalism. The Information Tribunal on appeal *reversed* this decision. The Administrative Court held that there was no jurisdiction to hear the appeal. The Court of Appeal agreed but the House of Lords by 3-2 said there *was* jurisdiction to hear the appeal. So the present state of play is that at present Mr. Sugar *is* entitled to see the report unless that decision is now reversed on a fresh appeal to the Administrative Court.

A Contested Libel Action

As indicated, this is something of a *Rara Avis*. On January 29, Austen Ivereigh, a former spokesman for the head of the Catholic Church in England, was awarded £30,000 after a nine day trial against Associated Newspapers Limited in relation to an article in the Daily Mail in June 2006 accusing him of hypocrisy over an abortion his former girlfriend had had when they were both students in Oxford.

The interest of the case was that there had been an earlier trial at which the jury had been unable to reach a unanimous verdict. The costs of both parties were estimated in the press to exceed £2 million and indeed Ivereigh's counsel tried to persuade the court to order that £1 million be paid on account.

Quite apart from the scale of the costs in relation to what was at stake, the case was noteworthy for the fact that it was the first case to be re-tried when the original jury had been unable to reach a unanimous verdict. Up until that point such hung-jury cases were invariably settled to reflect the uncertainty of outcome manifested at the first trial. This case was, however, different and it was not without significance that the claimant lawyers were acting on a conditional fee agreement. They would not be paid unless they won.

More Gloom from Ireland

An interesting booklet "*Damage and Costs in Ireland: a Guide for Publishers*" had been published by the leading Dublin solicitors, McCann Fitzgerald. This reminds one that this is a plaintiff-friendly jurisdiction. Attempts to reform the law do not seem to have got very far. As long ago as 1991 the Law Reform Commission recommended a full-scale reform of the Defamation Act 1961 and in 2002 the government identified reform of Ireland's defamation laws as a priority. There is a Defamation bill going though the Irish Parliament but at the same leisurely pace and it is some way off from being enacted.

This means that, generally speaking, the Irish law has all the worst aspects of the old English law of defamation and none of the recent English improvements. There are a few applications before trial enabling trial by ambush. Most Irish solicitors acting for plaintiffs have, it would appear, limited experience in defamation matters and therefore defer to their barristers with the result that cases are that much more difficult to settle before trial. Juries are given no guidance as to damages with the consequence that although the Supreme Court considered the award of €317,434 to a wealthy entrepreneur, Dennis O'Brien as "disproportionately high" at the re-trial the jury awarded the Plaintiff €750,000. In 1999 the Supreme Court upheld a jury award of €380,921 to Proinsias de Rossa, a politician who had been wrongly accused of supporting terrorism.

McCann Fitzgerald note that the Supreme Court observed that the libel was extremely serious and that the amount was towards the top of the range, but it seems that that range increases inexorably. McCann Fitzgerald also report the rise in privacy damages, of which the latest instance was the case of *Herrity v. Associated Newspapers* where €90,000 was awarded which included €30,000 by way of punitive damages. It is worth noting in this context that the English courts have set their minds against the award of punitive damages in such cases.

In the best traditions, the Irish High Court, on February 17, 2009, approved a €50,000 settlement for a 10 year-old against the Daily Mirror in respect of their publication in March 2007 suggesting that the boy, then aged 9, had been found with a bag of cocaine in the school grounds. Rather appropriately it turned out that the substance was nothing more sinister than baby powder!

David Hooper is partner at Reynolds Porter Chamberlain in London.

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U.S. Media Organizations Join Submission to Parliament Committee

Argue for Fundamental Reforms to UK Libel Law

A number of American publishers are planning to sign on to a submission to the UK Parliament's Culture, Media and Sport Select Committee inquiry on Press Standards, Privacy and Libel. The draft submission written by Geoffrey Robertson QC, Doughty Street Chambers, and Mark Stephens, Finers Stephens Innocent, is reprinted below.

1. These submissions are presented on behalf of foreign based newspapers and news organisations and internet services, together with overseas publishers and human rights organisations. We all have substantial and increasing concern at the potential of the English law of defamation to affect our work unjustly and oppressively, reducing the amount of newsworthy information that we may disseminate to people in the UK, and particularly in England and Wales. The committee will be aware of the "libel tourism" and "libel terrorism" bills in the United States, which have been fuelled by a real and justified grievance: we do not think, however, that such laws satisfactorily address a problem that has arisen between two friendly nations. US/UK co-operation in communications is vitally important to both countries: indeed, "freedom of speech" was the first of the four freedoms enumerated by President Roosevelt after America entered the Second World War on the side of the UK and of liberty. We respectfully suggest that the problem caused by libel law – and sometimes, by libel lawyers – could be addressed by the UK government and parliament so that it will no longer threaten to damage US/UK relationships.

2. The claimant-friendliness of English libel law, most notoriously its requirement that the media bears the burden of proving truth, attracts many wealthy foreign forum shoppers in search of favourable verdicts that they would not obtain at home, or in the home countries of publishers whose newspapers and magazines have an international circulation. The rule which gives them the opportunity to sue a foreign publication with a minute circulation in the United Kingdom dates from 1849, when the Duke of Brunswick despatched his manservant to a newspaper office to obtain a back issue of the paper in order to sue for a libel he had overlooked for 17 years.1 This single publication was deemed sufficient to constitute the tort of libel and from this anachronistic case springs the absurd but venerated rule that in the UK a single defamatory publication – even if only in a library – is an actionable tort.

3. The primitive Duke of Brunswick rule that every publication is a separate tort has long been abandoned in America where a single publication rule applies to every edition of a newspaper or to the placing of an article on an internet site. However, in a disastrous 3-2 decision, the House of Lords approved the Duke of Brunswick rule in Berezovsky v Forbes Magazine. Boris Berezovsky, the controversial Russian oligarch sued Forbes for damage done to his "English" reputation by allegations that he had made his billions through corruption, gangsterism and murder. Forbes sold only 1900 copies in England but 800,000 in the United States. The trial judge ruled that Russia and the United States were both more appropriate places for trying the action because Berezovsky at the time had an entirely Russian reputation and the defendant was an indelibly US magazine. However, on appeal three judges in the House of Lords were struck by Berezovsky's ex-wives in Chelsea and by his connections with royalty and UK based banks. The minority judges said that the trial judge had been "entitled to decide that the English court should not be an international libel tribunal for a dispute between foreigners which had no connection with this country".2

4. The result of the Duke of Brunswick rule is that blatant internet forum shoppers can come to London to sue foreign news organisations in relation to allegations that are entirely sourced abroad. The Court of Appeal has permitted American boxing promoter Don King to sue a US attorney for defamation over anti-Semitic allegations made on a Californian website – an unhappy decision which followed the green light that Berezovsky gave to forum shoppers. It is

[1] *Duke of Brunswick v Harmer* (1849) 14 QB 185

[2] *Berezovsky v Forbes* 2000 EMLR 643 at 666, per Lord Hoffman.

difficult to understand why Americans who fall out with each other in America should be permitted to take up the time of UK courts with their slanging matches, rather than resolve them under their own law. If English courts continue to exercise their exorbitant jurisdiction over foreigners responsible for alleged libels on the internet, then those defendants who have no assets in England will simply be advised to stay away from any trial, especially if they are American, since their courts do not enforce English libel judgments.

5. American courts refuse to enforce awards made under British libel law, on the ground that this law is "antipathetic to the First Amendment"3. In America defamation actions succeed when the media can be proved at fault: the claimant must show that the allegations were false and published with a reckless or negligent disregard for the truth. What US courts find repugnant about UK law is that it places the burden of proving truth on the defendant and holds him liable to pay damages for statements he honestly believed to be true and has published without negligence. In every other area of tort law the burden of proof is on the claimant: why should libel be any different? The reason, of course, is that the English common law disfavours free speech. It does so by use of two absurd presumptions: that defamatory (i.e. critical) statements are always false, and that defamations always do significant damage. These two presumptions – of falsity and damage – are both in terms illogical, but are in law irrebuttable and further proof that English law disfavours free speech.

6. Repressive British laws - especially sedition and criminal libel – were repudiated by the First Amendment to the US Constitution. In New York Times V Sullivan (1964) the US Supreme Court ruled that defamation law could restrain coverage of public events and public figures which was malicious, in the sense of being reckless or unconcerned about truth. A more stringent test applies to reporting facts about persons who are not public figures. There is a widespread belief in the UK that US libel law is powerless. Nothing could be further from the truth. It is certainly different, but in some respects is far less favourable to the media. Jury damages can be for millions of dollars – there is no cap. There is much less protection for journalistic source disclosure, and orders for discovery can be extensive and expensive. So all significant US media organisations employ defamation lawyers to fact-check the copy, and they take out insurance against non-compliance with US law. Libel lawyering and insurance is part of the management and editing function of the news organisation, directed to the law that applies where it is established – i.e. the state where it predominantly circulates. Given the extent to which media organisations rely on their compliance with their own country's law, it is, as a general proposition, unfair to subject them to a law and procedure that is entirely alien, and which lacks the defences available in the place of main publication.

7. It must also be stressed that most US media organisations readily offer alternative dispute resolution. Many have ombudsmen who will make an independent investigation of any allegation of defamatory reporting and order corrections and apologies – sometimes after a very critical report on journalistic standards. Most internet services will be prepared to hyperlink the offending article to a letter of complaint, so that no-one will read it without being able to read the complainant's alternative presentation. Newspapers usually offer a right of reply by way of a letter to the editor. English libel lawyers usually and foolishly tell their clients to reject this offer, despite the fact that the letters on the Op-Ed pages are often the second most widely read section (other than the front page). There is a real sense amongst English claimants' lawyers that they want money for their clients as well as themselves, as if only money will assuage hurt feelings and compensate, in some metaphysical way, for the blot on the family escutcheon. Russian oligarchs who do their suing in England are particularly amenable to this line of thought. We gain the impression that many of these claimants are so wealthy (they measure their wealth in many billions) that they do not bother about the five or low-six figure sum that they might eventually receive in damages in England. Money does not matter at all to them: they are suing in order to inflict some pain and irritation and frustration and expense on the journalists and editors they see as their tormentors. They use libel actions, in other words, not to vindicate their reputation but to harass and embarrass their critics and to develop for themselves a reputation for taking libel action whenever criticised, - a reputation that will deter would-be critics, whose newspapers do not have the money to fund expensive libel defences.

[3] *Bachen v India Report Publications* 585 NYS 2d 661 (1992)

8. What normally happens when a foreign newspaper or website is sued in the jurisdiction of England and Wales, either by a UK resident or (increasingly) by a foreigner (i.e. a libel tourist, who wishes to take advantage of the UK's plaintiff-friendly libel law), is the receipt of a pompous "letter before action" from a firm of London solicitors, (e.g. Carter Ruck, Eversheds, Schilling and Lom etc). It will demand apologies, damages and (of course) their legal costs. When a factual error is demonstrated, the foreign media organisation will normally publish a correction or arrange for a hyperlink that draws it to the attention of every internet downloader. Otherwise, it will offer an independent inquiry if it has an ombudsman, or at least a letter to the editor. These offers are usually rejected. Then will come a request to appoint solicitors in London as agents to receive service. This would reduce the initial costs in the litigation, but would also place the burden of proof on the media defendant if it makes a forum non conveniens argument.4 So it is a request that the media will be well advised to turn down.

9. In this event, the claimant will apply to a master or judge in the High Court for an order to serve legal process on the defendants out of the jurisdiction. Regrettably, the grant of such an order has become a mere formality – no enquiry ever seems to be made as to whether it is fair for a foreign media defendant to be hauled into a London court to defend a publication which may have sold very few copies here or which may have no relation at all to matters in Britain. The master or judge in the Royal Courts of Justice acts as a mere rubber stamp for the claimants: they pay their money, they make their witness statement and in a formal and quick procedure they are given their order without any thought as to how it will impact on free speech. All they need to show is one single downloading or one single publication within the jurisdiction. In automatically granting such requests for "service out" on foreign media defendants, English law, and English judges, manifest their contempt for free speech. They automatically decide to drag foreign media into the expensive and pettifogging English libel world, without the slightest enquiry into the fairness of so doing.

10. Subsequently, it becomes possible for the media organisation, once it instructs solicitor and counsel (at the cost of about fifty thousand dollars), to come to court to make a forum non conveniens application before a high court judge. In this argument, that usually lasts a day, it contends that England is an inappropriate jurisdiction for trial of a libel e.g. where millions of copies have been distributed in the US by a US paper, and very few in the UK. IN the 1990s, there were some very sensible decisions which sent US libel tourists packing: see Wyatt v Forbes5 and Chadha v Dow Jones6. These were American plaintiffs who could show only a tenuous connection with the UK, and were suing Forbes Magazine and the Wall Street Journal which were overwhelmingly published in the US. However, this pre-internet line of authority was severely weakened by the disastrous House of Lords decision, (by three judges to two) in Berezovsky v Forbes7 which permitted the oligarch to sue Forbes Magazine in London over allegations that related to matters that took place only in Russia. This decision upheld the absurd early nineteenth century rule in the Duke of Brunswick's case, that every single publication is a separate libel, so just a few internet downloads in England gives jurisdiction to try a defamation claim here.) Despite Lord Hoffman's powerful and logical dissent, warning against the temptation to make England a global defamation policeman, this case has now made London the libel capital of the world. Interestingly, Berezovsky settled the case in a deal where Forbes apologised for its allegations that he had murdered rivals (it could not prove them) and he dropped his complaint about the numerous corruption allegations, which Forbes said in its pleadings that it could prove. No mention has been made of them ever since: in Britain a powerful and wealthy claimant of any nationality with a track record for bringing libel actions can successfully chill speech about himself.

11. The test for accepting jurisdiction – i.e. rejecting a forum application – is whether there has been a "real and substantial" tort in this country. England's libel judges, themselves former libel practitioners, naturally think that there has been a real and substantial tort, unless the defendant can prove that there were only a handful of internet downloads, or a few print copies circulated here. The paucity of copies can also be the basis of an abuse of process application, which is unlikely to succeed given the mindset of the present libel judges. One that did, before a sensible master, was Mardas v New York Times, where only

[4] See Schapira v Ahronson 1999 EMLR 735

[5] Unreported December 2nd 1997, Morland J

[6] 1999 EMLR 724, CA

[7] 2000 EMLR 643

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177 copies of the paper had been sold in London (mainly to New York tourists) and the story had been archived on an NYT internet site. The story itself was an obituary of the Maharishi, which had quoted from Paul McCartney's autobiography (published twenty years before and never sued) as having criticised Mardas for spreading a rumour, in India in 1968, that the guru had sexually harassed a nurse. The story of the Mardas rumour-mongering had been in circulation for many years in many authoritative books but he had never sued over it. The key witnesses – John Lennon and George Harrison and the Maharishi himself - were dead. The Master thought it an unjustifiable waste of court time and the litigants' money to stage a trial over the matter that could never be conclusively determined. However, Eady J overruled him and held that the sale of 177 copies was enough – the trial should go ahead, irrespective of the massive costs to the defence. He ordered the NYT to pay £65,000 immediately, the cost of winning before the Master one morning and losing before the Judge later at a one day hearing. The rights and wrongs of what happened in the Maharishi's commune forty years ago are obviously impossible to establish, but the English libel judges are determined that the time of their courts should be taken up with the attempt. Even if the New York Times wins in the long run, it will get back only 65% of its costs.

12. To foreign observers the English libel industry is most unusual. Its legal costs are by far the highest in Europe.8 There are only two main libel chambers – 5 Raymond Buildings and 1 Brick Court – whose barristers do 90% of the defamation work. They have a monopoly and this drives the costs up. From these chambers all the libel judges are recruited – there are four of them at present, two from each Chambers, deciding disputes brought and defended by their old solicitors and argued by their old colleagues. It is quite extraordinary that whoever allocates High Court judges does not think that judges bred in any other discipline – e.g. public law, for example, which gives some training in freedom of speech – are qualified in or capable of handling trials for libel. The result is that the only judges available in England for libel trials are steeped in the arcane world of common law libel, which has developed without much respect for rights of freedom of speech. This has a financial consequence for defendants: it means that in order to make the law fairer and more favourable to free speech, defendants cannot expect libel judges to have much sympathy. Their decisions must be appealed – not just to the Court of Appeal but to the House of Lords. The cost of this is exorbitant, and it is little wonder that UK newspapers and media organisations have no stomach for paying it. Forbes took the risk and lost by the narrowest of margins. The Wall Street Journal in Jameel v Dow Jones put up the money and won a major victory in refurbishing the Reynolds public interest defence. However, Dow Jones only received part of its costs. Nonetheless the case exposed how libel judges from libel chambers had been sabotaging the Reynolds public interest defence since 1998, when it was developed by the House of Lords. Is it not a matter of some embarrassment to UK legislators that freedom of speech in the UK is dependent on the long purse of foreign news organisations?

13. That long purse is no longer available. Several major US papers are now in receivership, and the drying up of the advertising market with consequent loss of journalistic jobs means there is little money available for improving media law in Britain. Leading US newspapers are actively considering abandoning the supply of the 200 odd copies they make available for sale in London – mainly to Americans who want full details of their local news and sport. They do not make profits out of these minimal and casual sales and they can no longer risk losing millions of dollars in a libel action which they would never face under US law. Does the UK really want to be seen as the only country in Europe – indeed in the world – where important US papers cannot be obtained in print form?

14. More important – certainly more damaging for free speech - is the Duke of Brunswick "multiple publication" rule, long abandoned in the US, whereby one internet downloading in a particular state amounts to publication in that state so as to found jurisdiction. One "hit" in England is enough for a multi-million pound libel action in London. All major foreign newspapers now have internet sites – they archive each publication as a matter of course for the historical record. They are usually prepared to hyperlink to the article any letter or reply that corrects facts or disputes opinions, but they will not obey and they are not obliged to obey orders or injunctions from foreign courts. If claimants want injunctions, they must sue in the US, in the state of

[8] See *A Comparative Study of Costs in defamation Proceedings Across Europe;* Centre for socio-legal studies, University of Oxford, December 2008.

predominant publication. The same should apply when they want damages.

15. The consequences of making media organisations liable for putting articles – perfectly lawful by the law of their own domicile – on websites which are occasionally accessed in England should be obvious. The cost of fighting libel actions may lead internet publishers to build "fire walls" against access from the UK, in order to avoid such actions. This would damage British business and its communication and information services, and would draw international attention to the UK's failure to protect free speech. It would underline the hypocrisy of the British government lecturing other countries on the subject, when the UK itself had become a black hole for internet censorship through its friendliness to foreign libel tourists.

16. What is the best solution to this admitted problem with the internet? Defamation is a means by which the law strikes a balance between the individual's right to reputation and the public right to communicate and receive information. In the context of global dissemination of information by a technology which has no clear or close comparison with any other, a publication rule should not expose foreign publishers to liability in a jurisdiction like England, which has a different and more repressive law of libel, unless they actually solicit or encourage access by residents in the UK to their internet sites.

17. That would mean a rule which locates the act of publication in the place where the article was substantially prepared for uploading rather than in any place where it is downloaded by computer users – unless the publisher has, by its conduct in that place, instigated the downloading. Every media corporation has a "centre of operation" where journalistic material is edited and prepared for publication and where the publication is read by lawyers and insured against libel action. Usually this will be in the place where the article is written and uploaded on its server as well. The most satisfactory rule would locate the act of internet publication in the place where the article is substantially produced, rather than in any place where it happens to be downloaded by computer users, unless the publisher or author has instigated the downloading (e.g. by advertising the article) and thus has waived the rule's protection and provided the state in which the downloading occurred with a clear interest in assuming the power to adjudicate the claim.

18. The above is the kind of rule that one would expect in an international treaty, and Justice Eady is on record in Mardas v NYT as calling for an international treaty on the subject. However, it is unlikely that any treaty could be agreed for some years. There is no reason why Britain could not take the lead in this vexed area and provide a solution that is satisfactory to all except the most aggressive libel tourists. That solution, we urge, would be the following:

- Applications for service out of the jurisdiction on foreign media organisations in relation to any tort of defamation or privacy shall be notified to the said organisation three weeks in advance of the hearing of the proposed application.
- The master or judge shall only give leave if satisfied by the proposed claimant, and after giving the proposed defendant the opportunity to be heard (without submitting to the jurisdiction), that
- In any case relating to publication of print copies, there are at least 750 such copies circulated by the defendant in England and Wales and that that the actual number of copies circulated here exceeds 2% of the total circulation of the publication in the world.
- In a case relating to publication on a foreign internet site, that the article in question has been advertised or promoted in England and Wales by or on behalf of the defendant.
- If, at any stage after leave to bring the action has been given, it appears that 2a) or 2b) is not in fact satisfied, the defendant may apply for summary dismissal of the claim.
- The Duke of Brunswick rule should be abolished, and the US single publication rule should be adopted.
- In all actions for defamation, the normal rule in tort shall apply, namely that the burden of proof that the imputation was defamatory shall lie on the claimant.
- The presumption of falsity and presumption of damage should both be abolished.
- In any action that proceeds in England or Wales against a foreign publisher or a foreign website, in relation to a publication which is substantially distributed in the state in which the publisher is headquartered, the court shall apply to that publication the defamation law of that particular foreign state.

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New York Court Quashes Verification Subpoena Citing State Constitution-Based Privilege

By Michael Grygiel

When a reporter receives a non-party subpoena to verify the accuracy of published information — a situation which may arise when a party to litigation (whether criminal or civil) has been quoted or is the source of attributed statements in news reportage – New York State's Shield Law (*Civil Rights Law* § 79-h(c)) does not apply because its protections are limited to "unpublished news."

However, in an interesting decision & order issued on November 3, 2008, in *People of the State of New York v. Lloyd Kinnear*, New York State Supreme Court, County of Ontario (Hon. Thomas M. Van Strydonck) granted a motion to quash such a "verification" subpoena that had been issued to a reporter for the *Canandaigua Daily Messenger*, holding that the protection provided under Article I, Section 8 of the New York State Constitution established a reporter's privilege notwithstanding the inapplicability of the Shield Law in this context.

To our knowledge, this is the only written decision issued by a New York State court granting a motion to quash a verification subpoena through the application of a reporter's privilege based on the State Constitution's independent guarantee of freedom of speech and press.

Background

Defendant in the case, the Supervisor of the Town of Canandaigua (an elected position), was arrested on a felony DWI charge after he was involved in a single-car accident. The Ontario County District Attorney sought to compel the reporter's testimony to a Grand Jury concerning the defendant's statements that he "had too much" to drink and "didn't belong behind the wheel" – which the prosecution characterized as admissions – as reported in a news article published by the *Daily Messenger* the day following the accident.

In opposing the subpoena based on the decision of the New York Court of Appeals in *O'Neill v. Oakgrove Construction, Inc.*, 71 N.Y.2d 521, 528 N.Y.S.2d 1 (1988), the newspaper argued that before a member of the press can be compelled to testify concerning published material behind the closed doors of a Grand Jury proceeding, the subpoena must be reviewed by a court under *both* a qualified constitutional privilege (requiring a specific showing of materiality, necessity, and exhaustion of other sources) *and* the common law applicable to discovery.

In briefing the issue, the *Daily Messenger* emphasized that the fact that the information sought by a subpoena is already published has no bearing on the rationale for the existence of the constitutional privilege in the first place:

- The constitutional privilege for nonconfidential information exists largely because of the extraordinary range of information collected by news organizations that could ostensibly be "relevant" to innumerable litigants. Under ordinary standards, the practical burden on the time and resources of the media in responding to subpoenas would be vastly different than on other citizens, resulting in the very "diversion of journalistic effort and disruption of newsgathering activity" that the *O'Neill* court sought to avoid. This is true whether the information sought by subpoena is published or not – the intrusion and the time burdens are the same.

- The constitutional privilege protects against the danger that reporters will lose their professional autonomy and objectivity. The public's belief in a news organization's independence would be severely diminished if journalists were seen to provide information to one side or the other in litigation. Journalists in fact and in appearance need to remain free from entanglement with government or private interests. Again, this rationale applies equally to published and unpublished material. A reporter should not be called to lend credibility or support to one party against the other in a judicial

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proceeding, unless the testimony is essential and not otherwise available.

- the privilege protects the free flow of news. The specter of a reporter being called to testify about a news report is highly likely to make sources reluctant to speak with the reporter and this, too, is true whether the testimony sought concerns published information or not. Sources will be unwilling to speak to reporters if they fear that any statements attributed to them readily become grounds for the reporter's compelled testimony, so that a reporter who is known to have covered events which may lead to a criminal prosecution could be turned into an expedient witness. The net result would be a diminished ability to report the news to the substantial detriment of an informed public.

Given the ability of the police officers who arrested Supervisor Kinnear at the accident scene to testify as to their contemporaneous, first-hand observations of his conduct and condition, along with the availability of a blood alcohol test that had been administered to the defendant, the *Daily Messenger* argued that the District Attorney was unable to demonstrate that the reporter's testimony was necessary to obtain an indictment and, further, that the substance of the testimony sought to be compelled was readily obtainable from alternative sources. Under these circumstances, and relying on the *O'Neill v. Oakgrove Construction* rationale – in particular, on then Associate Judge Kaye's concurrence emphasizing the expansive protection traditionally afforded to newsgathering and publication under the State Constitution, which Justice Van Strydonck pointedly referenced during oral argument – the Court held that the prosecution could not satisfy the privilege's requirements and quashed the subpoena:

> The District Attorney has the burden of satisfying a stringent standard before it compels a reporter to testify under oath about published statements made by the defendant. This State has maintained a tradition of providing the broadest protection to the role of gathering and disseminating news of public concern. Indeed, the protection of Article I, § 8 of our State Constitution has been held to be more expansive than that afforded under the Federal Constitution.
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> The Court of Appeals in *O'Neill* requires one seeking information otherwise protected by the State Constitution to satisfy the requirements of a tripartite test. Under this test, the party seeking this information must demonstrate ". . . clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigants [*sic*] claim, and (3) not otherwise available." The District Attorney has failed to meet this test. Accordingly, the subpoena in question is quashed and Julie Sherwood is not required to appear before the Ontario County Grand Jury.

Notably, the Court rejected the District Attorney's claim in his brief and during oral argument that *In re Grand Jury Subpoena,* 269 A.D.2d 475, 703 N.Y.S.2d 230 (2d Dep't 2000), a Second Department memorandum opinion which concluded (without meaningful analysis) that the constitutional privilege recognized in *O'Neill* did not apply to published material "[u]nder the particular circumstances of th[at] case," was controlling in this instance. In doing so, we submit that the decision reinforces the observation of Justice Powell in his brief concurring opinion in *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972), that the balancing of "vital constitutional and societal interests" implicated in reporter's privilege cases should proceed "on a case-by-case basis [in] accord[ance] with the tried and traditional way of adjudicating such questions."

Michael J. Grygiel and William A. Hurst of Hiscock & Barclay, LLP in Albany, NY represented The Canandaigua Daily Messenger and its staff reporter Julie Sherwood. The prosecution was represented by R. Michael Tantillo, District Attorney for the County of Ontario.

Federal Judge Reaffirms "Hot News" Misappropriation

AP's Claim Against Aggregator Survives Motion to Dismiss

By Dave Tomlin

Copyright law still cannot preempt a "hot news" misappropriation claim in New York, a federal judge has ruled in refusing to dismiss a "hot news" claim filed by The Associated Press against the online news aggregator All Headline News Corp. *The Associated Press v. All Headline News Corp. et al.*, No. 08 Civ. 323 (S.D.N.Y. Feb. 17, 2009).

"A cause of action for misappropriation of hot news remains viable under New York law, and the Second Circuit has unambiguously held that it is not preempted by federal law," wrote U.S. District Judge P. Kevin Castel in his February 17 ruling, referring to the Second Circuit's opinion in *National Basketball Association v. Motorola,* 105 F.2d 841 (2d Cir. 1997).

That opinion held that a hot news claim survives preemption when it meets a five-factor test establishing that the plaintiff produced a service based on time-sensitive information which the defendant used to produce a competing service in a manner that threatened to remove the incentive to gather the information in the first place.

Background

AP claimed that All Headline News copied AP stories from licensed websites, stripped off AP's name and logo, and put the copy up on its own website for use by other news distributors.

Judge Castel rejected AHN arguments that the claim should be governed by the law of Florida where the hot news claim is not recognized, and that federal copyright law preempts a hot news claim. "The defendants have set forth no persuasive reason why the Second Circuit's preemption analysis in *NBA* should be rejected or overruled by this Court," Judge Castel wrote.

AP's outside counsel described the decision as an important victory for AP and other news organizations in the Internet Age because with only a few keystrokes and without incurring the cost of investing in real journalism, free riders can easily copy news stories from the web and resell those stories in direct competition with AP and publishers. "The Southern District's decision sends the message that even in the Internet age, the law will still protect the interests of news organizations, their licensees, and the public against unfair competition," AP's counsel said after the decision.

Judge Castel also refused to dismiss AP's claim under the Digital Millennium Copyright Act that All Headline News had removed or altered copyright management information from AP reports, rejecting the defendant's arguments that the DMCA provision was intended to apply only to automated technological protection, not to branding. "The defendants have cited no textual support for limiting the DMCA's application to 'the technological measures of automated systems' – a phrase that appears nowhere in the statute," the judge wrote.

Judge Castel granted dismissal of two other claims, one alleging trademark infringement and the other unfair competition.

Dave Tomlin is Associate General Counsel of The Associated Press. Andrew L. Deutsch of DLA Piper in New York represents AP in this matter. AHN is represented by Brian D. Caplan, Caplan & Ross, LLP, NY.

Copyright Claim Over the Movie "Robots" Dismissed

By Catherine Robb

A California federal district court dismissed on a 12(b)(6) motion plaintiffs', Hans Rosenfeld and Tools Theater Investment Co.', suit against Twentieth Century Fox Film Corporation, Twentieth Century Fox Home Entertainment, LLC, and Blue Sky Studios based on defendants' release of their film, *Robots. Rosenfeld v. Twentieth Century,* No. 07-7040 (C.D. Cal. Jan. 28, 2009) (Matz, J.).

After giving plaintiffs ample opportunity to plead their claims for copyright infringement, trademark infringement, violations of the Lanham Act and Texas state law claims, the court found that plaintiffs had failed to state any claims and dismissed the federal claims with prejudice.

Background

Plaintiffs' claims were premised on their idea for (and drawings and outlines for) a live action Las Vegas stage show called TOOLS, which plaintiffs alleged was infringed by defendants' film *Robots*. In addition to arguing that plaintiffs had not adequately pled any claims under law and that there was nothing similar about the works, defendants also maintained throughout that they had never even heard of plaintiffs or TOOLS until plaintiffs filed the lawsuit. Defendants were also able to get discovery stayed until after defendants' Motions to Dismiss were decided, arguing that plaintiffs were not entitled to what would be costly and burdensome discovery until after they had adequately pled a claim that could sustain a motion to dismiss. (Plaintiffs also sued an entity named Soundelux Showorks, Inc., with whom they did apparently have previous contact, but Soundelux was never served and was eventually dismissed).

Hans Rosenfeld and Tools Theater Corp. originally filed a lawsuit in the Eastern District of Texas (Marshall Division), which has a reputation for being friendly to plaintiffs. The complaint alleged copyright infringement, trademark infringement, and Lanham Act violations, alleging that defendants' film, *Robots*, about an all-robot society, infringed upon plaintiffs' copyrighted and trademarked live action, interactive Las Vegas show about humans and their interaction with robots.

In addition to the trademark and copyright claims, plaintiffs also alleged a slew of state law claims, including misappropriation/theft of confidential information, unfair competition, deceptive trade practices and fraud. Plaintiffs also sought a declaratory judgment.

Because plaintiffs were based in El Paso, Texas and defendants were based in Los Angeles and New York City, and there was no discernible connection to the Eastern District of Texas, defendants filed a Motion to Transfer Venue to the Central District of California - Los Angeles, which the court granted. After arriving in the Central District of California, upon Defendants' motion, the case was transferred (again) from the Judge's court in which it had originally been lodged to another Central District Judge who already had familiarity with the film.

Although Plaintiffs had filed a lawsuit alleging copyright infringement, plaintiffs did not attach any of the copyrights and/or any of the allegedly infringed work to their lawsuit, thus providing no information about the substance of their claim. Plaintiffs also provided little information in the complaint about the substance or basis for any of their claims. Thus, in addition to their answer, and prior to transfer of the case, defendants filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and a Motion for More Definite Statement. But, no court ruled on those motions due to the numerous court transfers in the case. Nevertheless, throughout the course of the lawsuit, defendants repeatedly requested that plaintiffs amend their complaint to more completely plead their claims, but plaintiffs failed to do so.

In an effort to prove that there was no infringement and to obtain early dismissal of the claims, defendants themselves obtained the allegedly infringed material – collectively referred to by plaintiffs as the TOOLS works – from the United States Copyright Office and attached plaintiffs' copyright registrations to a subsequently filed Motion for Judgment on the Pleadings pursuant to Rule 12(c). In reviewing plaintiffs' copyright registrations, defendants discovered that plaintiffs had registered a format for a live, interactive musical fantasy adventure show that was to be performed in a specially designed venue on the Las Vegas strip and that consisted of humans (or humanoids), other creatures, and generic robots. Defendants' work, *Robots,* was (and is) an animated feature motion picture that was exhibited in movie theaters and on DVD throughout the world.

In their Motion to Dismiss, defendants alleged that plaintiffs had not properly alleged any causes of action and could not recover on any claims as they were currently pled (or at all). The court agreed and on September 25, 2008, granted defendants' Motion to Dismiss, but allowed plaintiffs an opportunity to amend their complaint. In its order, the court found that plaintiffs had failed to allege a valid and protectable trademark either through a valid registration or common law priority of use and, at most, had alleged that they had invested time and money in developing and promoting an "idea" of the Tools show.

Similarly, the court found plaintiffs had also not sufficiently alleged the elements of a claim for dilution. Regarding the copyright claims, the court found that there was uncertainty about whether the court could engage in an analysis of substantial similarity due to plaintiffs' failure to provide sufficient notice for the basis of their claims. Despite the fact that defendants had engaged in their own discovery and provided the copyright registrations to the court, the court was unable to determine whether the copyrighted work and the alleged infringement were both before the court, due to plaintiff's vague allegations and failure to attach the allegedly infringed materials and to articulate the basis for their claims. Thus, the court allowed Plaintiffs an opportunity to amend their Complaint, but advised that if plaintiffs did replead, defendants would be allowed an opportunity to file a 12(b)(6) Motion to Dismiss.

Plaintiffs filed an Amended Complaint, but did not substantively amend their complaint. Instead, plaintiffs simply attached the same copyright registrations that had previously been submitted by defendants and added a few nonsubstantive sentences to their complaint. But, as defendants pointed out in their Motion to Dismiss, plaintiffs did not cure the many defects from the original pleading. In particular, plaintiffs still did not adequately plead "use in commerce" or a protectible trademark, instead continuing to simply allege marketing and promotion efforts of the Tools concept.

Plaintiffs other Lanham Act claims were similarly unconvincing to the court. Plaintiffs amended complaint also failed to address the deficiencies of the copyright claims in the original complaint, although plaintiffs did finally attach the copyright registrations that defendants had previously attached, thereby confirming which copyrighted (and allegedly infringed) works were at issue.

In their 12(b)(6) Motion to Dismiss, defendants argued that there was no showing of access and that the two works were not substantially similar. Although plaintiffs listed 28 elements that were purportedly similar between their TOOLS works (from 15 different registrations) and *Robots*, the alleged similarities as alleged on the face of the complaint were non-protectable, general, and vague concepts or ideas, (*e.g.*, theme of "good v. evil with good eventually overcoming evil but with great difficulty;" both works have an "antagonist with evil empire plans").

As defendants argued, even if the allegations of similarity were accepted as true, they failed on their face to satisfy the extrinsic test under *Kouf v. Walt Disney Pictures & Television,* 16 F.3d 1042 (9th Cir. 1994), which uses an objective comparison of elements of the two works (e.g., looking at specific expressive elements focusing on articulable similarities between plot, themes, dialogue, mood, setting, pace, characters, and sequence of events in the two works).

On January 28, 2009, the court again dismissed plaintiffs' complaint for failure to state a claim. The court again found that plaintiffs had failed to allege use in interstate commerce, instead alleging simply that they had undertaken an unsuccessful effort to promote and market the concept of the Tools show. On the copyright claims, the court found that "no reasonable jury" could find that the two works were substantially similar using the objective criteria of the extrinsic test articulated under *Kouf*.

The court noted that Tools story concerned human factory workers who were threatened by the factory boss and his evil plot to replace them with robots. In the Tools story, a factory worker fights back, destroying the robots and saving mankind. According to its creator, the Tools main theme is "the relationship between man and robot in modern times." As the court noted, *Robots*, on the other hand, has no human characters; it is inhabited only by robots with differing, individualized physical and personality traits.

The *Robots* theme – "You can shine no matter what you are made of" – plays out in a young, idealistic robot who moves to the big city to become an inventor, only to find that greed and profit have become the mantra of the formerly idealistic company. After a revolt, the young robot prevails and saves "all the humble 'bots'" from the greedy forces.

In granting defendants' motion, the court found that the plots, themes, and sequences of events in the two works were "substantially different." As the court found, the alleged similar themes of good versus evil, young male heroes with blonde girlfriends, and diabolical villains, even if present in both works, were general ideas that are unprotectable. In addition, the court found that the alleged similarities in settings – industrial factories, ultra modern offices, monorails and other architectural features – were *scenes a faire*. Finally, the court noted that the pace, mood, and production value of the two works were substantially different because Tools was designed to be a live interactive show, while Robots was an animated film.

The court found that, from an objective standpoint, no reasonable jury could find that the works were substantially similar to support a conclusion that defendants copied plaintiffs' works. Therefore, the court dismissed the copyright claims in addition to the Lanham Act claims and claim for declaratory judgment .

Twentieth Century Fox Film Corporation, Twentieth Century Fox Home Entertainment, LLC and Blue Sky Studios. were represented by Laura Lee Prather and Catherine Robb of Sedgwick, Detert, Moran & Arnold LLP.

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GIS Electronic Mapping Database Must Be Disclosed Under California Public Records Act

Court Rejects Homeland Security Regulations and Copyright as Reasons to Deny Disclosure

By Rachel Matteo-Boehm and Matthew Jaksa

In what appears to be a nationwide issue of first impression, the California Court of Appeal has ruled that local government officials may not use the federal Critical Infrastructure Information Act of 2002, 6 U.S.C. §§ 131-134, to shield their own records from disclosure under state open records laws. *County of Santa Clara v. Superior Court*, 170 Cal. App. 4th 1301 (Feb. 5, 2009).

In the same published decision, the court also held that copyright law did not allow county officials to restrict the use or disclosure of records subject to disclosure under the California Public Records Act ("PRA"). The case was the first published decision in California to address the applicability of copyright laws to government records subject to the PRA, and is only one of a handful of cases in the nation to have discussed the interaction between copyright and state open records laws.

Background

At issue in the case was whether the County of Santa Clara was required to provide an electronic copy of its geographic information systems ("GIS") basemap pursuant to the PRA. GIS is a multilayer mapping technology that allows for sophisticated analysis of geographic information. The foundational layer of GIS, known as the "basemap," contains basic information such as parcel boundary lines, addresses, and ownership information. Using commercially available software, interested parties can layer other publicly available databases over the basemap data and perform complex computer assisted analyses of the layered information. The basemap data is thus of great value to the news media, public interest groups, and others in the private sector in analyzing an endless array of issues. Some of the many ways in which a GIS basemap can be used are as follows:

Analysis by property owners of tax assessments/zoning decisions: Used in conjunction with the assessor's roll database, a property owner can use the basemap to locate other parcels with similar descriptive and so-called "locational" characteristics (*e.g.*, same approximate size, same approximate distance to a park or school, same approximate distance from a freeway) to determine whether their taxes are higher or lower than those paid by others, or whether zoning decisions are equitable. To the extent disparities are discovered, they can be corrected, and the information can also be used to determine whether politically connected individuals are receiving favorable treatment.

Use by public interest groups: Using the Basemap Data together with other publicly available data, an organization can perform any number of studies that further the public interest. For example, advocates for low and moderate-income housing in Washington DC used similar data to analyze the dysfunctional concentration of such housing in poor, crime-ridden neighborhoods. In California, basemap data has been used to determine whether street repair services were being provided equitably to neighborhoods of varying economic level, and to help an environmental nonprofit group model alternative land use regulations, parcel by parcel.

Investigations by the news media: Basemap data plays a critical role in news reporting in the electronic age. Reporters have used GIS basemap data to help them pinpoint the cause of building collapses after Hurricane Andrew; to conduct a sophisticated analysis of ownership of property parcels in critical areas; to track building permits issued in fire-prone areas; to track the health effects of smog in urban areas; and to track geographic concentration of subprime loans.

Like many other California counties, Santa Clara County was making its basemap data available to the public upon request; unlike other counties, it was charging huge amounts for copies of the basemap – in some instances, more than $100,000. However, the PRA requires that public agencies make copies of public records, including records maintained in electronic form, available for a fee that in most cases may not exceed the direct cost of reproduction.

Accordingly, in June 2006, the California First Amendment Coalition ("CFAC"), a nonprofit, non-partisan educational and advocacy organization focused on freedom of expression and open government issues, made a PRA request for the basemap. The county denied CFAC's request, claiming the basemap was exempt from disclosure under several of the PRA's exemptions to disclosure (including the PRA's exemption for software and the so-called "catch-all" exemption found at Government Code 6255) and was also protected by copyright. Notably, however, the county did not even mention security as a concern warranting non-disclosure.

In October 2006, CFAC filed a petition for writ of mandate in the Santa Clara County Superior Court seeking to compel the county to release a copy of the basemap for direct cost of reproduction. Several months after CFAC initiated writ proceedings, the county submitted a copy of the basemap to the Department of Homeland Security ("DHS") and argued that, having done so, the basemap – which the county claimed posed a security risk because it would purportedly reveal the exact location of underground water lines – was exempt from disclosure under the regulations promulgated by DHS under the Critical Infrastructure Information Act of 2002 ("CII Act").

After multiple rounds of briefing and three court hearings, the Superior Court ruled in favor of CFAC in May 2007, issuing an unusually long 27-page decision and order rejecting the county's claimed PRA exemptions and directing it to release the basemap for the cost of duplication. As to the county's claimed security concern, the court rejected its arguments under the Critical Infrastructure Information Act and noted that if security were a truly a concern, one would think the county would not have disclosed it to anybody, even for a fee.

In June 2007, the county initiated a writ proceeding in the California Court of Appeal, focusing primarily on its belatedly-offered security argument. The court issued an order to show cause in March 2008, inviting full briefing by the parties. On appeal, CFAC's brief was supported by four different amicus briefs submitted on behalf of an impressive array of amici, including the National Security Archive, the Center for Democracy and Technology, the Electronic Frontier Foundation, the Reporters Committee for Freedom of the Press, the Real Estate Information Professionals Association, and one brief submitted on behalf of a local water company and 77 different GIS professionals.

After briefing by the parties and amici, the case came on for oral argument on January 15, 2009. On February 5, the Court of Appeal issued a 41-page opinion rejecting all of the county's arguments for withholding the basemap, including its arguments that (1) homeland security regulations provided an exemption from disclosure, and (2) copyright law permitted the county to place restrictions on disclosure and allowed the county require recipients to sign an "end user agreement."

Critical Infrastructure Information Act

The CII Act was enacted to help protect the nation's critical infrastructure from terrorist attack by providing for collaboration between DHS and those persons and entities that control critical infrastructure. At its core, the CII Act encourages private and public entities to voluntarily submit "critical infrastructure information" to DHS by ensuring that the information will be treated confidentially by DHS and those federal, state, and local government entities with which DHS later shares the information.

The final DHS regulations implementing the CII Act provide that once critical infrastructure information is submitted to DHS and DHS validates the information as "protected critical infrastructure information," the information "shall be treated as exempt from disclosure under the Freedom of Information Act and any State or local law requiring disclosure of records or information." 6 C.F.R. § 29.8(g). In the Santa Clara County action, the county contended that having obtained validation for its basemap from the DHS, the basemap was therefore exempt from disclosure.

The Court of Appeal disagreed, determining that the CII Act had no application to the basemap. The court explained that the Act's "consistent and pervasive" regulatory language creates a distinction between those entities that ***submit*** critical infrastructure information to DHS and those agencies that ***receive*** the information (*i.e.*, DHS and those government entities with which DHS later shares the information). While the CII Act prohibits a receiving entity from disclosing protected information pursuant to open record laws, nothing in the Act imposes such a rule on the

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entity that submitted the information to DHS in the first place.

While the Court of Appeal's analysis was a technical one grounded in the twists and turns of the statute and DHS regulations, the result is of huge practical importance in that it rejects a wide-ranging preemption of state and local law. Indeed, the position advocated by the county had the potential to eviscerate state and local open records laws by permitting governments to shield otherwise-public records from disclosure simply by submitting the records to DHS and convincing the agency to validate the records as protected critical infrastructure information. This goes beyond the Act's apparent purpose, which is not to prohibit holders of critical infrastructure information – many of which are private sector entities – from disclosing their own information, but rather to encourage voluntary submission of critical infrastructure information to DHS by ensuring that the information will not be publicly disclosed by DHS and other receiving entities.

Copyright Protections For Public Records

An additional argument advanced by the county was that, even if no specific exemption allowed the county to withhold the basemap, the county could impose restrictions on end users of the basemap based on copyright law. While copyright is primarily a creature of federal law, state law determines whether state and local governments may claim copyrights in public records they create.

Looking to the PRA for guidance, the court first determined that nothing in that Act provides explicit authority for the assertion of a copyright interest in a public record. It next examined whether end-user restrictions grounded in copyright might nonetheless be compatible with the purpose and operation of the PRA. Answering this question in the negative, the court concluded that the PRA's policy of unrestricted disclosure would be undercut by allowing the county to impose "extra-statutory restrictions" on the use of public records through the imposition of end user agreements. Accordingly, the court concluded that the basemap must be disclosed as provided by the PRA, without restriction or limitation.

The Court of Appeal considered two cases from other jurisdictions in reaching its conclusion. In *County of Suffolk v. First American Real Estate Solutions*, 261 F.3d 179, 189 (2d Cir. 2001), the Second Circuit Court of Appeal examined New York's open records law and determined that, while the law required a county to make its tax maps available to the public for inspection and copying, it did not affect the agency's ability to impose end-user agreements restricting subsequent redistribution of those maps. On the other hand, the opinion of the Florida District Court of Appeals in *Microdecisions v. Skinner*, 889 So.2d 871 (Fla. Dist. Ct. App. 2004) reached the opposite conclusion, determining that Florida's open records law prevented a county appraiser from requiring persons who received electronic copies of GIS maps to sign a licensing agreement if the maps were used commercially.

The California Court of Appeal followed the result and reasoning of *Microdecisions*, noting that the Florida open records law construed in *Microdecisons* was similar to California's PRA in at least two important respects. First, California's open records law does not allow limitations on access based on the purpose for which the records are requested. Second, that law generally limits the fee that can be charged by an agency for production of a public record to the cost of reproduction.

What these cases ultimately suggest is that the issue of whether public officials may claim copyright protections in public records depends on an analysis of the particular open records law at issue. In the absence of an explicit statutory provision allowing for copyright protection, the issue will likely turn on whether the forum state's open records law leaves room for copyright restrictions on use of public records. In those instances where a state's open records law requires unrestricted disclosure without regard to the recipient's motive or intended use of the records, copyright restrictions would likely not be consistent with the law.

The county has until March 17 to seek review of the decision by the California Supreme Court.

Petitioner California First Amendment Coalition is represented in this matter by Roger Myers, Rachel Matteo-Boehm, Kyle Schriner, and Matthew Jaksa, Holme Roberts & Owen LLP, San Francisco, CA. Ms. Matteo-Boehm argued the case before the California Court of Appeal. Respondent County of Santa Clara is represented by County Counsel Ann Miller Ravel and Deputy County Counsel Robert A. Nakamae.

Pennsylvania Supreme Court Holds That Autopsy Reports Are Public Records

By Michael Berry

Last month the Pennsylvania Supreme Court held that autopsy reports are public records. *See* *Penn Jersey Advance, Inc. v. Grim*, 962 A.2d 632 (Pa. Jan. 22, 2009). Although the court's holding stands as a resounding victory for public access, its long-term implications are less clear, as the court expressly avoided deciding whether autopsy reports will remain accessible under the Commonwealth's new Right to Know Law, which went into effect just three weeks before the Supreme Court handed down its decision. And, without providing any specific guidance, the Court left open the possibility that courts can seal autopsy reports "based on privacy or privilege concerns."

Background

Under the Pennsylvania Coroner's Act, every coroner throughout the state is required to "deposit all of his official records and papers for the preceding year" with the clerk of court "for the inspection of all persons interested therein." Citing this law, reporters for the Easton *Express-Times* and the Allentown *Morning Call* requested that the Lehigh County Coroner, Scott Grim, provide copies of the autopsy report he prepared following the shooting death of a local police officer.

The officer's death, which the coroner declared to be a homicide, had garnered substantial public interest, particularly because he was shot inside police headquarters. Nevertheless, Coroner Grim denied the newspapers' requests based on his view that the autopsy report was not an "official" record or paper under the Coroner's Act. The two newspapers filed mandamus actions in the local court of common pleas seeking to force Grim to deposit his autopsy report in the clerk's office. The court granted the newspapers' request and ordered the coroner to deliver the report to the clerk. Coroner Grim appealed to the Commonwealth Court, one of two intermediate appellate courts in Pennsylvania.

Grim's challenge was not the first time Pennsylvania's appellate courts had addressed the accessibility of autopsy reports. In 1996, the Superior Court, Pennsylvania's other intermediate appellate court, determined that autopsy reports are "official records of the coroner's office" and thus should be released under the Coroner's Act. *See In re Dillon*, 674 A.2d 735, 739 (Pa. Super. Ct. 1996). That determination was later cited favorably by the state Supreme Court in a case addressing whether autopsy reports could be sealed to protect ongoing criminal investigations. *See In re Buchanan*, 880 A.2d 568, 576-77 (Pa. 2005). Several months before the Supreme Court issued its decision in *Buchanan*, the Commonwealth Court took the opposite position, holding that autopsy reports are not "official records" covered by the Act and that the statute only requires coroners to disclose documentation of the cause of death and whether the death resulted from foul play. *See Johnstown Tribune Publ'g Co. v. Ross*, 871 A.2d 324, 330-31 (Pa. Commw. Ct. 2005); *see also MLRC MediaLawLetter* April 2005 at 38.

In *Grim*, the Commonwealth Court was forced to address these conflicting rulings. Ultimately, it followed its prior decision and, consistent with that decision, concluded that Coroner Grim was not required to deposit the autopsy report with the clerk of courts. The newspapers petitioned the Supreme Court for review, contending that the Commonwealth Court erred by failing to follow the Superior Court's decision in *Dillon* and the Supreme Court's guidance in *Buchanan*.

The Supreme Court's Decision

The Supreme Court reversed the Commonwealth Court's ruling and applied the plain meaning of the Coroner's Act, as foreshadowed by its *Buchanan* decision. Specifically, the Court held that because one of a coroner's "official duties" under the Act is conducting an autopsy, "[i]t follows logically that a coroner's resulting autopsy reports constitute 'official records and papers' within the meaning of [the Act]." Thus, coroners must deposit their autopsy reports with the clerk of court at the end of each year.

The Supreme Court recognized that under its decision the public would have access to "'potentially privileged information related to the decedent's medical history and graphic photographs taken during the autopsy.'" The Court explained that trial courts could address this "legitimate" concern through their "inherent power" to "limit public access to autopsy reports (or portions thereof) based on privacy or privilege grounds where warranted." Although the Court did not discuss this point in detail, it said that "anyone seeking to protect an interest in such material, and having standing to do so, can seek appropriate relief from the trial court."

This concern prompted a dissent from Justice J. Michael Eakin, who discussed the privacy issues raised by the Court's decision at length. Justice Eakin criticized the effect of the Court's ruling as "abominable," stating his view that "matters having nothing to do with cause and manner of death should remain private and not be routinely disclosed."

The New Right to Know Law

In a footnote, the Supreme Court stated that it expressed no view "on the relationship between the Coroner's Act and the Right to Know Law," noting that the new open records law, which became effective on January 1, 2009, "has no application to the events underlying this case." While this question technically remains an open issue, it appears reasonably clear that the Court's decision in *Grim* should continue to control public access to autopsy reports. Although the new Right to Know Law provides that "autopsy record[s] of a coroner," copies of "autopsy report[s]," and photographs taken during an autopsy are exempt from disclosure, it also expressly states that if its provisions "regarding access to records conflict with any other federal or state law, the provisions of this act shall not apply." In other words, under the Right to Know Law, the mandate of the Coroner's Act should continue to govern public access to autopsy reports. If the Supreme Court continues to follow the same plain meaning approach it employed in *Grim*, the public should continue to have access to autopsy reports under the new open records law.

Michael Berry is an attorney in the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. Penn Jersey Advance, Inc. was represented by Douglas J. Smillie of Fitzpatrick Lentz & Bubba, P.C. The Morning Call, Inc. and Joseph McDonald were represented by Malcolm J. Gross and Michael Alan Henry of Gross, McGinley, LaBarre & Eaton, L.L.P. Scott Grim was represented by Stuart Shmookler of the Lehigh County Department of Law. Teri L. Henning and Melissa Bevan Melewsky of the Pennsylvania Newspaper Association filed an amicus brief in support of the newspapers.

North Carolina Bill Introduced to Curb Defamatory Internet Content

Bill Would Criminalize Defamatory Statements Online; Amends Retraction Statute

By Charles E. Coble and Mark J. Prak

A bill introduced this session in the North Carolina General Assembly would take the regulation of speech on the Internet in a troubling new direction. Indeed, the negative response to Senate Bill 46, introduced by Democratic State Senator Steve Goss, has spanned the political spectrum, ranging from North Carolina's Civitas Institute, which termed it the "bad bill of the week," to the BlueNC blog. Senate Bill 46 was referred to the Senate Judiciary 1 Committee on February 4, 2009, where it remains. The bill has several components.

First, the bill would criminalize defamatory statement made over the Internet. In particular, the bill declares it to be "unlawful for any person to communicate by transmission through an electronic medium any false, defamatory statement that is libelous or slanderous." The offense would be punishable as a Class 2 misdemeanor and, notably, the State of North Carolina would have jurisdiction "if the transmission that constitutes the offense either originates in the State or is received or viewed in the State." The bill defines "electronic medium" to include "the Internet and any computerized or electronic information service," including "a bulletin board, a network, an online service, electronic mail, a forum, a blog, or a news group."

> ***… the introduction of Senate Bill 46 in North Carolina is a signal that state legislatures may become more active in attempting to curb what they view as the excesses of Internet speech.***

Thus, as drafted, the bill would create a new class of criminal libel in North Carolina. In response to criticism of this move -- particularly given that states have generally moved away from criminal libel statutes and those with criminal libel statutes on the books (such as North Carolina) generally have let them lie fallow -- Senator Goss apparently told local press outlets in North Carolina that the inclusion of criminal penalties in the bill was "an oversight." There is a serious question whether the enforcement of criminal libel statutes would violate the First Amendment to the U.S. Constitution in the wake of the *New York Times v. Sullivan* and *Garrison v. Louisiana* cases.

Second, a particularly troubling aspect of the bill appears in subsection (e) of section 2. It provides:

> The person who administers or provides the facilities for the electronic medium involved in the alleged libel or slander shall not be held liable for the alleged libel or slander unless the person is guilty of negligence either in allowing the material to be placed in the electronic medium or in allowing the material to remain in the electronic medium after the person became aware that the material was false and defamatory.

This provision would make websites and web hosts liable for third-party content if they were found "negligent" in allowing a defamatory statement to be posted or to remain posted after a complaint or some other form of notice was received. This effort to hold website operators responsible for third-party content runs headlong into Section 230 of the Communications Decency Act, a federal statute that expressly provides that websites and web hosts are not responsible for defamatory or most other actionable content (the prime exception being posts amounting to copyright violations) created by third-party users. So long as the website operator – or "interactive service provider" – is not deemed an "information content provider" with respect to the statement at issue, the website operator cannot be treated as the publisher of the statement for liability purposes.

Congress passed Section 230 in an effort to encourage website operators to police content on their sites without running the risk of being held responsible for objectionable content they miss. Senate Bill 46 would turn that approach on its head by creating an incentive for website operators not to learn about objectionable posts made to their blogs or message boards. Because of this direct conflict with Section 230, this provision of Senate Bill 46 would be preempted and unenforceable under the Supremacy Clause, Article VI, Section 2, of the U.S. Constitution.

Third, Senate Bill 46 would make significant changes to North Carolina's retraction statute. The second section of the bill would require a plaintiff seeking to bring a lawsuit in response to defamatory material conveyed through an electronic medium first to give notice to the person accused of making the statement and then to allow that person 5 days to correct the statement at issue and post an apology. The request could be made through traditional means or "by placing the request at one of the locations in the electronic medium known . . . where the libelous or slanderous material was placed." Once the person receives the notice, he or she must post the apology and correction within 10 days, to the extent possible, in the same location and for the same time period that the challenged statement was posted.

If a trier of fact concludes that the statement at issue was made in good faith, was due to an "honest mistake," was posted without the prior knowledge or approval of the person "who administers the facilities for the electronic medium," or, even if the post was made with approval of the administrator, there were "reasonable grounds for believing that the communications were true" and a timely correction and apology is posted in compliance with the statute, then the plaintiff would be limited in the lawsuit to recovery of his or her actual damages.

A final note worthy of mention is that the changes to the retraction statute and the proposed liability for negligent website operators "shall not apply to anonymous communications." This provision creates a questionable incentive – website operators would be protected from the section's liability so long they require users to post content anonymously, a move unlikely to inspire restraint among would-be Internet defamers.

In short, Senate Bill 46 as drafted is problematic in a number of ways. It appears to run afoul of both Constitutional and federal law, and the incentives it would create would likely do little to accomplish the stated objectives of the bill's sponsors, namely to reduce defamatory content in emails, message board posts, and blogs. Nevertheless**,** the introduction of Senate Bill 46 in North Carolina is a signal that state legislatures may become more active in attempting to curb what they view as the excesses of Internet speech. Because many news organizations operate websites that allow users to post content, the news media across the country should be on the lookout for analogues to this bill in their own states.

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Student Punished for Personal Blog Entry Is Denied Recovery

School Officials Protected By Qualified Immunity

In a case that has been closely followed by citizen media groups and Internet activists, the Connecticut federal district court last month entered judgment largely in favor of school officials who had disciplined a high school student for comments made on the Internet. *Doninger v. Niehoff*, 2009 WL 103322 (D.Conn. Jan. 15 2009) (Kravitz, J.).

The plaintiff sued school officials for violating her First Amendment rights after she was banned from participating in school politics for referring to high school officials as "douchebags" in her personal blog. Although the district court found that there were factual disputes about the school's motivation for punishing the plaintiff, school officials were protected by qualified immunity for taking action against a student's off-campus speech.

Background

Frustrated by multiple delays and scheduling conflicts for an annual music festival at Lewis S. Mills High School, student and junior class secretary Avery Doninger, along with three other junior class officers, wrote an e-mail urging parents and taxpayers to contact the school in support of the festival. In reaction to the influx of urgent phone calls to the school, the school principal, Karissa Niehoff, addressed the students on the proper procedures to handle such complaints and, according to Avery, cancelled the event.

In reaction to this news, Avery posted an entry announcing the "cancellation" in her personal blog, referring to the school officials as "douchebags" and encouraging more students to contact the school in support of the festival in order to "piss [Ms. Niehoff] off more." After the festival controversy was over, school officials discovered the blog entry and disqualified Avery from serving as a class officer during her senior year.

In addition, school officials prevented students from wearing t-shirts emblazoned with the phrase "Team Avery" during the speeches for the class officer elections. The students were allowed to wear the shirts both before and after the assembly.

On these facts, Avery sued school officials claiming her First Amendment rights were violated. Claims were also made under the First Amendment for the censorship of the "Team Avery" t-shirts, for violations of Fourteenth Amendment rights to equal protection, and for intentional infliction of emotional distress under Connecticut state law.

Her motion for a preliminary injunction was denied by the district court and the Second Circuit affirmed. *Doninger v. Niehoff*, 514 F.Supp.2d 199 (D.Conn. 2007), *aff'd*, 527 F.3d 41 (2nd Cir. 2008) (Sotomayor, Livingston, Preska, JJ.).

Last month the district court ruled on the parties' cross motions for summary judgment in a decision that touched on the blurred boundaries between on-campus and off-campus speech in the age of the Internet.

Public Schools and the First Amendment

Plaintiff claimed that punishment for speech outside of the school violated the First Amendment. The district court's analysis on the issue began with a review of the previous decisions made under the motion for preliminary injunction. There, the district court had decided that an injunction was not warranted, focusing on the nature of the punishment and concluding that "the Supreme Court and other courts have been willing to accord great discretion to school officials in deciding whether students are eligible to participate in extracurricular activities."

The Second Circuit affirmed denial of a preliminary injunction on separate grounds, holding that plaintiff's statement on her blog met the test established in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), since it "foreseeably created a risk of substantial disruption within the school environment." The court focused on the (a) offensive nature of the language used, (b) the misleading, if not false, nature of the entry (since the event was never actually cancelled) and its potential for disruption, and (c) the nature of the punishment, as analyzed by the district court.

After additional discovery, both sides moved for summary judgment. Plaintiff argued that even if her blog entry did raise the potential for school disruption she was actually punished for the offensive language on her blog. Under the Rule discussed in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), the concern over the potential disruption, and not some other motive, must be the actual reason for the punishment imposed. The district court found disputed issues of fact on this question, citing the timing of the punishment and testimony from the school principal that the blog entry displayed "a lack of citizenship" and that "douchebag" was "a horrible word."

Qualified Immunity

However, despite the disputed facts over the school officials' motivation, the unsettled boundaries between on-campus and off-campus student speech in the digital age entitled the defendants to qualified immunity on plaintiff's main claim.

Plaintiff argued that qualified immunity was barred by *Thomas v. Board of Education*, 607 F.2d 1043 (2d Cir. 1979) where the court noted that "the arm of [school] authority does not reach beyond the schoolhouse gate." The district court, though, noted that "we are not living in the same world that existed in 1979."

> The students in Thomas were writing articles for an obscene publication and handing out copies after school. Today, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. … Off-campus speech can become on-campus speech with the click of a mouse. As the case before us demonstrates, we are decidedly not in the world confronted by the Second Circuit in *Thomas.*

the unsettled boundaries between on-campus and off-campus student speech in the digital age entitled the defendants to qualified immunity

The court went on to cite a litany of law review articles discussing the contours of the law in this area, citing with approval the comment that "when it comes to student cyber-speech, the lower courts are in complete disarray." The court concluded that "if courts and scholars cannot discern the contours of First Amendment protections for student internet speech, then it is certainly unreasonable to expect school administrators, such as defendants, to predict where the line between on- and off-campus speech will be drawn in this new digital era."

Other Claims

The sole claim to survive summary judgment involved the censorship of the "Team Avery" t-shirts. The court rejected the qualified immunity defense, finding that the law regarding non-offensive, non-disruptive speech in school is clearly established.

The plaintiff was represented by Jon L. Schoenhorn & Associates LLC in Hartford, CT. The American Civil Liberties Union of Connecticut served as an amicus, represented by David J. McGuire of American Civil Liberties Union of CT in Hartford, CT. Defendants were represented by Beatrice S. Jordan, Katherine E. Rule, and Thomas R. Gerarde of Howd & Ludorf in Hartford, CT and Christine L. Chinni of Chinni & Meuser, LLC in Avon, CT

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Legislative Update: DTV, Open Government, and Copyright Dominate Early Media Agenda on Capitol Hill

By Kathleen Kirby and Shawn Bone

Media issues figured prominently in the early days of the 111th Congress, as both Chambers scrambled to deal with problems surrounding the nation's transition to digital television and attempted to capitalize on President Obama's immediate promise of a more open and transparent government.

While it is anticipated that Democratic majorities in both Houses will create a more favorable climate for certain media initiatives, such expectations must be tempered by political reality. Congressional attention thus far this session necessarily has focused on the economy, and other high priority policy goals for the new President – health care, education reform, and renewable energy – will dominate the legislative agenda in the coming months. Still, several legislative proposals of interest to the media appear to have some momentum heading into the spring legislative cycle.

DTV Delay Act

Earlier this month, Congress passed and the President signed S. 352, the "DTV Delay Act." The Act postponed the DTV transition, long-scheduled for February 17, until June 12. The February 17 date was selected by Congress in 2005, but recent concerns about funding for the converter box coupon program (which provided $40 toward equipment necessary for those with analog TVs not hooked up to cable or satellite to continue watching TV) and consumer education prompted President Obama's team to push for a delay. In addition to postponing the transition, the bill permits broadcast stations to transition sooner if they comply with stringent new FCC rules. If the stations do make the early switch, that spectrum can immediately be allocated for public safety services. The House and Senate also included $650 million in the stimulus bill for additional DTV converter box coupons to help relieve the backlog of applications.

Free Flow of Information Act of 2009

Building off last year's momentum, supporters of a federal shield law have re-introduced that measure. The new bill, H.R. 985 (introduced by Representative Rick Boucher (D-VA) with 38 bipartisan original co-sponsors, including the Chairman of the House Judiciary Committee, Representative John Conyers (D-MI)), is identical to the bill passed by the House last session. Senator Arlen Specter (R-PA) has introduced a Senate version, S. 448, that is identical to his proposal from the last Congress as passed by the Senate Judiciary Committee.

The shield law proposals, of course, are designed to establish a qualified privilege for reporters under federal law. The bills contain a series of standards regarding when the government or a party to a criminal or civil case can compel a reporter to testify regarding his or her sources. They include a number of specific exceptions to the privilege, including: (1) prevention or investigation of acts of terrorism or other significant and articulable harm to national security; (2) furnishing eyewitness observations of a crime; and (3) obtaining information necessary to prevent death or significant bodily harm. The privilege extends both to the reporter and to communications service providers engaged in business transactions with such reporter.

The House and Senate bills are not identical. The House proposal includes language that would create an exception to the privilege in cases where confidential information held by a reporter would reveal the identity of someone who has unlawfully disclosed trade secrets, personally identifiable health information, or nonpublic personal.

The Senate bill contains a somewhat more expansive definition of "journalist" for purposes of applying the privilege (under the Senate bill, a person would not be required to conduct journalistic activities for a substantial portion of his or her livelihood or for substantial financial gain to invoke the privilege), along with an exception allowing a court to compel disclosure of sources and work product not covered by a specific promise of confidentiality.

The federal shield law died on the Senate floor last year when Senator Specter failed to gather 60 votes to invoke cloture. With the support of both the White House and major Senate Republicans like John McCain, the bill may have a greater chance of passage this year. Expectations are for quick House action, followed by Senate consideration and the possibility of a Conference Committee to iron out the differences between the two bills.

Reducing Over-Classification Act of 2009

The House acted quickly to pass legislation to establish new rules for the Department of Homeland Security pertaining to its

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process of classifying information. On February 3, the House passed H.R. 553, the "Reducing Over-Classification Act of 2009," introduced by Representative Jane Harman (D-CA). The bill directs the Secretary of DHS to establish procedures within the Department to prevent the over-classification of information related to homeland security, the prevention of terrorist attacks, and weapons of mass destruction. Those rules must include a process whereby intelligence products produced by the Department are prepared in both a classified and unclassified form, if the product "would reasonably be expected to be of any benefit" to States, localities, law enforcement, or the private sector. DHS must also create auditing mechanisms to ensure that these rules are followed, track the classification activities of the Department's employees, and conduct training on the proper classification of documents to prevent over-classification of information.

Supporters of the legislation expect that these new procedures will make DHS a model agency for the classification of sensitive information. During debate on the bill, Representative Bennie Thompson (D-MS), Chairman of the House Homeland Security Committee, commented that the procedures in the bill "would ensure that classification is limited to narrow cases, thereby promoting the creation of unclassified intelligence products from the outset." Representative Harman seconded these thoughts, noting that "[p]rotecting sources and methods is the only valid reason to refuse to share information." Passed in the House by unanimous consent, the bill now awaits action in the Senate.

Performance Royalties

Congress will again, this session, consider the question of royalty payments to music artists by terrestrial radio stations. Competing pieces of legislation have been introduced regarding whether such royalties should be imposed at all. Representatives Gene Green (D-TX), Mike Conaway (R-TX) and 110 co-sponsors have introduced a resolution supporting "Local Radio Freedom" and opposing any attempt by Congress to impose "any new performance fee, tax, royalty, or other charge relating to the public performance of sound recordings on a local radio station for broadcasting sound recordings over-the-air, or on any business for such public performance of sound recordings." Similarly, supporters of performance royalties have re-introduced their legislation, S. 379 (Senator Patrick Leahy (D-VT)) and H.R. 848 (Representative John Conyers (D-MI).

The performance royalty bills in the House and Senate are largely the same as the bills passed by the Judiciary Committees in both Chambers last Congress. Representative Conyers, however, has included in his bill language that would codify a royalty distribution system that was agreed to by the artists and record companies earlier this decade. Under that language, artists would be paid their portion of the royalties (amounting to a total of 50% of the overall royalty payments) directly through SoundExchange.

The bill would also guarantee that the Copyright Royalty Board, in setting the royalty rates to be paid to performers, could not discount those rates by any amounts paid to songwriters (a recent CRB decision had made certain deductions to the fees paid by Internet radio to owners of musical works based on payments made to the performers). Quick action on these measures can be expected, although final passage of a performance royalty bill is not assured.

SHVERA

A significant new issue facing the House and the Senate this Congress with respect to broadcast media is the need to renew the Satellite Home Viewer Reauthorization Act (SHVERA). SHVERA, passed in 2004, reauthorized and revised the compulsory copyright license granted to DBS providers for local broadcast programming. SHVERA is set to expire on December 31, 2009, and must be renewed if Congress wants to prevent the need for DBS providers to negotiate program-by-program copyright licenses with program producers. SHVERA also establishes the rules for distant signal importation by DBS providers into unserved areas, and for local-into-local service for broadcast markets.

The SHVERA debate this Congress likely will center less on what changes, if any, should be made to the copyright regime for broadcast content than questions of retransmission consent and DMA modification. Broadcasters have long argued that such issues are tangential to the core copyright questions regarding broadcast programming, but expectations are that both DBS and cable will try to use the SHVERA legislation as a vehicle to impose arbitration requirements on retransmission consent negotiations.

They may also use the bill as a means of adopting rules allowing multichannel video program distributors to carry programming from broadcasters in "adjacent markets" without a retransmission consent agreement, along the lines of a proposal introduced by Representative Mike Ross (D-AR) in 2007 (H.R. 2821, the "Television Freedom Act of 2007"). Broadcasters, in turn, may use the SHVERA debate to cut back on the ability of DBS providers to use distant signal importation and to impose mandatory local-into-local service obligations in those markets where DBS already does not provide such service.

The House Energy and Commerce Committee, House Judiciary Committee, and Senate Judiciary Committee all have hearings scheduled for late February on SHVERA and its renewal, and the

Senate Commerce Committee is expected to follow with its own hearing in the near future. Although copyright is an issue traditionally within the jurisdiction of the Judiciary Committees, the Commerce Committees have long played a role in the SHVERA debate because of its relationship to the Communications Act. In the past, each Committee has developed its own draft of the renewal legislation, and the drafts are later combined into a compromise measure to be debated in the House and Senate, respectively. Indications are that the Committees will take a similar approach during this renewal cycle.

FCC Nominations

The second prominent issue on the horizon for the Senate is the naming of new FCC Commissioners. Although an official nomination has not been made by President Obama, speculation has centered on Julius Genachowski as the next Chairman. Genachowski, a classmate of Obama's at Harvard law and former aide to FCC Chairman Reed Hunt, served as the President's top technology advisor during the campaign.

In the interim, sitting Democrat Commissioner Michael Copps is serving as the Acting Chairman. The President also must name a Republican to fill the position vacated by Commissioner Deborah Tate at the end of the last Congress. Reports have also indicated that Democrat Commissioner Jonathan Adelstein may be named to another position in the Administration, leaving his seat open. Finally, Republican Commissioner Robert McDowell's term expires in June of this year, and it will be up to the Administration whether to re-nominate him.

Each of these nominations will be given Senate Commerce Committee and full Senate consideration in due course. Expectations are that the Administration would like to package Genachowski's nomination with the Republican nominee to replace Commissioner Tate, in order to avoid a protracted battle with Republicans in the Senate. President Obama also will need to appoint someone to replace Acting Assistant Secretary Meredith Baker at the National Telecommunications and Information Association, an agency with a key role in overseeing the DTV transition.

Kathleen Kirby and Shawn Bone are with Wiley Rein LLP in Washington, D.C.

FTC Proposes Major Revisions To Guidelines on Endorsements and Testimonials

By Nancy J. Felsten

Almost four decades ago, in 1972, the FTC issued its *Guides Concerning the Use of Endorsements and Testimonials in Advertising (*the "Endorsement Guides" or "Guides"),[1] designed to provide a regulatory safe harbor for advertisers pitching their products and services with the help of glowing praise from satisfied third parties. Last revised in 1980, the Guides have provided a relatively simple framework for using testimonials and endorsements from "regular" consumers, experts or celebrities.[2] As discussed below, the FTC has now issued for public comment proposed revisions to the Guides, which if implemented could significantly affect advertising and marketing practices by:

Increasing the potential for advertisers to be held liable for statements by endorsers, and for endorsers to be held independently liable for such statements;

Eliminating the safe harbor pursuant to which advertising is permitted to include atypical consumer endorsements in conjunction with a "results not typical" disclaimer;

Setting forth an expansive view of the need for disclosure of material connections between advertisers and endorsers, including potentially requiring disclosure of advertiser/celebrity spokesperson relationships even outside of a traditional advertising context; and

Expanding disclosure requirements related to "emerging media" such as blogging, word of mouth and chat boards.

In reviewing advertisements, the question for the FTC is always whether "a particular advertisement conveyed a false or unsubstantiated message to consumers in violation of Section 5" of the FTC Act.[3] The Endorsement Guides are not law. Rather, they merely "set forth the general principles that the Commission will apply in examining endorsements within the confines of its traditional Section 5 authority; they do not provide an independent source of legal authority."[4]

Nonetheless, the Guides are often thought of as law by advertisers who recognize that non-compliance may lead to regulatory action. Likewise, the Guides are given varying degrees of deference by courts, state Attorneys General, self-regulatory entities such as the National Advertising Division of the Better Business Bureau and industry associations such as the Electronic Realtors Association and the Direct Marketing Association. Accordingly, the proposed revisions of the Guides (the "Proposed Revisions") are likely to have significant impact.

The Current Guides

The current Guides define an endorsement or testimonial as any "advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser."

[1] 16 C.F.R. Part 255.

[2] The terms "endorsement" and "testimonial" are used interchangeably, in keeping with FTC practice.

[3] See*, 16 C.F.R. Part 255:* Guides Concerning the Use of Endorsements and Testimonials in Advertising: Notice of Proposed Changes to the Guides, and Request for Public Comments *(press release re approved Federal Notice dated November 21, 2008)(hereinafter, "2008 Request for Public Comments") at p. 34, available at http://www.ftc.gov/os/2008/11/P034520endorsementguides.pdf .*

[4] *Id.*

The Guides presume that consumers perceive testimonials as representative of what the consumer can expect in using the product or service -- hence the need for some type of disclosure if the testimonial, although truthful, is not representative.

The current Endorsement Guides set forth the following core principles:

Testimonials must be truthful and unsolicited (i.e., given without expectation of any kind of remuneration);

Testimonials may not constitute claims substantiation. Thus, even if truthful with respect to the individual experience of the testifier, the advertiser still must have competent and reliable evidence to support that the product or service produces the touted results;

If a testimonial is not "typical" of the result that a consumer can reasonably expect to match, the advertising must either disclose that the results are not typical or disclose what the "generally expected performance" will be;

For expert endorsements, the expert "qualifications" must be relevant to the product (e.g., a doctor of veterinary medicine should not endorse children's cold remedies);

Endorsements by organizations must reflect the collective view of the organization;

Connections between endorser and advertiser that could affect credibility should be disclosed, if not obvious to the consumer.

FTC's Review of Endorsement Guides

In January of 2007, the FTC commenced the current review of the Endorsement Guides, requesting public comment on possible revisions, focusing in particular upon two consumer perception studies conducted at the FTC's behest (the "Endorsement Studies"). The Studies looked at disclaimers associated with weight loss, dietary supplement and business opportunity testimonial advertising.

The FTC's purpose in commissioning these studies was to determine (i) whether testimonials inherently communicate product efficacy or performance claims, (ii) whether testimonials communicate to consumers that the reported experiences reflect "typical" consumer experience, and (iii) whether atypicality-style disclaimers (e.g. "results not typical") are sufficient to confine the touted experience to the individual endorser, rather than one properly projected to consumers generally.

The FTC's notice and request for comment indicated particular concern with the so-called "typicality" safe harbor in the current Guides. This provision has for many years provided the regulatory lynchpin for the now standard "*Results Not Typical*" disclaimer. This phrase regularly appears in conjunction with advertising for all manner and types of consumer products and services, from weight loss to financial services to gasoline additives to beauty treatments to do-it-yourself building products. According to the FTC, the Endorsement Studies demonstrate that in spite of a variety of test disclaimers -- several featured far more prominently and with more explicit language than those under current general use by advertisers -- the typical consumer not only fails to perceive that the results depicted are not necessarily typical of the average consumer, but further believes he or she will achieve the depicted results.

The FTC accepted dozens of public comments with respect to possible revision to the Endorsement Guides and issued its proposed revisions (the "Proposed Revisions") in November 2008. At that time, the FTC requested further public comment on the scope of the Proposed Revisions, as well as on a number of specific questions, all discussed further below. The FTC comment period, originally scheduled to close January 30, 2009, has at the request of certain marketing industry trade groups been thus far been extended to March 2, 2009. Following receipt of the comments, the FTC will presumably make the Guides final, either as proposed or possibly with some degree of revision.

The key changes reflected in the Proposed Revisions are summarized and discussed below.

Independent Advertiser/Endorser Liability

The Commission has proposed a new Section 255.1(d)(part of the "General Considerations"). The new section would make explicit that not only may the advertiser be liable for the false or unsubstantiated statements made through an endorser, but endorsers also "may be liable for statements made in the course of their endorsements." Although this is arguably simply a re-statement of current law, the FTC has rarely sought to hold third-party endorsers liable for their testimonial statements, with the exception of a few isolated cases largely involving celebrity and expert endorsers receiving undisclosed sales-based payment, so this element of the Proposed Revisions may reflect a shift in the FTC's enforcement priorities.

Further underscoring the possibility of endorser liability, the examples in this section of the Proposed Revisions warn against spokespersons -- in particular expert or celebrity spokespersons -- turning a blind eye. The revisions make clear that an endorser will be subject to independent liability if he or she must have realized the claims incorporated in the testimonial are false. The examples provided (e.g. a dermatologist knowingly relying on faulty science for an acne product, and a celebrity demonstrating the cooking process during an infomercial, which falsely claims chickens "roast perfectly" every time in advertiser's roasting bag), envision liability even for the expert or celebrity[5] reading the advertiser's own script, as long as the script is written in such a way that consumers would likely believe the words reflect the endorser's own experiences.

[5] For independent endorser liability to attach, the public needs to view the statements as those of the endorser, and not merely those of the advertiser. A presumption exists that the public will generally view celebrity statements as reflecting their own views and experiences. Such is not necessarily the case for the unknown journeyman actor, clearly reading from a script.

The Proposed Revisions also add an example illustrating potential advertiser liability for false product statements by "paid" bloggers, even where the statements are *not* directed by the advertiser. The examples also suggest potential liability for bloggers who promote products and services without disclosing payment by the advertiser. The Proposed Revisions place an obligation on advertisers to monitor the statements of bloggers, and emphasize that advertisers are liable for all statements made by "their endorsers" as well as for failure to disclose material connections between them, cross referencing to the "material connections" provisions at Section 255.5.

Consumer Endorsements -- Section 255.2

Re
visions to this section are likely to receive some of the greatest industry scrutiny and response. In effect, the Proposed Revisions replace one safe harbor with another less advertiser-friendly one. Rather than the now standard "results not typical" disclaimer, advertisers would generally be required to disclose affirmatively the product or service's "generally expected results." The Proposed Revisions further make clear the FTC's two-pronged view on efficacy and typicality in testimonial advertising.

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First, proposed section 255.2(a) explains that consumers *will* view testimonials as statements of product efficacy, regardless of whether or not the testimonials actually reflect the typical consumer experience.

Second, proposed section 255.2(b) eliminates the safe harbor known as "disclaimers of typicality." Instead, it provides that if the advertiser cannot substantiate that the experience described is "representative of what consumers will generally achieve, the advertiser should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation."

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This new approach reflects the FTC's determination that such explicit disclosure "is necessary to eliminate a deceptive message of typicality conveyed by the advertiser's use of atypical consumer endorsements."[7]

The Proposed Revisions also provide that the advertiser must substantiate its disclosure of typicality, presumably with some manner of empirical evidence demonstrating the average or typical consumer experience. Depending on the product or service, this substantiation may be very different from the substantiation required to support efficacy, and in fact may frequently be unavailable to many advertisers, whether because typicality is illusive, the product is too new, or for other reasons.

What Is Generally Expected Performance?

The bright spot for advertisers is that the Commission has specifically asked for comment on "whether there are product categories for which this [typicality disclosure] requirement would prevent advertisers from using endorsements even though the advertiser believes that the endorsers' experiences *are or likely are* generally representative."[8] As might be expected, during the first round of comment, industry trade associations, major weight loss advertisers and many others objected to the requirement that typicality be disclosed -- and substantiated -- on a combination of practical and constitutional grounds. For some products there may be no "average" or "typical" consumer, and at least one commentator noted that the practical result "of such a requirement would be a *de facto* prohibition on use of testimonials."[9] Others, such as the coalition of State Attorneys General, strongly pushed for typicality disclosure. Indeed some, include the State AGs, advocated that advertisers not be allowed to use atypical testimonials at all; but rather that only typical consumer experience be reflected in advertising.

The FTC did not go that far, but the proposed new disclosure and substantiation requirements discount the comments of those who believe that typical or average or expected performance may be elusive in many industries, including for legitimate purveyors of weight loss products or programs.[10] Its request for further comment, however, does leave open the possibility that the FTC may further concede that there are some areas where typicality disclosure are not appropriate.

Possible Exceptions to Typicality Disclosure

The FTC proposal acknowledges that not all testimonials will require disclosure of typical results. In some cases, the endorsements will presumably reflect typical consumer experience. Although there is no clear answer to what proportion of consumers must achieve similar results to achieve typicality, the FTC indicates that a number under 20 percent is insufficient to avoid further disclosure.[11] In other

[7] See, *2008 Request for Public Comments,* p. 45.

[8] *See*, *2008 Proposed Guide Revisions,* pp. 28 fn.44, 49-50.

[9] *See* Comments dated June 18, 2007, submitted by Kelley Drye Collier Shannon at p. 17, available at http://www.ftc.gov/os/comments/endorsementguides/527492-00012.pdf.

[10] Weight loss advertising is viewed by many as the driving force for the Commission's decision to revise the Guides. Regardless, testimonial advertising is used by an ever-growing body of advertisers and the new requirements will reverberate across the spectrum of American products and services.

[11] The FTC's notice states that its research shows that "consumers interpret testimonials to convey that about half of new consumers could expect the claimed results." *See*, 2008 Request for Public Comments at pp. 51 – 53. The FTC has chosen not to provide a benchmark for how many consumers must achieve like results in order to avoid further disclosure, however Example 2 to 255.2(c) indicates that fewer than 20 percent of consumers achieving endorser-like results is not sufficient, and would require an affirmative disclosure of generally expected results. The example provided concerns a heat pump product which will purportedly save on monthly utility bills.

cases, the endorsements will obviously and of necessity be limited either to the endorser or to the particular circumstances described, obviating the need for further results disclosure.[12] The FTC also noted that purely subjective testimonials (e.g. taste, smell, perhaps softness or other sensory claims, for example), or clear opinions such as found in movie reviews, would not require typicality disclosure or typicality substantiation.[13]

The Commission considered and ruled out merely requiring stronger non-typicality disclosures. Nonetheless, the FTC has left open the door to stronger atypicality disclosures. It seeks comment on its proposal to add a footnote to 255.2(b), acknowledging the possibility that "use of a strong disclaimer of typicality could be effective in the context of a particular advertisement" and further noting that an advertiser would in any case avoid FTC action should it be able to present reliable, empirical data showing the "net impression of its advertisement with such a disclaimer is non-deceptive." This, however, is may not provide much comfort to advertisers, who rarely have in hand consumer perception research on "net impression" (and the type of market research, such as focus group studies, that advertisers are more likely to have prior to a campaign launch, is unlikely to qualify as such empirical data).

The FTC's request for additional comment is, however, a nod to two important concepts: first, that not all endorsements will require equivalent or even any typicality disclosure; and, second, that no advertising will be deceptive if the advertiser can show otherwise. These self-evident statements will not have much effect on the composition of the Guides, but they may be designed to assuage those who believe the new disclosure requirements run afoul of the First Amendment. However, they are likely to provide little comfort to advertisers confronted by the impracticalities and potential costs of compliance with the Proposed Revisions.

Disclosure of Material Connections/Independent Liability

The intertwined concepts of material connections and independent liability have received significant attention from the FTC in the Proposed Revisions. Section 255.5 *Disclosure of material connections* (as to which the FTC has specifically requested comments), has been substantially revised, disentangling to a degree celebrities and experts and revising the examples, all to illustrate the following:

> For expert endorsers, sales incentives or other financial interest in the advertiser's product or company must be disclosed, to allow consumers to determine the credibility of the endorsement.
>
> For celebrity endorsers, financial incentives will be presumed and need not be reflexively

[12] The Commission's discussion of the Proposed Revisions cites a $100,000 winner at a casino, noting that consumers will not in that context naturally expect the same result. Similarly, Example 4 to Section 255.2(c), references a weight loss ad where the endorser drank two WeightAway shakes, and "only ate raw vegetables, and exercised vigorously for six hours at the gym." The example concludes that the "limited and truly exceptional circumstances" of this endorser's experience were clearly stated, obviating the need for a typical results disclosure – assuming, however, substantiation for the general product performance claim, that is that the product "causes substantial weight loss."

[13] *Example 7 to Section 255.2(c) describes exiting movie goers giving their opinion and clarifies that in at least some contexts, such opinion advertising doesn't trigger an inquiry into "typical" consumer opinion. The example notes, however, that if the consumers were offered free tickets in advance to talk about their views afterward, these materials connections would have to be "clearly and conspicuously disclosed."*

[16] *See*, *2008 Request for Public Comments* at p. 57 ("If consumers know that an expert has a significant financial interest in sales of the product…is this information likely to affect their assessments of the expert's credibility").

disclosed, at least in the context of "traditional" advertising.

During non-paid "commercial" time, e.g. during broadcast media or other interviews, celebrities generally must disclose that they are speaking as paid endorsers for the product/service they discuss (which discussion the Commission views as "advertising"). (However, no such disclosure is required if no actual mention is made of the product, for example wearing apparel with the company insignia, but without mention, during the interview, of the product or the manufacturer.)

Advertiser funding of an "independent" research or other study need not be disclosed if "the design and conduct of the research project are controlled by the outside research organization."

"Material connections" disclosures are required in connection with new forms of marketing, specifically blogs, on-line discussion or message boards and "street teams."

Section 255.5 continues to require that advertisers disclose connections between themselves and endorsers if such connection is "not reasonably expected by the audience." The Commission proposes to distinguish, however, between celebrity and expert endorsers. So, for example, a sales-based royalty paid to a celebrity endorser need not be generally disclosed (see, Example 2), but such disclosure might be relevant to consumers looking to assess what weight to give an expert endorsement. Accordingly, proposed Example 4 now states that disclosure of a financial interest in sales might be material to consumers evaluating a physician endorsement of an anti-snoring product. The FTC specifically has requested comment on the proposition that a financial interest in sales is likely to affect consumer assessment of the weight to give to the endorsement.[16]

Regarding celebrities, the FTC confirmed that advertising does not generally need to disclose they are paid for their endorsements. The FTC cautioned, however, that in certain non-traditional contexts disclosure may be necessary to ensure consumers recognize the financial connection between product and celebrity. The FTC has now added and is seeking further comment with respect to its Section 255.5 Ex. 3.[17] This example establishes the idea that during interviews "there is no reason for consumers to suspect that the endorsement is anything more than a spontaneous mention by a celebrity who has no apparent connection with the product's marketer," triggering a material connection disclosure. This could have significant repercussions for advertisers and celebrity brand "ambassadors," as well potentially for product placements and embedded advertising (at least if the celebrity is being separately compensated by the advertiser). These are situation which heretofore the Commission has chosen not to specifically address.

Finally, and significantly, the Commission is also seeking further comment regarding consumer expectation related to its newly added examples 7 – 9, which require material connection disclosures for bloggers, word of mouth "street team" marketers and even non-advertiser affiliated discussion boards. These examples propose that these "endorsers" may bear liability independently from the advertiser, and that advertisers may bear liability for over-statements made by these third parties, even if not made at the company's behest.

Although ostensibly added merely to demonstrate the "general principle that material connections between the endorser and the advertiser should be disclosed to [] new forms of marketing,"[18] the examples are broadly drawn and in some instances appear to expand (i) situations which require disclosure, (ii) the threat of liability to advertisers for unanticipated utterances by bloggers and others, and (iii) potential liability for these third-parties (many of

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[17] *See*, *2008 Request for Public Comments* at pp. 58 -60

[18] *Id*. at p. 61.

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whom may consider themselves to be providing independent editorial content, and not pure commercial speech), for statements that go beyond available proof of efficacy.

Indeed, Example 7 posits a situation which both advertisers and blogger/reviewers likely thought did not come within the testimonial guides at all. The example proposes a student blogger with a personal weblog discussing gaming experiences, frequented by readers who ask his opinions about products. The FTC states that given the value of a free game system, the blogger must disclose its provision by the advertiser, in conjunction with the blogger's positive review which appears at the site. The example begs the questions of how "valuable" the merchandise must be to trigger disclosure, the advertiser's obligations of disclosure (linking to or otherwise referencing the review), as well as how the student blogger is supposed to know that his or her independent "review" is in any case subject to FTC scrutiny under the Guides.

Examples 8 and 9 refer variously to an employee of a manufacturer anonymously (and therefore improperly) posting positive comments regarding the employer's products to a third-party chat site and to members of a hired "street team," who must disclose they are being paid for making positive references to the advertiser's product.

Taken together, the examples tend to confuse, rather than explicate, just when or by whom disclosures are needed and what measure of control the advertiser is required to exert over statements or content delivered by third-parties. The FTC admonishes that advertiser's should train bloggers in claim substantiation and further "monitor bloggers *who are being paid* to promote its products and take steps necessary to halt the continued publication of deceptive representations when they are discovered (emphasis added)." This example perpetuates the difficulty in interpreting just what constitutes payment, whether all types of both monetary and non-monetary (e.g. free merchandise) "payment" trigger control obligations, and the practical and legal parameters of exerting control over third-party speech. Together, this creates an arguably untenable situation for advertisers and one that seems very likely to chill the exercise of non-deceptive commercial speech.

Additional Proposed Revisions

The Proposed Revisions eliminate Section 255.2(c) of the Guides, which prohibits efficacy claims in consumer endorsements for drugs or devices without adequate underlying scientific support.

The FTC has not abandoned the requirements incorporated in Section 255.2(c), but indicated that the subsection is redundant with other provisions requiring that all performance claims (express and implied) be substantiated.

With respect to expert endorsements(Section 255.3), the FTC repeats the theme of potential independent endorser liability, present throughout the Proposed Revisions. The section cross-references Section 255.1(d), which as noted above makes the general statement that "[e]ndorsers also may be liable for statements made in the course of their endorsements."

The Proposed Revisions to the examples in section 255.3 further confirm the obvious proposition that the FTC will require disclosure of all information it considers material.

The proposed language generally reworks the examples, largely to remove anachronisms and to provide examples of the importance to the FTC of the foregoing, including that qualifications match both the explicit and implicit qualifications of the endorser to the product. Proposed Example 2, for example, demonstrates that an endorser referred to as "doctor" in advertising for hearing aids, should be a medical doctor with experience in audiology, and not, to use the example, merely a person with a "doctorate in exercise physiology."

Another example (newly numbered example 4), is revised slightly to emphasize the need for disclosure of the limits of the endorsement itself, and not just of the endorser's expertise. The example refers to advertising stating that a hospital has chosen to use one OTC product over another. The advertising does not explain that convenient package sizing, available only to hospitals, drove the choice. According to the FTC, the endorsement would be deceptive not only because the packaging is unavailable and therefore irrelevant to consumers (as included the 1980 version of the Guides), but also because "the basis for the hospital's decision is not disclosed to consumers."

"Slice of Life" turned into testimonials?

Currently, the FTC, the television networks and regulators take the view that "slice of life" advertising, which mimics real-life situations to provide context and mood, does not fall within the Endorsement Guides if no full names or locations or other indicia of "real" people and events are used. Accordingly, slice of life scenarios ("the Monroe's at breakfast time in bucolic anywhere eating Cheerios"), presented in the advertiser's own words, do not constitute endorsements under the Guides. This is significant, because such scenarios accordingly need not comport with the Guides (i.e., they need not reflect real people or real experiences), in contrast to testimonials, which must meet the requirements of the Guides (i.e., they must constitute unsolicited reflection of the speaker's actual views and experiences or disclose otherwise).

The Proposed Revisions state that an endorsement is any depiction that the consumer will perceive reflects the views of a third party – regardless of whether the statements are the endorser's own or are in fact entirely scripted by the advertiser. On its face, the change appears relatively benign, since endorsements by definition must reflect the unsolicited views of the endorser. Query, however, whether this revision may affect interpretation of what constitutes non-testimonial slice of life commercials, triggering odd disclosure requirements of "paid endorsements" or otherwise still further impacting on the advertiser's freedom to produce non-deceptive creative.

Conclusion

The Commission has traditionally focused on post-market enforcement of deceptive speech, rather than on attempting pre-market regulation of commercial speech. The proposed revisions are arguably a departure from this practice. It remains to be seen whether requiring disclosure of generally expected results or other "material connections," among other components of the Proposed Revisions, will go beyond the means necessary to achieve the FTC's interest in preventing deception.

That said, as noted above, the Guides do not themselves create law, but rather provide insight as to how the Commission interprets existing law. A final understanding as to how far reaching the Proposed Revisions may be awaits first their final implementation and ultimately their interpretation by the courts, should the FTC in its zeal enforce the "guidelines" beyond the limit of law or the constitution.

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Ethics Corner: New York Adopts ABA Model Rules, Effective April 1st

By Bruce E. H. Johnson

In December 2008, New York – the last state to retain the old Lawyer's Code of Professional Responsibility – announced that it would join the District of Columbia and virtually every U.S. state (the final exceptions include Maine, with its own unique code, and California, with its own unique rules (Both Maine and California are currently considering revisions to their ethics rules based on the ABA Model Rules)), by adopting new Rules of Professional Conduct based on the ABA Model Rules. The new New York Rules, which replace the existing Disciplinary Rules and Ethical Considerations, become effective on April 1, 2009.

Interestingly, New York was among the first states to consider the ABA Model Rules, which were the product of the ABA's Kutak Commission, but in November 1985, in a closely-divided vote, the New York State Bar of Association House of Delegates rejected the reforms. (New Jersey was the first state to adopt the Model Rules, a few months before the New York vote.) Instead, in 1990 and 1999, the state engrafted language and concepts from the Model Rules into the existing Code. Meanwhile, since 1982, any New York lawyer who takes the Bar Examination was tested on the ABA Model Rules, not the New York Code.

One of the major changes represented by these new Rules is that they are set forth in a new format and numbering system that are based on the ABA Model Rules. In announcing the adoption of the Rules, Chief Judge Judith Kaye of the New York Court of Appeals stressed the value of uniform national ethics standards: "This is an important day for New York's legal profession as we adopt new lawyer ethics rules that are accessible and understandable, consistent generally with national standards, and relevant to emerging practice areas and trends that are transforming how lawyers represent and communicate with clients."

The changes are the product of a five-year study by the New York State Bar Association that resulted in a February 2008 recommendation to the Administrative Board of the New York Courts to adopt the ABA Model Rules format with minor changes. An internal committee appointed by the Administrative Board then analyzed the State Bar's proposed rules and issued its recommendations to the Board, which in turn approved most of the proposals, though sometimes retaining some or all of the language of existing Disciplinary Rules. The Board also approved the State Bar's recommended transition to the ABA Model Rules format. The Rules were formally reviewed and adopted by the Justices of the four Appellate Divisions in early December 2008.

New York ethics lawyers recognized the defects in the existing Code, which reduced the Code's value as a guide to legal ethics. As the New York State Bar Association Committee on Standards of Attorney Conduct stated in its February 2008 report, "the structure of the Model Rules provides a more readily accessible source of ethical guidance for New York lawyers than does the current New York Code." Also, the report noted, the Code's structure, with its mixture of Disciplinary Rules (which originated as the old ABA Canons) and Ethical Considerations (which began as aspirational goals and later assumed the "dual functions of recommending best practice guidelines and providing explanatory commentary" on specific Disciplinary Rules, "does not lend itself to easy or ready reference and problem solving."

While the new Rules were promoted to solve the Code's inherent limitations, some commentators suggest that there remains significant continuity with the old Code. For example, Stephen Gillers, an ethics expert at NYU Law School, estimated that about three-quarters of the new Rules embody the current Code, and the rest are the ABA Model Rules or versions modified for use in New York State. Gillers also stresses one major change from existing New York practice: the Rules will require that attorneys get written consent from both sides that they can continue representing a current client in a case in which a former client is an adverse party. "There are no more oral consents" as of April 1, 2009, Gillers added.

One subject where the Bar and the courts disagreed, and where New York still deviates from the national norm is the issue of multijurisdictional practice. The Bar had proposed a version of ABA Model Rule 5.5, which allows a limited "safe harbor" for certain in-state activities by non-admitted lawyers in exchange for application of the

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state's ethics and disciplinary rules to the activities of these out-of-state attorneys. The New York courts instead adopted Rule 5.5(a), which states simply that "[a] lawyer shall not practice law in a jurisdiction in violation of the legal profession in that jurisdiction." The language thus provides no useful guidance for in-house lawyers for multi-state media corporations based in New York.

For law firm lawyers, the new New York Rule 1.18 is a major change from prior practice. The Rule addresses prospective clients, and clarifies that confidential communications received from a prospective client do not automatically result in a disqualification of an entire law firm. If the firm erects a timely screen and provides written notice to the former prospective client, only the lawyer receiving the actual communication would be prevented from representing the adverse party in the same or substantially related matter. New York's existing Disciplinary Rules did not address these issues at all. (In addition, the protections of Rule 1.18 are expressly denied to a prospective client who communicates with a lawyer in order to disqualify the lawyer from handling a materially adverse representation in the same or a substantially related matter.)

Another area of interest was ABA Model Rules 1.6 and 1.13, which now allow lawyers to disclose confidential client information to "prevent, mitigate, or rectify" damages caused by client fraud. New York, however, chose a more restrictive formulation – allowing its lawyers to reveal client information only 'to prevent reasonably certain death or substantial bodily harm." (The New York Rules may not be the end of the discussion, however. *Bloomberg News* recently revealed that securities lawyer Thomas Sjoblom of the Proskauer firm assisted federal investigators – or more precisely engaged in a "noisy withdrawal" – about Texas businessman R. Allen Stanford and his company, the Stanford Group Co., who were allegedly in the process of perpetrating a massive Ponzi-type fraud. Sjoblom did this, apparently, because of securities lawyers' duties imposed by the federal Sarbanes-Oxley Act, which are similar to those imposed in the ABA Model Rules.)

The following is a partial list, provided by the New York courts, of other noteworthy changes contained in the new New York Rules of Professional Conduct:

Scope of Representation and Allocation of Authority between Client and Lawyer (Rule 1.2)

Rule 1.2 codifies a lawyer's obligation to abide by a client's decisions regarding the objectives of representation, including whether to settle a civil matter or to enter a plea, waive a jury trial or testify in a criminal matter.

Fees and Division of Fees (Rule 1.5)

Rule 1.5(b) requires a lawyer to communicate fees and expenses to the client before or within a reasonable time after commencement of representation, thereby extending the current letter of engagement rule (22 NYCRR 1215), without the necessity of a writing, to all matters currently excepted under that rule.

Confidentiality of Information (Rule 1.6) and Conduct before a Tribunal (Rule 3.3)

Rule 1.6(a)(2) permits disclosure of confidential client information impliedly authorized to advance the client's best interests when it is reasonable or customary.

Rule 1.6(b)(4) permits a lawyer to reveal confidential information to the extent necessary to secure legal advice about compliance with ethical rules or other laws.

Rule 3.3 requires a lawyer to correct a false statement of material fact or law previously made to the tribunal by the lawyer or the client and to take necessary remedial measures, including disclosure of confidential client information.

Rule 3.3 requires a lawyer who knows that a person intends to, is or has engaged in criminal or fraudulent conduct related to the proceeding to take reasonable remedial measures, including disclosure of confidential client information.

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Current Clients: Specific Conflict of Interest Rules (Rule 1.8)

Rule 1.8(c) prohibits a lawyer from soliciting any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or from preparing on a client's behalf an instrument giving a gift to the lawyer or a person related to the lawyer, unless the lawyer or recipient of the gift is related to the client and a reasonable lawyer would find the transaction fair and reasonable.

In a business transaction between lawyer and client, Rule 1.8(a) requires the lawyer to advise the client in writing to seek the advice of independent counsel and to give the client a reasonable opportunity to do so; and the client must give informed written consent that addresses the lawyer's role in the transaction and whether the lawyer is representing the client in the transaction.

Special Conflicts of Interest for Former and Current Government Officers and Employees (Rule 1.11)

Rule 1.11 governs the lawyer's obligations based on conflicts presented when a lawyer moves from government to private employment and vice versa, and provides that such conflicts may be waived by the government entity upon informed consent.

It is likely that New York will be asked to consider a version of the ABA's revised Model Rule 1.10, which was adopted by the ABA House of Delegates on February 17, 2009, and creates a similar screening mechanism for lateral lawyers in the private sector, similar to New York Rule 1.11(b).

Indeed, a version of this rule, allowing a law firm to screen a lateral hire so long as the lawyer had no access to confidential client information at the prior firm that was "material" or "significant" – a requirement that was rejected by the ABA in its February 17th debate. This lateral hire screening mechanism was first adopted by Oregon in 1983 and has since been followed in many other states, including Arizona, Colorado, Delaware, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, North Carolina, North Dakota, Ohio, Pennsylvania, Tennessee, Utah, Washington, and Wisconsin.

Voluntary Pro Bono Service (Rule 6.1)

Though not enforceable through the disciplinary process, Rule 6.1 reaffirms a lawyer's responsibilities to provide at least 20 hours of pro bono legal services each year to poor persons, and to contribute financially to organizations that provide legal services to poor persons.

Copies of the new New York Rules of Professional Conduct are available at www.nycourts.gov/rules/jointappellate/.

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