404 Park Avenue South, 16th Floor, New York, NY 10016 • (212) 889-2306

LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through January 22, 1999

In This Issue . . .

PUBLISHED BY THE

LDRC

LIBEL DEFENSE RESOURCE CENTER

404 Park Avenue South
16th Floor
New York, NY 10016
(212) 889-2306

Fraud Upheld But Not Publication or Punitive Damages in *WDIA v. McGraw-Hill* *MedLab v. ABC*, pages 10, 13

Government Supports Wiretap Disclosure Claim Against Media, page 17 More Decisions in this fast growing body of law, pages 19-22

HOUSTON COURT OF APPEALS OVERTURNS $3.2 MILLION LIBEL JUDGMENT FOR MAYORAL CANDIDATE

By Bob Latham

In an opinion that reinforces the ability of journalists to do investigative pieces on candidates for public office, the Houston Court of Appeals reversed a judgment obtained by Sylvester Turner, a Texas state representative and an unsuccessful candidate for mayor of Houston in 1991, and rendered judgment for KTRK Television, Inc. of Houston and its investigative reporter, Wayne Dolcefino. *Dolcefino v. Turner*, No. 14-97-240-CV, December 30, 1998 (Tex. Civ. App. -- Houston (14th Dist.)). Turner had asserted in the highly publicized six week libel trial, covered live by Court TV, that a broadcast by KTRK six days before the 1991 mayoral run-off election accused him of being a knowing participant in a multi-million dollar fraud. Turner attributed his loss in the mayoral election to the KTRK broadcast. Awarded $5.5 million by the jury, he obtained a $3.2 million judgment against KTRK and Dolcefino after the trial judge reduced the $4.5 million punitive award against KTRK to $2.2 million.

The lengthy opinion of the Court of Appeals reversing the judgment relied on the absence of actual malice. However, in analyzing the actual malice issue, the court also addressed the substantial truth of the complained of statements in the broadcast. Following both precedent and common sense, the opinion not only is useful in defending allegations of actual malice in public official or public figure libel cases, but also in

(Continued on page 2)

Dolcefino v. Turner

(Continued from page 1)

establishing that "technical errors in nomenclature" do not equate with falsity.

The Faked Death of Turner's Legal Client

The facts of the Turner case are intriguing, to say the least. KTRK's broadcast detailed the saga of Sylvester Foster, a male model and owner of several beauty salons in Houston, who supposedly drowned after falling overboard from a pleasure boat in the Gulf of Mexico on June 22, 1986. In the months before his disappearance, Foster had applied for multiple life insurance policies, had purchased several luxury cars all with credit life insurance, and had applied for an emergency passport. He was also the subject of criminal investigations in Houston and Las Vegas and indeed was facing trial in Las Vegas on June 23, 1986, the day after his supposed "death." In 1989, Foster turned up alive in a Spanish prison on drug charges.

Information regarding Foster and his connection to mayoral candidate Sylvester Turner, a Harvard educated attorney in Houston, came to Dolcefino and KTRK ten days before the mayoral run-off election in 1991. Dolcefino investigated the story of Foster's faked death and the efforts to collect life insurance proceeds over the next four days. The KTRK broadcast reported on, among other things, Turner's involvement in preparing and probating Foster's will and his efforts to get the insurance money released.

One of Dolcefino's sources was a private investigator, Liz Colwell, who had been appointed by the probate court in which Turner had attempted to probate Foster's will on behalf of the named executor of Foster's estate, Dwight Thomas. KTRK's investigation also revealed that during the time Turner was running for mayor, he was sharing a residence with none other than Thomas, who in addition to being named Foster's executor was the beneficiary of at least one of Foster's life insurance policies. Evidence at trial showed that the Secret Service, which investigated the Foster insurance conspiracy, listed Thomas and Turner as suspects.

The Substantial Truth of the Complained of Statements

The Houston Court of Appeals addressed the issue of substantial truth in the context of actual malice, holding in effect that KTRK could not have knowingly broadcast a false statement if the complained of statement in the broadcast was substantially true. The Court of Appeals stated that "the central premise of Turner's argument on appeal is that the broadcast charged that he was a knowing participant in a multi-million dollar fraud." However, the court noted that Turner could not cite any statement in the broadcast where such an accusation was made. Instead, the court found that the broadcast "raised questions about the suspicious circumstances of Foster's 'death' and how much Turner knew, as well as questioning Turner's choice of business and personal associates." The Court of Appeals did not address the issue of whether the defamatory implication alleged by Turner was present or whether such an implication could support a judgment. Rather, in reversing the judgment on actual malice grounds, the court analyzed the substantial truth of actual statements in the broadcast and the technical errors that Turner tried to urge.

For instance, the broadcast asserted that Turner "pursued the estate money even after significant evidence of a possible scam in Foster's death had already surfaced." Turner argued that the life insurance proceeds were non-probate and therefore not "estate money." The Court of Appeals held that "whether the funds were probate or non-probate does not change the import of the statement to the average viewer of the broadcast. Technical errors in legal nomenclature do not cause a statement to be false."

Likewise, Turner claimed that there were only $1.7 million in potential insurance benefits available rather than $6.5 million as had been stated in the broadcast. The court held that even if that were the case, "insurance fraud of $1.7 million is no less defamatory than $6.5 million" and therefore Turner could not

(Continued on page 3)

Dolcefino v. Turner

(Continued from page 2)

demonstrate the falsity of this statement. Similarly, Turner took issue with the statement that the will was "drawn up" on June 19. He alleged that he had prepared the will weeks earlier and that it was only "signed" on June 19 -- three days before Foster's disappearance. The court found no meaningful distinction between "signing" and "drawing up" a will that gave rise to a defamation claim. Other statements alleged to be false were treated to similar analytic approaches.

The Absence of Actual Malice

Liz Colwell, the probate court appointed investigator, testified at trial that she confirmed to Dolcefino prior to the broadcast every statement of which Turner complained. She also testified that she had told Dolcefino before the broadcast that Turner was "in it up to his eyeballs," a statement that was not used in the broadcast. Her testimony would seemingly make it impossible for Turner to prove actual malice since, as the Court of Appeals held, citing *New York Times v. Connor*, 365 F.2d 567, 576 (5th Cir. 1966), a reporter is entitled to rely upon one source and discount information coming from other sources. Turner, however, attempted to draw an analogy to the fact pattern in *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989).

In *Harte-Hanks*, the Supreme Court upheld a finding of actual malice when a newspaper relied upon a single source in charging that a candidate for public office had used dirty tricks, offered bribes and suborned perjury. In the Turner case, however, the Court of Appeals found Turner's reliance on *Harte-Hanks* misplaced since in *Harte-Hanks* there was one sole source who was not credible and the information was highly improbable. By contrast, in *Turner*, the court determined that "Dolcefino based his story on reliable information from trustworthy sources, which were primarily the [probate] court records, a Secret Service agent and the official probate court investigator [Colwell]." The court also rejected Turner's contention that the information KTRK uncovered was highly improbable. To the contrary, the court noted, "there had been several items in the news that would tend to raise questions about Turner's qualifications and ability to serve as Houston's mayor" in addition to and quite apart from KTRK's report.

The Court Rejects Political Motivation as Evidence of Actual Malice

One of Turner's primary arguments was that "the source" of the broadcast was a man with the alliterative name of Peary Perry, who Turner claimed was a representative of the campaign of the victorious mayoral candidate, Bob Lanier. Turner contended that he had shown actual malice by KTRK's attempt to "conceal" that its "source" was affiliated with a rival political campaign. The court rejected this argument finding, first of all, that Perry was *not* "the original source" of the story. In a pronouncement that strongly benefits reporters covering political campaigns, the court further found that "even assuming Perry was the initial source for the broadcast and was motivated by a strong political bias against Turner, that amounts to *no* evidence of actual malice, let alone clear and convincing evidence." (Emphasis added)

No Actual Malice by the Rebroadcast of the Story

KTRK aired the complained-of story twice: once on the 5:30 p.m. news and again on the 10:00 p.m. news. Between the two broadcasts, at 8:00 p.m., Turner called a press conference to denounce the 5:30 broadcast. With him at the press conference were a probate court judge who had presided over the Foster probate case and an attorney who had represented one of the insurance companies that contested the fact that Foster was dead. Neither the judge nor the attorney had seen the 5:30 broadcast and instead were relying on what Turner had told them about it in making their comments at the press conference.

(Continued on page 4)

Dolcefino v. Turner

(Continued from page 3)

They each stated that they did not believe Turner had done anything "dishonest" or "inappropriate" and had been "professional" in his conduct in the Foster probate case.

In the 10:00 broadcast, KTRK included Turner's comments from his 8:00 p.m. press conference, denying that he had anything to do with the Turner insurance fraud conspiracy, but did not air the comments from the judge or the attorney. Turner stated that this omission was intentional and "was probably the most compelling evidence of [Dolcefino's] recklessness offered at trial."

The appellate court disagreed. In the first instance, the court held that because actual malice involves a publisher's state of mind "at the time of publication," the omission of the statements of the probate judge and the attorney could not support a finding of actual malice with respect to the 5:30 p.m. broadcast.

With regard to the 10:00 p.m. broadcast, the court found that neither the judge nor the attorney refuted any specific statements in the 5:30 p.m. broadcast, and in particular did not refute any of the statements that Turner claimed were libelous. They also did not offer any facts that would refute the challenged statements in the broadcast. Therefore, the omission of their comments could not support the conclusion that Dolcefino entertained serious doubt as to the truth of the broadcast and was *not* evidence of actual malice.

Perhaps more importantly, the court held that even if the comments of the judge and the attorney had directly challenged the truth of any of the allegedly defamatory statements in the 5:30 p.m. broadcast, there still would be legally insufficient evidence to constitute actual malice since Dolcefino was "free to rely on and believe his original sources." "A publisher's failure accurately to guess which of two conflicting accounts a jury might later believe does not demonstrate actual malice," quoting *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475, 478 (8th Cir. 1987).

The Protection of Editorial Discretion

There are several additional factors in the court's analysis of the actual malice issue that are worth noting. First, the court placed importance on the fact that Dolcefino, KTRK's investigative reporter, did not operate without management. Rather, the court noted that the news director, the executive producer, and the president and general manager of KTRK all were involved in the editorial process and "did not doubt Dolcefino or the information he reported." Secondly, the court found it significant that KTRK in its investigation in no way sought to avoid Turner. Rather, Dolcefino interviewed Turner "extensively and repeatedly asked Turner's press secretary for denials and contradictory evidence."

Finally, in rejecting Turner's argument that KTRK could have included information that would have placed Turner in a more favorable light, the court upheld the role of editorial discretion, stating: "[t]he exercise of editorial judgment to omit information favorable to the plaintiff is no evidence of actual malice."

Turner has filed for *en banc* reconsideration of the decision.

Bob Latham, a partner with Jackson Walker L.L.P. in Houston and Dallas, was part of the defense team for KTRK and Dolcefino at trial, along with Jackson Walker partners Chip Babcock, as lead counsel, and Leon Carter, and Stephanie Abrutyn of ABC, Inc. David Moran joined the team for the appeal.

9th Circuit Reverses Summary Judgment in Libel Suit Over Tabloid Headline

The Ninth Circuit reversed summary judgment in favor of Globe Communications in a libel suit by Kato Kaelin over a front page tabloid headline stating "COPS THINK KATO DID IT! ... he fears they want him for perjury, say pals." The panel consisting of Judges Betty Fletcher, Dorothy Nelson and Barry Silverman, who wrote the opinion, held that a jury could find that the headline was a false and defamatory insinuation that Kaelin was a suspect in the murders of Nicole Brown and Ron Goldman even if the article itself did not convey this impression. In addition, the court held that deposition testimony by an editor, including his acknowledgment that some readers might think the word "it" in the headline referred to murder, not perjury, was sufficient evidence of actual malice to defeat a motion for summary judgment. *Kaelin v. Globe Communications*, __ F.3d __ (9th Cir. Dec. 30, 1998).

The headline appeared on the cover of the *National Examiner*, published by Globe Communications, in October 1995, one week after O.J. Simpson was acquitted of murdering Brown and Goldman. Kato Kaelin, Simpson's infamous long term "house guest," was a witness at Simpson's trial. The inside article under a similarly phrased headline, reported that friends of Kaelin's feared he was a suspect in the murders and further that police would pursue perjury charges against Kaelin for "spoiling" their case against Simpson.

Defamatory Headline

The court held that a headline standing alone could be the basis of a libel action since "headlines are not irrelevant, extraneous, or liability-free zones." For purposes of the appeal, the court assumed that the article itself was not defamatory and focused on the cover headline. Parsing the headline, the court determined that it contained two logically and grammatically separate sentences, the first "COPS THINK KATO DID IT!" expressing what the police supposedly thought; the second, "he fears they want him for perjury, says pals" expressing the concerns of friends over a possible perjury charge. According to the court, a reasonable reader could interpret the word "it" in the headline to mean that police suspected that Kaelin committed the murders.

The court offered up an unusual analysis of how the cover headline should be read in context with the whole article which, the Globe argued, cleared up any potential defamatory meaning in the headline. Citing its recent decision in *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), where the Ninth Circuit affirmed a $150,000 jury award for touting an "exclusive interview" with Clint Eastwood when, in fact, Eastwood never spoke to the *Enquirer*, the court said it would look to the

(Continued on page 6)

Tabloid Headline

(Continued from page 5)

totality of circumstances. "Our conclusion [in Eastwood] was based not on any requirement that each part of the article be independently defamatory, but rather on the fact that the totality of the circumstances showed the editors' intent to mislead readers." *Kaelin* at __.

Here the court found significant that the cover headline did not reference the internal page of the article which was "located 17 pages away from the cover" and was therefore unlike a conventional newspaper headline immediately preceding an article. Referring to *Eastwood*, the court stated that there "we recognized the peculiar nature of front page headlines" -- which can communicate a defamation to "the ordinary reader . . . as well as those who merely glance at the headlines while waiting at the supermarket checkout counter."

The Globe's argument that the text of the article cleared up any possible defamatory meaning in the headline was, according to the court, a question of fact for the jury.

Actual Malice

Reversing the finding of the district court, the Ninth Circuit held that a news editor's deposition testimony regarding the cover headline was sufficient evidence of actual malice to defeat summary judgment. Asked whether he had concerns about the headline, the editor, John Garton, testified that "journalistically I didn't think it was the best headline in the world." As to whether it implied Kaelin committed the murders, he testified: "No, I just didn't think it was very accurate to the story. It could have been better." According to Garton, the word "it" in the headline "COPS THINK KATO DID IT!" referred to perjury, not murder. Regarding possible confusion over the meaning of the headline, Garton stated that he was "a bit concerned about it, yes, but in fact I thought the second part of the headline coped with that."

As to this testimony, the district court held that "while Globe employees might not have acted with the professionalism that would be expected at a more reputable journalistic institution before running the article about [Kaelin], the failure to act reasonably is not enough to establish malice." In contrast, the Ninth Circuit held that the editor's statement of concern over the headline was direct evidence from which a jury could infer that the Globe knew the headline was false or that it acted with reckless disregard. The editor's statement that the second part of the headline cured any confusion over the meaning of "it" was, according to the court, an issue of credibility for a jury to decide.

The decision also cites as significant a statement by the editor that "the front page of the tabloid paper is what we sell the paper on, not what's inside." According to the decision, this remark would permit a reasonable juror to conclude that the Globe had a pecuniary motive to run an inaccurate headline. In conclusion, the court again referred to *Eastwood*, noting that like in that case the "totality" of the Globe's choices in running the headline could permit an inference of actual malice.

Student Journalist Prevails at Libel Trial in Massachusetts

By Robert A. Bertsche

A student journalist won a hard-fought libel battle in Massachusetts two days before Christmas 1998. After a two-day bench trial, a state Superior Court judge dismissed a Wellesley College professor's libel claim against the student, who had written, erroneously, that the professor had obtained tenure "only after successfully suing the college for racial discrimination." *Tony Martin v. Avik Roy*, No. 93-007137, Mass. L.W. No. 12-314-98 (Fabricant, J.) (Mass. Super. Ct. Dec. 23, 1998).

The judge ruled that the statement, published in a student-run magazine in 1993, was "partly false, but substantially true," making this one of the first published decisions in Massachusetts to rely explicitly on the substantial truth doctrine. In any event, she found, the statement was not defamatory.

She also ruled that the professor, a public figure, had failed to prove damage to his reputation or actual malice on the part of the student reporter. Significantly, even though the reporter's state of mind was in issue, the judge declined to order the reporter to disclose the identity of his confidential source. Rather, responding to defendant's motion in limine, she ruled that the plaintiff had not complied with the court's prior order requiring him first to seek the source's identity by other means.

The five-year libel battle is believed to be the first libel case against a student journalist to come to trial in Massachusetts, and it may not be over yet. Plaintiff Anthony Martin, professor of Africana Studies at Wellesley, has moved for a new trial on the grounds of judicial bias. That motion was pending as of press time. Prof. Martin has not yet publicly stated whether he will appeal if the new trial motion is denied.

Background

The defendant, Avik Roy, was the founder of *Counterpoint*, an occasional publication by students of both Wellesley and the Massachusetts Institute of Technology. He wrote the article at issue during the summer after his senior year at M.I.T., and it was published in September 1993.

At the time of the publication, the judge found, Prof. Martin was the subject of global publicity regarding his use in one of his classes of a book published by the Historical Research Department of the Nation of Islam called *The Secret Relationship Between Blacks and Jews*, which argues that Jews played a predominant role in the African slave trade. According to the opinion, "[t]he substance of the news media commentary in general ... was that *The Secret Relationship* was anti-Semitic, that Martin was anti-Semitic, that he was teaching anti-Semitic propaganda as history, that the content of his courses lacked scholarly validity, and that Wellesley should revoke his tenure and fire him."

Prof. Martin did not sue any of the national news media, which he excoriated in a book he self-published in December 1993, called *The Jewish Onslaught: Despatches from the Wellesley Battlefront*. Instead, he sued *Counterpoint*, its editor, and Roy. *Counterpoint* was never served, and the editor was dismissed early in the case on an unopposed motion for summary judgment.

No Defamatory Meaning

The judge's ruling after trial relied heavily on Massachusetts common law of libel, rather than federal or state constitutional law. Following the suggestion in a pretrial memorandum filed by the defendant, the court held that to say a plaintiff had successfully sued for discrimination was not defamatory, because "by referring to a successful suit for discrimination, the statement necessarily implies that he was indeed qualified, and so established in court." Even if the statement could be read as implying that he intimidated the college into granting him tenure, "the intimidation suggested is solely by means of action that is entirely lawful and fully in accord with public policy – the bringing of a well-founded suit to remedy a violation of his statutorily protected rights."

(Continued on page 8)

Student Journalist Prevails

Substantial Truth

The court also ruled that the statement, when read in context, was "substantially true." The article was headlined, "Afrocentric Scholar Accused of Harassment: Wellesley's Tony Martin, whose image was battered in controversy last year, must weather another storm." Most of the article discussed an incident that occurred two years earlier between Prof. Martin and a Wellesley undergraduate, in which the student said Martin physically intimidated her, and Martin called the student a racist and a bigot. That incident had only recently been publicized on campus.

Much of Roy's article discussed what Roy described as Prof. Martin's characterization of the student as a racist, and the efforts of Wellesley College to cover up the incident. In the tenth paragraph of his 13-paragraph piece, Roy wrote, "*Counterpoint* has also learned that, according to sources within the administration, Prof. Martin gained tenure within the Africana Studies department only after successfully suing the college for racial discrimination, providing a possible explanation as to Martin's outspoken racial views as well as the administration's reluctance to openly censure him." That paragraph was the only statement over which Prof. Martin sued.

The judge ruled that testimony at trial established "that Martin did sue the College for racial discrimination; that in that suit he did allege mistreatment with respect to his tenure decision; and that the suit ended in a manner that he considered successful." However, the suit occurred in 1987, 12 years after Prof. Martin obtained tenure, and thus was not literally true (though the judge found that "[i]t is by no means established that fear of litigation did not play a role" in the tenure decision).

Under the circumstances, the judge ruled, "The conclusion Roy drew from the erroneous statement, ... that the College might be exercising particular restraint in dealing with Martin for fear of being sued, follows at least as strongly from the actual facts as it would from the erroneous version. In the context of the article, the importance of the statement lay in its support for this conclusion. In that respect, insofar as material to the context in which it was made, the statement was true." This is one of the first published Massachusetts decisions to rely explicitly on the substantial truth doctrine accepted in many other jurisdictions.

No Damage to Reputation

The judge also found that Prof. Martin had failed to prove that he suffered damage to his reputation as a result of the statement. The total number of people who mentioned the article to Martin was not more than 20, and two people who specifically mentioned the statement in issue knew that Prof. Martin had received tenure without filing a lawsuit.

No Actual Malice

In response to a pretrial motion to determine status, the Court found that Prof. Martin was a public figure, relying heavily on a blanket stipulation that the plaintiff had submitted to that effect. (A prior judge in the case had declined to make such a ruling on summary judgment, noting that the plaintiff disputed whether the alleged libel was germane to the controversy as to which plaintiff was a public figure. The trial judge ruled otherwise when the question arose in a pretrial motion to determine status.) The Court reaffirmed that ruling based on the evidence presented at trial. Accordingly, it was the plaintiff's burden to prove actual malice by clear and convincing evidence.

It was undisputed at trial that the reporter, Roy, made few if any efforts to corroborate the information he obtained from his confidential source that - according to other, also confidential, sources within the Wellesley administration - Martin had sued before obtaining tenure. Roy did not call Prof. Martin for comment; did not examine court filings; and did not himself question the administration sources. Roy testified at trial, however, that he trusted his source; that she had proven reliable in the past; and that some of the other information she provided him for the article was corroborated by others.

(Continued on page 9)

Student Journalist Prevails

Throughout the trial, as urged in a motion in limine filed by the defendant, the Court excluded proferred testimony relating to the reporter Roy's alleged bias, alleged personal dislike of Prof. Martin, the alleged conservative bent of the *Counterpoint* publication, and the source of its funding, on the grounds that none of those issues are relevant to whether Roy published the statement in issue with knowledge or reckless disregard of its falsity. In its opinion, the Court noted that the only evidence offered to show malice was the plaintiff's inference that the confidential source was a Wellesley student, who the plaintiff believed, was hostile to him. Plaintiff inferred that because Roy was friendly with that student, Roy was aware of that hostility.

The Court rejected the inference, noting that except as to the possible identity of the source, the plaintiff's chain of inferences "fails at every link." The judge ruled that there was no evidence that the person the plaintiff believed to be the confidential source held personal hostility to Prof. Martin or had any inclination to deliberately convey false information about him – much less that Roy had "any awareness of or any reason to suspect any such attitude or conduct" by the source. More likely, the Court said, "a good faith misunderstanding occurred" regarding how Martin obtained tenure. The Court explicitly found that Roy "genuinely believed the information to be true."

Confidential Source

A notable sidelight of the decision was the judge's refusal to order the reporter to disclose the identity of his confidential source. Massachusetts has no shield law, but does have common-law protection for confidential sources. In this case, the defendant refused to name the source during discovery, but did provide some information about her: that she was a Wellesley student on the Counterpoint staff, and that he had used her in the past as a source and found her to be reliable. When plaintiff sought to compel disclosure of the source's name during discovery, the Court ordered plaintiff first to seek to obtain the name through third-party depositions, and to report back to the court on the success of those efforts.

At trial, the judge found that the plaintiff had not complied with that pretrial order because, although plaintiff believed he knew the source's identity, he had neither taken any third-party discovery nor reported back to the Court as required. For that reason, "and without making any ruling on the existence or scope of any privilege," the Court ruled at trial that Martin had waived any right to compel Roy to disclose the source.

Trial counsel for the defendant reporter were Robert A. Bertsche and Kimberly Y. Schooley of Hill & Barlow, A Professional Corporation, Boston, Mass.

$20 Million Jury Award in Employment Slander Case

Took Jury Ninety Minutes to Decide

Illustrating the potential of high jury awards in employment-related cases, a jury in Albany, Kentucky on January 15, 1999 awarded five million dollars each to four former Wal-Mart employees who were fired after being captured on videotape eating from damaged packages of nuts and mints *Angel et al. v. Walmart* (Clinton Cir. Ct. Jan. 15, 1999). After a three day trial and only ninety minutes of deliberation, the jury awarded each former employee $1 million for slander, $1 million for mental anguish and $3 million in punitive damages.

Wal-Mart defended its actions on the grounds that the employees violated the company's anti-pilferage policy. The employees maintained that they were merely enjoying the benefits of an unwritten policy that items damaged in shipping that can no longer be sold, such as the cashew nuts and breath mints at issue, would be left in employee lounges for consumption. A Wal-Mart spokesman described the award as "just way too high" and said the company will appeal.

IN 'NEWSGATHERING TORT' CASE, MCGRAW-HILL FOUND LIABLE BUT RESULTING ARTICLE IS DEEMED TO SERVE THE PUBLIC INTEREST

By Anne B. Carroll

Last month a federal district judge found publisher McGraw-Hill and a *Business Week* reporter liable for $7,500 for pulling Dan Quayle's credit report in 1989 during the course of undercover newsgathering – liable not to Dan Quayle but to the company that sold them the credit report. The newsgathering in question was for a September 1989 *Business Week* cover story, entitled "Is Nothing Private?", about the hazards to personal privacy posed by the computer age. The decision -- arrived at with virtually no First Amendment analysis -- shows judicial distaste for covert journalism meeting judicial respect for a journalistic piece of unquestioned merit and value on one set of peculiar (and sometimes hilarious) facts. It will give comfort neither to defenders of undercover reporting nor to plaintiffs lacking a libel claim who hope to cash in big on the sins of those who gathered the bad news about them.

The decision -- arrived at with virtually no First Amendment analysis -- shows judicial distaste for covert journalism meeting judicial respect for a journalistic piece of unquestioned merit and value on one set of peculiar (and sometimes hilarious) facts.

Ruling after a bench trial, the court in *W.D.I.A. Corp. v. McGraw-Hill, Inc.*, No. C-1-93-448 (S.D. Ohio Dec. 18, 1998), held that the defendants committed contract breach and fraudulent inducement in making misrepresentations to the plaintiff in order to test the security of the nation's credit reporting system. (A third claim under Ohio's RICO provisions was dismissed in 1995.) At the same time, however, the court declined to award punitive damages, citing the important role played by "testers" in safeguarding individual rights, the fact that the ensuing *Business Week* article concerned a matter of "vital public interest" and the defendants' lack of malice or ill will. And without a word of discussion about the constitutional implications of granting post-publication damages flowing from a truthful news story, the court attempted to confine the compensatory award narrowly to harm it said was proximately caused by defendants' pre-publication acts.

The case was brought by an on-line credit reporting bureau in Cincinnati that resells to its subscribers credit reports on individuals compiled and furnished by the "Big Three" national credit reporting services. The court held that W.D.I.A. incurred just over $4,000 in cognizable damages from McGraw-Hill's conduct; prejudgment interest brought the total award to $7,500.

Under Cover, Business Week-Style

The events underlying the suit began in spring 1989 when, as part of preparing the privacy article, then-*Business Week* editor and reporter Jeffrey Rothfeder decided to see how easy, or difficult, it was to get around the legal protections shielding individuals' credit reports. He and his editors decided that the only reliable way to find out was through an undercover, first-hand test of the system, concluding that the question was important enough to warrant a departure from the magazine's general policy against what it calls "unusual reporting techniques."

Rothfeder then applied by mail to become a subscriber of W.D.I.A., one of 25 companies in the country that sold on-line access to such reports. In the application – which was itself part of the *Business Week* test of the system – he stated that he was an editor at McGraw-Hill, inserted deliberate "inconsistencies [and] incongruities," and omitted some of the information required.

But the reporter also signed a form agreement promising that he would pull credit reports only for pur-

(Continued on page 11)

'NEWSGATHERING TORT' CASE

(Continued from page 10)

poses deemed "permissible" in the federal Fair Credit Reporting Act (FCRA) and stated (untruthfully) that he intended to use the credit reports for the permissible purpose of screening potential employees. Moreover, found the court, "[w]hen contacted personally during the application screening process by an investigator for W.D.I.A. at defendants' place of business, defendants intentionally misled the investigator by half-truths and silence."

After receiving his password from W.D.I.A., Rothfeder went on line at his personal computer and pulled the credit reports of then-Vice President Dan Quayle and a Democratic congressman. Prior to publication, he called both officials to tell them what he had done, and why, and to ask permission to print information about their credit reports. Both agreed. (Indeed, Dan Quayle's spokesman provided a supportive quote for the article.) The *Business Week* article reported on Rothfeder's investigative activities in detail but did not name or otherwise identify W.D.I.A. as the source of the credit reports on the ground that the story's aim was to identify systemic security problems in the industry rather than to place blame on the particular company chosen for the test.

Misbehavior All Around

In its decision the court concluded that W.D.I.A.'s owners noticed but ignored the inconsistencies and the other flaws planted in the reporter's application; that in selling the $495 subscription package to Rothfeder, W.D.I.A.'s marketing agent gave him advice on violating FCRA; and that in giving the reporter access to credit reports W.D.I.A. itself engaged in conduct that violated FCRA and breached its part of the contract with him.

The court also found that six months before receiving Rothfeder's application W.D.I.A. had, by approving a wholly fabricated subscriber application, badly failed a secret test of its security procedures administered by a credit reporting industry trade group, and that the trade group's subsequent complaint to the Federal Trade Commission brought on an investigation which led to an FTC suit charging that W.D.I.A. systematically violated FCRA. (The head of the trade group testified -- on W.D.I.A.'s behalf -- that *his* secret test of the company was "'a clean, honest approach to finding out [about W.D.I.A.'s failure to comply with federal laws] and keep it within the family, keep it within the context of [the industry trade group].'" As the court also noted, after discovering what the trade group had done, "W.D.I.A. 'commend[ed]' [the group] for its actions, encouraged [it] to undertake more such investigations, and expressed satisfaction that it was [this group] rather than the regulators at the FTC who had conducted the audit.")

Nonetheless, the court found that by pulling Dan Quayle's credit report for a purpose not enumerated as "permissible" under FCRA, the defendants had materially breached their contract with W.D.I.A. and that, for purposes of the fraudulent inducement claim, W.D.I.A. had reasonably relied on the defendants' misrepresentations in approving the application, in part because of "the good reputation for truth and veracity the defendants enjoyed worldwide."

A Puzzling Damages Analysis

Turning to damages, the court rejected W.D.I.A.'s claims that it should be compensated for its costs associated with the FTC action (which was eventually settled by W.D.I.A.'s submission to a Consent Order) and with trips taken by its owners, after the publication of the article, to congressional hearings on FCRA in Washington and to a trade group convention in Arizona. The court concluded that the FTC action bore no relationship to any conduct of the defendants and that the trips to Washington and Arizona -- which plaintiff contended were necessary in order for W.D.I.A. to counter damage done by defendants to its reputation --

(Continued on page 12)

'NEWSGATHERING TORT' CASE

(Continued from page 11)

in fact "resulted from the publication of the truthful article, not from the breach of contract or fraud."

But plaintiff did not go away empty-handed. Immediately after the publication of the article, W.D.I.A.'s president Mark Hanna flew from Cincinnati to Chicago in his private plane -- at a cost of $3,860.52 -- to tell an executive of TransUnion, one of W.D.I.A.'s three credit report suppliers, that W.D.I.A. was the anonymous company which had supplied the Quayle credit report to *Business Week* and to explain his side of the story. The court found this trip, private plane and all, not only to have been proximately caused by the defendants' pre-publication conduct but also to have been "reasonable and necessary for W.D.I.A. to avert being cut off from access to credit information by TransUnion as had occurred previously after . . . [W.D.I.A. failed the industry trade group's] test."

This is hard to square with findings elsewhere in the court's opinion (based on trial testimony of the TransUnion executive) that TransUnion's knowledge of W.D.I.A.'s connection with the events recounted in the *Business Week* article came exclusively from Hanna himself, and not from the article, and came in the wake of the article's publication and not before it. And it is harder still to square with the finding that other post-publication trips undertaken by the plaintiff for the essentially similar reason of mitigating the consequences of a truthful negative press report (and repairing its public image after its own president destroyed the anonymity that the defendants had preserved) were *not* proximately caused by the defendants' pre-publication acts. Still, the absence of an analysis in the decision that might account for the distinction should greatly limit its precedential effect.

Just Don't Call It The First Amendment

Nowhere in its 48-page opinion did the court find a kind word for First Amendment values. Indeed, its citations to First Amendment authority stood solely for the proposition that the constitution raises no bar at all to press liability for wrongs committed in the course of newsgathering. Yet in a conclusion of law supporting its refusal to grant punitive damages, the court turned to fair housing and federal administrative enforcement decisions for the principle that "[t]esters serve an important role in determining whether a statute intended to safeguard the rights of individuals is properly protecting those rights" and that "'[u]ndercover work is a legitimate method of discovering violations of civil as well as criminal law.'"

"Defendants' test of the credit reporting system," the court added, "does not support an award of punitive damages in this case because it served to inform Congress and the general public about a matter of vital public interest and was done in such a way as to protect the identity of W.D.I.A. and the rights of consumers."

Postscript: Two weeks ago, W.D.I.A. moved the court for an award "in the interest of justice"of its attorney fees and costs incurred in prosecuting the action against McGraw-Hill and Rothfeder, a claimed total of over $163,000. The defendants are opposing the motion. On January 15, 1999 W.D.I.A. filed a notice of appeal. Defendants are considering a cross-appeal.

Anne B. Carroll currently practices at Satterlee Stephens Burke & Burke in New York City. While an associate at Cahill Gordon & Reindel, she assisted Floyd Abrams in the defense of McGraw-Hill and Mr. Rothfeder in this case.

Arizona District Court Grants Summary Judgment to ABC on All But Fraud in Hidden Camera Case

No Post-Publication Damages For MedLab

By Andrew D. Hurwitz

Judge Roslyn O. Silver of the United States District Court for the District of Arizona recently entered an order granting summary judgment to ABC on virtually all claims in a case arising out of a *PrimeTime Live* broadcast concerning pap smear testing. *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, 1998 WL 896979 (D. Ariz.) The case involved a broad attack on ABC's newsgathering techniques, and the order provides important guidance on evaluating such claims.

Among the more important rulings: publication of the news report could not be considered either as a substantive factor in the intrusion claim or as an element of damages supporting the trespass, fraud and intrusion claims.

Factual Background

The *PrimeTime Live* story, "Rush to Read," was aired in 1994. It reported the performance of several laboratories, including Scottsdale-based Consultants Medical Lab ("CML"), in reading a series of pap smears. Using a fictitious identity set up for purposes of this investigative report, ABC reporters had supplied the pap smears to the labs, claiming that they were from patients at the "Huron Women's Health Collective." The story reported that CML failed to identify evidence of cancer on several of the slides.

As part of its investigation, ABC conducted an interview with John Devaraj, the manager of the lab. Devaraj met with the ABC personnel on the assumption that they were interested in setting up their own lab in Georgia. During a meeting between Devaraj and the ABC representatives in CML's offices, Devaraj described the laboratory business in general, and CML's approach to that business in particular. Unbeknownst to Devaraj, the meeting was recorded on a hidden camera. A brief portion of the hidden camera footage was used in the broadcast. Neither Devaraj nor CML were identified by name.

Procedural Background

Devaraj and CML originally filed suit in Arizona state court against ABC, ABC's local affiliate, and a number of ABC personnel. After removal, Judge Silver granted a motion to dismiss all claims against the affiliate, as well as claims for public disclosure of private facts, intentional infliction of emotional distress, unfair practices, trade libel, negligent infliction of emotional distress, and conspiracy. *Matter of Medical Laboratory Management Consultants*, 931 F. Supp. 1487 (D. Ariz. 1996). Plaintiffs later voluntarily dismissed their claims for defamation and false light invasion of privacy. The remaining claims were for intrusion, fraud, interference with contractual relations, trespass, eavesdropping, and punitive damages. These claims were the subject of motions for summary judgment filed by the defendants.

The Order

In a forty-two page order, Judge Silver granted summary judgment to the defendants on all aspects of the case, save a narrow portion of the fraud claim. The order begins by recognizing that the case involves "two fervently protected fundamental rights in competition: the right of the individual to be left alone and the right of society to access information of public interest." Judge Silver also recognizes that the case "involves a difficult analysis of common law causes of action enshrouded by the First Amendment." The order then engages in a detailed factual and legal analysis of each of the remaining claims.

(Continued on page 14)

Arizona Hidden Camera

(Continued from page 13)

Intrusion

Since no Arizona cases addressed the issue of hidden camera interviews, Judge Silver applied the test in *Restatement of Torts (Second)* § *652B* to the intrusion claim: the plaintiff is required to show that the defendant "has intruded into a private place or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." She began by holding that CML, a corporation, had no intrusion claim.

As to Devaraj, Judge Silver relied upon the undisputed fact that the taping took place in the workplace, in a setting at least partially open to the public and accessible to employees. Devaraj had not communicated any expectation of privacy in the conversation to the undercover interviewers, each of whom was a total stranger to him. The topic of conversation involved only the lab business, not any private facts about Devaraj. Judge Silver therefore concluded that Devaraj did not have a reasonable expectation of privacy in the location or in the contents of the conversation.

Judge Silver also found that the alleged intrusion did not meet the *Restatement* requirement of being "highly offensive to a reasonable person." Citing *Shulman v. Group W. Productions, Inc.*, 74 Cal. Rptr. 2d 843 (Cal. 1998), the court found that the public's interest in obtaining news may mitigate the offensiveness of a particular intrusion. Here, the information sought--the performance of a licensed laboratory in reading pap smears--involved a matter of public interest, and the hidden camera interview involved only the business of the laboratory, not private facts about Devaraj. Judge Silver therefore concluded that the interview was not "highly offensive."

Judge Silver also held that the eventual publication of a portion of the interview was not relevant to the intrusion claim, and could not be considered in determining the offensiveness of the act. She held that the intrusion itself was "minimal" and that the plaintiffs' real complaint was that the information gained from the intrusion was published.

Interference with Contractual Relations and Prospective Economic Relations

The district court began its analysis by noting that any claimed injury to CML's business resulted entirely from the broadcast, not the newsgathering techniques. Under *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), the issue was therefore whether plaintiffs could meet the fault and falsity standards imposed by the First Amendment.

Although CML and Devaraj were private figures, Judge Silver held that the broadcast involved matters of public concern. Therefore, under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), plaintiffs had the burden of proving that the broadcast was false. The district court carefully reviewed the five areas where plaintiffs had claimed that the story was false, and found in each instance that the statements were "substantially true" and/or that plaintiffs had not established falsity.

Because she found no proof of falsity, Judge Silver did not consider the defendants' alternative claim that plaintiffs had not established the level of fault required under Arizona law.

Fraud

The only fraud alleged in the complaint involved the pretense used by ABC to conduct the hidden camera interview. (Plaintiffs had previously attempted to amend the complaint to allege that the representation that the slides came from the "Huron Women's Health Collective" also constituted fraud, but the amendment was rejected as untimely under the district court's Rule 16 scheduling order). Defendants' motion for summary judgment was premised entirely on the argument that plaintiffs could not establish any pecuniary damages from this alleged fraud.

The district court agreed that Arizona law allowed only recovery for pecuniary damages caused by fraud, not emotional distress or other personal injuries. The court then found that the major pecuniary damages claimed by the plaintiffs -- loss of business from physicians who saw the broadcast -- were proximately caused by the broadcast, not the alleged fraud. In so ruling, Judge Silver

(Continued on page 15)

Arizona Hidden Camera

(Continued from page 14)

followed *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 965 F. Supp. 956 (M.D.N.C. 1997). Since she found that these claimed damages were not a proximate result of the alleged fraud, Judge Silver found it unnecessary to reach defendants' alternative argument that such damages could not be awarded in any event because the broadcast was true.

Under this reasoning, Judge Silver dismissed all of the fraud claim except for Devaraj's assertion that discovery of the fraud led him to expend about $3000 on medical treatment and psychological counseling. She found a fact issue present as to this claim, since treating physicians had testified that Devaraj suffered depression and other physical symptoms not simply as a result of the broadcast, but also as a result of the alleged fraud.

Trespass

Defendants' motion for summary judgment relied heavily on Judge Posner's opinion in *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir 1994), which involved a similar undercover camera story. *Desnick* held an entry obtained by consent nonactionable, despite the fact that the consent was fraudulently induced, since the real complaint was not invasion of a possessory interest, but the personal effect on the plaintiff from discovering the ruse.

While finding the *Desnick* analysis "alluring," the district court refused to adopt it, holding that an Arizona court would find a consent procured by a misrepresentation to be ineffective under *Restatement of Torts (Second)* § 892. Since Devaraj had consented to entry by purported entrants into the lab business, not reporters bearing hidden cameras, the district court held that any consent defense must fail.

Nonetheless, Judge Silver granted summary judgment on the trespass claim, holding that all damages claimed by the plaintiffs arose from the broadcast, not from the trespass. Again citing *Food Lion*, she found that trespass was "remote" from any alleged loss in business caused by the broadcast.

Wiretapping

Plaintiffs' only claim not involving Arizona law was under 18 U.S.C. § 2511, the federal eavesdropping statute. Plaintiffs claimed that the secret recording of Devaraj's conversation was actionable under this statute, which prohibits the interception of a communication "for the purpose of committing any criminal or tortious act."

The district court held that, even assuming that a portion of the broadcast was tortious, there was no evidence that the defendants recorded the conversation "for the purpose of committing a tort." Judge Silver relied on the legislative history of the 1986 amendment to section 2511, which was passed in response to a case in which a media defendant was held liable for secretly recording an interview. She also relied on the district court opinon in *Berger v. Cable News Network, Inc.*, 1996 WL 390528 (D. Mont.), *aff'd* 129 F.3d 505 (9th Cir. 1997), *cert. granted*, 67 U.S.L.W. 3315 (No. 97-1927); *Deteresa v. American Broadcasting Companies*, 121 F.3d 460, 465 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840 (1998); and *Russell v. American Broadcasting Company*, 1995 WL 330920 (D. Kan.). Each of these cases granted summary judgment on eavesdropping claims where the only evidence was that the news media's purpose was simply to gather information, not to commit a tort.

Punitive Damages

The district court rejected the plaintiffs' claim for punitive damages, holding that such damages were only recoverable under Arizona law "under special circumstances" and for "the most egregious of wrongs." She held that the defendants' alleged conduct did not meet these standards. She also relied upon her previous holding, in dismissing the intentional infliction of emotional distress claim, that conduct which another federal court (the Seventh Circuit in *Desnick*) had found to be nonactionable could not be deemed "outrageous" in the absence of conflicting Arizona authority. *Medical Laboratory*, 931 F. Supp. at 1494.

(Continued on page 16)

Arizona District Court Grants Summary Judgment to ABC

(Continued from page 15)

Crime-Fraud Exception

The plaintiffs had argued, relying on an unpublished order in *Food Lion*, that ABC should be required to produce certain privileged attorney-client documents under the crime-fraud exception. Reviewing the Ninth Circuit law, Judge Silver held that the exception only applied where there was evidence that the attorney was "retained in order to promote intended or continuing criminal or fraudulent activity" and where the advice was "sought for a knowingly unlawful end." Rejecting the reasoning of *Food Lion* that ABC employees "should have known" that use of a false identity "could amount to fraud," Judge Silver pointed out here that there was no evidence that legal advice had been sought with the purpose of committing a fraud, but rather to allow the employees to conform their actions with the law in an area where the law was "far from settled."

Conclusion

In addition to dismissing virtually all of plaintiffs' substantive claims, Judge Silver also granted summary judgment to two ABC employees whose involvement in the underlying investigation and broadcast were peripheral.

Plaintiffs have indicated their intention to appeal. However, the order entered was not a final judgment under Rule 54(b), nor was it certified for interlocutory review under 28 U.S.C. § 1292(b). Therefore, any appellate review must await the disposition of the remaining fraud claim.

Andrew D. Hurwitz and Diane M. Johnsen of Osborn Maledon, P.A., Phoenix, represented the defendants in this matter, along with Jean E. Zoeller of ABC and other ABC in-house counsel.

THIRD CIRCUIT TO RULE ON FEDERAL WIRETAP STATUTE APPLIED TO MEDIA

Justice Department Defends Statute

By Theodore J. Boutrous, Jr.

The Third Circuit will soon decide *Bartnicki v. Vopper*, No. 98-7156 (3d Cir.), a case that squarely presents the important question whether the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§ 2510 et seq.), violates the First Amendment when invoked to punish a member of the media for publishing the truthful, newsworthy contents of a taped telephone call that was illegally intercepted by a third party but lawfully obtained by the journalist.

Until recently, the Bartnicki case, which was argued in October 1998, somehow managed to evade the attention of the media bar and everyone else -- including the Department of Justice, which knew nothing about the case until after the oral argument when the Third Circuit asked for the views of the United States. The Justice Department's brief in Bartnicki, filed on November 17, 1998, advances an extremely narrow, and potentially very dangerous, view of the First Amendment. The Justice Department has since repeated these views in *Boehner v. McDermott*, another case that raises First Amendment challenges to Title III and is scheduled to be argued on April 30, 1999 in the D.C. Circuit (*LDRC LibelLetter*, August 1998).

Tape in Teacher Dispute

In Bartnicki, the plaintiffs, Gloria Bartnicki, an employee of the Pennsylvania State Educational Association, and Anthony Kane, a teacher at Wyoming Valley West High School and President of the Teachers' Union, were both involved in heated negotiations with the School District concerning teacher salary increases. In May 1993, Bartnicki used the cellular telephone in her car while discussing with Kane the possibility of a strike and a 3% salary increase. During the conversation, Kane stated, among other things, that if "they're [the School District] not gonna move for 3% we're gonna have to go to their homes . . . to blow off their front porches, we'll have to do some work on some of those guys."

Unbeknownst to Kane and Bartnicki, an unknown individual illegally scanned and recorded this conversation and then provided a copy of the tape recording to Jack Yocum, the president of the Wyoming Valley West Taxpayers' Association and an opponent of the wage increase. Yocum then gave copies of the tape to several radio stations, who broadcast the conversation. Separately, two newspapers and two television stations also obtained copies of the tape and published and/or broadcast portions of the illegally recorded cellular conversation.

Suit Against Media and Source

Bartnicki and Kane filed a lawsuit against Yocum and the media organizations in the United States District Court for the Middle District of Pennsylvania, invoking the provisions of Title III that permit a private suit for compensatory, statutory and punitive damages against anyone who illegally intercepts a telephone call and against anyone who "intentionally disclose[s]" the contents of such a call if the person "know[s] or has reason to know" that the call was illegally intercepted.

The defendants, who themselves had indisputably obtained the tape "lawfully," brought a motion for summary judgment, asserting that the suit was barred by the First Amendment and relying on cases such as *Landmark Communications v. Virginia*, 435 U.S. 829 (1978), *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). These cases stand for the general proposition that "where a person lawfully obtains truthful information about a matter of public significance . . . state officials may not constitutionally punish publication of the information, absent a

(Continued on page 18)

FEDERAL WIRETAP STATUTE

(Continued from page 17)

need to further a state interest of the highest order."

On June 17, 1996, District Judge Edwin M. Kosik issued an unpublished decision rejecting the First Amendment argument and denying summary judgment. *Bartnicki v. Vopper*, Civil No. 3:CV-94-1201 (M.D. Pa. June 17, 1996). Judge Kosik concluded that the Landmark/Daily Mail/Florida Star line of cases did not apply, holding that Title III was a law of "general applicability" that did not "single out" the press, similar to the state breach-of-contract law in *Cohen v. Cowles Media Co*, 501 U.S. 663 (1991).

Government Argues Intermediate Srutiny

The defendants filed an interlocutory appeal in the Third Circuit. Following the October 5, 1998 oral argument, the Third Circuit invited the Justice Department to intervene and express the views of the United States regarding the constitutionality of Title III as applied in Bartnicki. The fact that the Justice Department intervened and supported the district court's ruling is not surprising because it is duty bound to defend the constitutionality of federal statutes absent extraordinary circumstances. But the position that it advocated on behalf of the United States is both startling and potentially very threatening to First Amendment values.

According to the United States, Title III's application in Bartnicki to punish publication of the tape is not even subject to the strict scrutiny test applied under the First Amendment in cases like *Landmark, Daily Mail* and *Florida Star* because Title III supposedly is a "content-neutral law" of "general applicability." Instead, the United States argues, Title III is subject only to "intermediate scrutiny." Thus, rather than requiring the government to justify punishment of truthful speech by pointing to a "state interest of the highest order," the United States proposes that it merely be required to demonstrate an "important or substantial governmental interest."

The United States' position is plainly wrong. Title III's supposed "content neutrality" does not eliminate the need for strict scrutiny. The Supreme Court -- unanimously -- has already resolved that issue in *Butterworth v. Smith*, 494 U.S. 624 (1990). In Butterworth, the Court struck down under the First Amendment a Florida statute that prohibited a grand jury witness from disclosing publicly his own grand jury testimony after the grand jury had ended. The statute did not target speech based on its content. Rather, it prohibited all witnesses from disclosing their testimony whatever its content. The Court in Butterworth nonetheless applied the strict scrutiny test of *Florida Star*, *Daily Mail*, and *Landmark* and struck down the Florida grand jury statute.

The United States' argument that intermediate scrutiny applies because Title III is a "general law" that does "not single out speech or other expressive activities," but instead imposes only "an incidental burden on expression" also is incorrect. Title III expressly, directly and seriously punishes speech by punishing "disclosure" of the contents of an intercepted communication. As a matter of logic, common sense and law, a statute that expressly punishes speech cannot possibly be termed an "incidental" burden on speech.

Government Files in Boehner

The United States' *Bartnicki* view, if accepted, could have sweeping and perverse consequences. Applying the far less rigorous and unpredictable intermediate scrutiny test would allow the government and private parties to argue that all sorts of truthful speech can and should be punished in circumstances where the First Amendment would prohibit punishment of false speech under *New York Times v. Sullivan.*

Indeed, according to the United States, Title III's application is only subject to -- and survives -- intermediate scrutiny in *Boehner*, where two public figures are fighting about truthful speech regarding a matter of indisputable public concern. Congressman John Boehner (R-Ohio) has sued Congressman Jim McDermott (D-Washington) for allegedly leaking to the press a tape of an illegally intercepted cellular phone call -- which McDermott himself had obtained lawfully. During the call, House Republican leaders, including Boehner, dis-

(Continued on page 19)

FEDERAL WIRETAP STATUTE

(Continued from page 18)

cussed the House Ethics Committee's investigation of then-Speaker Newt Gingrich. The discussion focused purely on public matters and Congressman Boehner does not even allege that he suffered any actual injury as a result of McDermott's disclosure; Boehner is therefore seeking only statutory and punitive damages, but no compensatory damages.

Nonetheless, the United States contends that the general privacy interests protected by Title III are "important" enough to trump Congressman McDermott's First Amendment right to publish truthful information of extraordinary public interest regarding the federal government official -- the Speaker of the House -- two heartbeats away from the presidency. (Congressman Boehner did not sue any of the newspapers that published the contents of the tape.) It is impossible to reconcile this argument with *New York Times v. Sullivan*, which would protect even false speech from punishment under those circumstances absent clear and convincing proof of actual malice and actual injury.

Publication by the press of information gathered from a source who has allegedly violated the law in obtaining the information can serve vitally important public purposes, as it did in the Pentagon Papers case and numerous other instances. The United States' position in *Bartnicki* and *Boehner* would create a dangerous, unpredictable weapon and would set a bad precedent that could fetter free speech and press rights in other contexts. Hopefully, the courts in those cases will see it that way and apply strict scrutiny to strike down Title III.

Mr. Boutrous is a partner in the Washington, D.C. office of Gibson, Dunn & Crutcher LL. He is representing a group of news organizations that are filing an amicus brief in the Boehner v. McDermott case discussed in this article.

LOUISIANA APPELLATE COURT HOLDS NEWSPAPER MAY BE LIABLE FOR PUBLISHING TAPED PHONE CALL BETWEEN PUBLIC OFFICIALS

Press Learned of Call At Press Conference

By Mary Ellen Roy

A newspaper publisher must stand trial for publishing the contents of an intercepted telephone conversation between public officials, even though the newspaper obtained the transcript of the taped call at a press conference called by a political opponent, a Louisiana appellate court recently ruled. *Keller v. Aymond*, 98-844 (La. App. 3d Cir., 12/29/98), 1998 WL 901774.

The defendants, Avoyelles Publishing Company and its owner, are applying for a writ of review of *Keller* to the Louisiana Supreme Court.

The Avoyelles Journal and the Alexandria Daily Town Talk published excerpts of telephone conversations regarding matters of public concern between the plaintiffs, Michael Johnson, a state district judge, and McKinley "Pop" Keller, a police juror (the Louisiana equivalent of county commissioner). The newspapers obtained the transcripts at a press conference called by a local attorney, Carol Aymond, who had run against Johnson in a judicial election. Aymond claimed that tapes of the telephone conversations appeared anonymously in his vehicle one day. Aymond played the tapes and distributed copies of the transcripts at the press conference. A reporter asked Aymond, an attorney and former judicial candidate, whether the taping was legal, and he stated that it was legal.

Violates LA Wiretap Law?

In fact, however, the interception of wire or oral communications in Louisiana is illegal under the Electronic Surveillance Act, La. Rev. Stat. 15:1301. The Louisiana Electronic Surveillance Act is similar but not identical to the federal wiretap statute, 18 U.S.C. Section 2510 *et seq*. The Louisiana Act provides generally that it is unlawful to intercept wire or oral communications except with the consent of

(Continued on page 20)

Keller v. Aymond

(Continued from page 19)

at least one party to the communication, unless the comunication is intercepted for the purpose of committing a criminal or tortious act. It is unlawful to disclose the content of such interceptions "knowing or having reason to know" that the information was obtained through an interception in violation of the Act. La. Rev. Stat. 15:1303(A)(3). The Act provides criminal penalties for willful violation. La. Rev. Stat. 15:1303(B).

The Act also provides that "No person may broadcast, publish, disseminate, or otherwise distribute any part of the content of an electronic communication intercepted in violation" of the Act. La. Rev. Stat. 15:1307. A provision, the court of appeals notes, that does not exist in the federal statute. Any person whose communication is "intercepted, disclosed, or used" in violation of the Act may bring a civil cause of action against any person who "intercepts, discloses, or uses" such a communication and is entitled to recover damages, attorney's fees, and punitive damages. La. Rev. Stat. 15:1312.

No Criminal Intent Required

The District Court granted summary judgment in favor of Avoyelles Publishing Company, publisher of The Avoyelles Journal, but the Court of Appeal reversed. The District Court held that there must be criminal willfulness by the defendant in violating the Electronic Surveillance Act before a civil remedy can be sought and that as applied to the newspaper, the Act violated the First Amendment.

The Court of Appeal held that a newspaper can be held civilly liable for publishing the contents of a conversation taped in violation of the Electronic Surveillance Act even if the elements of criminal willfulness are lacking. *Keller*, 1998 WL 901774 at *6. In fact, *Keller* held that "the plaintiffs need do no more than prove publication in order to prevail at trial against the defendant newspapers." *Keller*, 1998 WL 901774 at *9. The Court also held that there was no requirement that the disclosure of the contents of the communication must be a first or initial disclosure, rejecting the newspaper's contention that it could not be liable for publishing information disclosed in a public setting. *Keller*, 1998 WL 901774 at *10.

Analogy to Access Cases

Keller held that it was not unconstitutional to make a newspaper liable for publishing communications obtained in violation of the Electronic Surveillance Act, finding support in cases in which courts have held that the press has no constitutional right of access to such communications. *See Certain Interested Individuals v. The Pulitzer Publishing Co.*, 895 F.2d 460 (8th Cir. 1990) (press has no right of access to FBI affidavits based on telephone conversations intercepted pursuant to court-ordered wiretapes and attached to applications for search warrants); *California First Amendment Coalition v. Calderon* (9th Cir. 1998) (press has no right to view certain phases of lethal injection executions).

Keller reasoned that since the Electronic Surveillance Act prohibits access to private telephone conversations between individual citizens and the press has no right of access greater than that of the public, then the press "cannot escape the prohibitions of the Louisiana Electronic Surveillance Act under the guise of constitutional protection." *Keller*, 1998 WL 901774 at *5.

The Court held that since neither the constitutional right to privacy nor the constitutional right to free speech is absolute, the court must carefully balance the public's interest in freedom of the press against the individual's privacy interests. *Keller*, 1998 WL 901774 at *3.

> "The plaintiffs had an expectation of privacy in their personal conversations that is clearly protected by the Fourth Amendment to the United States Constitution and by Article 1, Section 5 of the Louisiana Constitution." *Keller*, 1998 WL 901774 at *4.
>
> "Neither the public nor the press has a right of access to private conversations between private individuals initiated in the privacy of their respective homes. This is particularly true when intercepted individuals have not been indicted for a crime and yet stand to have their reputations and careers seriously damaged by public opinion." *Keller*, 1998 WL 901774 at *4.

The Court held that since the plaintiffs alleged that the

(Continued on page 21)

Keller v. Aymond

(Continued from page 20)

interceptions were illegally obtained by private citizens, "There is no legitimate public interest to be served by the newspaper's disclosure of the private conversations of the plaintiffs in this case." *Keller*, 1998 WL 901774 at *4. The Court also relied on *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), for the proposition that the First Amendment "did not immunize a television broadcasting company when it broadcasted a performer's entire act without his consent." *Keller*, 1998 WL 901774 at *4.

Florida Star Ignored

The Court did not address the Florida Star line of cases holding that the First Amendment prohibits liability for publishing truthful, lawfully acquired information of public significance, absent a state interest of the highest order. See *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989); *Boehner v. McDermott*, 1998 WL 436897 (D.D.C. July 28, 1998) (privacy interests in taped telephone conversation between Congressmen insufficient to overcome newspapers' First Amendment rights to publish contents of conversation obtained from another Congressman).

In earlier proceedings, the other newspaper defendant, the Alexandria Daily Town Talk, filed an exception of no cause of action (equivalent to a motion to dismiss). The district court granted the exception, but the Court of Appeal reversed. *Johnson v. Aymond*, 97-1466 (La.App. 3d Cir. Apr. 1, 1998), 709 So.2d 1072. The Supreme Court denied writs, with two justices dissenting. *Johnson v. Aymond*, 98-1181 (La. June 19, 1998), 720 So.2d 1214.

One of the plaintiffs, former state district judge Michael Johnson, is a particularly colorful character, even by Louisiana standards. The Louisiana Supreme Court removed Johnson from office in 1996, two months after being re-elected to a second term, because of his ownership interest in a company that leased pay telephones in the parish jail. *In re Johnson*, 96-1866 (La. Nov. 25, 1996), 683 So.2d 1196. The Supreme Court held that Johnson had "persistently behaved with a flagrant disregard for his ethical obligations as a judge." *Johnson*, 683 So.2d at 1197. The Supreme Court previously had put Johnson on probation for arresting and incarcerating an individual for misdemeanor traffic offenses with Judge Johnson being the alleged victim and complainant.

Aymond, the attorney who called the press conference to release the taped phone transcripts published by the newspapers, ran against Johnson in the judicial election for Johnson's second term. Even after being removed from office, Johnson had himself sworn in for his second term, arguing that his removal affected only his first term. Johnson also threatened to run again for the vacant seat if the Supreme Court held that his removal applied to his second term as well. The state Supreme Court held that Johnson's removal applied to both terms and moreover, passed a rule that judges removed from office could not run for re-election for at least five years. *In re Johnson*, 96-1866 (La. Feb. 3, 1997), 689 So.2d 1313.

Mary Ellen Roy is with the firm Phelps Dunbar L.L.P. in New Orleans, LA.

6th Circuit Holds Disclosure Of Wiretap Contents In Pleading Violates Ohio Statute

By Jill Meyer Vollman

On November 16, 1998, the Court of Appeals for the Sixth Circuit held that a law firm violated Ohio's wiretap statute when it disclosed the contents of an illegally obtained wiretap in a court pleading. The opinion in *Nix v. O'Malley*, 160 F.3d 343 (6th Cir. 1998) did not involve a media organization or discuss any media related issues. The decision highlights for attorneys involved in a wiretap case potential arguments on both sides of the issue generally and provides some additional considerations for determining how much knowledge is enough to "have reason to know" of an illegal wiretap.

(Continued on page 22)

Nix v. O'Malley

(Continued from page 21)

Disclosures to Attorneys

Nix was the last of three lawsuits filed as a result of an alleged illegal wiretap of plaintiff's telephone conversations. The basis of the lawsuit was that O'Malley and the attorneys hired to defend him against the charges in the prior wiretap litigation all violated Ohio's wiretap law again by disclosing the contents of the wiretap of Nix three different times: when O'Malley disclosed the contents to his attorneys, when his attorneys used the information to prepare O'Malley's defense, and, finally, when they filed with the court an affidavit disclosing some of the contents. *See* Ohio Rev. Code Ann. § 2933.52(A) (the statute, which has been amended to mirror the federal statute since the time of actions in controversy, was interpreted consistent with the federal standard). The appellate court upheld the summary judgment dismissal on the two "disclosures" between the attorneys and their client, but reversed the grant of summary judgment as to inclusion of the wiretap contents in the pleading filed in court.

Initially, it should be noted that the *Nix* court upheld the dismissal of the "disclosure" of the contents between attorney and client and the use of it in preparing O'Malley's defense based upon the "defense exception." The court noted, however, that this exception is a narrow one, which does not protect the unnecessary public disclosure of illegally wiretapped information in a court filing. Therefore, to determine whether the defendants violated the Ohio statute when they filed an affidavit disclosing the contents, the court employed the statutorily required "knew or had reason to know" analysis, i.e., that the defendants knew or had reason to know that the contents were obtained through an illegal wiretap. Ohio Rev. Code Ann. § 2933.52(A).

"Knew or Had Reason to Know"

This analysis began with the premise that "reason to know" can be based upon circumstantial information and does not require a legal holding that the wiretap was illegal. The court then reviewed the unique facts that the parties were involved in the extensive litigation and connected proceedings before they filed the affidavit, which proceedings set forth very strong evidence that the wiretap was illegal.

In addition, the court found that the inclusion of the contents in the affidavit was not protected by the "adjudication exception," which excepts from liability disclosures to a court either for a determination of admissibility or for a resolution of legality. See *William v. Poulos*, 11 F.3d 271, 286 (1st Cir. 1993). Instead, the court labeled the disclosure of the information in the affidavit as "near-gratuitous" stating that, regardless of the defendants' reasoning, illegally intercepted communication that needs to be filed should be filed *in camera* or under seal if doing so would not harm the defense in any material way. The court also refused to recognize any special immunity for the attorneys' disclosure.

Worth noting is that the court holds the attorneys here liable under a "should have known" standard based upon the extensive network of underlying facts, litigation, testimony, and circumstances connected with the filing of multiple lawsuits and other related court actions. Indeed, the court's application of the "knew or should have known" test does not change its nature or the law in this area. The court's opinion does not hold that there is "reason to know" of an illegal wiretap merely because one party claims or alleges that it is illegal.

It is a rare case in which the parties will have the depth of relationship present here. The clearest message from the case is not for simply any third party in possession of wiretap material, but for lawyers. If the adjudication exception does not apply, those litigating in this area should disclose to the court information allegedly obtained by illegal wiretap under seal.

Jill Meyer Vollman is with the firm Frost & Jacobs LLP in Cincinnati, Ohio

Mississippi Prior Restraint Law Comes of Age

By John Bussian

If press lawyers were ever to prove their mettle, this was the time. The fabled Delta Democrat-Times in Greenville, Mississippi published the contents of a juvenile arrest record discussed in open court at a sentencing hearing after being ordered by the trial judge not to do so. The decision to publish was made without petitioning the court to vacate its prior restraint, setting the stage for a showdown.

Sure enough, Delta Democrat reporter Cynthia Jeffries, who authored the story and who had been directed not to publish by the trial judge, was summarily held in contempt of court. Immediately thereafter she was jailed for violating the prior restraint.

Although the order was clearly invalid as a prior restraint, things went from bad to worse. The trial judge refused to allow the reporter a hearing to face the charges and denied bail. Delta Democrat counsel, Roy Campbell III, had to travel 50 miles to find another judge willing to sign an order releasing the reporter from jail pending appeal. In the meantime, Ms. Jeffries spent 5 hours in jail.

Reversal in the Mississippi courts was by no means certain, given the non-existence of state case law allowing a prior restraint to be challenged in narrow circumstances by violating the order. Nerves were calmed a bit when the Mississippi Attorney General filed his brief agreeing that the conviction should be reversed. Indeed, with approval the court noted that the state conceded that the order was a prior restraint on speech and "as such is presumptively invalid," and that "such an order must not necessarily be contested with an attack on the order itself but may be contested by disobedience." *In re Providence Journal Co.*, 820 F.2d 1342 (1st Cir. 1986)(stating one subject to a transparently invalid prior restraint can challenge its validity through violation of the order), cert. dism'd, sub.nom. *United States v. Providence Journal*, 485 U.S. 693 (1988)."

Better heads prevailed. On December 17, the Mississippi Supreme Court ruled unanimously that the order barring publication was an unconstitutional prior restraint and that the reporter was denied due process by being held in direct contempt without a hearing, reversed the contempt conviction, and wrote a four-page opinion, the first significant prior restraint law in modern Mississippi legal history.

The Supreme Court found that in order to overcome the presumed invalidity of a prior restraint a court had to meet the three-part test established by the U.S. Supreme Court in *Nebraska Press Association*, 427 U.S. 539 (1976). In this instance, the lower court made no determination whatsoever to overcome the presumed invalidity. And by the Mississippi Supreme Court's analysis, the lower court's order met none of the requirements that in that rarest of instances would actually support a prior restraint.

Simultaneously, the Mississippi Judicial Standards Commission added an exclamation point to the ruling by finding that the trial judge willfully violated judicial conduct standards in entering the prior restraint and jailing the reporter. The Commission removed the judge from the bench.

It was a resounding vote for free press rights in Mississippi. The jailed reporter received the highest honors bestowed by the Society of Professional Journalists. And her lawyers breathed a sigh of relief. (*Cynthia Jeffries v. State of Mississippi*, Case No. 97-KA-00796-SCT)

John Bussian is national counsel to the Community Newspaper Division of Freedom Communications, Inc. and served as counsel for the Delta Democrat-Times.

Nevada Prosecutor Raids Newsrooms for Copies of Interviews with Crime Suspect

In an unusually aggressive, and likely illegal, move to obtain copies of media interviews of a criminal suspect, a Nevada state district attorney executed search warrants against three Nevada television stations -- KOLO-TV, KRNV-TV, KTVN-TV -- and one newspaper, the Reno Gazette-Journal. The warrants sought copies of interviews the stations and paper conducted with Christopher Merrit who was arrested two days earlier on January 4, 1999 for allegedly opening fire at people and cars on Interstate 80 outside of Reno.

Merrit told police he intended to rob his victims, but later in interviews with the media he claimed his shooting spree was the first step in a planned cross-country killing spree. Interestingly, at least some of Merrit's interviews with the media were separately recorded by sheriff's deputies who also supervised all the interviews of the suspect. The district attorney described the tapes as central evidence against Merrit and claimed he needed to seize the tapes because there was no court proceeding from which a subpoena could be issued, adding that in prior instances the media had erased tapes before they could be subpoenaed.

In response to the search warrant the Reno-Gazzette-Journal agreed to preserve its interview notes until a subpoena was issued. KRNV-TV sent a copy of its interview tape to the judge who signed the warrant. KTVN-TV turned its interview tape over to its attorneys. KOLO-TV turned its tape over to officers but with a warning that the seizure was a violation of the federal Privacy Protection Act of 1980 and Nevada's shield law.

In response to a letter from KOLO-TV's lawyer Kevin Doty that the seizure was illegal, the district attorney returned the tape a day later with a request that it be preserved until a subpoena is issued. The station is considering filing a lawsuit for damages.

THE TIN DRUM UPDATE: COURT GRANTS SUMMARY JUDGMENT PROTECTING VIDEO RETAILER AND CUSTOMER RIGHTS

By Jon Epstein

In the latest ruling in litigation challenging the seizure as child pornography of all videotape copies of the award-winning movie, *The Tin Drum*, by Oklahoma City police from local video stores and libraries, the federal district court on December 18, 1998 granted plaintiffs partial summary judgment. *Video Software Dealers Association, Inc. v. The City of Oklahoma City*, CIV-97-1150-T (D. Okla. 12/18/98). The lawsuit was brought by the Video Software Dealers Association ("VSDA"), the National Association of Recording Merchandisers ("NARM") and Southwest Video Rentals, Inc. and plaintiff/intervenor The Oklahoma Department of Libraries.

On cross-motions for summary judgment, the Court reiterated its prior decision that the Academy Award-winning film does not violate Oklahoma's child pornography statute. The Court also ruled that the procedure used by defendants to remove *The Tin Drum* from public access without an adversarial proceeding to determine whether it violated the subject child pornography statute constitutes an unlawful prior restraint and that the defendants violated the Video Privacy Protection Act when they obtained customer information without complying with the express provisions of that Act.

While the Court held that defendants' actions in removing the film without an adversarial proceeding constituted an unlawful prior restraint under the First Amendment, it left unresolved plaintiffs' claims that the defendants also violated the Fourth Amendment in connection with the removal of the film.

The Tin Drum Is Not Child Pornography

As the *LDRC Libelletter* previously reported, in June 1997, a local anti-pornography group complained to Oklahoma City police that the 1979 Academy Award-winning film *The Tin Drum*, copies of which the group had obtained from the local library and a video retailer, contained child pornography. The police presented a videotape copy of the movie to a state district judge who, without any notice to interested parties, hearing, or formal ruling, told the officers that the movie contained a scene which seemed to meet Oklahoma's statutory test for child pornography.

After consulting with the local district attorney's office, police confiscated all copies of the film from local video stores without obtaining a warrant or arresting anyone in possession of the film. The police also demanded that video store clerks divulge customer information for any copy of the tape which was out on rental. The parties disputed whether the customer information was voluntarily provided by the video store clerks or whether the information was disclosed only because the clerks believed they were required to comply with the officers' requests and that they would face adverse action if they did not comply.

After the plaintiffs filed their suit challenging the seizure of the tapes and the forced disclosure of customer information, the local district attorney filed an action in state court to have *The Tin Drum* declared to be child pornography. That action was successfully removed to federal court and assigned to the same judge who presides over the *VSDA* suit. On October 20, 1998, that judge ruled that the film is not subject to the criminal penalties of Oklahoma's child pornography statute. *State of Oklahoma ex rel. Robert H. Macy v. Blockbuster Videos, Inc., et al.*, CIV-97-1281-T (10/20/98).

In its December 18, 1998 Order in the *VSDA* case, the Court briefly reiterated its prior holding and reasoning behind its determination that *The Tin Drum* did not constitute child pornography pursuant to Oklahoma's laws and turned its attention to the issues which were not raised in the companion case.

(Continued on page 26)

THE TIN DRUM UPDATE

(Continued from page 25)

The Defendants' Removal Procedure Was An Unlawful Prior Restraint

The Court then addressed the procedure used by the defendant in its effort to remove the film from public access. On December 23, 1997, the Court had granted plaintiffs a preliminary injunction and directed that the removed copies of the film be returned to the parties from whom they were obtained, pending the outcome of the lawsuit, because defendants' removal of the film without an adversarial proceeding to determine whether it violated the statute constitutes an unlawful prior restraint. In the preliminary injunction ruling, the Court concluded that constitutional law requires that, before public officials take such action, they must first give the interested parties an opportunity to present their contentions, evidence and legal arguments for consideration by a court. In its most recent Order, the Court reiterated this holding and granted plaintiffs a declaratory judgment on that issue.

Video Privacy Protection Act Violation

The plaintiffs also successfully argued that the defendants violated the federal Video Privacy Protection Act, 18 U.S.C. §2710 (the Act) when the police officers obtained the names of rental customers from the video store employees. The Act prohibits disclosure of "personally identifiable information concerning any customer by a videotape service provider," without the customer's prior consent except in certain limited circumstances. Specifically, where a law enforcement agency requests disclosure of such information, it may be released only pursuant to "a warrant issued according to the Federal Rules of Criminal Procedure, an equivalent state warrant, a grand jury subpoena, or a court order." The Act also provides that court orders authorizing disclosure "shall issue only with prior notice to the consumer and only if the law enforcement agency shows that there is probable cause to believe the records or other information sought are relevant to a legitimate law enforcement inquiry."

The Court noted that it was not disputed that the police officers requested that video store employees provide them with the names and addresses of some customers who had rented *The Tin Drum* and that the officers obtained no warrant or court order prior to this request. During their depositions, the police officers candidly acknowledged that they were not aware of and had received no training with respect to the Act.

Possession of Private Information Can Make Cops Liable

The defendants argued that they could not be liable under the Act because the Act prohibits disclosure by a "videotape service provider," and that it was the employees of such providers who disclosed the customer information. Thus, the defendants argued that the only potential violation was committed by the employees who released the information. The plaintiffs argued that the information was disclosed only because the store employees believed that they were required to comply with the officers' request and that they would face prosecution or other adverse action if they did not comply.

The Court found persuasive the holding in *Dirkes v. Borough of Runnemede*, 936 F.Supp. 235, 240 (D.N.J. 1996), in which the defendants were a municipal police department and a police officer who also argued that they could not be liable under the Act because they were not videotape service providers. In *Dirkes*, the Court rejected the defendants' "narrow reading of the statute" and held that "those parties who are in possession of personally identifiable information as a direct result of an improper release of such information are subject to suit under the Act."

In *VSDA*, the Court agreed with the *Dirkes* rationale and stated:

> The primary concern of the Act is safeguarding the confidentiality of customers. That it is applicable to law enforcement personnel is apparent from the Act's inclusion of specific prerequisites which must be satisfied before confiden-

(Continued on page 27)

THE TIN DRUM UPDATE

(Continued from page 26)

> tial information can be furnished to such personnel.... The Act's requirements were not followed in this case, and defendants are proper parties.

The other defendants (police chief, district attorney, and the City) argued that they could not be liable because they did not personally obtain the confidential customer material. The plaintiffs argued that they knew about the planned removal of the film and became aware that the officers obtained the identities of customers soon after the officers did so. Thus, the plaintiffs argued that these defendants condoned or ratified the officers' conduct.

The Court concluded that plaintiffs are entitled to declaratory judgment that the officers violated the Act when they obtained the customer information without following the procedures expressly provided in the Act. The Court also held that "the other defendants who were in possession of the information obtained in violation of the Act are proper defendants."

While the facts and legal arguments made in this case were directed to liability of law enforcement personnel and their failure to follow the Act's express prerequisites before they requested or demanded the information, the Court's language that "other defendants who were in possession of the information obtained in violation of the Act are proper defendants" could concern media lawyers who represent clients who may find themselves in possession of customer information disclosed by videotape service providers. The Court in *VSDA* was not asked, nor did it address, whether third parties other than law enforcement and the city could be held similarly liable under the Act; however, the rather broad language of the *VSDA* decision is something of which to be aware.

The Court Rejected Defendants' Other Defenses

In denying defendants' motion for summary judgment, the Court also held that trade associations such as VSDA and NARM have standing to redress their members' injuries where (1) their members would otherwise have standing to sue in their own right; (2) the interests they seek to protect are germane to the organizations' purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Based on plaintiffs' undisputed allegations, the Court determined that they satisfied the criteria for associational standing

Some of the defendants argued that they were entitled to summary judgment under the qualified immunity doctrine. They argued that an official is not liable for a constitutional rights violation where a reasonable official in his position would not have believed that his conduct violated constitutional rights. However, the plaintiffs successfully argued that qualified immunity applies only to claims for money damages and is not available in actions seeking only equitable relief.

Plaintiffs' Fourth Amendment claim is the only claim left to be resolved. A status conference at which the parties will address the remaining claim is scheduled for January 29.

Jon Epstein is a partner in the Oklahoma City office of Hall, Estill, Hardwick, Gable, Golden & Nelson. Epstein and his partner Robert D. Nelon served as counsel for VSDA, NARM, and Southwest Video Rentals in The Tin Drum litigation. John T. Mitchell of the Washington, D.C. office of Jenkens & Gilchrist is lead counsel for VSDA, NARM, and Southwest Video Rentals.

CERT GRANTED:
U.S. Supreme Court to Hear Challenge To Casino Ad Ban

By J. Michael Lamers

On January 15,1999, the Supreme Court of the United States agreed to hear a challenge by radio and television broadcasters in New Orleans, Louisiana and its vicinity to the federal ban on broadcast advertising for privately-operated casinos *Greater New Orleans Broadcasting Association, et al. v. United States of America, et al.* (98-387). The case presents the Court with its first significant opportunity to address fundamental aspects of commercial speech doctrine since *44 Liquormart v. Rhode Island*, 517 U.S. 484, 116 S.Ct. 1495 (1996).

The long-standing speech restrictions at issue, which are codified in the United States Criminal Code as well as in regulations promulgated by the Federal Communications Commission, prohibit broadcast advertising for "any lottery, gift enterprise or similar scheme offering prizes dependent in whole or in part upon lot or chance." But, over the last 20 years, the government has introduced a number of exceptions to the blanket ban, including exceptions for state-operated lotteries, gambling conducted by charitable organizations, and gambling conducted at casinos operated by American Indian tribes.

Almost five years ago, broadcasters in Greater New Orleans, where casino gambling is legal, filed a complaint in federal district court, alleging that the ban violates the First Amendment. The district court applied the prevailing commercial speech analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S.Ct. 2343 (1980), and held that the ban is constitutional, because, in spite of its many exceptions, it directly and materially advances a substantial federal interest in suppressing public participation in gambling. The Fifth Circuit Court of Appeals affirmed the district court's opinion in late 1995. The broadcasters appealed and the Supreme Court vacated the Fifth Circuit Court's judgment and remanded the case to the Fifth Circuit for reconsideration in light of *44 Liquormart*, a case that the Supreme Court decided while the broadcasters' appeal to the Court was pending. In *44 Liquormart* the Court, in a set of four separate opinions, invalidated Rhode Island's restrictions on alcoholic beverage advertising and, in so doing, seemed to call into question bans on speech aimed at suppressing non-speech conduct.

On remand in late 1997, the Fifth Circuit Court once again upheld the advertising ban in a 2-1 decision. Both the panel majority and the dissent expressed concerns about the diverse set of opinions set forth in *44 Liquormart*. Meanwhile, the Ninth Circuit Court of Appeals and a district court in New Jersey applied *44 Liquormart* to strike down the casino advertising ban in those jurisdictions. The broadcasters appealed to the Supreme Court once again, calling the Court's attention to the inconsistent judgments of the three courts that have reviewed the ban, as well as other divergent post-*44 Liquormart* decisions in lower courts.

With the grant of the broadcasters' petition, the stage is set for Supreme Court reconsideration of *44 Liquormart* and other guiding commercial speech cases.

J. Michael Lamers is with the firm Hardy and Carey, L.L.P. in Metairie, Louisiana and represents, along with Ashton R. Hardy and Joseph C. Chautin III, the Greater New Orleans Broadcasting Association in the petition.

PLAYBOY PREVAILS IN CONSTITUTIONAL CHALLENGE TO SECTION 505 OF THE TELECOMMUNICATIONS ACT OF 1996

By Burton Joseph and Robert Corn-Revere

On December 29, 1998, Judge Jane R. Roth of the United States Court of Appeals for the Third Circuit, on behalf of a three-judge panel in the United States District Court for the District of Delaware, sustained a challenge by Playboy Entertainment Group, Inc. and held Section 505 of the Telecommunications Act of 1996 unconstitutional. *Playboy Entertainment Group, Inc. v. United States, Civil action No. 96-94-JJF (D. Del. Dec. 28, 1998).* The decision permanently enjoined the Federal government from enforcing the law and reversed an earlier decision by the same panel that had denied Playboy's request for a preliminary injunction.

Attacking "Signal Bleed"

Playboy challenged Section 505 based upon an alleged violation of the First Amendment rights of Playboy, vagueness and overbreadth and the denial of equal protection of the laws.

The Communications Decency Act ("CDA") was adopted as part of the Telecommunications Act of 1996 and Sections 504 and 505 attempted to address the issue of imperfect scrambling of video and audio signals on premium cable channels, a phenomenon known as "signal bleed." Premium channels as a matter of course are scrambled but the technology is imperfect and non-subscribing customers may at times momentarily glimpse or hear signals from premium programming.

The legislation was aimed at preventing fleeting images or sound that might be "indecent" and therefore harmful to minors. Section 504, which was not challenged in this litigation, requires cable operators, without additional charge, to "fully scramble" upon the request of any customer who does not subscribe to the channel. Section 504 codified a voluntary policy that had been initiated by the cable industry and formally adopted by the National Cable Television Association in 1995.

In spite of this protection, the CDA included Section 505 which was specifically applicable only to "adult" cable networks. Section 505 was added at the last minute as an amendment by Senator Dianne Feinstein and Senator Trent Lott. There was no hearing or debate, no evidence presented in support of the amendment and Congress made no findings either to the extent of the problem or to the degree, if any, that a fleeting glimpse of unscrambled images, or momentary unscrambled audio, might be considered harmful.

Section 504 requires blocking at the request of the subscriber but Section 505 imposed scrambling of both video and audio in advance for all households with respect to "sexually explicit adult programming or other programming that is indecent", and only when transmitted on channels "primarily dedicated to sexually oriented programming." This frequently required extremely expensive installation, whether or not there was signal bleed, and irrespective of whether it was requested by the subscriber. If full scrambling of both audio and video could not be made available, cable operators were permitted to transmit only during "safe harbor" hours, 10:00 p.m. to 6:00 a.m., an option elected by virtually all systems. Section 505 therefore permitted broadcasting only during one-third (1/3) of each day unless the economic burden was assumed to install traps for all subscribers, whether or not there were children in the home or whether or not it was desired or requested by the subscriber.

(Continued on page 30)

PLAYBOY PREVAILS

(Continued from page 29)

Litigation History

Playboy Entertainment Group, Inc., whose video channels include Playboy Television and AdultVision, filed suit in the U.S. District Court in the District of Delaware to enjoin enforcement of Section 505. On March 7, 1996, the Court issued a temporary restraining order enjoining the federal government "from enforcing or implementing Section 505." On November 8, 1996, after a hearing before a three-judge District Court as required by the CDA, the Court issued a decision denying Playboy's request for a preliminary injunction, but kept the TRO in place while Playboy sought review in the Supreme Court. 945 F.Supp. 772 (D. Del. 1996). In March, 1997, the Supreme Court summarily affirmed the lower court but sent the matter back to the District Court for further proceedings on the request for a permanent injunction. 117 S.Ct. 1309 (1997). The Court held a hearing on Playboy's request for a permanent injunction in May, 1998.

The Decision

In granting a permanent injunction barring enforcement of Section 505 and the FCC regulations adopted pursuant thereto, the Court held that strict scrutiny was the applicable standard of review because Section 505 was a content-based restriction on speech. The Court acknowledged that although Section 505 had a content-neutral objective of preventing signal bleed, it was triggered only in response to certain types of adult programming and only on certain channels. The Court denied the government's claim that sexually-oriented speech is of lesser value, noting that, "no majority of the Supreme Court has ever accepted the argument that sexually-explicit, but not obscene, material receives less protection under the First Amendment than artistically, politically, or scientifically valued forms of speech." The Court also rejected the government's argument that the "secondary effects" model was applicable as in zoning cases and reasoned that in order for Section 505 to be constitutional the government must show both that it served a compelling interest and that it adopted the least restrictive means to achieve that end.

The Court found that Section 505 did serve a compelling governmental interest but was troubled by lack of evidence considered by Congress or presented by the Justice Department, noting "the mere articulation of a theoretical harm is not enough," and that "some evidence of harm short of definitive scientific proof must be presented." Nevertheless, the Court was not prepared to say that there was no prospect for harm and concluded that Section 505 was nevertheless unconstitutional because it was not the least restrictive means of serving the government's purpose. The Court found that Section 505 harmed Playboy, its distributors and customers, but that the solution articulated in Section 504 was less restrictive. At the same time the Court required Playboy to arrange with cable operators to notify subscribers of the existence of the remedy similar to that provided in Section 504, as a viable alternative.

Since the Court resolved the issue on the basis of "less restrictive means", it declined to address Playboy's contention that Section 505 was unconstitutionally vague or that it violated the Equal Protection Clause.

On January 12, 1999, the government filed Motions to Correct and Alter the Judgment, alleging the Court's Order is overbroad and inconsistent with its opinion. Playboy will contest this motion.

Burton Joseph is senior partner at Barsy, Joseph & Lichtenstein in Chicago, Illinois. Robert Corn-Revere is a partner at Hogan & Hartson, Ltd. in Washington, D.C. Both represented Playboy in this matter.

New Copyright Law Limits Online Liability

By Lisa T. Oratz

The recently enacted Online Copyright Infringement Liability Limitation Act (the "Act") provides important benefits to online "service providers" by limiting their liability for copyright infringement for certain kinds of specified activities. PL 105-304 (10/28/98) at 112 Stat. 2860, 17 U.S.C. § 105 If the limitation of liability applies, the service provider will not be liable under U.S. copyright law for any monetary damages, and the type of injunctive relief available is narrowed.

The definition of "service provider" in the statute is fairly broad and for most activities includes any provider of online services or network access. In addition to Internet service providers (ISPs) and Internet backbone providers, this definition would appear to encompass many businesses that operate Web sites or other Internet services or facilities and likely includes company LANs and intranets. However, it is important to note that the limitation of liability depends upon the nature of the activities that are being provided, and the types of activities which are excluded from liability are fairly limited. Generally speaking, the activities to which the limitation of liability applies are passive activities where the service provider does not exercise any control over, or interact with, the infringing material.

The four general areas of activities covered by the statute are:

1. Transitory Digital Network Communications. Sending communications initiated by others through a service provider's system, where the service provider does not alter the content (for example, providing Internet backbone connections or routing of digital transmissions through servers).

2. System Caching. Temporarily storing material (such as a site or page) on a service provider's system.

3. Providing Storage Space on a System or Network. Storing, at the direction of a user, material that resides on a service provider's system or network (such as bulletin boards, chat rooms, and Web site hosting).

4. Providing "Information Location Tools". Referring or linking users to an online location containing infringing material or infringing activity by using search engines, links, directories and similar information location tools.

Each type of activity is subject to a variety of specific rules and conditions in order for the limitation of liability to apply. If these rules and conditions are not fully complied with, a service provider may lose the benefit of the exemption and be subject to potentially large damages claims. Therefore, it is important that companies and institutions that act as service providers understand the complex requirements of the Act and establish procedures to ensure that such requirements are complied with. Although a detailed discussion of all the applicable rules and conditions is beyond the scope of this article, some of these requirements are summarized below.

For certain types of activities, there are elaborate "take down" and "put back" requirements which require the service provider to remove or disable access to allegedly infringing material if a proper notice is received and to repost the allegedly infringing materials in certain circumstances where a proper "counter notice" is received. The Act also provides a limitation of liability for service providers who properly comply with the "take down" provisions and imposes liability for damages and costs for anyone who knowingly materially misrepresents that an activity is infringing.

One of the most important requirements that should be immediately addressed is that the service provider

(Continued on page 32)

Online Activities

(Continued from page 31)

designate, both to the Copyright Office and on its online service, an agent to receive "take down" notices. While the designation requirement is not required for certain types of covered activities, service providers will generally want to designate an agent regardless of the activities in which the service provider is engaged, in case some of the service provider's activities fall under a category that does require registration.

Another requirement is that the service provider must adopt, post and implement a policy for terminating, in appropriate circumstances, the accounts of subscribers who are repeat online infringers. In addition, service providers must accommodate and not interfere with "standard technical measures" used to identify or protect copyrighted works.

It is important to note that the statute does not change the law as to whether the covered activities are an infringement. Rather, it merely limits the liability of a service provider who is found to be infringing due to such activities. The Act took effect immediately; therefore, companies who wish to take advantage of its provisions should act quickly to comply with the designation requirements and implement the other practices or procedures necessary to take full advantage of the Act.

Lisa Oratz is Of Counsel in the Bellevue office of Perkins Coie LLP

Bono Act is a "Giveaway"

Harvard Law and Hale & Dorr Unite to Challenge New Copyright Act

Attorneys from Boston's Hale & Dorr and Harvard's Berkman Center for Internet and Society have joined forces to challenge The Sonny Bono Act, the new copyright provision that generally affords 20 additional years to the life of a copyright. For a summary of the Act's provisions, see *LibelLetter* December 1998, at 27. The lawsuit alleging that the new law violates "the constitutional principle that copyright protection should last for only a limited, reasonable amount of time."

The suit arose after a republisher of old books, Eric Eldred, posted a message on his Web site warning that the new law would force him to close down his site. The message and press accounts of Eldred's plight drew the attention of the Harvard faculty.

Jonathan Zittrain, lecturer in cyberlaw at Harvard and executive director of Harvard's Berkman Center, recently stated that the law is "truly a giveaway. It locks up for another 20 years a number of works that are already difficult to find." The new law extends the term of copyright protection from life of the author plus fifty years to life-plus-seventy years, or, for pre-1978 works, life of the author plus seventy-five years to life-plus-ninety-five years.

Eldred, who republishes books on the Internet that have fallen into the public domain and that are difficult to find, began Eldritch Press in 1995. Eldred still may be protected under the new law if his website is deemed

New York Appellate Division Dismisses E-Mail Suit ISP Not Liable for Defamation Under New York Common Law

Applying New York common law drawn from telephone and telegraph cases, New York's Appellate Division, Second Department, has dismissed libel claims against Prodigy Services Company based upon e-mail distributed on its systems. *Lunney v. Prodigy Services Co.* (A.D.2d Dec. 28, 1998).

Young "Lunney's" e-mail

In what appeared to be a crude practical joke, an anonymous individual set up fraudulent accounts with Prodigy and posted "a 'vile and obscene' e-mail message in the name of [Plaintiff-Alexander Lunney]," a prospective Eagle Scout *Id.* at 2. The e-mail message was sent to Lunney's Boy Scout Leader who subsequently contacted Lunney's Scout Master and local police. Lunney was confronted at his home in his mother's presence by the Scout Master and asked for an explanation. Lunney denied any involvement and was taken at his word. There was no police follow-up.

A subsequent exchange of letters between Prodigy and Lunney revealed that not only had Lunney not sent the crude message, Lunney had never subscribed to Prodigy services. While Prodigy sent an early letter to Lunney stating that it was suspending what Prodigy believed to be Lunney's account "due to the transmission of 'abusive, obscene, and sexually explicit material'", when Prodigy learned of three fraudulent accounts that had been set up in Lunney's name, Prodigy apologized to Lunney.

On December 22, 1994, Lunney filed a complaint based on the original email message against Prodigy alleging libel per se, negligence, and harassment. Lunney also sought to enjoin Prodigy from distributing derogatory statements about him. A second amended complaint brought in two additional bulletin board messages and an internal electronic book-keeping entry and memo to a subcontractor regarding "Alex Lunney" and his account termination for "failure to pay, [credit card] fraud as well as transmission of obscene material." The second amended complaint alleged libel, negligence and harassment or intentional infliction of emotional distress. Prodigy brought three successive motions for summary judgment, the last two of which were denied. Prodigy appealed.

Prodigy is Not Publisher

The Appellate Division first noted that while the bulletin board messages might lead one to believe that Lunney was a "foul-mouthed teenager", the messages were clearly not "of and concerning" Lunney. *Id.* at 3. "At most, one could read into the e-mail message in question a statement of fact to the effect that the plaintiff is a bully who has threatened to sodomize a scout leader's sons." *Id.* Even if one were to assume the statement was defamatory, the court said, Prodigy could not be found to have published the statement and "even if Prodigy could be considered a publisher of the statement, a qualified privilege protects [Prodigy] from any liability given the absence of proof that Prodigy knew such a statement would be false." *Id.*

The court applied law derived from telegraph and telephone company cases. The panel found that telephone companies, because of their passive role in the distribution of information, were not treated as publishers, relying on *Anderson v. New York Tel.*, 35 N.Y.2d 746 (1974). In that case, plaintiff sued the telephone company because of the defamatory content of messages that a telephone subscriber made available to those who dialed one of two telephone numbers. Even assuming, as the facts suggested in *Anderson*, that the telephone company personnel knew of the defamatory messages, the telephone company was not deemed to be the publisher of those messages.

(Continued on page 34)

Appellate Division Dismisses E-Mail Suit

(Continued from page 33)

Prodigy, the court here found, should be seen similarly. Indeed, in this case, unlike that of *Anderson*, Prodigy was unaware of the content of the messages until they were brought to its attention.

Qualified Privilege Requires Actual Malice

The court went on, however, to find that even were Prodigy to be considered a publisher, it would be protected by a qualified privilege developed in cases involving telegraph companies. In those cases, because the telegraph operators were actual participants in the sending of the messages, they were deemed to be "publishers." The law, however, developed a privilege to be applied to them that held them liable only upon a showing of actual malice; that is, knowledge of the falsity of the message.

The Appellate Division acknowledged and distinguished the decision in *Stratton Oakmont, Inc. v. Prodigy Services Co.* (Sup. Ct. Suffolk County, May 24, 1995). In that case, liability was imposed on Prodigy because Prodigy had attempted to exercise some sort of editorial control over the text of bulletin board messages. The *Lunney* court noted that the *Stratton Oakmont* decision punished Prodigy for inadequately performing a task it had no duty to perform. It should be noted that the enactment of Section 230 of the Communications Decency Act ("CDA") was in part a response to the *Stratton Oakmont* decision.

In Line With CDA

Finally, the Appellate Division noted that a finding of no liability on Prodigy's part was in harmony with the line of recent cases that have found no liability for the transmission of libelous or offensive statements. *See Cubby, Inc. v. Compuserve, Inc.*, 776 F.Supp. 135 (S.D.N.Y. 1991); *Doe v. America Online*, 1997 WL 374223 (Fla. Cir. June 26, 1997); *Zeran v. America Online*, 958 F.Supp.1124, (E.D.Va. 1997), *affd* 129 F.3d 327, (4th Cir. 1997) *cert denied* 118 S.Ct. 2341 (1998); *Blumenthal v. Drudge*, 992 F.Supp. 44 (D.D.C. April 22, 1998).

Prodigy attorney Michael J. Silverberg of Phillips, Nizer, Benjamin Krim & Ballon, New York, NY, told LDRC that Section 230 of the CDA was invoked at oral argument and in defendant's briefs. Section 230, otherwise known as the "Good Samaritan" provision of the CDA, provides that ISPs may not be held responsible for the content of messages posted through the ISP.

It was enacted, however, after the first complaint in this lawsuit was filed. An interesting issue which was not addressed by the appellate court was the issue of the retroactivity of the CDA. While the initial complaint was filed before the CDA went into effect, Attorney Silverberg argued that the CDA should apply because of s.230(d)(3) which provides that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." Silverberg argued that s. 230 should apply because no liability had been imposed in the *Lunney* case. With respect to the amended complaint, which was filed after the CDA went into effect, the plaintiffs argued that the complaint related back to the original complaint and therefore the CDA should not apply. Silverberg responded that every publication of a defamatory statement brings a new cause of action.

Silverberg noted that the Appellate Division did not address the applicability of the CDA but rather found New York common law sufficient to dismiss the claim against Prodigy.

The court held that the internal Prodigy memoranda were covered by the common interest privilege and claims based on them dismissed for lack of proof of actual malice. Other theories advanced by plaintiff were held "patently meritless."

Surveys About The Press
Who, If Anyone, Do We Trust?

There have been a number of surveys on attitudes toward the press released in recent months. One would be hard pressed to report on them all, but I thought it might be worthwhile to point out for the LDRC membership some of the results. At least two of the polls can be found on Web sites in their entirety. Each poll, of course, has its own unique spin, making comparisons imperfect. But whether you read polls for the sheer pleasure of it all, or because you believe (as I sometimes do) that they reveal a bit about the attitudes that lawyers in media cases will face in judges and jurors, there is generally something for everybody if you read enough of the results.

The Polls

New York Magazine released its poll in its November 23, 1998 issue. Conducted by Global Strategy Group Inc, they spoke with 1000 adults nationwide, 400 of whom were in New York. A bit skewed, to be sure, but the most wickedly fun of these polls.

ASNE, the American Society of Newspaper Editors, sponsored a poll released on December 15, 1998, for which 3000 adults were contacted last April and May, followed by 16 "validation" focus groups completed in August, 1998. The polling agency was Urban & Associates Inc. This is the most extensive of the recently released polls. It is part of the ASNE three-year long Journalism Credibility Project. It covers a wide range of issues including perceptions by the public of reporters (e.g., well informed, cynical, "not like us") use of confidential sources and bias in media coverage. Only a few of the highlights will be touched upon here. *www.asne.org*

Ogilvy Public Relations Worldwide released a poll on December 9, 1998, conducted for it by NFO Research. They spoke with 509 adults, ages 18-64, in July/August of 1998. *www.ogilvypr.com/newsdesk*

And finally, Editor & Publisher magazine released a poll in its January 2, 1999 issue. This E&P/TIPP Newspaper Poll was conducted with 120 editors and publishers around the country between December 7-15, 1998.

Is the Press Part of the Solution or Part of the Problem?

The E&P study reported that 67.5% of its newspaper editor and publisher respondents agreed with the statement that "[t]he news media not only reports but often fuels and drives political controversy." Ten percent agreed with that statement "strongly." On a similar note, 47% of the respondents to the New York Magazine poll thought that the press plays a negative role in society, versus 48% who thought the press role was a positive one.

Are We Accurate?

ASNE reported that 73% of their respondents were increasingly skeptical of the accuracy of what they heard or read in the news. 66% said that newspapers ran stories without checking them simply because other papers published them, not because the papers knew the stories to be true.

Ogilvy reported that 32% of their respondents trusted the traditional media "always," 4% "never," and the rest in the "sometimes" category. Women trusted the traditional media somewhat more than men, and 18-35 year olds trusted traditional media the most often.

Ogilvy found that no age group trusted the Internet very much, although, not surprisingly, the 18-35 year olds were somewhat more willing to give it a chance.

That's a bit more trust for traditional media than *New York Magazine* found. *New York* found 7% trust the media "a great deal," while 59% trust the media "somewhat." Twenty-two percent trust the media "not that much," and 10% "not at all." While 10% said that they trusted the media more than they did five years ago, 46% trust it less.

(Continued on page 36)

Surveys About The Press

(Continued from page 35)

Public Wants it Right, Not First

In the ASNE survey, newspapers had a somewhat better reputation for doing more careful research than television (a 16 percentage point lead), an 8% lead when it came to offering better explanations and details in news stories, and a 5% lead on higher standards for accuracy. Television got much higher points for immediacy - with 93% of adults finding that television was the first to break news.

But ASNE found that being first did not always mean that viewers thought you were more accurate. In response to a hypothetical posed by the poll in which there was a factual discrepancy between early television reports and next day newspaper reports, people thought the papers were likely to be more accurate, having had the time to research the facts and get them right.

Comments from the ASNE respondents emphasized their concerns that the rush by reporters to "get it first" all too often meant that they did not "get it right." Eighty-seven percent wanted the media to double-check their facts even if it meant that the public had to wait a bit longer to get the story.

Trust & Bias

Seemingly inconsistent, ASNE found that when asked which medium they would trust most when they heard conflicting versions of the same story, 34% of their respondents said television/cable and 24% said daily newspapers. The Ogilvy respondents favored local television for reliability , almost two to one over newspapers and over national television, and way ahead of radio, magazines and the Internet. That result was heavily gender and age weighted. Men were more evenly split between television and newspapers; women favored television. And while the 56 and over age category was also fairly evenly split between television and newspapers, the 18-55 group chose television almost two-to-one. Newspapers apparently found highest favor in the West; their lowest in the South.

Distressingly, the ASNE survey, which tried to get at perception of media bias from a number of queries, found that the public strongly viewed the press as biased; agreeing that powerful people can get stories in or keep them out of papers (78% of the respondents), that particular people and groups get "special breaks" from the media (50%), and that newspapers pay lots more attention to stories that support their own point of view (77%). ASNE took "cold comfort" from the fact that in their poll, television was seen as more suseptable to bias than newspapers; 42% saw television as the worst offender followed by 23% for newspapers.

More Watching and Relying on TV

The Ogilvy survey showed that more Americans watch local television news each day than accessed any other source of information. 84% of the respondents said that they watched local television news daily or more, 74% watched national television news, 74% listened to radio and 70% read a newspaper at least daily.

Along similar lines, ASNE found 79% of its respondents on a typical workday watched local television evening news, 72% read their local newspaper, 67% watched network evening news.

Most Ogilvy respondents thought television was more influential now than five years ago than thought that of newspapers, magazines, radio, books or the Internet. The Ogilvy respondents ranked television as somewhat more influential than newspapers when it came to information about current events; 54% versus 48% for newspapers. Radio ranked a rating by 28% of the respondents, friends/associates and magazines by 19%, religious figures by 9%, the Internet by 8% and third-party experts by 7%. On political events, entertainment and sports, television had higher "influence" ratings than newspapers; on business news they were even. Fifty percent of ASNE respondents said they relied on television/cable the most to stay informed; 28% said daily newspapers. Other media were far lower on the scale.

(Continued on page 37)

Surveys About The Press

(Continued from page 36)

[On the other hand -- and I can only recommend that you actually read the Ogilvy survey to get the full picture on this finding -- only 35% of those who say they watch local television news said that they gave it full attention, 56% partial attention, and 11% gave it minimal or virtually no attention.]

NY Magazine Tests Clinton Coverage: Press Moral Standards on Par with Prez

The New York Magazine poll was designed to test certain issues related to the coverage of Monicagate. For one thing, they found that the majority of the respondents thought that the media has either the same or lower moral standards than the President.

Indeed, while 44% of their respondents felt that the media has the same moral standards as President Clinton, 23% of the respondents felt that media moral standards were LOWER than Clinton's. 20% nationally (only 8% of the New Yorkers quizzed) thought the media had higher moral standards than the President.

Seventy-one percent agreed that legitimate news organizations were sinking to the level of tabloids in reporting gossip and unsubstantiated stories. Only 25% disagreed with that statement. And 79% agreed that the press either distorted or rearranged facts to make a story more interesting; 31% stating that they thought the press did so "very often" and 48% only "somewhat often."

The good news on the New York Magazine poll: the poll showed that the public thought that the motive for the intense press coverage of the Clinton/Starr/Lewinsky story was not that the press was "out to get him," which only got the vote of 17% of those polled or that reporters were personally obsessed with the scandal, which got 16% of the vote. Instead, 64% of the respondents said that the motive behind the press coverage was no more than "ratings and sales." Sadly, only 28% believed that the media coverage was motivated by the fact that the media thought it was an important story.

This is consistent with the more generally applicable findings from the ASNE survey. There, 88% of the respondents agreed or agreed strongly with the statement that journalists cover sensational stories because they are exciting, not because they are important. 85% agreed that newspapers *frequently* over-dramatize some stories just to sell more papers. Perhaps consistently or inconsistently with the *New York Magazine* findings, 78% of the respondents agreed, or agreed strongly, that reporters *enjoyed* reporting on the personal failings of politicians and public figures.

ASNE respondents also thought that the media was offering far too much coverage of the Clinton/Starr/Lewinsky story (66% thought their local paper had too much; 85% thought television had too much) and that the reporting had inaccuracies and omissions (82%).

Perhaps related to the coverage of this story, but clearly having broader implications, over three-quarters of the respondents to the ASNE poll expressed concern about the credibility of news stories that relied on confidential sources. Forty-five percent said that in their view the media should not run a story if it were not possible to get someone to go on the record to confirm the reported facts.

ASNE Study Supports Corrections

ASNE is urging newspapers – and one would think television, radio and other media as well – to pay attention to details and to issue retractions and corrections when errors are found. The first mandate derives from a finding that far too many readers felt that their newspapers contained errors in grammar, spelling and facts. The second mandate comes from the finding that a large majority of the respondents (78%) felt better about their newspaper and the quality of its news coverage when they saw the paper publish corrections.

(Continued on page 38)

Surveys About The Press

(Continued from page 37)

Of the editors and publishers that made up the respondents for the E&P poll, the vast majority did not agree with the proposition that the press was often inaccurate. They did agree in large numbers - 60% -- that press coverage was too cynical. And 37% agreed, and 5% agreed strongly, that the press was too adversarial.

Newspaper Publishers and Editors Optimistic About the Future

E&P found that editors and publishers were, overall, optimistic about the health of the traditional newspaper business. The majority thought their newspaper's profitability was stronger than five years ago, ad revenue was higher, and editorial quality and technical innovation were stronger. They predicted that the traditional newspaper industry would be either about the same (42.5%) or better (28.3%) with only 23% predicting it would be worse over the next five years. Newspapers are hedging their bets with the new media, however, as 93% operate a Web site and 77% have separate Web staff. Only 24% said their Web sites were profitable. Yet 62% said that they planned to increase the budget devoted to their Web sites over the next year.

And two very heartening findings:

The ASNE survey reported two findings that media and their counsel should find heartening. One, and this is consistent with a Pew survey of a few years ago, 80% approved of the media engaging in investigative reporting, defined as "uncovering and reporting on corruption and wrongdoing they find in business or government."

The other: while 40% felt that the courts should make it easier for people to win lawsuits against the news media -- "for instance, Richard Jewell, who was accused but then cleared of responsibility for the Olympic Park bombing a few years ago" -- 41% disagreed, agreeing instead that this would limit news reports the public needs to hear.

Conclusory Notes

It is not always easy to square these figures. There are numerous internal contradictions. ASNE finds that more people believe television to be biased than newspapers, yet find that more people rely on television to keep them informed. Which medium is more reliable, and what that term may mean, in the viewer/reader minds may just depend on the poll you read. Consistent throughout, however, is an undercurrent of dissatisfaction with the media, a sense that media push stories for their salability, not their news value, that the media is a pretty cynical group.

ASNE, for one, is very concerned. Ed Seaton, current president of ASNE and editor-in-chief, Manhattan (Kan.) Mercury, wrote in an introduction to the organization's recent survey about yet another poll -- this one by the Freedom Forum -- in which almost 90% said that they believed reporters sometimes use unethical or illegal methods and that two-thirds believe that reporters sometimes make up stories and pass them off as real. "In a phrase, we're up a creek..."

Whether you agree with Ed Seaton or not, the subject of public perceptions and how they affect the media's ability to litigate effectively, how they may affect the prepublication/prebroadcast review process (if at all), will be agenda items for discussion in the break-out sections next September at the NAA/NAB/LDRC Conference in Virginia.

-- *Sandy Baron*

You may wish to watch out for this one: Freedom Forum to Produce Fairness Handbooks for Journalists

The Freedom Forum announced that former ABC News executive Av Westin will prepare a handbook of fairness guidelines for broadcast journalists as part of its Free Press/Fair Press project. A second handbook on fairness in print journalism will be prepared by Robert J. Haiman, a former reporter and editor with the St. Petersburg Times and past president of the Poynter Institute for Media Studies, in St. Petersburg, Florida.

The Freedom Forum's Free Press/Fair Press project was started in 1997 to study public perceptions about media fairness and has included forums around the country with journalists and members of the public. The project director, Robert H. Giles, stated that they have "learned there are serious concerns among journalists and the public about fairness" and " a deep desire among journalists to discuss and seek guidance on improving fairness." According to Giles, the handbooks "will be a compendium of the best practices in newspaper and television newsrooms." Westin stated that the goal is to produce guidelines -- not absolutes -- that broadcasters can use when questions of fairness and balance in reporting arise.

CBS and Rolling Stone Oppose Subpoenas in Cable Car Court-Martial

A military court judge is set to rule on motions by CBS and Rolling Stone magazine to quash subpoenas from military prosecutors in the court-martial process against two marine aviators who were on a training flight in the Italian Alps last February that severed a ski lift cable killing 20 people. The pilot and navigator on the jet are to be tried by a military court in Camp Lejune, North Carolina next month on charges of involuntary manslaughter and obstruction of justice.

Military prosecutors subpoenaed Rolling Stone's outtakes of tapes of on and off-the-record interviews with the pilot for an article it published last month on the accident. The subpoena to CBS seeks all tapes of on-the-record interviews conducted with the pilot and another crew member, who is not charged, that are part of an upcoming 60 Minutes piece on the accident. Rolling Stone, represented by Laura Handman, and CBS, represented by Floyd Abrams, both argued that under the First Amendment journalists can not be forced to divulge such information.

At a recent pretrial hearing, the military judge in the case said that he was not inclined to order wholesale disclosure and that, in the worst case, there would be a submission to the court for *in camera* review.

Libel Defense Resource Center
404 Park Avenue South, 16th Floor
New York, New York 10016
(212) 889-2306
www.ldrc.com

MARK YOUR CALENDARS FOR THESE IMPORTANT LDRC EVENTS:

1999 NAA/NAB/LDRC Libel Conference
September 22-24
Hyatt Regency Crystal City Hotel
Arlington, Virginia

LDRC Annual Dinner
Wednesday, November 10,1999
Sheraton New York Hotel & Towers
[Note New Location]

LDRC Defense Counsel Section
Annual Breakfast Meeting
Thursday, November 11, 1999