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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through January 22, 2002

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PRIVACY, PRIOR RESTRAINTS AND PUBLISHING

NEWSWORTHY

Federal Court Denies Camera Access to Trial of Alleged Terrorist Moussaoui

The United States District Court for the Eastern District of Virginia (Hon. Leonie M. Brinkema) has denied Court TV's and C-SPAN's motion to televise the proceedings in the trial of accused terrorist-conspirator, Zacarias Moussaoui. (The underlying case is *U.S. v. Moussaoui*, No. 01-CR-455-A.) The Court found that Federal Rule of Criminal Procedure 53 afforded the Court no discretion to allow camera coverage, and that the rule was constitutional.

Noting that the Sixth, Seventh and Eleventh Circuits have found the rule to be constitutional, Judge Brinkema rejected the media's efforts to rely on the Richmond Newspapers v. Virginia line of Supreme Court cases on the First Amendment guarantees to the public of access to criminal trials.

> [T]here is a long leap ... between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap not supported by history.
>
> Slip op at 5, quoting from Westmoreland v. Columbia Broadcasting Systems, Inc., 752 F.2d 16, 23 (2nd Cir. 1984).

That some members of the media and public could attend the proceedings, coupled with the electronic availability of transcripts within three hours of the close of each's court session, was sufficient access to render the rule constitutionally sufficient.

> Contrary to what intervenors and amici have argued, the inability of every interested person to attend the trial in person or observe it through the surrogate of the media does not raise a question of constitutional proportion. Rather, this is a question of social and political policy best left to the United States Congress and the Judicial Conference of the United States.
>
> Slip op at 7.

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Also Available:

Compendium of Judicial References to First Amendment Interests in Newsgathering

The Newsgathering Committee, chaired by Dean Ringel, Cahill Gordon & Reindel, and Kelli Sager, Davis Wright Tremaine, with author (and DCS President) David Schulz, and his colleagues at Clifford Chance Rogers & Wells, have created a COMPENDIUM OF JUDICIAL REFERENCES TO FIRST AMENDMENT INTERESTS IN NEWSGATHERING.

This 46-page report is a collection of statements by the courts, cataloged on a court-by-court basis, on the relationship of the First Amendment in newsgathering claims, access cases, and reporter privilege matters.

To obtain a copy of this very useful reference tool, send an e-mail to kchew@ldrc.com, or contact LDRC by telephone – 212.337.0200 – or by facsimile – 212.337.9893. Unless you indicate otherwise, it will be sent to you electronically.

Particular thanks for this reference report goes to David Schulz, Clifford Chance Rogers & Wells, and Nick Leitzes at the firm who assisted him in putting together the report.

Federal Court Denies Camera Access to Trial of Alleged Terrorist Moussaoui

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The Court went on to hold that even if Rule 53 (and its local counterpart) were found to be unconstitutional, security concerns and the effect of camera coverage on this particular trial, including the enhanced potential for intimidation of witnesses, would override the right of access. The Court agreed that cameras were now unobtrusive, and that many of the concerns about cameras in courtrooms discussed in *Estes* in 1965 were no longer issues. In their place was the new threat posed by the ability of modern media to distribute images, including witness faces and voices, internationally and in ways that allow them to be preserved by the recipients, all of which was troubling to the Court.

> Today, it is not so much the small, discrete cameras or microphones in the courtroom that are likely to intimidate witnesses, rather, it is the witness' knowledge that his or her face or voice may be forever publicly known and available to anyone in the world.

Slip op at 9.

The Court found that law enforcement witnesses would likely be compromised for similar reasons, and the safety of the court and its personnel might be compromised by broadcasting photographic images of the physical layout of the court and of court personnel.

The Court rejected as both burdensome and subject to error the media offer to mask the faces of those witnesses who did not want to be photographed.

Finally, the Court expressed its concern about showmanship by trial participants, particularly in light of Moussaoui's behavior at arraigment, which "suggests that the

defendant's conduct in this case may be both unorthodox and unpredictable."

With a nod to the substantial interest that the public has in this trial, and specifically those who experienced losses on September 11th, Judge Brinkema concluded that "the purpose of this trial is not to provide catharsis to the victims or to educate the world about the American legal system."

Lee Levine, Jay Brown, Cam Stracher, Amy Ledoux and Tom Curley of Levine Sullivan & Koch, Washington DC., and Doug Jacobs of Court TV and Bruce Collins of C-SPAN represented Court TV and CSPAN in this matter.

Closed Circuit Feed of Moussaoui Trial to Thousands Proposed

A bill passed by the Senate would allow cameras in the Arlington, Va. courtroom to cover the Moussaoui trial, but only to provide closed-circuit coverage to be viewed by victim's families. *See* Terrorist Victims' Courtroom Access Act, S. 1858, 107th Cong. (2001). The bill would provide an exception to federal rules which generally bar all cameras in federal courts, *see* Fed. R. Crim. Proc. 53 (2001), and provides that the video provided by the cameras can only be used "for viewing by those victims the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense of traveling to the location of the trial."

A similar exception was made for the trial of Timothy McVeigh, who was convicted in the Oklahoma City bombing. *See* Anti-Terrorism and Effective Death Penalty Act of 1996 § 235, Pub. L. No. 104-132 (1996); *see also U.S. v. McVeigh*, 931 F. Supp. 753 (D.Colo. 1996) (rejecting media's attempt to use video from camera used by court to record proceedings).

Iowa Jury Returns Defense Verdict on "Homebuilder Rip-off/Scam" Reports Based on Truth

By Michael Giudicessi

A Polk County, Iowa jury deliberated for only two hours on December 18, 2001 before returning a defense verdict for KCCI-TV in a defamation case brought by an area contractor.

The five-woman, three-man jury received the case after seven days of trial and was given an eight-question special verdict form.

While the jury found that the KCCI-TV reports were defamatory when they reported that the plaintiff "messed up the construction" and "ran off with the money," the jurors determined that the news reports were true or substantially true.

The case, one of the few, if any, libel cases against a media defendant tried in Des Moines in 20 years, stemmed from two July 2000 broadcasts by KCCI-TV, the market's top rated station, owned by Hearst-Argyle.

Home Builder Rip-Off

The broadcasts, which carried graphics identifying the subject matter of the news reports as "Homebuilder rip-off?" and "Homebuilder rip-off/scam," detailed a dispute between a Baxter, Iowa couple who hired plaintiff Rod Brown to do framing and construction on their retirement "dream home."

The news reports reported that Brown had received $30,000 in advance but had not completed the construction. The reports also detailed how the homeowners had a mechanic's lien placed against their property after Brown failed to pay a lumberyard for materials and supplies used on their project.

Brown claimed at trial that the news reports falsely indicated he had "run off" with the couple's money, failed to report that the couple had prevented him from completing the work, mischaracterized the quality of his workmanship and damaged his business and reputation.

At trial, the court excluded, on objection, some reputational testimony for lack of foundation.

Allegedly False and Unfair

Brown also challenged the accuracy and fairness of the news reports. He relied heavily on assertions that KCCI-TV aired the news reports without talking to him first, failed to make more than a single call to try contact him by telephone and "purposefully avoided" facts that he claimed would have corroborated his side of the story.

The court, however, would not allow Brown to present evidence that another television news station decided not to air a news report about Brown. Nor could Brown present evidence of acts or omissions by KCCI-TV in connection with the investigation or reporting of other news reports.

KCCI-TV, in its in limine motion to exclude evidence of another television news station's decision not to air the story, argued that the evidence of what another station chose to do would impermissibly tread into matters of news judgment.

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Iowa Jury Returns Defense Verdict on "Homebuilder Rip-off/Scam" Reports Based on Truth

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KCCI-TV also argued that the proposed evidence lacked probative value because it related to comparative or objective standards rather than subjective actual malice. Moreover, Brown never offered any competent evidence as to why the other news stations decided not to air the story.

In another in limine motion that was granted, KCCI-TV argued that Brown should be prevented from presenting evidence of acts or omissions in connection with the investigation and reporting of other news reports. KCCI-TV argued that any testimony about what KCCI-TV did or did not do in connection with other reports would only confuse the jury. KCCI-TV asserted that such evidence would mislead the jury as to whether journalistic standards were relevant and material to actual malice.

Brown also alleged that the news reports were literally false due to an error in reporting the amount of the mechanic's lien and by reporting that he "was unavailable for comment." To support his arguments, Brown attempted to call lay witnesses who would provide their opinions as to the truth or falsity of the reports, as well as their opinions as to the propriety of KCCI-TV's investigation or report. KCCI-TV, however, was able to exclude such testimony when the court granted KCCI-TV's in limine motions.

KCCI-TV made two more in limine motions, one of which was denied. The court denied KCCI-TV's in limine motion to exclude evidence regarding the causation of emotion distress and emotional distress damages. KCCI-TV was opposed to Brown presenting that evidence because Brown did not have an expert to offer such testimony. Brown wanted to call lay witnesses who would testify that Brown suffered emotional distress as a result of the broadcasts.

The court, however, granted KCCI-TV's in limine motions to exclude evidence of damages suffered by anyone other than Brown – most notably, his family. Since there are no rights to recover for derivative injuries in an action for defamation, Brown could not recover any damages incurred by his family. Moreover, because the report was not "of and concerning" the family, the family could not recover even had they been a party to the action.

At trial, the evidence at trial showed Brown received a $20,000 check from the couple in advance of starting construction and that he received another $10,000 from them prior to completing his work on the $42,000 project.

The evidence also showed how he immediately spent that initial $20,000 for items unrelated to the retirement home project. His use of the funds included paying for past due child support, personal credit card balances, materials purchased from a lumber yard for previous projects, car loans and lingerie for his wife purchased at Victoria's Secret.

Other evidence included expert testimony about the poor quality of Brown's work and the fact his construction business had continually operated at a low profit level or at a loss prior to the broadcasts in issue.

While the jury found that the KCCI-TV reports were defamatory ... the jurors determined that the news reports were true or substantially true.

The case went to trial three weeks after Chief Judge Arthur Gamble denied KCCI-TV's summary judgment motion.

Judge Gamble, however, ruled that because the plaintiff was an elected city councilman and well-known community figure in his hometown, he was both a public official and a public figure. Thus, the jury was instructed that Brown bore the burden of proving fault under the constitutional actual malice standard.

That determination, however, did not affect the jury's verdict because the jury did not reach the fault question of the special verdict form.

Additionally, because the Court, over KCCI-TV's objection, posed only one question on falsity that incorporated both plaintiff's burden of proving falsity and defendant's defense of substantial truth, the jury's verdict implicitly made a substantial truth finding that required only a preponderance of the evidence.

Plaintiff has until January 28, 2002 to appeal.

Michael Giudicessi and Ross Johnson of Faegre & Benson LLP, Des Moines, tried the case for KCCI-TV. Robert Hawley of the Hearst legal department assisted in preparation of the case for trial. John Werner and Donna Miller of Grefe & Sidney, Des Moines, represented plaintiff Rod Brown. Brown v. Des Moines Hearst-Argyle Television, Inc. *(Iowa Dist. Ct. No. CL84214, Polk Co., Iowa).*

Probation Company, Owner Win Before Federal Jury in Suit Against Local TV Station

Proceedings Led State Supreme Court to Recognize False Light

A federal jury in Tennessee has awarded a woman and her company $310,000 to compensate for what the jury found to be a libelous series of news reports broadcast by WDEF-TV in Chattanooga. Post-trial motions are pending in the case, *West v. Media General Operations, Inc.,* No. 1:00-CV-184 (M.D. Tenn.; jury verdict Nov. 29, 2001).

The Series

"Probation for Sale," a series broadcast by WDEF-TV in November 1999, reported on Charmaine West, the owner of probation services firm First Alternative Probation and Counseling, and her business relationships with judges of the Hamilton County General Sessions Court, who referred criminal defendants to her company as part of alternative sentences.

The news reports said that West had given the judges food and other gifts, and that judges allowed her to sit "on the bench" during court proceedings. WDEF also reported that West's mother owned a Florida condominium in the same complex as one judge, Richard Holcomb, and showed West at the complex with the judge.

The news reports said that West had given the judges food and other gifts, and that judges allowed her to sit "on the bench" during court proceedings.

The General Sessions Court is a court of limited jurisdiction, which includes misdemeanor cases. Judges are elected to eight-year terms.

West's lawsuit against WDEF's corporate owner, Florida-based Media General Operations, Inc., was originally filed in Hamilton County Circuit Court in May, but was removed to federal court on a defense motion based on diversity. The suit originally demanded $1.3 million for libel and invasion of privacy, an amount that rose to $6 million at the final pretrial conference.

Tennessee Supreme Court Recognizes Tort

Upon a defense motion to dismiss filed on July 26, Federal District Court Judge R. Alan Edgar certified to the Tennessee Supreme Court the question of whether the state recognized the tort of false light invasion of privacy. In the meantime, discovery continued in the case.

The Tennessee Supreme Court ruled on this question on Aug. 23, 2001. *See LDRC LibelLetter*, Sept. 2001, at 33; *West v. Media General Convergence, Inc.*, 53 S.W.3d 640, 29 Media L. Rptr. 2454 (Tenn. 2001). In a unanimous opinion, the court held that false light should be recognized as a cause of action in the state.

> After considering the relevant authorities, we agree with the majority of jurisdictions that false light should be recognized as a distinct, actionable tort. While the law of defamation and false light invasion of privacy conceivably overlap in some ways, we conclude that the differences between the two torts warrant their separate recognition.

West at 645, 29 Media L. Rptr. at 2458.

In the light of this decision, the federal court denied the defense motion to dismiss on Sept. 13, 2001. Media General then made a motion for summary judgment, which Judge Edgar granted in part and denied in part on Nov. 13, the morning of trial. He held that West and her company were limited-purpose public figures, and thus had to prove actual malice; he added, however, that a genuine question of material fact existed as to whether actual malice could be shown.

Judges Testify At Trial for Plaintiff

During the seven-day trial, the plaintiff called two Hamilton County General Sessions Court judges, who denied that they sent defendants to West's company in return for gifts.

Judge Richard Holcomb said that both the promotions and the title of the series, "Probation for Sale," offended him. "I was very much offended because there is no probation for sale in General Sessions Court in Hamilton County," he said. Holcomb also testified that he received a call at his Florida condominium from a woman asking for someone to pick up some laundry at the same time that

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Probation Company, Owner Win Before Federal Jury in Libel Suit Against Local TV

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West, who was in Florida visiting her grandmother, was visiting him. Faith Logan, formerly secretary to the WDEF news director, testified that she had called Judge Holcomb's condominium in order to lure out his wife so that reporter Chris Willis, who had followed West to Florida, could photograph Judge Holcolm and West together in his condo.

Judge Clarance Shattuck testified that West had never sat on the bench during trials, but that she and others often sat in an unused witness chair. He also said that various members of the court community would leave food for the others in a snack room, and that West did not give him any gifts other than perhaps a fruit basket for Christmas.

West herself testified that the news reports had "devastated" her business, and caused the company to lose $10,000 in business per month. "I probably would have killed myself had it not been for my daughter," she said.

The Defense Case

During the defense case, former WDEF News Director David Goldberg said that the series did not imply that West was sexually involved with judges, or that bribery was occurring at the court. He also denied that Judge Holcomb's wife was edited out of pictures used in the broadcast.

Reporter Willis said that the series was not meant to imply that West and Judge Holcomb were having an affair, and that Mrs. Holcomb was not featured in the video because "I didn't believe she was part of the story."

The defense also argued that West's business had been declining in prior months because of allegations in a class action lawsuit and a state attorney general's report which concluded that the company's rates were excessive.

A number of witnesses on both sides of the case were former WDEF employees, and two have their own litigation pending against the television station. Logan, the former secretary who testified for the plaintiff, has a sexual harassment suit pending against the station. Her former boss, former WDEF News Director David Goldberg, has a suit pending regarding his termination as well. And reporter Willis was fired by the station shortly after the series ran for his refusal to sign its sexual harassment policy.

Verdict and Appeals

After seven and a half hours of deliberation over two days, the jury found for the plaintiffs on the defamation count; it awarded her $190,000 in compensatory damages ($100,000 for pretrial losses, $10,000 for future losses, $30,000 for loss of reputation, and $50,000 for pain and suffering) to Ms. West, and $120,000 in past economic damages to her company.

The defense has filed motions for judgment as a matter of law and for new trial or a remittitur, and has filed a notice of appeal with the U.S. Court of Appeals for the 6th Circuit. The plaintiffs have also filed their own motion for judgment as a matter of law.

WDEF is represented by Don Zachary, Samuel Felker, Ail Fowler and Rebecca Kell of Bass, Berry & Sims in Nashville; the plaintiffs are represented by Harry Burnette and Steven Dobson of Burnette, Dobson & Hardeman of Chattanooga.

Restaurant Owner "Turns Tables" on TV Station As Well As Customers

Oklahoma Jury Awards $700K in Libel Suit

By Robert D. Nelon

A jury in the District Court of Oklahoma County found aggressive reporting and colorful language more than they could stomach in a defamation suit brought by Robert L. Tayar, the former owner of an Oklahoma City restaurant, against Palmer Communications, Inc., the former owner of KFOR-TV in Oklahoma City, and three individual defendants, Anthony Foster, Brad Riggan, and Melissa Klinzing. Foster was the reporter, Riggan was the photographer, and Klinzing was the news director. After a week-long trial in December 2001, the jury, in a 9-3 decision, awarded $350,000 actual and $350,000 punitive damages against Palmer. The plaintiff dismissed his case against the individual defendants before the case went to the jury. *Robert L. Tayar v. Palmer Communications, Inc., et al.*, No. CJ-97-2237 (District Court, Oklahoma County, OK).

A Consumer Report

The November 1995 broadcast was a consumer report about customers' complaints that the restaurant, called "Molly Murphy's House of Fine Repute," refused to honor a gift certificate. The restaurant had given certificates to a radio station in exchange for advertising. The complaining customers had won the certificates in the radio station's own promotion.

When customers tried to present two certificates (won at different times) in payment for a meal at the restaurant, the customers were informed that only one certificate could be used at one time. There was no such restriction printed on the certificate and the radio station was unaware of the restaurant policy. According to the customers, they were treated rudely by the restaurant management, so they complained to the consumer hotline at KFOR.

After interviewing the customers, Foster called the restaurant twice for comment. A woman and then a man on the phone, who refused to identify themselves, told Foster that the restaurant owed him no explanation, then hung up on him. Foster and his photographer, Riggan, went to the restaurant for comment about the customers' complaint. Tayar yelled for them to leave and physically removed them from the premises. Tayar was arrested for assault and battery, and the report on the air turned out to be not only about the consumers' complaint but about also the assault at the restaurant.

The suit originally involved five plaintiffs (Tayar, plus Tayar's wife and three affiliated corporations) making nine claims (including intrusion on seclusion, false light, malicious prosecution, tortious interference with business, and abuse of process). Summary judgment was affirmed (in two previous appeals) on all but a defamation claim by Tayar.

Language Becomes a Problem

At trial, the plaintiff claimed that several phrases in the news report were defamatory, such as "You could call it the case of double coupon double cross," and that when the customers presented the two coupons in payment for their meal, the "waitress turned the tables on them." Tayar also complained about the description of the confrontation in the restaurant, which was shown to viewers almost in its entirety, that Foster described as "an all out attack." Tayar complained generally that the broadcast made him appear to be a "dishonest, unscrupulous, double-crossing businessman and person."

The plaintiff's expert was Bob Losure, a former anchor for CNN, whose opinion was based primarily on his dislike for the language chosen, his distaste for the fact that the reporting crew went into the restaurant with "camera rolling," and his belief that a dispute about a restaurant gift certificate was not newsworthy.

The defendants argued that all of the facts were accurately presented and that the phrases the plaintiff complained about, and the general implication the plaintiff said was made by the broadcast, were rhetorical or opinionative speech that was not actionable. The plaintiff was conceded to be a private figure, and the standard of fault was agreed to be the professional negligence standard employed under Oklahoma law.

Experts Dual

The parties presented competing expert witnesses. The plaintiff's expert was Bob Losure, a former anchor for CNN, whose opinion was based primarily on his dislike for the lan-

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Restaurant Owner "Turns Tables" on TV Station As Well As Customers

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guage chosen by the reporter and producer, his distaste for the fact that the reporting crew went into the restaurant with "camera rolling," and his belief that a dispute about a restaurant gift certificate was not newsworthy. The defendants tried unsuccessfully to argue to the trial court that Losure's opinion was not relevant and reliable because it was not directed to whether the defendant's effort to report the truth was within the standards employed by reasonable television journalists.

The defendants' expert was Joe Angotti, a long-time executive producer with NBC News who now teaches at the Medill School of Journalism at Northwestern. Angotti testified that he found no fault with the report, and he told the jury that there needed to be more consumer reporting.

The plaintiff presented no damages witnesses other than himself and his ex-wife, but the defendants were unable to convince the trial court on a motion for directed verdict that the plaintiff had failed to prove loss of reputation. The court ultimately instructed the jury, over defendants' objections, that damages could be presumed because the report implied that the plaintiff was deceitful.

The court ultimately instructed the jury that damages could be presumed because the report implied that the plaintiff was deceitful.

Unusual Twists

The case took a couple of unusual twists shortly before trial. The judge assigned to the case after the last appeal (Karl Gray) conducted a pretrial conference four days before the trial was to begin. He informed the plaintiff's counsel that unless something unexpected was presented in the plaintiff's case, he intended to direct a verdict for the defendants. Judge Gray believed that previous rulings from the appellate courts eliminated some of the elements of the plaintiff's defamation claim. For example, the Court of Civil Appeals had held that the defendants' presence at the restaurant was lawful and that they "reasonably reported the events at the restaurant," so Judge Gray found unpersuasive the plaintiff's claim that the defendants were trespassers, that he was entitled to use force to eject them from the restaurant, and that he was not guilty of assault and battery.

However, after telling the plaintiff's counsel of his intent to direct a verdict, Judge Gray then announced that he would recuse if the plaintiff requested him to do so. The plaintiff did, and the case was transferred to Judge Bryan Dixon.

Judge Dixon let the plaintiff try what was tantamount to a false light case, and permitted the plaintiff to present evidence and argument throughout the trial that Tayar was justified in using force to eject the reporter and photographer from his restaurant. Judge Dixon also let the issue of punitive damages go to the jury, even though the Court of Civil Appeals had affirmed summary judgment on Tayar's false light claim because there was no evidence of reckless disregard. Judge Dixon rejected the defendants' arguments that the law of the case foreclosed consideration of punitive damages.

What the Jury Thought

Juror interviews after the trial indicate that the case was originally close. Apparently, in the first straw poll taken by the jury, they were split 6-6. Three jurors ultimately switched to the plaintiff's side. The jury did not like the reporter (who had suffered a stroke last July and was ineffective in responding to questions from the plaintiff's counsel) or the photographer or their reporting tactics, and the jury thought KFOR had been unfair to the plaintiff in reporting what they believed was a nominal story. They said they awarded damages to the plaintiff based on the losses he claimed the restaurant suffered. (The Court of Civil Appeals had ruled that he could not do so, but Judge Dixon's instructions left open that possibility.)

KFOR has filed a post-trial motion for judgment NOV that is scheduled to be heard on February 8th and plans to appeal if the motion fails with the trial court.

The defendants were represented at trial by Robert D. Nelon and Jon Epstein of DCS member firm Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City. The plaintiff was represented by Charles L. Richardson and Keith A. Ward of Richardson, Stoops, Richardson & Ward of Tulsa

Virginia Court Rebuffs Police Officer's 'Small Group Theory'

Won't Satisfy the 'Of and Concerning' Requirement With the 'Small Group Theory'

A Virginia Circuit Court dismissed a police officer's libel claim after it held that, under *New York Times v. Sullivan*, the "small group theory" of defamation could not be used to satisfy the "of and concerning" requirement when a government body, no matter its size, was the subject of defamatory statements. *Dean v. Town of Elkton, et. al.*, 2001 Va. Cir. LEXIS 213 (Rockingham County, Va., 2001). Prior to this case, only one other case in Virginia dealt directly with the "small group theory" of defamation – *Ewell v. Boutwell*, 121 S.E. 912 (Va. 1924).

Donald Dean, the police officer, sued the town and its mayor for defamation after a series of comments by the mayor criticized the police force and accused the police force of corruption. Most of the mayor's comments were directed at the "Elkton police" generally. The mayor named Dean directly in only one comment.

The plaintiff claimed he could satisfy the "of and concerning" requirement under the "small group theory" of defamation. The Elkton police department was comprised of five to eight officers during the relevant times. But the Circuit Court of Rockingham County, in an opinion by Judge John McGrath, rejected the plaintiff's arguments, relying on *New York Times v. Sullivan.*

The main question the court considered was whether defamatory statements "naming small governmental entities or small governmental departments" may be the "basis of a defamation action by an official of such a government or governmental department by using the 'small group theory' to establish Plaintiff's standing"

According to the circuit court, *New York Times v. Sullivan* "was based on the bedrock constitutional principle that one cannot defame a government" or a governmental agency. Judge John McGrath quoted *Sullivan* extensively, including a passage in which the Supreme Court held a theory that allows a claim for defamation, where the speaker has been critical of the government in general, is a proposition that "may not constitutionally be utilized to establish that an otherwise impersonal attack on governmental operations was a libel of an official responsible for those operations." *Sullivan*, 376 U.S. 254, 291-2 (1964). Thus, according to Judge McGrath, the "small group theory" of defamation "cannot be constitutionally utilized to prove the 'of and concerning' element of a defamation action if the defamatory statement is directed at a government or governmental agency no matter what its size."

> Obviously, if a defamation names or refers by direct implication to a specific individual who is a governmental official, that individual would have a viable cause of action subject to the normal rules of 'constitutional malice' set forth in *New York Times v. Sullivan.*

As to the one remark that did name him directly, the court held that it did not make Dean "appear odious, infamous, or ridiculous," and thus was not defamatory. Therefore, the entire claim was dismissed.

William W. Helsley of Helsley & Clough in Harrisonburg, Va., and A. Gene Hart, of Harrisonburg, Va., represented Dean. David P. Corrigan of Harman, Claytor, Corrigan & Wellman in Richmond, Va., represented the Town of Elkton and the mayor.

UPDATE: New York Appeals Court Affirms *New York Times* Win

Bias of Sources, Errors, and Alleged Inadequate Investigation Not Sufficient Evidence of Gross Irresponsibility

By Laura R. Handman and Jeffrey H. Blum

Relying on lack of proof of gross irresponsibility, the New York Appellate Division, Second Department, unanimously affirmed the grant of summary judgment for *The New York Times* in a defamation action arising out of an article, titled "What Happens If Process Server Doesn't Serve?" *Norman Yellon v. Bruce Lambert and The New York Times Company*, Index No. 2000-1001 (Dec. 24, 2001). The article was published by *The New York Times* on the front page of its weekly Long Island section on April 4, 1999.

Although the article reported on three types of charges stemming from the conduct of plaintiff Norman L. Yellon as a notary public and as the proprietor of a process serving agency, only one charge was contested by the plaintiff:

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New York Appeals Court Affirms *NYT* Win

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claims by more than a half dozen independent sources with first-hand knowledge that Yellon had failed to make proper service in various legal proceedings.

Lower Court: Falsity But Not Fault

On Sept. 25, 2000, Suffolk County Justice Ralph Costello, granted *The New York Times*' motion for summary judgment on lack of actual malice and gross irresponsibility. (*See* LDRC *LibelLetter*, Oct. 25, 2000 at 14.) Even though the lower court granted summary judgment to the *Times*, it was troubled by many of the sources in the Article, some of whom had been repeatedly sanctioned by courts. The lower court also found that the claims of lack of service lodged by the various unsuccessful litigants were either untrue or had not been raised by them in the course of their litigations.

The article did, however, fully disclose the biases of the sources in the article and referred to the sanctions against them. The lower court held that "while a prudent person would have investigated further, given the animus between [a source] and Yellon," it did not amount to gross irresponsibility.

The lower court also rejected Yellon's argument that the *Times* should not be permitted to rely on an undisclosed confidential source as evidence of its lack of fault, noting that "plaintiff has an obligation to demonstrate that he has first endeavored to obtain this information by other means, and been unsuccessful, instead of directly intruding upon the self-imposed confidentiality of defendants. No such effort has been asserted by plaintiff."

The Second Dept. Affirms in Short Order

In a succinct two-page decision, the Second Department affirmed the grant of summary judgment on lack of gross irresponsibility. In holding that Yellon failed to raise an issue of fact as to gross irresponsibility, the Second Department noted the reporter's reasonable reliance on a freelancer who had brought him the story, the reporters' independent corroboration of what the freelancer had told him, the reporter's review of court documents, the reporter's attempts to interview Yellon and the inclusion in the Article of Yellon's denials of wrongdoing.

Although the Second Department's brief decision does not discuss some of the factual concerns expressed by the court below, the decision is a rebuff to the common refrain by libel plaintiffs that defendants "would have, could have, should have" done more investigation in finding it sufficient evidence of gross irresponsibility. This is the case even where several of the challenged statements are false, even where, arguably, available court records would have revealed some of the falsities and even though some of the sources were biased.

> *[T]he decision is a rebuff to the common refrain by libel plaintiffs that defendants "would have, could have, should have" done more investigation*

At least when the news organization enjoys the reputation of *The New York Times*, when the reporter has done extensive reporting (here, 200 hours, 45 sources, 500 pages of documents) and where the plaintiff admitted to at least some, if not all, the misconduct charged, courts in New York will find the reporting passed the gross irresponsibility test. That test is proving as difficult as actual malice for plaintiffs to meet — indeed, in some ways more difficult because the objective measure is more susceptible to a summary judgment ruling.

Confidential Source Issue

As to the confidential source issue, the Second Department implicitly rejected Yellon's argument by simply holding that "plaintiff's remaining contentions are without merit." This case marks a trend for courts in New York to take a more nuanced approach to the consequences in defamation cases when the defendants refuse to disclose identities of confidential sources.

Like the court in *Bement v. N.Y.P. Holdings*, 29 Me-

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Internet Posters Found Liable and Enjoined From Future Postings

A California jury awarded $775,000 in damages to a biotechnology company which sued former employees Michelangelo Delfino and Mary Day for libel over postings to various Internet message boards about the company and its executives. The judge presiding in the case also issued an injunction barring the former employees from posting additional messages, which they did throughout the trial on their own website and on various bulletin boards. See *Varian Medical Systems v. Delfino*, No. CV 780187 (Cal. Super. Ct. jury verdict Dec. 18, 2001).

The Saga Begins

Delfino was fired by Varian Medical Systems, Inc. in October 1998 after manager Susan Felch accused him of sexual harassment and he was suspected of sabotaging equipment in the company's laboratory. His co-worker Mary Day quit two months later.

Within a few weeks, messages began appearing on various message boards, primarily Yahoo! Finance's board devoted to Varian. Eventually, more than 13,000 postings regarding Varian showed up on 100 message boards, and on the defendants' site.

Among other things, the messages charged that various Varian executives discriminated against homosexuals and pregnant women and that the executives were having affairs.

Felch and Varian Vice President George Zdasiuk filed suit against Delfino in Santa Clara Superior Court in February 1999. The plaintiffs had the case removed to federal court, but that court later sent the case back to state court. *See Varian Associates v. Delfino*, No. 99-CV-20256 (N.D. Cal. remanded to state court April 5, 2000).

The Injunction

While the case was pending before the federal court, in June 1999 U.S. District Court Judge Ronald M. Whyte issued an preliminary injunction barring Delfino and Day from posting messages regarding Varian and its employees. But they continued to post, and in November the defendants were held in contempt, after the plaintiffs presented evidence that the defendants had posted particular messages from a computer at Kinko's. The defendants were ordered to pay $20,000 to cover the plaintiffs' costs of investigating the incident.

Judge Whyte held Delfino in contempt again in April 2000 for refusing to mediate the case, and fined him $21,941.74. He then granted defendants' motion for partial summary judgment on the Lanham Act claims. This removed federal jurisdiction in the case, and Whyte remanded the case to the California Superior Court.

In the meantime, Delfino and Day appealed the preliminary injunction barring them from posting messages about Varian. Without hearing argument in the case, in September 2000 the 9th Circuit reversed the injunction in an unpublished opinion, and ordered the district court to vacate the injunction. See *Felch v. Day*, 238 F.3d 428 (table), 2000 U.S. App. LEXIS 23925 (decision) (9th Cir.Sept. 11, 2000).

Subpoenaing Yahoo, Seeking SLAPP Dismissal

Back in state court, the defendants then filed a motion to subpoena Yahoo! in order to find out the identities of what the defendants said were posters other than them who had posted disparaging comments about Varian. The subpoena was eventually quashed in August 2001 for defendants' fail-

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New York Appeals Court Affirms *NYT* Win

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dia L. Rptr. 2493 (N.Y. Sup. Ct., N.Y. County Nov. 20, 2001), this court did not simply bar any reference to what the confidential source told the reporter. Here, the court imported the exhaustion requirement from privilege cases. At least when there is a limited universe of potential sources, when a confidential source's information appears credible and plaintiff had not taken any steps to discover the source's identity, the defendant may be able to rely on such source to establish lack of actual malice or gross irresponsibility.

Laura R. Handman and Jeffrey H. Blum of Davis Wright Tremaine LLP, along with Adam Liptak, Senior Counsel for the Times, represented the defendants in this action.

Internet Posters Found Liable

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ure to show a compelling need.

In October 2000, the defendants moved to have the case against them dismissed under California's anti-SLAPP statute. The trial court rejected this motions, and the defendants appealed to the California Court of Appeals, which affirmed. The defense then sought review by the California Supreme Court, but it refused to hear the case. See *Varian Medical Systems, Inc. v. Delfino*, 2000 Cal. LEXIS 9639 (Dec. 13, 2000) (denying petition for review).

Prior to trial, Judge Jamie Jacobs-May rejected the defendants' motion for summary judgment. The defendants filed an appeal of this decision, but the court of appeals dismissed the appeal after the defense failed to file a statement of the case as required by Cal. Ct. Rule 19.5.

Finally, a Trial

The case finally came to trial before Judge Jack Komar of the Santa Clara County Superior Court in October 2001. Delfino and Day continued to post messages throughout the eight-week trial — and the plaintiffs often introduced them as evidence, sometimes on the same day that they were posted. Their postings argued that the lawsuit against them was a "SLAPP suit" — aimed a silencing their fair criticism of the Varian — and that it should be dismissed under California's anti-SLAPP provision, Calif. Civ. Proc. Code §425.16. In court, their motion to dismiss the case on this basis was rejected, a decision which they have appealed.

The 12-member jury unanimously found on Dec. 13 that Delfino and Day had libeled two Varian executives, and awarded $425,000 in compensatory damages. A few days later the jury award the plaintiffs an additional $350,000 in punitive damages.

The New Gag Order

While the jury deliberated, Judge Komar enjoined Delfino and Day from making additional postings. "I certainly find that there has been a very serious defamation, a very serious harassment in this case by the defendants, by both of them," Komar said in a ruling from the bench. "It is without remorse or repentance. There's a promise and a commitment to do it until they're dead. ... And I take them at their word."

Komar's order bars the defendants from referring to Felch, Zdasiuk and other witnesses as "homophobic" or "chronic liars," and from accusing them of having sexual affairs, videotaping company bathrooms, posing a danger to children, being mentally ill, having committed perjury, and creating pornography in the workplace. He also enjoined them from posting messages detailing Felch and Zdasiuk's financial affairs, and giving the names and addresses of their families. The injunction also bars Delfino and Day from posting messages using the names of other Varian employees.

Komar specifically refused to bar the defendants from describing Varian executives as "sick," saying that "when you start talking about the CEO or the vice president of a corporation, there may be some leeway to characterize decisions made by the CEO that do not relate to a fact which are expressed opinions."

But the Postings Continue

But after the injunction was issued, the defendant's web site stated, "Postings, postings, postings. Aliases, aliases, aliases. Day after day after day of message board postings and new aliases. Yes, the postings and their aliases continued in spite of [the plaintiff's victory]." Elsewhere on the site was the slogan "We'll post until we're dead!"

The defendants' web site, with considerable commentary and documents regarding the case, is www.geocities.com/mobeta_inc/slapp/slapp.html. A similarly exhaustive, plaintiff-oriented site, which purports to be more objective, is online at www.geocities.com/mdx2faq/.

Varian was represented by Lynne Hermle, Matthew Poppe and Robert Linton of Orrick, Herrington & Sutcliffe LLP in Palo Alto and by in-house counsel Mary Rotunno and Joseph Phair. The defendants were represented by Palo Alto attorney Randall Widmann.

English Court of Appeal Decision on Qualified Privilege For Newspaper Article and Online Archive Rejects Single Publication Rule

By Meryl Evans

In the June 2001 edition of the LDRC *LibelLetter* I reported on the action brought by Russian businessman Grigori Loutchansky against Times Newspapers Limited, which came to trial at the High Court in London in March and April of 2001. At issue were articles in *The Times* that discussed Loutchansky's alleged links to the Russian Mafia. There were in fact two sets of libel proceedings – the first concerned the 'hard copies' of two articles, and the second was primarily concerned with the fact that electronic copies of the same articles were accessible in the archive section of *The Times'* website long after publication of the hard copies.

The trial Judge, Mr Justice Gray, rejected *The Times'* defense that the articles enjoyed a qualified privilege under the House of Lords' authority in *Reynolds -v- Times Newspapers Limited*. The Judge also decided that *The Times* had no defense to continuing publication, via its website, of electronic versions of the articles.[1] An appeal of these decisions was heard the week of November 12 and the Court of Appeal's Judgment was handed down December 5, 2001. *Loutchansky v. The Times Newspapers Ltd.*, [2001] EWCA Civ 1805 (Ct. App.) (copy available at <www.courtservice.gov.uk/>). The Court of Appeal held that the trial court applied too stringent a test for qualified privilege and remanded for a redetermination under a new guideline. But the Court of Appeal affirmed that a claim could be brought against *The Times'* Internet archives, declining to apply a single publication rule.

The Approach to Reynolds

The appeal concerning the hard copies of the articles concentrated on the nature and application of *Reynolds* qualified privilege, focusing on two main issues: 1) the test adopted by Mr Justice Gray to decide whether the newspaper was under a duty to publish the articles sued upon and 2) the nature of the test for *Reynolds* qualified privilege.

The test applied by Mr Justice Gray at first instance was that a duty to publish arises only where "a publisher would be open to legitimate criticism if he failed to publish the information in question." *The Times* contended that this test was far too narrow and failed to give sufficient weight to freedom of expression and the public's right to know. We also argued that *Reynolds* has not been properly understood by the lower Courts in subsequent cases and encouraged the Court of Appeal to grasp the opportunity to adopt what we said was the proper interpretation of the House of Lords opinions in that case. Alternatively, if *Reynolds* had been correctly interpreted in other cases, then *Reynolds* itself was wrong and breached the right to freedom of expression, enshrined in Article 10 of the European Convention on Human Rights. Accordingly, *Reynolds* ought not to bind the Court of Appeal.

> *The Court of Appeal added that the journalist and/or editor "can have no duty to publish unless he is acting responsibly."*

The Chilling Effect of Reynolds

Our basic objection to *Reynolds* and the way it has been interpreted and applied by the lower courts in subsequent cases can be summed up by quoting from the judgment of the New Zealand Court of Appeal in *Lange v Atkinson*, where it considered that *Reynolds* "appeared to alter the structure of the law of qualified privilege in a way which adds to the uncertainty and chilling effect almost inevitably present in this area of the law."

The problem has been that although *Reynolds* set out the fundamental principles which must be taken into account when considering a defense of this type, little guidance is given as to the exact nature of the test. At first sight, *Reynolds* seems to be similar to the traditional defense of qualified privilege and depends on the media organization being under a duty to publish the information and the public having a corresponding interest in receiving it. *Reynolds* adheres to this formulation but adds in a third factor — the standard of the journalism.

We argued that a single test which conflates these three elements (a 'single composite test') fails to give proper weight to the importance of freedom of expression, and

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that the proper test is a two-stage one where, put at its simplest, the first question is: 'is the subject matter of the article, assuming it to be true and leaving aside the quality of the journalism, something which the public has a right to know?' If the answer to this question is "no," the defense fails. If the answer is "yes," the occasion of publication is capable of being privileged. Only then should the Court go on to consider the second stage of the test, which involves an examination of the quality of the journalism to see whether it falls short of the standard of responsible journalism so as to displace the defense. This approach emphasizes the importance of the right to freedom of expression which had been accorded primacy in English law but arguably given no more prominence, post-*Reynolds*, than the right to reputation.

Court of Appeal's Decision

The Court of Appeal agreed with us that the test applied by Mr Justice Gray was too stringent. In its judgment, the Court of Appeal departed from traditional duty/interest formulations to be found in pre-*Reynolds* qualified privilege cases and examined *Reynolds* privilege as a breed apart. The Court of Appeal considered that it was bound by the precedent set in *Reynolds* and it was not therefore open to it to replace the single composite test with a two-stage test. They set out to "illuminate" the single composite test which *Reynolds* "clearly" dictated and identify certain of the crucial considerations likely to influence its application.

The Court formulated the following test to be applied in cases of *Reynolds* privilege:

> the interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist.

The Court of Appeal added that the journalist and/or editor:

> can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly... Unless the publisher is acting responsibly privilege cannot arise.

The Court of Appeal sent the case back for Mr Justice Gray to re-determine his "findings of fact" in light of their new test.

Illumination or Further Confusion?

The new test formulated by the Court of Appeal is, in legal terms, extremely wide. In effect, provided the journalism is responsible, then there is the potential for almost any article of any public interest to fall under the protection of *Reynolds* privilege. The judgment also went a long way to making it clear that there is little if any room for a plea of malice in a *Reynolds* privilege case, emphasizing the Court of Appeal's view that *Reynolds* privilege has broken free from some of the principles which govern traditional qualified privilege from which it evolved.

> *[T]he success or failure of the defense can only be gauged by turning the trial into an issue of the journalist's professional negligence.*

The practical problems to which *Reynolds* gives rise remain. There is, for example, no guidance in the Court of Appeal's judgment concerning how a trial judge is to assess whether or not the journalism is "responsible," so the success or failure of the defense can only be gauged by turning the trial into an issue of the journalist's professional negligence. Whether, in order to fulfil that role, the court should benefit from the evidence of other journalists as to how the conduct of the defendants measures up to that of an ordinary, competent journalist (if that is indeed the test), is not addressed in the Court of Appeal's judgment. It may be that judges will be left to form their own view of the standard of journalism in each case.

I should emphasize that *The Times* is more than happy to be measured against a standard of responsible journalism. The concern is that with a single composite test, anything which falls short of perfect journalism will mean that a *Reynolds* privilege defense fails. We want to change the emphasis so that the first consideration is the public's right

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to know. The Court of Appeal moved some distance in that direction, as can be seen from the test it formulated, but in our opinion there is still some way to go before the law gives proper recognition to the right to freedom of expression.

Publication on the Internet: No End to Liability

The Times also asked the Court of Appeal to reconsider whether it could argue that Loutchansky's claim was time barred on the grounds that there was no 'publication' of the articles by *The Times* after the date when the articles were first posted on its website.

This was, in effect, an attempt to have adopted in English law a 'single publication rule' (operating only in relation to limitation, and not to multi-jurisdictional cases) and American authorities on that point were considered at length. The question turned however, on the English case of *Duke of Brunswick*, decided in 1849. The net effect of that case is that the 12 month limitation period is triggered afresh, each time someone reads a defamatory article on the Internet, regardless of how long it has been there.

We argued that this placed a restriction on the maintenance and provision of access to both electronic and physical archives that was a disproportionate restriction on freedom of expression. Accordingly, the rule in *Duke of Brunswick* conflicted with the European Convention on Human Rights protection for freedom of expression and the Court of Appeal was therefore obliged under English law to overturn it. *The Times* also sought to argue that the rule defeated the whole purpose of the 12-month limitation period for libel (a limit introduced by the Defamation Act 1996, which cut the period down from three years).

The Court of Appeal disagreed that the rule in *Duke of Brunswick* conflicted with the right to freedom of expression and considered that *The Times* had not made out its case for such a radical change in the law. The court accepted that permitting an action based on a fresh publication of an article first published long ago conflicted with some of the reasons for the introduction of a shorter limitation period but this was not a cause for major concern as the scale of publication many years after the initial publication — and therefore the damages flowing from it — was likely to be small.

The dismissal of *The Times'* appeal on this issue means that newspaper publications on the Internet (and, for that matter, in database form or even those held in libraries) are vulnerable to libel actions long after the expiry of 12 months from the date of initial publication. While that risk may be manageable for libraries, the position of any newspaper which makes historical material available on its own website or through a database is extremely vulnerable.

It was held that The Times could not be under a duty to publish defamatory material day after day without publishing any qualification that the articles were being hotly contested.

Reynolds and the Internet

The Court of Appeal considered whether *The Times* had a defense of *Reynolds* privilege for the publication of the articles on the Internet. The Court of Appeal dismissed *The Times'* appeal and brought in a new requirement for those seeking the protection of *Reynolds* in a claim concerning Internet publication. It was held that *The Times* could not be under a duty to publish defamatory material day after day without publishing any qualification that the articles were being hotly contested. The failure to attach a qualification could not be described as responsible journalism.

The Court of Appeal separately considered what a notice or qualification should contain. They proposed that where it is known that archive material "is or may be defamatory," the attachment of an appropriate notice warning against treating it as the truth would normally remove any sting from the material.

The Court of Appeal's suggestion that an "appropriate notice" provides a solution is flawed. Firstly, Claimants' solicitors will demand the attachment of a notice to any article to which their clients take exception, thus having a chilling effect on freedom of expression. Secondly, taking the Judgment to its extreme, if such warnings are required to

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protect all material which "is or may be defamatory," the only practical solution for Internet publishers is to attach a notice to everything they publish. To attach a warning only to those articles which the publisher considers are or may be defamatory would be to signal to potential claimants which articles the publisher considers are vulnerable to suit. On the other hand, attaching a warning to everything that is published clearly devalues the effect of the warning, possibly to the point where it is of no actual assistance. If that is the case, the only real solution is not to continue publishing articles on the Internet after the day of hard copy publication.

An Alternative Approach

At trial, *The Times* had sought to raise a novel defense of qualified privilege which, it was argued, should be available for those maintaining an archive. Mr Justice Gray did not consider that such a defense was available to *The Times*. The Court of Appeal did not overturn Mr Justice Gray's ruling and was not persuaded by *The Times'* arguments in favor of archives. The Court of Appeal stated that the maintenance of archives has a social utility but this is a "comparatively insignificant" aspect of freedom of expression. It considered that it was stale news and could not rank in importance with the dissemination of contemporary material.

The decisions of the Court of Appeal on the Internet publications are not encouraging ones for the providers and the users of archives, in particular electronic ones. The Court of Appeal's Judgment will make it more difficult, if not impossible, for an electronic publisher to satisfy a court that it was under a duty to publish. At a time when the Internet is fast becoming an indispensable resource tool, these decisions place unnecessary burdens on editors and restrict the flow of information. The incorporation of an archive defense into English law would eliminate these unwelcome developments.

Next Stop: The House of Lords

The Times asked the Court of Appeal for permission to appeal the following points of law:

1) the rejection of the two stage test for *Reynolds* privilege;
2) the correct test for qualified privilege for archive records;
3) whether the rule in *Duke of Brunswick* should be displaced in the context of the Limitation Act so that a single publication rule is adopted for material on the Internet;
4) the correct interpretation of section 8 of the Defamation Act 1996 (this appeal addresses the occasions when a claimant can have his claim disposed of summarily by a judge without a jury. It has not been considered in detail in this article as it concerns English legal procedure and does not relate to the defense of defamatory articles).

Permission was refused for all elements and *The Times* have petitioned the House of Lords for leave to appeal.

The claimant has lodged a cross appeal to argue that the Court of Appeal should have upheld Mr Justice Gray's Judgment on the grounds that the only real issue was responsible journalism. The claimants' position is that Mr Justice Gray's judgment was not tainted by use of the wrong test so that his criticisms of the journalism still held good.

The first stage of the appeal to the House of Lords is for a Committee to consider whether to give *The Times* leave to pursue the appeals. If provisional leave is given (as it was on the petition lodged last year) it is likely that the claimant will lodge objections. An oral hearing to consider both petitions will probably follow.

The decision whether to give provisional leave to appeal is likely to be made soon. Although not wishing to tempt fate, I am optimistic as to *The Times'* prospects. The disparate application of the *Reynolds* test by the lower courts has devalued the potential use of the defense. The Court of Appeal has been inclined to hear appeals in several cases and recently it has displayed a more liberal approach than that of the lower courts. I hope that the House of Lords feels the time is ripe for a review and clarification of *Reynolds*. If this opportunity is not taken, it may be a long time before the next one emerges. If the House of Lords allow the appeals to proceed, they will be faced with some difficult questions on the hard copy articles and the Internet. The House of Lords will need to consider the following matters:

- is there sufficient certainty in the *Reynolds* test so as to conform with the European Convention on Human Rights?

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- should a two stage test as propounded by *The Times* be adopted?
- at what stage should responsible journalism be considered?
- how is the test of responsible journalism to be measured?
- how do the ten factors propounded by Lord Nicholls in *Reynolds* tie in?
- should a newspaper be obliged to put a qualification or a notice on an article published on the Internet containing defamatory material?

These are not easy questions and we hope that the House of Lords decides that they should be tackled. If not, the resounding challenge created by the Court of Appeal's Judgment will be the practical application of the new test for *Reynolds*. The lower courts will have to grapple with the very wide test set out by the Court of Appeal while continuing to consider the ten factors set out by Lord Nicholls, with no guidance as to how they are to operate in tandem.

Of equal significance is the impact it will have on editors and media lawyers checking material prior to publication. They will have the unwelcome task of assessing whether the test may provide a particular article with a defense if a claim is brought relating to it. The judgment gives little practical assistance for those who are faced with making decisions daily about whether to publish an item.

The new test may allow a more liberal approach to be adopted with greater adherence to the right to freedom of expression. However, in the light of the post-*Reynolds* cases in which the right to reputation has been favored at the cost of the right to freedom of expression, the fear is that the Court of Appeal's new test is sufficiently wide to enable lower courts to apply *Reynolds* as strictly as they were prior to the *Loutchansky* appeal.

Life Beyond the House of Lords

Aside from the appeals, the case has more stages to go through before it is concluded. There is the re-determination of the defense of privilege in the light of the new test, although this is stayed pending the consideration of *The Times'* petition to the House of Lords on the test for *Reynolds* privilege. At some stage there may be a damages trial. The one listed for 11 January has been postponed indefinitely. Whether this proceeds depends on *The Times'* fortunes before the House of Lords and the fresh analysis of the articles by Mr Justice Gray.

Conclusion

This case, which has provoked a thorough analysis of so many areas of English libel law, may well be concluded outside this jurisdiction. If *The Times* is not given leave to appeal to the House of Lords to review an area of the law it considers to conflict with the European Convention on Human Rights, then *The Times* will have exhausted all its domestic remedies. It would then be entitled to appeal to the European Court in Strasbourg. It may be that only at that stage will the cases of *Loutchanksy* and *Reynolds* be viewed in a truly objective light, away from the cumbersome interpretation of *Reynolds* by the lower courts and the adherence to unsatisfactory and outdated precedents, decided in an age when man would not have contemplated the invention of the computer, far less the World Wide Web.

On appeal The Times was represented by solicitor Meryl Evans of Reynolds Porter Chamberlain and barristers Lord Lester of Herne Hill (Blackstone Chambers), Richard Spearman QC (4-5 Gray's Inn Square), Mr Richard Parkes (5 Raymond Buildings) and Mr Brian Kennelly (Blackstone Chambers). Loutchansky was represented at the appeals by solicitor Debbie Ashenhurst of Olswang and barristers Desmond Browne QC (5 Raymond Buildings) and Mr Hugh Tomlinson (Matrix Chambers).

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[1] I touched in my last report upon a petition for leave to appeal to the House of Lords, following the rejection by the High Court and the Court of Appeal of our argument that "after-acquired information" should be taken into account in assessing whether the qualified privilege applies. The House of Lords has granted provisional leave to appeal and I expect there to be a hearing shortly when the House of Lords will consider the other side's objections to our Petition, before deciding whether leave should be granted.

Court Enjoins Mass E-Mails as a Trespass to Chattels

Former Employee Sent Six Messages to as Many as 29,000 Intel Employees Complaining About Intel

Last month, a California Court of Appeals issued an injunction prohibiting a former Intel employee from e-mailing thousands of Intel employees under the legal doctrine of trespass to chattels. See *Intel Corp. v. Hamidi*, 2001 Cal. App. LEXIS 3107 (Cal. 3d App. Div. Dec. 10, 2001).

Over a period of two years following his firing, Kourosh Kenneth Hamidi sent out six mass e-mails to as many as 29,000 employees at the Santa Clara, Cal.-based Intel Corporation. Hamidi's e-mails voiced his complaints about the employment conditions at Intel. Hamidi later claimed that he was providing "an extremely important forum for employees within an international corporation to communicate via a web page on the Internet and via electronic mail, on common labor issues, that, due to geographical and other limitations would not otherwise be possible."

On March 17, 1998, Intel sent a letter to Hamidi demanding that he stop e-mailing its employees. When Hamidi refused, Intel sought to enjoin Hamidi under, among other things, the arcane legal theory of trespass to chattels.

The Legal Doctrine

Trespass to chattels, in its earlier forms, was a tort that included any "direct and immediate intentional interference with a chattel in the possession of another." Quoting from the Restatement, the California Court of Appeals noted that trespass to chattel "may be committed by intentionally ... (b) using or intermeddling with a chattel in the possession of another." Liability for trespass to chattel, according to the Restatement, was established if the "intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time, or some other legally protected interest [is harmed.]"

The court, in an opinion written by Judge Morrison and joined by Judge Scotland, found that the nature of the remedy that Intel sought — an injunction versus damages — was key to the analysis. The court found that relief for trespass, in a civil action, had historically been granted to the plaintiff "where he was not actually damaged, partly, at least, as a means of discouraging disruptive influences in the community." Quoting from an English law text, Salmond on Torts (21st ed. 1996), the court found that a trespass to chattels was "actionable per se without any proof of actual damage. Any unauthorized touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues."

Injunction Without Proof of Damage

Quite bluntly, the court held that Hamidi's "conduct was trespassory," and the fact that an "intrusion occurs supports a claim for trespass to chattels." In upholding the injunction, the court held that even though Intel had not demonstrated sufficient harm to "trigger entitlement to nominal damages for past breaches of decorum by Hamidi," Intel had demonstrated that Hamidi "was disrupting its business by using its [Intel's] property and therefore is entitled to injunctive relief based on a theory of trespass to chattels."

> *Quoting from an English law text, Salmond on Torts, the court found that a trespass to chattels was "actionable per se without any proof of actual damage. "*

The court held that Intel proved it was hurt by the "loss of productivity caused by the thousands of employees distracted from their work and by the time its security department spent trying to halt the distractions after Hamidi refused to respect Intel's request to stop invading its internal, proprietary e-mail system by sending unwanted e-mails to thousands of Intel's employees on its system."

Other Arguments Rejected

The court rejected an argument made by the ACLU in an amicus brief that six e-mails over the course of two years did not place a tremendous burden on Intel's computer system nor seriously disrupt business. The court said that the ACLU had discounted the disruption, given the fact that thousands of employees were involved.

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Court Enjoins Mass E-Mails as a Trespass to Chattels

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Similarly, the court rejected — almost without discussion — an argument made by the Electronic Frontier Foundation that unwanted e-mail was analogous to unwanted first-class mail, which is not considered a trespass. The court simply stated that the issue is "one of degree," noting that Hamidi "impliedly conceded that he could not lawfully cause Intel's computers to crash or overwhelm the system so that Intel's employees were unable to use the computer system."

The court also rejected Hamidi's free speech arguments. The court held that a private e-mail server is not a traditional public forum, nor is a private company which chooses to use e-mail a public forum. The court also held that Intel's workers do not have "core" First Amendment right to spend company time communicating with outsiders and each other to air grievances.

The Dissent

Judge Kolkey, in dissent, was critical of the majority accepting Intel's trespass to chattels argument without demonstrating some sort of concrete harm done by Hamidi's mass e-mails. According to the dissent's argument, California has "consistently required actual injury as an element of the tort of trespass to chattel." The only possible exception, according to the dissent, was when there has been a loss of possession. The dissent pointed out that Intel was "not dispossessed, even temporarily, of its e-mail system by reason of receipt of e-mails; the e-mail system was not impaired as to its condition, quality, or value; and no actual harm was caused to a person or thing in which Intel had a legally protected interest."

The dissent went on to criticize the acceptance of Intel's theory that it was harmed by a loss of productivity, and the loss of the time devoted to trying to prevent Hamidi from e-mailing the company. The dissent went so far as to say that if receipt of an unsolicited e-mail constituted trespass to chattel, so did unsolicited telephone calls, unsolicited faxes, unwelcome radio waves and television signals.

The dissent also criticized the majority's reliance on English treatises, including Salmond on Torts (as quoted above, "trespass to chattels is actionable per se without any proof of actual damages.") The dissent maintained that these treatises are the minority view.

Philip H. Weber of Placerville, Cal., represented Hamidi. The ACLU and the Electronic Frontier Foundation filed amicus briefs on behalf of Hamidi. Linda E. Shostak, Michael A. Jacobs and Kurt E. Springmann of Morrison & Foerster in San Francisco represented Intel.

UPDATE: Latest Development in *Boehner v. McDermott*

Wiretap Dispute Between Congressman Back to District Court

By Sonja R. West

Declining to rule on the "new-found importance" of the First Amendment questions, the D.C. Circuit recently took a pass on being one of the first lower courts to weigh in on the constitutional implications of the United States Supreme Court's major decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

In a post-*Bartnicki* remand from the Supreme Court, the same Court of Appeals panel for the District of Columbia Circuit as heard the case previously — Judges Ginsburg, Sentelle, and Randolph — again refused to dismiss the complaint of Rep. John A. Boehner (R-Ohio) under the federal wiretap statute against Rep. Jim McDermott (D-Wash.). *Boehner v. McDermott*, 2001 U.S. App. LEXIS 27798 (D.C. Cir. Dec. 21, 2001) The panel, which decided initially by a 2-1 vote to allow Congressman Boehner's complaint to stand and thereby reversed a dismissal by the district court, ruled that Boehner can amend his complaint. The Court of Appeals explained its ruling by stating "[w]e think the constitutional issues now raised may more readily be decided if Boehner is given an opportunity to amend his complaint."

In so doing, the panel refused to decide the issue before it: whether the First Amendment prohibits Boehner's complaint in light of the Supreme Court's decision in *Bartnicki*.

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Latest Development in *Boehner v. McDermott*

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In *Bartnicki*, the Supreme Court held 6-3 that the First Amendment prohibits punishing an individual or the press for disclosing illegally intercepted information concerning an issue of "public importance," so long as the publisher did not participate in the unlawful interception. Following its decision, the Supreme Court granted, vacated and remanded the related case of *Boehner v. McDermott* to the D.C. Circuit. *Boehner v. Mc Dermott*, 191 F.3d 463 (D.C. Cir. 1999), *cert. granted, vacated and remanded*, 121 S. Ct. 2190 (2001).

The facts of both *Bartnicki* and *Boehner* involve an attempted prosecution under the federal wire-tapping statute, 18 U.S.C. § 2511(1), following the publication of an illegally intercepted and recorded telephone conversation. In *Bartnicki*, the interception and recording was of a cellular telephone call between two union officials involved in contentious negotiations with the local school district. The majority opinion held that prosecution of the publishers was unconstitutional because "privacy concerns give way when balanced against the interest in publishing matters of public importance." In his concurring opinion, however, Justice Breyer, who was joined by Justice O'Connor, referred to a threatening remark by one of the union official and explained that the illegally obtained information in *Bartnicki* was a "special kind" of information of "unusual public concern."

> *[T]he Court of Appeals "conclude[d] that we would benefit from having the district court pass upon the [constitutional] arguments that have taken on new-found importance after Bartnicki."*

In *Boehner*, the lawsuit stemmed from the public release of a December 1996 phone conversation involving Boehner, then-House Speaker Newt Gingrich (R-Ga.), and other House GOP leaders discussing how best to respond to an ethics committee ruling against Gingrich.. A Florida couple recorded the conversation off a police scanner and, ultimately, gave it to McDermott. At the time, McDermott was the top Democrat on the House ethics panel. Accounts of the conversation soon appeared in news articles. Boehner has alleged that McDermott confidentially leaked the tape's contents to the press. Unlike *Bartnicki*, there were no threatening statements and the Rep. McDermott knew the identity of the persons who intercepted and recorded the conversation.

In supplemental briefing and oral argument to the Court of Appeals, the parties to the case and a group of media *amici* argued about the influence of the Court's *Bartnicki* decision and the proper balance to issues involving both publication of matters in the "public interest" and individual privacy.

On Dec. 21, 2001, the D.C. Circuit remanded the case "for further proceedings" to the district court in a *per curiam* decision. The Court of Appeals deferred ruling on the First Amendment questions in order to allow Boehner to amend his complaint and because the Court "conclude[d] that we would benefit from having the district court pass upon the [constitutional] arguments that have taken on new-found importance after *Bartnicki*."

Boehner's lawyer, Michael Carvin, was quoted in the press as saying that on remand to the district court he will argue that McDermott had an obligation to keep the ethics committee's proceedings confidential. He will argue that there are "special duties of nondisclosure" placed on public officials that take this case out from under the protection that the Supreme Court afforded the *Bartnicki* defendants.

McDermott's lawyer, Frank Cicero, also quoted in the press, disagreed, stating that "[i]f anything, public officials have greater First Amendment rights to speak out on issues like this than private citizens."

McDermott has 30 days from the panel's decision to ask for rehearing by the court of appeals *en banc*.

Michael A. Carvin and Louis K. Fisher of Jones, Day, Reavis & Pogue represented the plaintiff John A. Boehner and Frank Cicero, Jr., Christopher Landau, and Daryl Josefer of Kirkland & Ellis represented the defendant James A. McDermott. Theodore J. Boutrous, Jr., Sonja R. West and Jack M. Weiss of Gibson, Dunn & Crutcher LLP represented the media amici curiae Dow Jones & Company, Inc., The New York Times Company, Time Inc., ABC, Inc., The Washington Post Company, the Tribune Company, and the Reporters Committee for Freedom of the Press.

UPDATE: Supreme Court Passes on Three Stooges Case

Damaging California Right of Publicity Ruling Will Stand

The United States Supreme Court denied a California artist's petition for certiorari, ending the artist's fight over his use of the likeness of The Three Stooges. See *Saderup v. Comedy III Productions, Inc.*, No. 01-368 (U. S. Jan. 7, 2001). Gary Saderup was seeking a reversal of the California Supreme Court's decision that upheld the publicity rights claims brought by the owners of the rights to The Three Stooges. See *LDRC Libelletter*, May 2001 at 3.

When the California Supreme Court decided the case in April, it announced a new balancing test designed to reconcile the First Amendment and publicity rights in California. Under California Civil Code § 3344.1, any person who uses a deceased personality's name, voice, signature, photograph, or likeness on or to sell products, merchandise, goods or services must first obtain proper consent from the right-of-publicity holder. The statute excepts uses in connection with certain media, including original works of art. Saderup, without prior consent, created an original drawing of the Stooges, from which he created and sold lithographs and t-shirts bearing the image he created.

In announcing a new balancing test, the California Supreme Court made clear its understanding of the importance of and its due deference to First Amendment rights. However, the court also equated the publicity right with the accepted social utility of copyrights. Thus, the court deemed a balancing test to be the appropriate means by which to reconcile the competing rights. In defining the new balancing test, the court borrowed from the fair use test, asking whether the work adds something new. By way of example, the works of Andy Warhol, through the added elements of "distortion and careful manipulation of context," convey a message beyond the commercial exploitation of celebrity images, and are instead "form[s] of ironic social comment on the dehumanization of celebrity itself." Under the court's balancing test, however, Saderup, lost because his drawing failed to add "significant transformative or creative contribution."

In denying Sadrup's petition for certiorari, the Supreme Court issued no comment on the case. Stephen Barnett, of Berkeley, Cal., represented Saderup. Robert Benjamin, of Glendale, Cal., represented Comedy III Productions.

Appeals Court Finds Anti-SLAPP Statute Inapplicable Against Newsgathering Activities

A California Court of Appeals vacated a trial court's order granting *The New York Times*'s special motion to strike under the state's anti-SLAPP statute after the court of appeals found that the statute applied to news reporting but not to newsgathering causes of action. See *Carter v. Superior Ct. of San Diego County; New York Times Co., et. al., real parties in interest*, 2002 Cal. App. LEXIS 275 (Cal. Ct. App., 4th App. Div., Jan. 10, 2002).

Real Life ER

The plaintiff, R. Shaun Carter, was suing over the broadcast of videotape that was shot while Carter was being attended to in an emergency room. Carter had been taken to the emergency room after having an adverse reaction to a substance known as "Blue Nitro." Carter had ingested the substance, which doctors referred to as the "new rave amongst teenagers," while at a bathhouse, and had lost consciousness.

When Carter was taken to the emergency room, NYT Television was filming a television program entitled "Trauma: Life in the ER." The program showed Carter's treating physician disclosing Carter's condition and diagnosis, identified Carter by name, and showed him undressed to his underwear. Though the photographer obtained Carter's signature on a consent form, Carter claimed the photographer gave "every appearance

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of being a doctor" and told Carter the tape was needed for use in training of hospital personnel.

Carter sued for fraud, common law and statutory invasion of privacy by intrusion, invasion of privacy by public disclosure of private facts, defamation, improper disclosure of medical records, and, as to DCI only, commercial misappropriation.

Appellate Court Reverses Dismissal

The trial court granted the defendant's anti-SLAPP motion to strike. The Court of Appeals, however, vacated the order striking the plaintiff's claims and instructed the trial court to "enter a new and different order" striking only the claims for invasion of privacy by public disclosure of private facts, defamation, improper disclosure of medical records, and commercial misappropriation. The order reinstated the claims for fraud and invasion of privacy by intrusion.

Under California's anti-SLAPP statute, a cause of action is subject to the special motion to strike if the cause of action arises "from any act of [a] person in furtherance of the person's right of petition or free speech ... in connection with a public issue," unless the plaintiff can establish a probability of prevailing on the claim. Acts covered by this provision are defined as including "conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The *Carter* court, in an opinion by Judge McDonald, made a distinction between news reporting activities, which the court held were within the definition of covered acts, and newsgathering activities, which the court held were not. Because the intrusion and fraud claims arose from newsgathering activities, the court held that the claims could not be dismissed under the Anti-SLAPP statute.

In arriving at this analytical dichotomy between news reporting and newsgathering, the court relied on the 1998 decision from the California Supreme Court, *Shulman v. Group W Productions, Inc.*, 955 P.2d 469 (Cal. 1998). In *Shulman*, the California Supreme Court held that the broadcast of rescue workers extracting a victim from an overturned car was constitutionally protected by free speech, but the television producers "enjoyed no constitutional privilege, merely by virtue of their status as members of the news media, to ... intrude tortiously on private places, conversations or information." The *Shulman* court followed the "general rule of *nonprotection*: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws."

In *Carter*, the court of appeals found that the plaintiff was "in a zone of physical and sensory privacy and he had a reasonable expectation of seclusion or solitude in the [emergency room], in his conversation and of his person and of his words..." Thus, the plaintiff was alleging that NYT Television had "violated his expectation of privacy by invading into his personal space and affairs." Despite the fact that NYT Television was in pursuit of newsworthy material, it did not place the plaintiff's intrusion allegations within the ambit of the anti-SLAPP statute.

Similarly, the fraud allegations were not within the ambit of the anti-SLAPP statute, as fraudulent conduct and statements are not "acts in furtherance of ... free speech rights."

Four of the plaintiff's claims, however, were properly stricken by the trial court. Invasion of privacy by public disclosure of private facts, defamation, improper disclosure of medical records, and commercial misappropriation were all within the anti-SLAPP terms, and Carter could not show a probability of prevailing on those claims.

Guylyn R. Cummins of Gray Cary Ware & Freidenrich in San Diego, represented The New York Times Company. Lionel P. Hernholm, Jr. of San Diego, represented the plaintiff/petitioner.

Court Refuses to Issue Prior Restraint of Report on Religious Sect

Possibility of 'Future Emotional Trauma' Was Not Enough to Justify a Prior Restraint

By Paul Hannah

A United States District Court Judge has refused a request by a victim of sexual abuse to restrain a television station from broadcasting a report on alleged abuse of some children whose parents were members of a religious sect. In *A.M.P., et al. v. Hubbard Broadcasting, Inc., et al.*, Civil No. 01-2097 (D. Minn. Nov. 16, 2001), the court held that allegations of irreparable emotional harm did not justify a prior restraint of the proposed broadcast.

Early in 2001, members of the KSTP-TV (Minneapolis/St. Paul) investigative unit began to interview former members of a conservative, fundamentalist religious sect headed by Brother Rama Behera. The former members told stories of abusive behavior toward some children in the sect, including punishment with a cattle prod. One former member, Gaeland Priebe, said he had told Shawano County, Wisc. authorities of these abusive acts, and also confessed to sexual abuse of a member of his family. He faces a criminal trial in 2002. As a part of its investigation, KSTP-TV attempted, without success, to interview Brother Rama Behera.

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First Complaint Dismissed on Jurisdictional Grounds

A two-part report was scheduled to run on Nov. 15 and 16, 2001. On Thursday, Nov. 15, KSTP-TV received notice that a complaint had been filed in U.S. District Court on behalf of A.M.P., Gaeland Priebe's daughter and the victim of his criminal sexual conduct. The complaint also named "John and Jane Doe(s)" as plaintiffs. A court clerk informed KSTP-TV by telephone that a motion for a temporary restraining order had been scheduled before U.S. District Judge Michael Davis that afternoon. Judge Davis dismissed A.M.P.'s complaint on jurisdictional grounds, and did not reach the prior restraint question.

A.M.P. was not put off by Judge Davis' decision. A.M.P. filed, and then dismissed, a state court lawsuit. On Friday, Nov. 16, she filed a second complaint in U.S. District Court, and sought an order restraining KSTP-TV from broadcasting the second night of its report. Her motion was set to be heard by Chief Judge Paul A. Magnuson late that same afternoon.

A.M.P.'s second complaint named as defendants Hubbard Broadcasting, Inc., "KSTP-5" and "any other Defendant Does." It included causes of action for defamation, intrusion upon seclusion, publication of private facts, and intentional and negligent infliction of emotional distress.

In support of her motion for a temporary restraining order, A.M.P. argued that her father, Gaeland Priebe, was conspiring with others to use the KSTP-TV reports "as a ploy to create a defense in his criminal case." She argued that the report, if broadcast, "will only cause further irreparable harm to me and further compound the injuries I have sustained."

Court Relies on Near v. Minnesota and New York Times v. U.S.

In an order dated November 16, 2001, Judge Magnuson denied A.M.P.'s motion for a temporary restraining order, recognizing that such an order would constitute a prior restraint upon a news agency.

Citing *Near v. Minnesota*, 283 U.S. 697 (1931) and *New York Times Co. v. United States*, 403 U.S. 713 (1971), Judge Magnuson characterized the reaction of courts to such a request:

> Courts take a dim view of the prior restraint of expression, and exceptions to the general rule against such prior restraints are recognized only in extraordinary circumstances.

He described the exceptionally high standard set by courts in prior restraint cases with citations to *Ford Motor Company v. Lane*, 67 F.Supp.2d 745, 752 ("To justify a prior restraint on pure speech, 'publication must threaten an interest more fundamental than the First Amendment itself.'" (quoting *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1966)), and to *C.B.S., Inc. v.*

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UPDATE: Privacy Verdict Based on Telemarketing Calls Upheld in Part

Newspaper Win on Newsgathering Claims Not Appealed

The Ohio Court of Appeals has largely upheld a jury verdict which held the *Akron Beacon Journal* liable for invasion of privacy by repeated automated subscription sales phone calls to the Akron police chief Edward Irvine and his wife Geneva. See *Irvine v. Akron Beacon Journal*, Nos. 20450, 20524, 2002 Ohio App. LEXIS 39 (Ohio Ct. App. Jan. 9, 2002).

The appellate court reversed only the trial court's award of treble damages to the plaintiffs, leaving the statutory damages amount. The appeals court held that the federal Telephone Consumer Protection Act, 47 U.S.C. § 227(c)(5), allows a court to impose only one or the other, not both, and remanded the case for this purpose only. The jury's finding that reporters acted reasonably when they attempted to contact Mrs. Irvine about allegations that her husband was abusive was not appealed.

The claims arose after Geneva Irvine was hospitalized in October 1998 for injuries she reportedly blamed on her husband. When she went to stay with relatives in Louisiana, the *Beacon Journal* sent a reporter and a photographer. Mrs. Irvine refused to be interviewed, but the reporter left a copy of stories that the paper had already published, his business card and a note on the windshield of her car.

The Irvines filed suit for invasion of privacy, trespass, and stalking, and a claim that the newspaper used its automatic telephone dialing system to harass the Irvines.

A police investigation showed that the automated device was occasionally allowed to run unattended all night and through weekends. While the paper admitted that the Irvines had been called 18 times, the plaintiffs alleged they received hundreds of calls.

After trial, the jury found that the reporters acted reasonably in their newsgathering but the telemarketing constituted harassment. The jury awarded a total of $206,500, including $500 in statutory damages for each of three phone calls ($1,500), plus $4,500 in treble damages.

The jury verdict on the newsgathering claims was not appealed.

In a unanimous opinion, the court of appeals found many of the newspaper's arguments either had not been raised at trial or were based on portions of the trial record not submitted to the appeals court.

The court did agree to the impropriety of imposing both statutory damages and treble damages under the Telephone Consumer Protection Act.

The newspaper has filed a motion for reconsideration, arguing that despite the court's claims, the transcripts of all witness testimony were filed and available for review by the court.

The *Beacon Journal* was represented by Ronald S. Kopp, Stephen W. Funk and Alisa L. Wright of Roetzel & Andress in Akron, Ohio; Edward L. Gilbert of Akron represented the Irvines.

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Davis, 510 U.S. 1315, 1317 (1994) (prior restraint is justified "only where the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures.")

Judge Magnuson rejected A.M.P.'s argument that the harm which would befall her would justify a prior restraint. "[W]ith respect to A.M.P., without knowing the substance of the news broadcast at issue, the Court cannot determine with any certainty" whether A.M.P. would suffer harm. "[T]he possibility of future emotional trauma for A.M.P. cannot justify a prior restraint of expression."

Judge Magnuson gave the claims of the John and Jane Doe plaintiffs even shorter shrift. "[T]he Court does not even know whether they exist, and the Court certainly cannot justify prior restraint of the news media on the grounds that these potential plaintiffs might exist and might suffer some nebulous harm."

Although her motion for a restraining order was denied, A.M.P. has now filed an amended complaint, in which she adds causes of action for alleged assault, "terroristic threats," and civil rights violations. Defendants plan to vigorously defend against these claims.

Paul Hannah is a media attorney in St. Paul, Minnesota and represents the named defendants in the case.

Family Has No Claim Over Statements About Dead Dad

A United States Court of Appeals for the 10th Circuit affirmed the dismissal of a family's claim for invasion of privacy and violation of substantive due process rights, holding that the wife of a murdered man did not have a legitimate expectation that the local police would keep information about her husband's sexual practices confidential. See *Livsey v. Salt Lake County, et. al.*, 2001 U.S. App. LEXIS 27199 (10th Cir., Dec. 26, 2001).

The case arose when hikers in Salt Lake County, Utah, found the body of Edward J. Livsey. County police officer Jim Potter told the *Deseret News* that the death appeared to be an accident, and that it "looks like it was one of those autoerotic things," and "there was some type of binding involved." Though Livsey's identity was not revealed at the time of Potter's comments, the identity was later released and a widely-publicized trial ensued.

[T]he court found that the issue depended upon whether Livsey's wife had a legitimate expectation of privacy in the information about her spouse.

After a murder conviction was obtained, Livsey's wife and children requested an administrative name-clearing hearing. No one from Salt Lake County responded to the request, and the family subsequently filed suit alleging that Potter's statements and the denial of a name-clearing hearing deprived them of "their liberty and privacy interests."

The district court dismissed the action against Potter, holding that damage to one's reputation — by itself — was insufficient to support a procedural due process claim and because the plaintiff's were not "crime victims" within the meaning of the Utah Constitution. The district court also dismissed the action against the county, finding no underlying constitutional violation. The plaintiffs filed a motion for reconsideration, seeking to amend their complaint to include substantive due process and privacy claims. The motion for reconsideration was denied; the district court also held that the plaintiff's privacy and substantive due process claims had been previously advanced and rejected.

The Court of Appeals, in an opinion by Judge Louis F. Oberdorfer, affirmed the district court's dismissal of the claims.

As to the plaintiff's claim that their privacy had been invaded by Potter's comments, the court found that the issue depended upon whether Livsey's wife had a legitimate expectation of privacy in the information about her spouse. The Court of Appeals said that it was "compelled" to "draw the line around the individual directly implicated by or involved in the intimate or personal material revealed.

"[I]t would be almost impossible to define the limits of the right to privacy if it encompassed information about a spouse's behavior any time that behavior arguably reflected on the marital relationship."

In this case, the information revealed concerned "only the behavior of an unnamed decedent; it revealed no information about Norma Livsey or her marital relationship as such." Since Livsey's wife had no legitimate expectation that the information in question would remain in confidence, there was no violation of her privacy rights in Potter's comments to the newspaper.

As to the substantive due process claim, the court explained that the plaintiff must "demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking" to establish a violation of substantive due process. The court found that Potter's comments, coupled with the county's refusal to grant a name-clearing hearing, did not rise to this level. The court held that "a comment in a single newspaper article about an unidentified body found under unusual circumstances, bears no resemblance to the factual scenarios where federal courts have found conduct that 'shocks the conscience' of judges." Having found no viable constitutional claims, the court dismissed the claims against the county.

The Livseys were represented by Robert H. Copier of Salt Lake City. Potter and the county were represented by T.J. Tsakalos, a deputy district attorney in Salt Lake City.

Court of Appeals Reverses Dismissal of Retaliation Claim Against FBI

Former Intelligence Director Claims the FBI Acted in Retaliation for an Article He Wrote

The United States Court of Appeals for the Fourth Circuit reversed a district court's dismissal of retaliation claims brought by a former director of the Office of Intelligence in the U.S. Department of Energy who had written an article critical of the FBI, the White House, the CIA and the Department of Energy. See *Trulock, et. al., v. Freeh, et. al.*, 2001 U.S. App. LEXIS 27341 (4th Cir., Dec. 28, 2001).

From 1995 to 1998, Notra Trulock, the former director of the Office of Intelligence in the U.S. Department of Energy, warned the White House, the FBI and the CIA of possible espionage by Chinese spies. Trulock contends these warnings were largely ignored. He was ultimately forced out of his job in 1999. In 2000, Trulock wrote a story criticizing the White House, the Department of Energy, the FBI and the CIA. An excerpt of the story was published by the *National Review*.

> *At the time of the search, it was clearly established that the First Amendment prohibited an officer from retaliating against an individual for speaking critically of the government.*

Shortly after the article was published, the FBI questioned Linda Conrad, an executive assistant at the DOE who lived with Trulock. After the FBI questioned her at work, Conrad consented to a search of the townhouse she shared with Trulock. She also consented to a search of their computer. Despite the fact that Trulock and Conrad shared a computer, each of them had files that were password protected. Using Conrad's consent, the FBI searched and seized Trulock's password-protected files.

Trulock and Conrad filed suit, alleging violations of the First and Fourth Amendment. The district court dismissed both claims. The Fourth Circuit Court of Appeals, in an opinion by Judge Benson Everett, vacated the dismissal of the First Amendment claim. The court held that Trulock had alleged sufficient facts in support of his retaliation claim, and that at the time of the search, it was clearly established that the First Amendment prohibited an officer from retaliating against an individual for speaking critically of the government (thus negating any qualified immunity defense by the agents).

According to the court, Trulock had to prove three elements to establish a First Amendment retaliation claim. First, his speech had to be protected speech. Second, Trulock had to prove that the defendant's alleged retaliatory action adversely affected his constitutionally protected speech. Finally, Trulock had to prove a causal relationship existed between his speech and the defendant's retaliatory action.

The first two elements warranted no discussion — Trulock's article was critical of the government, and that is speech that goes to the core of the First Amendment. By seizing the files, the government was, in turn, preventing Trulock from speaking out on the matter in the future. For the third element, the court found a reasonable inference of retaliation given the timing of the search (a month after the article was published) and the out-of-the-ordinary behavior by the FBI (initiating an investigation without a criminal referral from the Department of Energy).

The Court of Appeals, however, upheld the dismissal of the Fourth Amendment claims. The court held that Conrad had not been illegally seized. Also, the court held that while Conrad's consent was involuntary, the agents who executed the search of the computer did so with a qualified immunity. Finally, the court held that Trulock may have had a reasonable expectation of privacy in his password-protected files, but the agents acted with qualified immunity because no reasonable officer would have known that Conrad's consent did not authorize them to search Trulock's files.

The dissent disagreed, saying that the qualified immunity did not apply because the owner of password-protected computer files "has a clear expectation of privacy in those files that is protected by the Fourth Amendment," and any reasonable officer should have recognized those privacy expectations.

Larry Klayman of Judicial Watch, represented Trulock and Conrad. Richard A. Olderman of the DOJ represented the government.

AIDS Activists Jailed After Threatening Journalists and Others

By Roger R. Myers, Joshua Koltun and Monica Hayde

American journalists are fortunate that, for the most part, their worst nightmares involve being hauled into court. Of course there are journalists in many parts of the world who receive communications far more chilling than a retraction demand — they are at constant risk of being approached and carted off in the middle of the night for having criticized or embarrassed the wrong person.

The recent encounters of several *San Francisco Chronicle* reporters with a uniquely aggressive brand of AIDS activist, however, is somewhat more reminiscent of the travails of third-world journalists than to the sort of retraction demand American journalists dread receiving. The case also raised the question of where to draw the line between vehement, but protected, speech against a newspaper's coverage of a particular issue and speech that should be restrained because of its threatening nature. In this instance, the newspaper and the court concluded the line had been crossed by repeated threatening contacts at home in the dead of night.

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The Threats

ACT-UP San Francisco is an association of militant AIDS activists (not associated with the national ACT-UP organization) engaged in a long-running battle with the San Francisco health authorities and mainstream AIDS organizations. Members of this organization believe that AIDS is not caused by HIV and that the health establishment and mainstream AIDS organizations are in cahoots with pharmaceutical companies to foist harmful AIDS drugs on those with HIV. ACT-UP San Francisco members are known for their "in your face" tactics at demonstrations, which are often held at public health fora or meetings of mainstream AIDS groups. They have a history of harassing researchers, activists and public figures with whom they disagree. David Pasquarelli is one of the leaders of ACT-UP San Francisco. Michael Petrelis, who is not a member of ACT-UP SF and does not agree with all of its beliefs, often demonstrates alongside them.

On October 22, the *Chronicle* published an article by Christopher Heredia about the rise of unsafe sex practices among gay men in San Francisco. On October 26, it published another article by Heredia about increases in syphilis rates among gay men in San Francisco.

Around the same time, ACT-UP San Francisco members had concluded that a San Francisco public health official, Dr. Jeffrey Klausner, was planning to quarantine gay men who refuse to modify their unsafe sexual practices – a conclusion based on an article in *Washington Monthly*. The magazine later conceded it had misstated Klausner's views.

Petrelis and Pasquarelli began making agitated calls to Heredia, accusing him of being a propagandist on the payroll of the city health department. So far, nothing particularly out of the ordinary for a journalist writing about issues of public concern. But matters rapidly escalated.

Several reporters began receiving threatening calls at their homes, some as late as 2 in the morning. For example, Sabin Russell, who often writes about AIDS related issues for the *Chronicle*, received phone messages that he and Heredia identified as coming from Pasquarelli. One message, addressing Russell, his wife, and his children by name, stated "you ... and your comfortable little clan, over there at your mansion at [address], better watch your backs. Because we've been down this path before in the past, where you propagandists put crap in the paper to demonize queers, and then they cart us off to the camps and cook us. And let me tell you one thing, motherfucker, that is not happening again — not in this town. If there is one more word in the paper demonizing queers, coming from you, you're finished, forever." Other re-

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porters received similar calls at home.

Other phone calls indicated that a campaign against the *Chronicle* was in the works. Editorial assistants at the paper's switchboard were inundated with calls from a man screaming to whomever picked up the phone that the recipient had syphilis. Over Veterans' Day weekend, a caller phoned in a bomb threat, and the building was cleared.

The Temporary Restraining Orders

With threatening phone calls multiplying that weekend and reporters afraid for their families' safety, the *Chronicle* was compelled to seek out San Francisco's emergency duty judge over the weekend to obtain a temporary restraining order against Petrelis and Pasquarelli on behalf of several reporters and editors, as well as the paper.

With threatening phone calls multiplying and reporters afraid for their families' safety, the Chronicle was compelled to seek out San Francisco's emergency duty judge over the weekend.

Because the campaign had targeted several staff members beyond those who regularly report on AIDS-related stories, the TRO broadly restrained the defendants from contacting any employees. Pasquarelli and Petrelis went into hiding, and it took considerable effort for the *Chronicle's* investigators to serve them with the restraining order and order to show cause for the preliminary injunction.

At the order to show cause hearing two weeks later, it turned out that the City of San Francisco and the University of California San Francisco hospital had also obtained temporary restraining orders against Petrelis and Pasquarelli, but had been unable to serve them. Petrelis and Pasquarelli were present at the hearing (to defend against the *Chronicle's* petition), as were an assemblage of ACT-UP San Francisco demonstrators, worried- looking bailiffs, and a class of Catholic School students on a field trip. As it happens, there were also several undercover policemen in the room.

Police Press Charges

Since Petrelis and Pasquarelli had not been served with the other TROs, all parties stipulated to a consolidated hearing a few weeks later. As Petrelis and Pasquarelli exited the courtroom and gave statements to the waiting TV cameras, they were arrested on multiple felony and misdemeanor charges stemming from the same allegations underlying the civil proceedings.

The defendants are each being held on more than $500,000 bail and have stipulated to a continuance of the TROs pending resolution of the criminal case. Their incarceration has generated a certain amount of publicity, as well as some expressions of solidarity from those who believe Petrelis and Pasquarelli are being persecuted for their controversial views.

Newspaper's Perspectives

For its part, the newspaper believes it is taking the same position its lawyers typically take in response to threats of litigation — vindicating the right of its reporters and editors to accurately report the news as they deem appropriate, without fear of wrongful interference by the government or private individuals. That the individuals have chosen to interfere by threats of violence rather than threats of litigation presents an interesting twist — one that gives the reporters even more cause for concern — but does not alter the fundamental principles at stake.

In past cases, members of ACT-UP San Francisco have claimed they practice a form of "performance art." Stay tuned for what may be a very unusual First Amendment case.

Messrs. Myers and Koltun and Ms. Hayde, who are with Steinhart & Falconer LLP in San Francisco, California, represented the San Francisco Chronicle *and several of its reporters and editors, including Heredia and Russell, in this matter.*

Judge Quashes Subpoena Seeking Reporter's Authentication of Published Information

First Amendment Interests and Prejudice to Defendant Outweighed Value of Testimony Sought

By Roger R. Myers and Lisa M. Sitkin

In one of the first decisions of its kind since the California Court of Appeal's decision in *Fost v. Superior Court*, 80 Cal. App. 4th 724 (2000), the trial judge in a California murder case recently quashed a prosecution subpoena seeking a reporter's authentication of *published* information about a jailhouse interview where the defendant would be unable to cross-examine the reporter as to unpublished information concerning his published statements. The court's decision to quash the subpoena illustrates one way *Fost* and evidentiary law may be used to address the nettlesome problem of subpoenas seeking testimony about published information where cross-examination will inevitably lead into questions about unpublished information.

Citing concerns that the limited probative value of the testimony sought was outweighed by both the burden on First Amendment interests and the prejudice to defendant, who would be barred by the California reporter's shield from effectively cross-examining the reporter, Judge Stephen Benson of the Butte County Superior Court denied the prosecutor's request to examine reporter David Andersen of the *Oroville Mercury-Register*.

Jail-house Interview Sought

The case, *People v. Randy Joe Skains*, No. CM 014407 (Butte County Sup. Ct.), arose out of the killing of a man accused of molesting the daughter of the defendant's girlfriend. The defendant claimed that the victim had threatened his girlfriend and her daughter on the night of the killing and that he had killed the victim to protect them and himself. Andersen conducted a jailhouse interview and wrote an article that included three verbatim quotations from the defendant about his fight with the victim. Because the account of the fight in Andersen's article differed from the account the defendant gave in his statement to the police, the prosecution subpoenaed Andersen to authenticate defendant's statements in the article. According to the prosecutor, this testimony was needed to show that the defendant had changed his story and thereby undermined his credibility.

After several attempts to resolve the matter informally, Andersen filed a motion to quash, arguing that forcing him to testify even as to published information would violate the constitutional interests served by the California reporter's shield and First Amendment reporter's privilege, as well as prejudicing the defendant, in violation of the Court of Appeal's recent decision in *Fost*. He also argued that any minimal probative value in the testimony was outweighed by the prejudice to the reporter, newspaper and defendant and therefore should not be allowed under California Evidence Code § 352.

According to the prosecutor, this testimony was needed to show that the defendant had changed his story and thereby undermined his credibility.

The Fost Decision

In *Miller v. Superior Court*, 21 Cal. 4th 883 (1999), the California Supreme Court held that, unlike defendants, prosecutors cannot pierce the California shield law because they have no federal constitutional right to a fair trial that could outweigh the reporter's state constitutional shield law rights. In *Fost*, however, the California Court of Appeal carved an exception to *Miller* allowing prosecutors to pierce the shield on cross-examination of a reporter called by a defendant to authenticate published information — but only if the defendant can show the published information sought by defendant would materially assist his defense (and therefore meets the test for a defendant to pierce the shield law established by *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990)). Otherwise, the *Fost* court said, the prosecution may prohibit or strike a reporter's testimony authenticating published information sought by the defendant because the prosecution would be unable to cross-examine the reporter as to unpublished information bearing on the published statements. As the *Fost* panel put it, "[w]here a witness refuses to submit to cross-examination ... the conventional remedy is to exclude [his] testimony on direct."

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Judge Quashes Subpoena Seeking Reporter's Authentication of Published Information

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Turning Fost Around

Turning *Fost* around, Andersen and the *Mercury-Register* argued that a subpoena by the prosecution seeking published information also should be quashed because the defendant could not meet the test for piercing the California shield law (or the test for overcoming the First Amendment reporter's privilege) and therefore would be unable to cross-examine the reporter as to any unpublished information going to the credibility of the published statements. (Defense counsel had confirmed that he would seek unpublished information even if the prosecution limited its questions to published statements.) The *Fost* court held that under such circumstances, the evidence elicited on direct examination by the prosecution would have to be excluded or struck at trial, 80 Cal. App. 4th at 733, 737, and at least one court had reached a similar result in another state. See *Hatch v. Marsh*, 134 F.R.D. 300 (M.D. Fla. 1990) (quashing subpoena where compelling reporter to testify about published information would open the door to adversary's demand for access to unpublished information).

This result, Andersen argued, was the only outcome that would be consistent with the purposes underlying the California shield law and First Amendment. Compelling a reporter to appear and testify seriously burdens his rights under the shield law and the First Amendment because these protections for the press are only effective if they keep the reporter out of court. Compelling reporters to testify in court not only "preempt[s] the otherwise productive time of journalists and ... measurably increase[s] [their] expenditures for legal fees," it also impedes their ability to "gain access" to sources of information because their neutrality is compromised by the "journalist appearing to be an investigative arm of the judicial system or a research tool of the government ...." *Shoen v. Shoen*, 5 F.3d 1289, 1294-95 (9th Cir. 1993).

Fost Not Explicitly Relied Upon

At a hearing held on Dec. 10, 2001, Judge Benson ordered the subpoena quashed. While acknowledging the potential prejudice to both the defendant and the reporter, Judge Benson did not explicitly rely on *Fost* as the basis for his ruling. Instead, he excluded the testimony pursuant to California Evidence Code § 352, under which evidence must be excluded when its probative value is outweighed by the "undue consumption of time" that litigating its admissibility would require and by the "substantial danger of undue prejudice" that would be caused by its admission.

> *Andersen's motion showed the defendant had told his story many times (and in many versions) to many people, and the prosecution could easily have impeached his credibility without calling a reporter to the stand.*

While the prosecution maintained that it needed Anderson's testimony to bolster its argument that the defendant told the police a different story about the events that led to the victim's death from the story he told to others, Andersen's motion showed the defendant had told his story many times (and in many versions) to many people, and the prosecution could easily have impeached his credibility without calling a reporter to the stand. Moreover, Andersen argued, the facts regarding the relevant events could be more readily — and more dependably — established on the basis of police reports, eyewitness accounts and other direct evidence. In these circumstances, Andersen contended and the court agreed, any minimal probative value was outweighed by the undue court time that would be consumed in disputes over the propriety and scope of the testimony in light of the shield law and by the prejudice to the defendant, the reporter, and the First Amendment.

A transcript of the proceedings will be available through LDRC shortly.

Mr. Myers and Ms. Sitkin, who are with Steinhart & Falconer LLP in San Francisco, California, represented Andersen and the Oroville Mercury-Register *in this matter.*

Ninth Circuit Holds That Privacy and Official Reputation Are Not Compelling Interests Justifying Sealing Presumptively Open Court Documents

A newspaper that is not a party to an underlying criminal case has no standing to appeal the closure of presumptively open court documents. Writ relief is appropriate, however, because interests in privacy and official reputation are insufficient to justify the closure of presumptively open documents.

By Rex S. Heinke and Cynthia E. Tobisman

In a case weighing an individual's interests in privacy and official reputation against a newspaper's right to explore a criminal's attempt to obtain a sentence reduction, the Ninth Circuit Court of Appeals, on December 3, 2001, granted *The Sacramento Bee's* writ of mandamus compelling the district court to unseal certain proffer letters. In *In Re: McClatchy Newspapers, Inc., dba The Sacramento Bee*, Nos. 01-70941, 01-10335, the Ninth Circuit vacated the district court's order and remanded the case with instructions to unseal the proffers and make them publicly available.

The case centered around the allegations of convicted felon Mark Nathanson. Nathanson was indicted in federal court on felony counts arising from federal offenses committed while a member of the California Coastal Commission. He pled guilty to accepting bribes and filing false income tax returns. He later moved to reduce his sentence, attaching to the motion two proffer letters implicating a high public official and a prominent businessman (who had business before public agencies) in alleged wrongdoing. No action was taken on Nathanson's motion to reduce his sentence, but Nathanson's motion (including the proffer letters) was placed in the clerk's safe rather than the file. Two years later, the government moved under Rule 35 to reduce Nathanson's sentence. The motion was granted.

Petitioner McClatchy Newspapers, dba *The Sacramento Bee*, learned of the proffers at a hearing to revoke Nathanson's probation. *The Bee* noted that neither the Rule 35 motion nor the court's order reducing Nathanson's sentence contained information about the basis for the sentence reduction. *The Bee* requested the documents that did not appear in the file and were not referred to in the docket. The government moved to formally seal the documents sought by *The Bee*. The dis-

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Grand Jury Investigation Ends; Leggett Set Free

Her Attorney Will Continue HerAppeal to the Supreme Court

On Jan. 4, after spending 168 days in jail for refusing to comply with a subpoena for her notes, Vanessa Leggett was set free when the grand jury investigation of a 1997 murder came to an end.

Leggett long surpassed the apparent previous record for incarceration of a journalist in America, set by a Los Angeles reporter almost 30 years ago. William Farr, then with the *Los Angeles Herald Examiner*, was jailed for 46 days in 1972 for refusing to reveal the source of leaked documents in the Charles Manson trial.

Leggett, a freelance writer from Houston, went to jail on July 20 because she refused to turn over her notes to a grand jury.

In August, the 5th Circuit Court of Appeals let stand the lower court decision that there was no applicable reporter's privilege that would protect Leggett's research. In November, the 5th Circuit Court of Appeals refused to rehear the case and rejected a request to release Leggett on bond — leaving Leggett's only hope with the United States Supreme Court.

After Leggett's release, Mike DeGeurin, Leggett's attorney, told reporters that they intended to pursue Leggett's Supreme Court petition. The Federal prosecutors have not ruled out a further subpoena.

Ninth Circuit Holds That Privacy And Official Reputation Are Not Compelling Interests Justifying Sealing Presumptively Open Court Documents

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trict court released the proffer letters in redacted form and *The Bee* sought a writ of mandamus to obtain the unredacted letters. The Ninth Circuit granted the writ and remanded to the district court to make factual findings in consideration of whether privacy interests alone justified the redactions.

On remand, the district court refused to release the unredacted letters, finding that doing so would adversely affect the public official and the businessman's reputations. The district court concluded that the redactions served the compelling interest of protecting both the privacy interests and the reputational interests of the official, the businessman and other innocent persons.

The Bee applied for a second writ of mandamus and appealed.

The Bee Had No Standing To Appeal The District Court's Closure Order

Because *The Bee* was not a party to the underlying criminal action, the Ninth Circuit held that *The Bee* had no standing to appeal. (citing *United States v. Sherman*, 581 F.2d 1358, 1360 [9th Cir. 1978].) (*The Bee* argued that there was a split in the Ninth Circuit authority on its standing to appeal [citing *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999) and *CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174 (9th Cir. 1984)], but the court did not discuss this split.) Thus, the Court analyzed *The Bee's* application for writ relief under the factors set out in *Bauman v. U.S. District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). The first *Bauman* factor was satisfied because *The Bee* had no other avenue for relief. The second factor (damage or prejudice to petitioner) was satisfied because *The Bee* was denied access to presumptively open documents.

The District Court's Order Sealing The Proffer Letters Was "Clear Error" Because There Were No "Compelling Privacy Interests" Present

The third "and most important" *Bauman* factor (clear error) was satisfied because the district court's findings "do not point to a compelling privacy interest." The Ninth Circuit held that the public official "has no privacy interest in freedom from accusations, baseless though they may be, that touch on his conduct in public office or in his campaign for public office." Likewise, the private individual, who did much business with public bodies, had "no privacy interest in allegations, baseless though they may be, bearing on the way he does business with public bodies."

Injury To Official Reputation Is An Insufficient Reason For Sealing The Proffer Letters

The Ninth Circuit also held that "injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" (citing *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 [1978].) The Ninth Circuit observed that "[s]ilence enforced upon the press to protect the reputation of judges [as in *Landmark*] is more likely to 'engender resentment, suspicion, and contempt much more than it would enhance respect'." It held that "[t]he same is true of public officials and of real estate developers engaged in projects requiring governmental approval."

The Ninth Circuit noted that a decent newspaper will not publish Nathanson's accusations without also noting the government's and the district court's skepticism about Nathanson's credibility. "If less scrupulous papers omit these significant doubts, these papers themselves will be of a character carrying little credibility."

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Ninth Circuit Holds That Privacy And Official Reputation Are Not Compelling Interests Justifying Sealing Presumptively Open Court Documents

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The Press Must Be Free To Monitor The Courts By Access To Their Records

The Ninth Circuit held that the question of why Nathanson had obtained a significant reduction in his sentence was a subject of legitimate public interest. Accordingly, *The Bee* had a right to explore and to publish the relevance of the proffer letters to the reduction.

The fifth *Bauman* factor — the importance and newness of the issue — was also satisfied. Indeed, the Ninth Circuit held that the press must be free to monitor the courts by access to their records. The application of this principle to proffer letters is new.

Future Proceedings.

As four of the five *Bauman* factors were present, the Ninth Circuit granted *The Bee's* writ of mandamus, vacated the district court's closure order, and remanded the case with instructions to unseal the proffer letters and make them publicly available. At this time, it is unclear whether the public official and the private citizen will seek further appellate review.

Rex Heinke and Cynthia E. Tobisman of Greines, Martin, Stein & Richland, LLP in Beverly Hills and Charity Kenyon of Riegels, Campos & Kenyon in Sacramento represented petitioner McClatchy Newspapers, Inc., dba The Sacramento Bee. Mr. Heinke has now joined Akin, Gump, Strauss, Hauer & Feld, LLP in Los Angeles.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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UPDATE: Ashcroft Names Panel on "Leaks"

Attorney General John Ashcroft has named an interagency task force to study the "problem" of government leaks, and to report to Congress by May 1.

The creation of the task force was mandated by the intelligence spending legislation for fiscal year 2002. The provision requires the attorney general to "carry out a comprehensive review of current protections against the unauthorized disclosure of classified information," and to assess "the efficacy and adequacy of current laws and regulations against the unauthorized disclosure of classified information, including whether or not modifications of such laws or regulations, or additional laws or regulations, are advisable ...." Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108, § 310 (signed Dec. 28. 2001).

Ashcroft announced the creation of the task force on Dec. 14 — the day after the final version of the legislation was passed by the Senate, following final House passage on Dec. 12 — although President Bush did not sign it into law until two weeks later.

In a press release announcing formation of the task force, Ashcroft is quoted saying:

> Leaks of classified information do substantial damage to the security interests of the nation. As a government, we must try to find more effectively (sic) measures to deal with this damaging practice, including measures to prevent it.

According to the release,

> [t]he task force will examine ways in which protection for classified information could be improved throughout the federal government. This would include whether new legislation is needed, whether personnel recommendations and processes need to be modified or tailored to address the specific and particular needs of the intelligence community, and the impact of new technology on the government's ability to control classified information.

The statute provides that the report shall be unclassified, although it may include a classified appendix.

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UPDATE: Some Reagan Papers Released

The Ronald Reagan Presidential Library and Museum released some internal Reagan Administration documents on Jan. 3, after almost a year of delays requested by the Bush Administration and after the documents had been reviewed by administration officials.

The 8,000 pages released by the library are just a portion of the more than 68,000 pages of confidential communications between Reagan and his advisors which were originally due to be released on Jan. 20, 2001. This was 12 years after Reagan left office, the maximum period allowed under the terms of the Presidential Records Act of 1978, Pub. L. No. 95-961, 92 Stat. 2523-27, codified as amended at 44 U.S.C. §§ 2201-7. The Reagan documents were the first subject to the Act.

An executive order issued by Reagan two days before he left office required the Archivist of the United States to give both the sitting and former presidents 30 days notice of the impending release of that former president's records. Within that period, the sitting president, upon the recommendation of the Counsel to the President or the Attorney General, could either request a delay in the release of the records, or order that the records be withheld indefinitely under a claim of executive privilege. *See* Exec. Order 12667, 54 Fed. Reg. 3403 (1989).

The National Archives notified the current administration of the release of the Reagan paper in February – behind schedule – and gave it 30 days to respond. On March 23, a letter from Counsel to the President Alberto Gonzales requested an extension until June 21; subsequent letters requested a second extension until August 31, then a third, indefinite extension. Finally, on Nov. 1, President George W. Bush issued a new executive order, Exec. Order 13233, 66 Fed. Reg. 56025 (2001), which gave both current and former presidents the authority to keep presidential records secret for indeterminate periods.

Under the new order, the sitting and former presidents have 90 days to review the material, after which either may block disclosure of the documents on the basis of executive privilege. *Id.*, § 3.

As the documents were released, White House officials said that their review of the remaining documents would be completed by the end of January, and Reagan Library director Duke Blackwood said that the records that are not withheld would be publicly available by the spring.

Under the executive order, any records that are withheld are available only to the sitting President, the Congress, and the courts as provided for under existing law, *id.*, § 6; others can take their cases to court, but the records will be disclosed only by "a final and nonappealable court order." *Id.*, § 3(d)(1)(i), (ii), § 6.

Despite the release, a coalition of historical associations, and public interest groups including the Reporters Committee for Freedom of the Press vowed to pursue their lawsuit challenging Bush's order. *See American Historical Ass'n v. Nat'l Archives and Records Admin.*, No. 1:01cv02447 (D.D.C. filed Nov. 28, 2001).

And although historians, academics, public interest advocates and Republican members of Congress urged Bush to rethink the order at a Nov. 6 hearing of the House Subcommittee on Government Efficiency, Financial Management and Intergovernmental Relations, no legislation on the matter has been introduced in the Congress.

Ashcroft Names Panel on "Leaks"

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The study provision was a substitute for a provision advocated by members of the Senate Intelligence Committee from both parties. That bill would have made federal government employees and former government employees who disclosed or attempted to disclose "properly classified" information subject to a fine and/or imprisonment for up to three years. See *LDRC LibelLetter*, Oct. 2001, at 57. President Clinton vetoed a budget bill containing such a provision in 2000. *See LDRC LibelLetter*, Nov. 2000, at 26.

The task force includes representatives of the CIA Director, the Secretary of State, the Secretary of Defense, the Secretary of Energy and other government agencies that deal with classified information.

Media Seek Access in Court and to Military

Court Says There May Be Right of Access to Military

Court Rejects Flynt's Move for Military Access

A federal judge has held that, in an appropriate situation, the media may have a First Amendment right of access of American military operations, "subject to reasonable regulations."

The statement came in a Jan. 8 ruling as Federal District Court Judge Paul Friedman rejected *Hustler* magazine publisher Larry Flynt's attempt to get a preliminary injunction in his lawsuit over restrictions on access to troops in Afghanistan. *Flynt v. Rumsfeld*, No. 01-CV-2399 (D.D.C. ruling Jan. 8, 2001) (denying preliminary injunction).

Prior to the ruling, Flynt insisted that his lawsuit was "not a publicity stunt." He is represented in this case by Washington, D.C. attorney John Perazich.

"People are naive," Flynt told *The Washington Post*. "They don't realize when they see these people (reporters) broadcasting from Afghanistan, they are in remote locations, isolated from the front lines."

Flynt sued after sending two letters to the Pentagon seeking to accompany American troops on ground combat operations. In response, the Pentagon offered access to humanitarian missions and airstrike flights.

In court, Justice Department lawyer John Griffiths argued that "the coverage in Afghanistan has been extensive. ... The First Amendment does not obligate the federal government to assist the media in its newsgathering."

"The court is persuaded that in an appropriate case there could be a substantial likelihood of demonstrating that under the First Amendment the press is guaranteed a right to gather and report news involving United States military operations on foreign soil subject to reasonable regulations," Judge Friedman wrote.

But, in Judge Friedman's opinion, this was not that case. Besides stating that it "is far from clear" that Flynt will prevail, Judge Friedman wrote that "(i)t does not appear that plaintiffs have in fact been denied they access they seek or that they would have been denied such access if they had pursued the matter fully through available military channels," noting that the Pentagon had not explicitly rejected Flynt's request, and had suggested that Flynt contact a specific official to arrange access to the operations offered. Thus he denied plaintiff's motion for a preliminary injunction.

Nevertheless, Judge Friedman's statement that there may be a First Amendment right of access is a welcome perspective in a field where there are relatively few judicial precedents.

In a similar suit that Flynt filed over the invasion of Grenada in 1983, Judge Oliver Gasch of the Federal District Court for the District of Columbia dismissed the case as moot, writing that

> The decision whether or not to impose a press ban during military operations and the nature and extent of such a ban if imposed are matters that necessarily must be left to the discretion of the commander in the field. ... A decision whether or not to impose a press ban is one that depends on the degree of secrecy required, force size, the equipment involved, and the geography of the field of operations. Moreover, the scope of press exclusion, if any, will differ somewhat in every case. Under such circumstances, where the decision being scrutinized is committed to the broad discretion of the commander in the field and is contingent upon a wide range of factors determinable only with reference to the particular military operation being undertaken, a declaratory judgment would be futile, and perhaps even dangerous, because of its limited value as a guide for future conduct.

Flynt v. Weinberger, 588 F. Supp. 57, 60-61, 10 Media L. Rep. 1978, 1981 (D.D.C. 1984).

The D.C. Circuit affirmed the district's court's finding of mootness, although it chided the lower court because "the district court, while purporting to dismiss the case for lack of jurisdiction, improperly considered and offered judgments on the underlying merits of the dispute." *Flynt v. Weinberger*, 762 F.2d 134, 135, 11 Media L. Rep. 2118, 2119-20 (D.C. Cir. 1985). The appellate court added that the plaintiffs should be permitted to amend their complaint to avoid mootness.

During the Gulf War, Federal District Court Judge Leo-

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Media Seek Access in Court and to Military

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nard Sand of the Southern District of New York wrote that there may be First Amendment issues at stake.

> If the reasoning of these recent access cases were followed in a military context, there is support for the proposition that the press has at least some minimal right of access to view and report about major events that affect the functioning of government, including, for example, an overt combat operation. As such, the government could not wholly exclude the press from a land area where a war is occurring that involves this country. But this conclusion is far from certain since military operations are not closely akin to a building such as a prison, nor to a park or a courtroom.

Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558, 1571, 19 Media L. Rep. 1257, 1268 (S.D. N.Y. 1991).

But ultimately Sand concluded that "[s]ince the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation." *Id.* He also declined to rule on the constitutionality of the pool system imposed by the military on the press in that conflict, for similar reasons. *Id.* at 1574, 19 Media L. Rep. at 1270.

Pentagon Eases Access, But Skepticism Remains

As Larry Flynt sought an injunction to get access to American troops in Afghanistan, the Pentagon began to ease media access to Afghanistan by announcing in late December that it was removing the pool requirement for the media in Afghanistan. And in early January, journalists accompanied six teams of American troops on missions exploring caves vacated by the Taliban and al Qaeda..

The changes came as most networks replaced correspondents who had covered the war from the beginning with fresh reporters.

Pentagon spokeswoman Victoria Clarke also announced a procedure to allocate media seats on trips by Defense Secretary Donald Rumsfeld. Under the plan, the Associated Press will receive first priority, followed two television representatives. The priority list then reads as follows: Reuters; Agence France-Presse; a "large newspaper/wire service/magazine" (defined as an outlet having an audited circulation of more than 500,000 that "cover[s] the Pentagon on a regular basis,"); a "small newspaper/wire service/magazine" (not meeting criteria for a "large" organization); then two more television journalists, a second large media outlet, then radio, then a still photographer, and then another wire service (which would rotate among the services).

Within each category, each media outlet that expressed interest was placed on a list in a random order. (The complete lists for each category are available online at http://www.defenselink.mil/news/Jan2002/d20020110sdtrav.pdf.) When trips arise, outlets at the top of each list will be given an opportunity to fill an available slot in their category. An outlet will then move to the bottom of the list, whether it accepts or declines the slot. Whether an outlet "cover[s] the Pentagon on a regular basis" will be determined "based on their deliberate and long-term commitment (prior to September 11, 2001)."

If more than 13 seats are available, they will offered to the media in the following category order: large newspaper/wire service/magazine; small newspaper/wire service/magazine; television; radio; photographers; then wire services.

The issue of which reporters were allowed to travel with Rumsfeld arose when the Pentagon selected ten reporters — six television reporters and four print journalists, but no wire service reporters — to accompany him on a tour of Middle Eastern countries in early October.

But an incident in mid-January and two in late December engendered more skepticism.

The latest incident came on Jan. 11, as prisoners were moved from Afghanistan to the U.S. Navy Base at Guantanamo Bay, Cuba, where they are to be held pending trial. American military commanders in Kandahar allowed print and television photographers to take pictures as 20 prisoners boarded a C-17 cargo plane for the flight to Cuba, under the agreement that

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the photographers would not transmit the photos until given permission. But after the plane left, the photographers were told not to transmit the pictures.

At the Pentagon, spokesman Rear Adm. Craig Quigley said that the order was made after the Red Cross objected, saying that allowing the photos would violate the Geneva Convention on the treatment of prisoners. But International Red Cross officials said that they had not raised any specific objections, although it does have a general stance on the issue.

Apparently the only outlet to use the images was CBS, which 10 seconds of grainy video during the "CBS Evening News."

A second incident occurred on Dec. 31 when the Associated Press reported that American Marines had been seen leaving their base near Kandahar in combat gear, and interim Afghani President Hamid Karzi said that a mission was underway to capture Taliban leader Mullah Mohammed Omar. The AP photographer who saw the Marines was barred from taking pictures. But Rear Adm. Craig Quigley of the U.S. Central Command denied that any such mission was taking place when questioned by reporters at the Command's headquarters in Tampa, Fla.

Pentagon officials later said that the Marines had been sent to gather only information, and denied any effort to deceive reporters. "We try hard to give you information, when we can, that tells you something has happened when it won't do any harm to a future operation," Clarke told reporters at the Pentagon on Jan. 2. "But in general, we're not getting into operational details."

"Did the U.S. military spokesman lie about...?" a reporter asked Clarke. "Oh, absolutely not. Absolutely not," she responded, cutting off the question.

The dispute over the Marine mission came about a week after three photographers — two from the Associated Press, and one from *The New York Times* — were detained at gunpoint by Afghan tribal fighters, with what the photographers said was the tacit approval of nearby American troops. The Afghanis allowed the photographers to leave after 45 minutes, but took the disks containing pictures they had taken with their digital cameras.

Previously, in what Pentagon officials later called a mistake, pool reporters at the Marine base "Camp Rhino" were temporarily confined to keep them from reporting on casualties caused by friendly fire.

Most Flight Restrictions Lifted

On Dec. 19, the Federal Aviation Administration lifted most of the restrictions on news and traffic flights imposed after Sept. 11.

While some restrictions remain in effect in New York, Washington, and Boston, the FAA removed them in 27 other large cities nationwide. *See* FDC 1/3359 (Dec. 19, 2001). The restrictions originally prohibited news flights from operating with 25 nautical miles of 30 major airports; the limit was reduced to 18 nautical miles in mid-October, and by early December the FAA had granted more than 2,000 waivers to individual operators.

The FAA actions mean that planes and helicopters outside of New York, Washington and Boston may resume covering news and traffic stories normally, although there are still restrictions around locations such as major sports arenas and nuclear power plants. *See* FDC 1/3352 (Dec. 19, 2001), FDC 1/3353 (Dec. 19, 2001).

In Washington, flights are still largely restricted within 15 statute miles of the Washington Monument. In New York, the restricted areas are within two nautical miles of lower Manhattan and eight nautical miles of LaGuardia Airport; in Boston, the restrictions still apply in and around the shores of Massachusetts Bay and within four nautical miles of Logan Airport. FDC 1/3354 (Dec. 19, 2001).

Second Suit Filed

While the lawsuit brought in November by the Global Relief Foundation against various news organizations which incorrectly reported that the foundation's assets had been frozen by the federal government still appears to be first lawsuit against the media stemming from coverage of the terrorist attacks and their aftermath, another libel suit was filed earlier against non-media defendants.

Irshad Khan and his uncle Jafar Khan sued over e-mails circulated within suburban Chicago which stated that they displayed a poster of Osama Bin Laden on the wall of their gas station in Naperville, Ill. Among the defendants who allegedly circulated the rumor via e-mail or word of mouth was an employee of Benedictine University.

The lawsuit was filed on Sept. 24.

Universal City Studios Inc. v. Corly: Further Consideration

The Second Circuit Has Put the First Amendment in the Analysis

By Rick Kurnit

The movie studios may be too quick to celebrate their victory in the Second Circuit in upholding the constitutionality of the Digital Millennium Copyright Act's provisions prohibiting trafficking in technology designed to circumvent technological protection measures. The Second Circuit very significantly held in this case that computer code is speech and as such is entitled to protection under the First Amendment.

The Court went on to hold that any restrictions on publishing code must meet the test the Supreme Court laid down in *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994)*, and it further clarified that the test would be whether the governmental action or statute does not "burden substantially more speech than is necessary to further the government's legitimate interests" *Id*. at 662. These holdings lay the ground rules for what will be an ongoing battle between those seeking to protect the property interests in intellectual property and those championing the public domain and maximum scope for fair use.

The movie studios may be too quick to celebrate their victory in the Second Circuit

Balancing Property & Speech

At issue in *Corly* was an injunction prohibiting posting of DCSS code by an on-line hacker-oriented magazine and additionally prohibiting the site from providing links to other sites which provide DCSS. (DCSS in the code that de-encrypts DVDs that are protected from copying by CSS encryption code.)

The Second Circuit's level of concern about protection of property interests justifying enjoining speech is indicated by the extraordinary order of the Court following the oral argument requiring responses to fourteen questions. They focused on the available technology that might permit access for fair use and still preclude piracy.

The Court's decision suggests that the absence of evidence that the injunction at issue was sought in order to suppress fair use or otherwise inhibit commentary relieved the Court of the need to determine whether the statute itself fails the *Turner Broadcasting* test, but the implication is strong that such evidence would require renewed scrutiny of the DMCA's prohibition on publishing DCSS or other computer code.

The Second Circuit ultimately concluded that the DMCA posed substantial First Amendment issues. The Court stated that it was forced to "choose between two unattractive alternatives: either tolerate some impairment of communication in order to permit Congress to prohibit decryption that may lawfully be prevented, or tolerate some decryption in order to avoid some impairment of communication." Thus, in upholding the injunction against posting of DCSS the Second Circuit left for a later case whether it is technologically practical to impose a requirement, similar to the Audio Home Recording Act's requirement, that encryption technology for DVD's provide for single copy or initial copying to accommodate fair use.

Linking

Judge Kaplan, in the District Court, was clearly troubled by the injunction against linking to any site that contained DCSS. In an effort to minimize the infringement on First Amendment rights, he imposed the highest possible standards of proving improper intent — *the New York Times v. Sullivan* standard for imposing liability for libel. Thus, he recognized that the Court's grant of injunctive relief to bar linking to certain content in order to protect property interests constitutes generally prohibited state action against speech based on the content of the speech.

Instead of addressing Judge Kaplan's concerns, the Second Circuit indulged in the whimsical notion that the author or editor of site's content could create a second site purged of DCSS to which Corley could then link. Quite apart from the practicality of this notion, the Court ignores the significance of a court order that determines the editorial content of a site as a condition to avoiding a government blockade on interested adults obtaining access to information. It should be sufficient that code itself is speech, but certainly inhibiting discussions of CSS and DCSS constitutes a substantial burden on free speech.

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The danger of the DMCA's prohibition on "trafficking" in information thus becomes clear. Linking is essential to the flow of information on the internet. The injunction against linking is truly an injunction against speaking.

In upholding the injunction against linking to sites that provide DCSS the Second Circuit side-stepped the First Amendment issues. In glibly arguing that any site that wanted to link to Corley's site could separate the DCSS from the other content of its site, the Court satisfied itself that legitimate content could still be published.

Here again, the Court recognized that the result of its decision to apply *Turner* to code is that there must be a means by which an accommodation can be achieved between legitimate First Amendment interests and protection of property interests.

Again, the significance is that the Court did not reject the validity of the constitutional challenge based upon the encryption restricting legitimate fair use. What the Court said was that the current injunction did not bar fair use because of the continuing availability of earlier technologies that permit copying off a monitor. The Court relied on its finding that there was insufficient evidence that the First Amendment interest were impermissibly burdened at this point in time. But significantly the Court rejected plaintiffs' contention that those concerns were frivolous.

The Court relied on its finding that there was insufficient evidence that the First Amendment interest were impermissibly burdened at this point in time.

Potential Impact on Fair Use

The impositions on fair use or use of material in the Public Domain caused by digital encryption of intellectual property range from the obvious inhibition of discussion by computer science scholars conducting research on protection techniques and consumer buffs discussing hacking solutions and the inadequacies of software codes such as CSS to, at the extreme, the potential problem that large media conglomerates will attempt to remove material from the public domain by including some new material and then locking the material up. Then as old technologies fade away and access is otherwise not available the public domain will be practically foreclosed. In the same vein, as increasing percentages of material protected by copyright are distributed only on new, protected formats, the ability as a practical matter to make fair use of that material will decrease.

The Supreme Court's decision in *Campbell v. Acuff-Rose, Inc., 510 U.S. 591 (1994)* which embraced Pierre Laval's seminal article, *103 Harv. L. Rev. 1105 (1990)*, urging that injunctions against copyright infringement should not be automatic has made the analysis of copyright infringement and fair use more complicated. While "slavish copying" or pure piracy may be an easy matter for injunctive relief, the distinguishing transformative use from piracy is not so simple. Courts are becoming increasingly sensitive to striking a First Amendment balance between copyright interests and competing interests of the public domain and fair use, and efforts to protect against piracy are required to give maximum breathing space to fair use.

Technology May Give the Answer

Ultimately, the limited duration of copyright and fair use could be defeated by the fact that the only publication of the new copyrighted material is in a protected format that could not be reproduced in a technologically acceptable fashion upon the expiration of copyright. The suggestion by the court that scholars can set up a camcorder and videotape off a monitor the image coming from a DVD is at best a stop gap. For fair use to flourish there must be an ability to use material in a technologically relevant fashion.

Although the Court concluded that we have not yet advanced technologically to an entirely digital format, it cannot be doubted that old technologies which are more cumbersome, less efficient, less competent will disappear and ultimately other opportunities to access digital material will be unavailable. When that occurs, the Second Circuit's decision suggests the courts would have to revisit the DMCA and give less deference to the legislative determination to restrict access as a means of protecting against piracy.

At the end of the day the Second Circuit recognized that

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cases like this pose a difficult balancing of First Amendment interests against protection of the copyright interests. But the court recognized that technological solutions will result in requiring exceptions to the heavy handed solution of the DMCA. The First Amendment mandates that where feasible, protection of copyright through encryption must provide reasonable access to legitimate fair use.

As a middle level Appeals Court in California clearly held, First Amendment interests must be protected against total suppression in service of property rights. *DVD CCA v. Bunner CAL. APP. LEXIS 1179* (CAL. CT. APP. 6th Dist. November 1, 2001). In that case the court was asked to apply California's trade secret law to preclude publication of DCSS. The Court concluded that the "statutory right to protect its economically viable trade secret is not an interest that is "more fundamental" than the First Amendment..." The Second Circuit was similarly uncomfortable with holding that any legitimate First Amendment interest would be sacrificed to mere convenience of the property interest seeking an injunction but the Second Circuit dodged the issue... for now.

The future will present the courts with technology that will permit greater accommodation for fair use and greater sensitivity to First Amendment interests. That technology will limit the right of copyright owners to prevent access and bar totally the ability to copy their material for constitutionally protected purposes. The Second Circuit's analysis does no more than hold that the technology has not yet arrived.

There can be little doubt that upon showing that DMCA's protections serve to inhibit commentary, criticism, fair use and transformative use that is otherwise protected the Court's will deny injunctive relief. In time, owners of copyrighted material must allow for limited copying or the DMCA's prohibitions on communicating code and discussing encryption technology will be unconstitutional. The protection of property interest in copyright must accommodate First Amendment interests, and technology will provide the means for a finer balance.

Rick Kurnit is a partner at Frankfurt Garbus Kurnit Klein & Selz, New York, New York, which represented defendants in this matter.

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