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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through January 23, 2004

Texas Supreme Court Reinstates Summary Judgment for *Forbes*

Unanimous Opinion Finds No Evidence of Actual Malice in 11-year old Business Disparagement Lawsuit

By Peter D. Kennedy

An Eleven Year-old Case Comes to an End.

The Texas Supreme Court has put to rest an 11-year old business disparagement lawsuit complaining about an October 1991 *Forbes* magazine article written by William P. Barrett. *Forbes Inc. v. Granada Biosciences, Inc.*, – S.W.3d –, 2003 WL 22999362 (Tex. December 19, 2003) (available at www.supreme.courts.state.tx.us/historical/2003/dec/010788.pdf).

Forbes' article described the "Incredible Shrinking Empire" of Granada Corporation of Houston, Texas, a conglomerate of interlocking business entities that strove to create a vertically-integrated, science-based cattle breeding and marketing operation. Once touted as an up-and-coming behemoth, *Forbes*' November 11, 1991 issue chronicled the company's legal and financial woes. Shortly after the article came out, the stock of the two publicly-traded entities in the Granada conglomerate, Granada Foods Corporation and Granada Biosciences, Inc., took a nose dive. Almost a year later, the two companies and the husband-and-wife management team of David and Linda Eller sued for business disparagement and libel.

The lawsuit has a tortuous history – two summary judgment motions, two trips to the court of appeals, and two trips to the Texas Supreme Court. On the second round of appeals, the Houston Fourteenth Court of Appeals did what has become a very rare thing in Texas – held that a fact issue existed as to *Forbes* and Barrett's actual malice in publishing the story. *See* "Texas Appeals Court Reverses Summary Judgment for *Forbes*," May 2001 LDRC LibelLetter at 27. The basis for the court of appeals' holding was somewhat obtuse, holding that there was a fact question as to the defendants' "state of mind at the time of publication," but without specifying what evidence showed that a false statement was published knowingly or with substantial doubts as to its truth. *See Granada Biosciences, Inc. v. Forbes Inc.*, 49 S.W.3d 610, 621-22 (Tex. App. – Houston [14th Dist.] 2001), *rev'd*, *Forbes Inc. v. Granada Biosciences, Inc.*, – S.W.3d –, 2003 WL 22999362 (Tex. December 19, 2003).

The Texas Supreme Court, in a unanimous 8-0 decision, reversed on actual malice grounds, making some useful observations along the way.

Actual Malice Standard Applied in a Business Disparagement Case

The corporate plaintiffs, Granada Foods and Granada Biosciences, conceded that they were public figures, and based on that concession the court of appeals had concluded that the First Amendment required the plaintiffs to offer evidence of constitutional actual malice to avoid summary judgment. Because the Granada entities did not challenge this ruling, the Supreme Court "assume[d] without deciding" that *New York Times v. Sullivan* "applies in a public figure's business disparagement suit against a media defendant," but noted that the United States Supreme Court had applied the standard in contexts other than libel claims, including a product disparagement claim in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

Single-Publication Rule Irrelevant to Determining Actual Malice

The *Forbes* article contained one acknowledged error that was corrected in the subsequent issue: although the article correctly reported than an Edward Bass had filed suit against Granada, it incorrectly identified him as the "Fort Worth near-billionaire," when in fact it was a different Edward Bass. The Granada entities claimed that it was more harmful to their reputation to be sued by a "near-billionaire" than an average person, and that the statement was therefore disparaging.

On Friday, October 25, 1991, Barrett, the article's author, faxed to David Eller, Granada Corporation's President, a copy of the *Forbes* article and then had a telephone conversation with him. During that conversation, Barrett acknowledged that he had just learned of the Edward Bass error. The Granada entities claimed that this admission, plus statements made to Barrett by Eller during the Friday telephone conversation constituted some evidence that the article was pub-

(Continued on page 4)

TX Supreme Court Reinstates Summary Judgment for *Forbes*

(Continued from page 3)

lished knowing it was false or with substantial doubts as to its truth.

The court of appeals had found a fact question as to Barrett and Forbes' "state of mind at the time of publication" in part by applying the single publication rule, which holds that for statute of limitations purposes, "publication is complete on the last day of the mass distribution of copies of the printed matter." *See Holloway v. Butler*, 662 S.W.2d 688, 692 (Tex. App. – Houston [14th Dist.] 1983, writ ref'd n.r.e.). The court of appeals had reasoned that if Barrett had learned of errors in the story on Friday October 25, that was before the *last* day of mass distribution, and so there was some evidence of knowledge of falsity "at the time of publication."

The Texas Supreme Court rejected this logic, noting that it was undisputed that by Friday October 25 "the article had been 'locked up' – printed and mailed to subscribers" and thus not subject to change. It held that the single publication rule is inapplicable to the determination of whether a publisher had actual malice "at the time of publication." The Court held that "[t]he single-publication rule's definition of the publication for limitations purposes is clearly designed to protect publishers from repeated liability based on old publications that might be reprinted or back ordered," and that "[i]t has nothing to do with determining the publisher's state of mind at the time of publication." The Court stated:

> Applying the single-publication rule in this context could lead to virtually uncontrollable liability and potentially absurd results. For example, a media defendant could be held liable for knowingly publishing false information even if it did not become aware of the error until the article has been printed and mailed to subscribers or otherwise distributed. Such a result would have an impermissible "'chilling' effect … antithetical to the First Amendment's protection of true speech on matters of public concern." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986).

The Court held that because "the focus of the actual-malice inquiry is the defendant's state of mind during the editorial process," "[e]vidence concerning events after an article has been printed and distributed, has little, if any, bearing on that issue."

Imprecise Description of a Corporate Conglomerate is not Evidence of Actual Malice

The two Granada entities also complained that the *Forbes* article contained negative statements about "Granada" that Forbes and Barrett knew did not apply to Granada Foods and Granada Biosciences. They argued that by failing to specifically distinguish the public corporations from other entities within the Granada group, Forbes had created an implication that those statements also applied to the public entities. Barrett had testified that he used "Granada" to describe "the organization of subsidiaries, affiliates, limited partnerships, joint ventures and other business organizations that were managed or otherwise under the direction and control of David Eller" Granada Foods and Granada Biosciences complained that "Forbes should have included qualifying language specifically excluding GBI and GFC whenever the article referred to 'Granada.'"

The Supreme Court held that, at most, Forbes was "guilty of using imprecise language in the article – perhaps resulting from an attempt to produce a readable article," quoting the U.S. Supreme Court in *Bose*. It noted that "Barrett was charged with the task of producing a readable article about an extremely complicated network of business entities related to the Granada Corp," reiterated its prior holdings that "the media's poor choice of words" does not constitute evidence of actual malice. Although the Court chastised Forbes for the alleged "careless use of the generic 'Granada,'" one wonders whether the Court had in mind another complex conglomerate of interlocking business entities that more recently has been subject to extensive reporting, and the difficulty of producing readable articles without using an overarching descriptive name: Enron.

No motion for rehearing has been filed, and so it appears that this 11 year-old saga may have drawn to a close.

Granada Biosciences, Inc. and Granada Foods Corporation are represented by Michael D. Sydow and Ralph S. Carrigan.

Peter D. Kennedy is a partner at George & Donaldson, LLP in Austin, Texas. Together with David H. Donaldson he represented Forbes Inc. and William P. Barrett in this case.

North Carolina Television Station & Reporter Win Trespass Trial

On December 22, 2003 after a two day trial, a North Carolina jury returned a verdict in favor of WLOS-TV and a reporter on civil trespass claims based on videotaping inside a nursing home. *Havon, Inc. v. Chesapeake Television, Inc.*, No. 01 CVS 3705 (N.C. Super. Ct. jury verdict Dec. 22, 2003). The Buncombe County jury accepted the station's defense that the reporter had obtained permission from an employee at the home to enter and videotape.

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The video was used in a July 2001 news report on the treatment and condition of patients in the home. The faces of the patients taped were blurred, as was footage of medical records and prescription bottles. Plaintiff, Havon Inc., the owner of the Pleasant Cove Assisted Living Facility in Candler, North Carolina, did not dispute the truth of the broadcast.

Trespass Claim Based on Filming in Nursing Home & Return Visit to Parking Lot

Plaintiff's trespass claims were based on two newsgathering efforts of reporter Amy Davis, who has since left the station. On May 2, 2001 near midnight, Davis, accompanied by a former Pleasant Cove employee, was allowed into the home by a nursing assistant cooperating with the reporter's investigation. Davis was escorted through the home and into patients' rooms by the former employee. Davis brought a hand-held video camera and filmed some patients who were sleeping and some patient medical files.

Plaintiff also claimed that Davis and a cameraman trespassed two months later when they briefly entered the home's parking lot. Plaintiff alleged that after learning of the first entry it barred the reporter from the premises.

(Continued on page 6)

NC Television Station & Reporter Win Trespass Trial

(Continued from page 5)

Plaintiff became aware of the reporter's first entry into the home prior to the broadcast when WLOS showed portions of the video to a company official during an interview for the report. It was also shown to the local representatives of the Department of Social Services.

Broadcast Was Temporarily Enjoined

On July 13, 2001 plaintiff obtained an unusual temporary restraining order barring WLOS from broadcasting any portion of the videotape. But on the subsequent hearing on a motion for a preliminary injunction on July 25, 2001, the court held there were no grounds to restrain broadcast of the videotape provided the station blurred the patients' faces and any personal medical records. According to one news report, the judge also chided WLOS for not reporting any suspected abuses of patients directly to state authorities, although the station made such a report on May 23, 2001 following the completion of Amy Davis's investigation. WLOS broadcast the news report that evening. The report included portions of the videotape and an on air interview with a resident of the home who complained about his treatment.

Trial on Trespass Claims Focused on Permission

Plaintiff initially named several patients as co-plaintiffs, alleging their right to privacy was violated by WLOS. It also named the two employees who had cooperated with the reporter as defendants. The patients and former employees were dropped from the case before trial. Defendants at trial were WLOS, the station's news director and its general manager at the time of the broadcast, and reporter Amy Davis.

The trial began on December 15, 2003 before Judge Andy Cromer. In the opening statement, plaintiffs lawyer told jurors that the main issue in the case was "whether the media is excused from abiding by the laws that the rest of us have to abide by," according to a report in the *Asheville Citizen-Times*. This theme was repeated in plaintiff's closing argument which described the issue in the case as "whether the press has special privileges when they gather the news." *Id.*

WLOS's defense was that its reporter had permission to enter the home and videotape patients for its report on conditions there. Testimony at the two-day trial focused on how Davis obtained access to the facility. Melissa Forster, who was a nursing assistant and the supervisor in charge at the home at that time, testified that she let Davis and former employee Stephanie Buckner into the facility and that she had the authority to do so. While she testified that she told Buckner that Davis should not bring in a camera, she acknowledged that she did not object when Davis entered with a camera and began videotaping. She also explained that she quit her job at the home the next day because she knew she would be fired for allowing Davis inside, but felt it was more important that the conditions of residents be disclosed.

The judge instructed the jury that if Foster had the authority to allow Davis to enter the home, and if a reasonable person would believe that she had such authority, no claim for trespass could lie. After nine hours of deliberation over two days, the jury returned a verdict for WLOS and the individual defendants.

The defendants were represented by J. Gary Rowe of Kelly & Rowe, P.A. in Asheville, North Carolina. Havon, Inc., was represented by Walter L. Currie and Cynthia S. Grady of Roberts & Stevens P.A., also in Asheville.

California Supreme Court Strongly Reaffirms Single Publication Rule

By Thomas R. Burke and Rochelle L. Wilcox

The California Supreme Court wrote the final chapter in a libel lawsuit brought by a witness from the O.J. Simpson grand jury proceedings by announcing a bright line test for the running of the statute of limitations. *Shively v. Bozanich*, 80 P.3d 676, 7 Cal.Rptr.3d 576 (Dec.22, 2003). In a decision by Chief Judge George, the Court strongly reaffirmed California's "single publication rule," embodied in California Civil Code § 3425.3, which provides that the statute of limitations for statements published in a book, newspaper or similar work commences on the first general publication of that work.

Grand Jury Witness Sued Over O.J. Book

Plaintiff Jill Shively sued several individual defendants, including a deputy district attorney in the Los Angeles District Attorney's Office, the County of Los Angeles and the author and publisher of a book about the O.J. Simpson case. Shively alleged that she was described as a "felony probationer" by the defendants on three occasions – the first two during allegedly confidential conversations and the third time when defendant William Morrow and Company published an account of these conversations in a book entitled *A Problem of Evidence*. Plaintiff alleged that she did not become aware of any of these defamatory statements until she actually bought and read a copy of the book more than one year after its publication.

Plaintiff's claims were dismissed by the trial court on statute of limitations and related grounds, but in a controversial decision the Court of Appeal reinstated the claims finding her causes of action accrued when she knew (or with reasonable diligence should have known) of the defamatory statements – a question for the jury to determine in this case. *See* 102 Cal.Rptr.2d 138 (Cal. App. 2 Dist. 2000).

The California Supreme Court reversed the "delayed discovery rule" used by the Court of Appeal to keep Shively's libel claims alive and held that all her claims were time-barred.

Single Publication Rule Applies

The Court reviewed the history of the single publication rule, explaining that it developed in response to the early common law rule that every sale of a book or newspaper was a "publication," beginning the statute of limitations anew. The Court illustrated the "difficulties" created by the early common law rule by referring to *The Duke of Brunswick v. Harmer* (Q.B. 1849), where a plaintiff was allowed to bring a libel action against a publisher after he discovered an allegedly defamatory statement that was published some 17 years earlier. "The early common law rule threatened a volume of litigation and a potential for indefinite tolling of the period of limitations that, these courts realized, would challenge the ability and willingness of publishers to report freely on the news and on matters of public interest." Under the single publication rule, "the cause of action accrues and the period of limitations commences, *regardless* of when the plaintiff secured a copy or became aware of the publication."

The Court found that generally, for defamation claims, the limitations period commences when the defamatory statement is "published" to a third party. The Court rejected Shively's argument that the discovery rule should apply to toll her claims, pointing out that "the discovery rule most frequently applies when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand." The discovery rule is "an exception based upon equity" and, as other courts uniformly have held, does not apply to libels published in books, magazines and newspapers. Summarizing its analysis, the Court explained:

> If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book ... on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule.

The Court concluded that all of Shively's claims – even those based on the private communications – were barred because the private communications were relayed in the

(Continued on page 8)

CA Supreme Court Strongly Reaffirms Single Publication Rule

(Continued from page 7)

book, triggering the statute of limitations for all claims. Summarizing that "any equitable ground supporting the application of the discovery rule to the earlier defamations ceased to exist once the book was published and was distributed to the general public," the Court directed entry of judgment in defendants' favor.

Plaintiff was represented by Gregory Charles Hill and Monique Shana Hill of Hill & Hill in Playa Del Rey, California. The non-media defendants were represented by Cindy S. Lee of Franscell, Strickland, Roberts & Lawrence.

Thomas R. Burke is a partner in Davis Wright Tremaine in San Francisco and Rochelle L. Wilcox, an associate, in the firm's Los Angeles office. Together with Kelli L. Sager and Alonzo Wickers IV of the firm, they represented Amicus Curiae California Newspapers Publishers Association; Los Angeles Times Communications, LLC; The Copley Press, Inc.; ABC, Inc.; Magazine Publishers of America, Inc.; News America, Inc.; Cable News Network; National Broadcasting Company, Inc.; and Time Inc.

No Access to Ancillary Grand Jury Proceedings, California Court Holds

In a case of first impression in California, an appellate court held that grand jury secrecy rules apply as well to ancillary proceedings, denying a media request for access to information about a criminal investigation of Catholic priests for child molestation. *Los Angeles Times and Los Angeles Daily Journal v. Superior Court*, 114 Cal.App.4th 247, 7 Cal.Rptr.3d 524 (Cal. App. 2 Dist. Dec. 12, 2003). Specifically, the court held that there is no presumptive right of public access to motions to quash grand jury subpoenas, and supporting documents, and ordered that they be sealed "to the extent necessary to prevent disclosure of matters occurring before the grand jury."

Grand Jury Investigating Catholic Priests

The grand jury investigating allegations of child sex abuse against several Catholic priests in Los Angeles subpoenaed the Los Angeles Archdiocese for the priests' confidential personnel files. The priests moved to quash. On April 1, 2003, retired Judge Thomas Nuss, acting as a discovery referee, held a hearing on the motions almost entirely in open court. But on August 27, 2003 he reversed course and issued an order directing that all future hearings on motions to quash be sealed. On September 11, 2003, the *Los Angeles Times* and the *Los Angeles Daily Journal* moved to overturn the closure order because of the public interest in the case and the presumptive right of access to judicial proceedings.

Grand Jury Secrecy is General Rule

Judge Klein, with Judges Croskey and Kitching concurring, ruled that there is no presumptive right of access to grand jury proceedings under either California case law, its Rules of Court or the experience and logic test of *Press Enterprise v. Superior Court*, 478 U.S. 1 (1986). The question of first impression under California law was whether, and it what extent, ancillary proceedings, such as the motions to quash, were also covered by the presumption against access. Referencing other state decisions on the issue and the Federal Rules of Criminal Procedure, the court essentially adopted FRCP 6(e) (6) which provides: "Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury." This rule, according to the court, "provides an excellent model for our guidance on the matter."

As to how the rule is implemented, the court quoted with approval from *In re Motions of Dow Jones*, 142 F.3d 496, 501-02 (D.C. Cir. 1998), that "[a]s a matter of judicial administration, initially closing all ancillary proceedings makes good sense" because "in ancillary proceedings ... it may be difficult to determine at the outset whether grand jury matters might wind up being discussed." But courts will nevertheless be required to ultimately make "individualized determinations whether a given disclosure will ... tend to reveal some secret aspect of the grand jury investigation." *Quoting In re Grand Jury Proceedings*, 851 F.3d. 860 (6th Cir. 1988).

The court remanded the petition to the Superior Court to determine whether aspects of the motions to quash could be disclosed under this new standard.

Kelli L. Sager, Alonzo Wickers IV and Susan E. Seager of Davis Wright Tremaine in Los Angeles represented the *Los Angeles Times* and *Los Angeles Daily Journal*.

The Single Publication Rule Applies To Internet Publications In Georgia

By Chris Reilly

On January 8, 2004, the Georgia Court of Appeals joined the ranks of the appellate courts that have upheld the single publication rule in the Internet era. *McCandliss v. Atlanta Journal-Constitution*, No. A04A0361, 2004 WL 35763 (Ga. App. Jan. 8, 2004). In a case with a bizarre fact pattern, the court upheld the dismissal of an untimely defamation claim, holding that the single publication rule applied notwithstanding the fact that the challenged news article could be downloaded at any time from *The Atlanta Journal-Constitution's* Internet archive.

The plaintiff, Scott McCandliss, founded a "social club" called "Hipsters" that described itself as catering to large women and the men who admire them. McCandliss, in conjunction with his club, held a lingerie fashion show for "plus-size women" — an event which the Court of Appeals did not hesitate to characterize in its opinion as "a spectacle." Following the show, McCandliss was sued by one of the show's female models who claimed that he submitted her pictures to an adult magazine without her consent. *The Atlanta Journal-Constitution* published two articles about the woman's suit. Nearly two years after the two articles were published, McCandliss sued the newspaper over its use of a phrase that had appeared on the cover of the adult magazine: "5,000 Pounds of Sex-Starved Fatties." The plaintiff claimed that the newspaper articles damaged his reputation by falsely making it appear that he, not the magazine, had authored the phrase to describe the fashion show.

The Court rejected McCandliss' attempt to distinguish print newspaper articles from those that appear in the Internet archive.

The *Journal-Constitution* moved to dismiss because, under the single publication rule, McCandliss' suit was filed well beyond Georgia's one-year statute of limitations period for defamation claims. McCandliss admitted in his complaint that the articles were published in the newspaper approximately two years before he filed his lawsuit. However, he argued that the single publication rule did not apply to copies of the articles on the newspaper's Internet archives, and amended his complaint to identify a woman that he claimed had downloaded the stories from the Internet within one-year of the filing of his complaint. The trial court granted the *Journal-Constitution's* motion to dismiss holding that McCandliss' claims were time-barred.

The Court of Appeals affirmed the dismissal of McCandliss' libel, false light and negligent publication claims, squarely embracing the single publication rule**.** The Court rejected McCandliss' attempt to distinguish print newspaper articles from those that appear in the Internet archive, quoting at length from *Firth v. State of New York*, 98 N.Y.2d 365 (2002), including the passage in that opinion emphasizing that the need to prevent "endless retriggering of the statute of limitations" and "a multiplicity of suits" was "even more cogent" given the "exponential growth" and "worldwide" reach of the Internet.

The Georgia Court allowed McCandliss' belated tortious interference with business relations claim to survive the motion to dismiss holding that it is not governed by the one-year statute of limitations applicable to claims based on injury to reputation. The newspaper plans to file a motion for reconsideration regarding this aspect of the decision.

The plaintiff appeared pro se.

Chris Reilly is an associate at Dow Lohnes & Albertson in Atlanta. Peter Canfield, Tom Clyde and Chris Reilly represented The Atlanta Journal-Constitution in this case.

Update: Supreme Court Rejects Appeal by Ramsey Housekeeper

On January 12, the Supreme Court refused to hear an appeal of a Tenth Circuit decision that upheld the constitutionality of Colorado criminal procedure rule 6.3 which requires witnesses to keep their grand jury testimony secret "until and unless an indictment or report is issued." *Hoffmann-Pugh v. Keenan*, 338 F.3d 1136 (10th Cir. 2003), *cert. denied*, 2004 WL 46691 (U.S. 2004). *See MediaLawLetter*, August, 2003 at 49.

Linda Hoffman-Pugh, a former housekeeper for John and Patsy Ramsey, brought a declaratory judgment action, arguing she could be held in contempt if she disclosed her grand jury testimony in a book she is writing on the JonBenet Ramsey murder investigation. The Tenth Circuit held that the rule did not violate the First Amendment because it did not preclude her from disclosing information she possessed prior to her grand jury appearance. The rule only prohibited her from disclosing information gained through "participation in the grand jury process," such as jurors' questions, "so long as the potential remains for another grand jury to be called to investigate an unsolved murder." 338 F.3d at 1140.

Update: Aspen Times Settles Lawsuit with Source

On December 19, the *Aspen Times* and its parent company, Colorado Mountain News Media, reached an undisclosed settlement with a source whose identity was indirectly revealed in a news report. *See* MLRC *MediaLawLetter* Dec. 2003 at 48.

On October 8, 2003 the *Aspen Times* published a front page article discussing a controversial development project in Snowmass Village, Colorado. The article quoted an unnamed source, identified as a "town planner" and referred to as "she," accusing the government of hatching "back-room" deals. Carolyn Poissant was the only female town planner. After the article appeared she was placed on administrative leave and subsequently fired.

Tom Kelley of Faegre & Benson in Colorado represented the newspaper. Sander Karp represented the plaintiff.

Mississippi Statute of Limitations Starts with Publication on Internet

By Malissa Wilson

In a recent Mississippi case involving pornography, Christianity and the First Amendment, the U.S. District Court for the Northern District of Mississippi held for the first time that the state's 1-year statute of limitations period for defamation actions began to accrue on the date the allegedly defamatory articles were first posted on the Internet even though hard copy editions of magazines featuring the same articles were later distributed to the public. *Lane v. Strang Communications Co.*, No. 1:02cv313DD (N.D. Miss., October 31, 2003).

Steven D. Lane, a Mississippi resident, sued Strang Communications Company, a Christian publishing company based in Florida, for publishing what Lane alleged were false statements about his conversion from an adult pornography entrepreneur to a "born again" Christian. The basis of Lane's suit was the article, "How a Porn King Found God," published in the March, 2000 edition of *Charisma & Christian Life* magazine. A shorter version of this article was published later in the May/June 2001 edition of *New Man* magazine. Electronic versions of the same articles were first posted on the publishing company's websites for *Charisma* and *New Man* on February 15, 2000 and April 20, 2001, respectively. Lane sought damages for defamation, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress.

Although Lane filed suit more than one year after the electronic and written editions of the articles were published, Lane argued that Mississippi's one-year defamation statute did not bar his claims because he had filed suit within one year of discovering each article. Lane argued that the hard copies of the articles were not distributed in the area of Mississippi where he lived and were therefore not available to the general public and he had no reason to know of their existence. He claimed that he had first learned about the articles while searching the Internet and that he had filed suit within one year of learning about their existence.

In a decision written by Chief Judge Glen H. Davidson, the District Court held that "the one-year statute of limitations on the Plaintiff's claims began to run at the latest on February 15, 2000 for the *Charisma & Christian Life* article, and on April 20, 2001, for the *New Man* article; this is the date that each of the articles were posted online on the Defendant's website, and is the date of last publication of the articles." The District Court dismissed Lane's claims for defamation, intentional infliction of emotional distress, and false light invasion of privacy, holding that they were barred pursuant to Mississippi's single publication rule, as applied to a mass media publisher, and that Lane's failure to discover the existence of the articles until one year after they were published did not toll the limitation period or give rise to a new claim.

The District Court also dismissed Lane's claim for negligent infliction of emotional distress on the ground that it failed to state a claim as a matter of law. The court noted that Mississippi does not recognize such claims when based on the written work of a mass media publisher, citing *Mitchell v. Random House*, 865 F.2d 664 (5th Cir. 1989). The Mississippi rule prevents plaintiffs from using the 3-year statute of limitations for negligent infliction of emotional distress claims to circumvent the 1-year statute of limitations for defamation and other intentional torts based on mass media publications.

Plaintiff was represented by Grant M. Fox, Fox & Fox, P.A. in Tupelo, Mississippi and Stephen L. McDavid and Anne E. Pitts of McDavid & Associates in Oxford, Mississippi.

Malissa Wilson is a member of Butler, Snow, O'Mara, Stevens & Cannada, PLLC, in Jackson, Mississippi and together with John C. Henegan, represented Strang Communications Company.

Update: Supreme Court Rejects Tony Twist Publicity Case

The Supreme Court refused to hear an appeal of the Missouri Supreme Court's decision in *Doe v. TCI Cablevision of Missouri, Inc. et al.*, 110 S.W.3d 363 (Mo. 2003), *cert. denied*, 72 U.S.L.W. 3441 (U.S. Jan. 13, 2004). *See* MLRC MediaLawLetter Aug. 2002 at 11.

The Missouri Supreme Court reinstated former hockey player Tony Twist's misappropriation suit against the creator of the comic book and animated television series *Spawn* which features a like-named fictional character who is a crime kingpin. The Missouri Supreme court held that there was sufficient evidence to go to the jury that defendant deliberately used Twist's name for commercial advantage and that such use was not protected by the First Amendment despite containing expressive elements.

Gary Condit Seeks $209 Million in Defamation Suit Against Tabloids

In mid-December, former California Congressman Gary Condit filed suit in Palm Beach County, California circuit court alleging that three tabloid newspapers libeled him by linking him to the murder of his former intern Chandra Levy.

Condit seeks $209 million in damages from American Media Inc. for stories published in its three weeklies, *The National Enquirer*, *The Globe* and *The Star*. His complaint identifies nineteen articles and seeks $1 million in actual damages and $10 million in punitives for each article.

Condit is represented by Lin Wood of Atlanta, who also represents Condit's wife Carolyn in several libel suits against the media over reports on the Levy case.

Lawyer's Statements to Media About Lawsuit Not Privileged Under Minnesota Law

By Thomas Tinkham

The Minnesota Court of Appeals held this month that an attorney who repeated the substance of her pleadings in an on-camera interview with ABC Television was not protected by the judicial action privilege, a public official privilege or a qualified privilege. *Chafoulias v. Peterson and American Broadcasting Companies, Inc.*, 2003 WL 23025097 (Minn. App. Dec. 30, 2003) (unpublished).

Defamation Case Brought Over Allegations in Harassment Lawsuit

Attorney Lori Peterson brought a federal sexual harassment lawsuit on behalf of five women against a number of defendants, including Gus A. Chafoulias, the owner of the hotel that employed the women. Among other things, the suit alleged Chafoulias failed to prevent known sexual harassment of his female employees by Arab hotel guests. In the early stage of the proceeding, Peterson was interviewed by ABC and a statement was subsequently broadcast in which she said that Chafoulias had known for years of the sexual abuse perpetrated by hotel guests on his employees.

Chafoulias brought suit and the case was originally dismissed by the district court as to both ABC and Peterson on the basis that Chafoulias was a limited-purpose public figure. The Court concluded he was a major developer in the Rochester area and had a significant role in the public dispute regarding treatment of local women by Arabs in Rochester, Minnesota. Further, the district court held that there was insufficient evidence of malice to go to the jury. The Minnesota Court of Appeals affirmed that decision. The Minnesota Supreme Court affirmed the decision as to ABC, but concluded that there were factual disputes as to whether Peterson was entitled to rely upon a public figure defense. *See* 668 N.W.2d 642, 31 Media L. Rep. 2377 (Minn. 2003).

Lawyer's Statements to ABC about Case Not Privileged

On remand, the Minnesota Court of Appeals considered whether Peterson was entitled to several privileges, including the judicial action privilege, as enjoyed by attorneys. Minnesota follows the *Restatement of Torts*, Section 586, to the effect that an attorney is absolutely privileged to publish material in communications preliminary to, or a part of a judicial proceeding. Peterson argued that her statements to ABC were privileged because they simply reiterated the essential content of her pleadings in the federal lawsuit.

The court recognized that, in some circumstances, extra judicial statements by an attorney will be absolutely privileged. For example, where the attorney communicates with the opposite party or communicates with a third party for the purpose of advancing the litigation, the privilege may apply. However, the court concluded that Peterson was not advancing the litigation itself in making her statements to ABC and, thus, the privilege did not apply. The Court, apparently, was not impressed with the notion that Peterson was advancing the interests of her clients in discussing the matter with the press. Instead the court required a direct nexus to the litigation itself for the attorney/litigation privilege to apply.

The Court, apparently, was not impressed with the notion that Peterson was advancing the Interests of her clients in discussing the matter with the press.

Second, Peterson argued that her statement enjoyed an absolute privilege as that of a public official. In Minnesota, a public official is absolutely immune from defamation where that official is speaking of matters related to his official duties and in furtherance of those duties. The Court simply concluded that Peterson was not a public official for purposes of this privilege.

Third, Peterson argued that her statement was entitled to a qualified privilege. The court notes that qualified privileges apply to statements made on a proper occasion, from a proper motive and based upon reasonable or probable cause. The question of whether an oc-

(Continued on page 14)

Lawyer's Statements to Media About Lawsuit Not Privileged Under Minnesota Law

(Continued from page 13)

casion is a proper one is a question of law for the court. Peterson argued that this was a proper occasion because she had a duty to refute the opposite party's denials of sexual harassment to support her own clients' case. The court ultimately concluded that Peterson did not make her statement on a proper occasion for purposes of the qualified privilege. Interestingly, the Court prefaces this conclusion by the statement that Peterson made no effort to articulate her dispute as a legal position by qualifying her statement based upon the available evidence but rather "aggressively made bald accusations of wrongdoing." This suggests that the propriety of the occasion may be determined, in part, by the nature of the message.

Kay Nord Hunt and Phillip A. Cole, Lommen, Nelson, Cole & Stageberg, P.A., represented Lori C. Peterson. Michael Berens, Kelly & Berens, PA, represented plaintiff Gus A. Chafoulias.

Thomas Tinkham is a partner in Dorsey & Whitney LLP, in Minneapolis, Minnesota, and represented ABC Broadcasting Companies, Inc.

Supreme Court Refuses to Hear Appeal Seeking Names of 9/11 Detainees

The Supreme Court declined to hear an appeal from last year's split decision from the D.C. Circuit holding that there is no FOIA or First Amendment obligation on the government to disclose the names of 9/11 detainees. *Center for Nat. Sec. Studies v. U.S. Dept. of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied,* 2004 WL 46645 (U.S. Jan 12, 2004). In a decision by Judge Sentelle, the D.C. Circuit reversed a decision by Judge Gladys Kessler that ordered the government to disclose the names of INS and material witness detainees and their lawyers. *See* 215 F.Supp.2d 94, 30 Media L. Rep. 2569 (D. D.C. 2002).

The D.C. Circuit held that disclosure of the detainees' names was exempt from FOIA, deferring to law enforcement affidavits that disclosure could allow terrorists to piece together information about the status of the government's investigation. As to the First Amendment claim, the D.C. Circuit concluded that the information sought about detainees was "non-judicial" information and therefore outside the "narrow" scope of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

Stock Broker Avoids Dismissal of Libel Suit
Book Passage Could Suggest Insider Trader to Average Readers

By Katherine M. Bolger

A New York federal court held that a book's description of a Wall Street financial transaction that does not make any allegation of criminal wrongdoing could nevertheless be susceptible to a defamatory meaning of criminal insider trader, at least to the minds of average readers. *Lucking v. Maier & HarperCollins Publishers, Inc.*, No. 03 Civ. 1401, 2003 WL 23018787 (S.D.N.Y. Dec. 23, 2003).

Libel Claim Based on Description of Stock Purchase

Plaintiff, former Goldman Sachs broker Bernadette Lucking, brought a claim alleging libel per se, libel per quod and negligent publication, against the author and publisher of the book *Trading With the Enemy: Seduction on Jim Cramer's Wall Street.* The book by Nicholas Maier, published by HarperCollins Publishers Inc., describes a 1996 incident in which an employee of Cramer & Co. telephoned a person described in the book as "Bernadette" a broker at Goldman Sachs, and placed an order for MCI stock explaining "there will be news!" After the stock went up later that day on news that MCI was a target for acquisition, Bernadette called Cramer & Co. to confirm not only that she had placed the order for Cramer & Co., but also that she had placed an order for Goldman Sachs based on the statement "there will be news." According to the passage, she concluded the conversation with the words "I owe you one."

The plaintiff argued that this passage defamed her because it accused her of insider trading and, as a consequence, damaged her professional reputation. The plaintiff also argued that the defendants were liable for a separate count of negligence because defendants had recalled and reprinted the book to correct an unrelated error and should therefore had been on notice that the author was unreliable. In light of this, plaintiff argued it was negligent to reprint the book. At a pre-motion conference, the plaintiff withdrew the libel per quod claim and elected to proceed on the libel per se and negligence claims.

Defendants Moved to Dismiss For Lack of Defamatory Meaning

The defendants moved to dismiss the complaint on the grounds that the passage was not reasonably susceptible of a per se defamatory meaning because the passage could not reasonably be read as charging that plaintiff engaged in criminal activity. Specifically, the defendants argued that the passage did not charge the plaintiff with insider trading because the passage did not state that plaintiff had knowledge that the Cramer & Co. trade was based on confidential information. Indeed, the defendants argued there was no indication in the passage that Cramer & Co.'s decision to buy the stock was based on non-public, material information provided by an insider. In fact, the passage reflects that James Cramer of Cramer & Co. had directed that the order be placed immediately after a conversation with a CNBC reporter, suggesting the company acted on public information.

Defendants argued there was no indication in the passage that Cramer & Co.'s decision to buy the stock was based on non-public, material information provided by an insider.

The defendants emphasized that the audience for a book about Cramer & Co. would be reasonably sophisticated in the securities business and understand that the passage did not accuse the plaintiff of insider trading. Finally, the defendants also argued that the negligent publication claim should be dismissed because it was barred by the holding in *Chappadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 379 N.Y.S.2d 61 (1975), which established a gross-irresponsibility standard for private figure defamation cases involving a matter of public interest.

Reasonable Reader Could Conclude Passage Alleged Insider Trading

Judge Naomi Buchwald in the Southern District of New York denied defendants motion to dismiss the plain-

(Continued on page 16)

Stock Broker Avoids Dismissal of Libel Suit Book Passage Could Suggest Insider Trader to Average Readers

(Continued from page 15)

tiff's libel *per se* claim, concluding that a reasonable reader could conclude that the plaintiff acted wrongly in placing the orders for Cramer & Co. and for Goldman. The court stated that, even if the passage did not charge the plaintiff with the indictable offense of insider trading, the phrases "there will be news" and "I owe you one" could leave the reader with the understanding that the plaintiff had engaged in insider trading.

The phrases "there will be news" and "I owe you one" could leave the reader with the understanding that the plaintiff had engaged in insider trading.

The judge specifically rejected the defendants argument that a plaintiff asserting a defamation claim is required to show that the passage accuses them of an indictable offense but instead concluded that if the passage created an impression of criminality it was reasonably susceptible of a defamatory meaning. The judge also rejected defendants argument that the nature of the readership should influence her decision, instead concluding that a reasonable Wall Street conscious reader could not be presumed to know the insider training rules. Finally, Judge Buchwald did dismiss the negligence claim, concluding that it was duplicative of the libel *per se* claim. Plaintiff was represented by David H. Pikus of Bressler Amery & Ross, in New York.

Katherine M. Bolger is an associate with Hogan & Hartson L.L.P. in New York, NY. Slade R. Metcalf and Ms. Bolger represented Nicholas Maier and HarperCollins Publishers Inc. in the case.

Keyword-Based Bannner Ads on the Web May Infringe Trademark Rights, Ninth Circuit Holds

By Mark Sableman

The issue of web banner advertisements prompted by trademarks as key words advanced in January with the Ninth Circuit's decision in *Playboy Enterprises, Inc. v. Netscape Communications Corp.,* 2004 WL 57738 (9th Cir. Jan. 14, 2004). The decision reversed a simplistic and unsupportable lower court ruling, and introduced a credible (though arguable) approach to keyword-based advertisements. And its concurring opinion invited reconsideration *en banc* of the Ninth Circuit's broad and widely criticized "initial interest confusion" doctrine – an invitation, that, if taken, could significantly redirect Internet law.

The decision involved the practice of search engines selling banner advertisements linked to keyword searches where the words are trademarks. In particular, Playboy Enterprises ("Playboy" or "PEI") complained about the sale of advertisements by the Netscape and Excite search engines linked to user searches for "playboy" and "playmate."

The district court had granted summary judgment to the search engines, but had done so on reasoning so flawed that the defendants abandoned it on appeal, and the appeals court dismissed it as "absurd" in a footnote. Specifically, the district court had concluded that because "playboy" and "playmate" were words in the English language, Playboy Enterprises could not claim infringement based on their use. For this logic to work, of course, one would have to believe that Internet users frequently searched for a man devoted to the pursuit of pleasure (the dictionary definition of "playboy") and for a child's play companion (the definition of "playmate"), and not photographs associated with *Playboy* magazine.

The Ninth Circuit easily found that Playboy Enterprises' trademarks had attained secondary meaning – thus showing that searches for those words could have trademark significance. Then, it confronted the important question raised by search engine sales of advertising tied to key words: Does the search engine's sale of a trademarked term constitute trademark infringement or dilution?

Does the search engine's sale of a trademarked term constitute trademark infringement or dilution?

Background Facts

The case arose not long after Overture, the search engine that powers many branded search engine portals (including Netscape, Excite, AltaVista and others), began offering advertisements keyed to particular search words. Overture contracts with advertisers, and its advertisements are displayed on all of the branded search engines, though in different ways and with different headings. Netscape and Excite list the advertised links above the normal search result list, under the heading "Sponsored Links."

Non-Overture based search engines also sell ads keyed to key words. Google does so, although Google's placement of advertisements, to the right side of the screen, in shaded boxes, under the heading "Sponsored Links," more clearly distinguishes paid ads from normal search listings than the Overture-powered search engines. Google states that it avoids sales of key words that it knows to be trademarks, but late last year it filed a declaratory judgment action, *Google Inc. v. American Blind and Wallpaper Factory, Inc.*, No. C:03-5340 JF EAI (N.D. Cal. Filed Nov. 26, 2003), seeking a ruling that it need not steer clear of words that may have descriptive meaning even if they are also claimed as part of a trademark.

In the *Playboy* case, the search engines sold the keywords "playboy" and "playmate" to adult-oriented website owners as part of a package of more than 400 words. When Internet users searched for any of those words, the advertiser's site would be displayed in a banner advertisement. As is typical, a user who clicked on the banner ad would be taken immediately to the advertiser's website – in this case, an adult-oriented website.

Playboy argued that the practice meant that its "playboy" and "playmate" trademarks were being used to take Internet users to competitors' websites. It argued that some users would inevitably be confused – and the key likelihood of confusion element of trademark law thus satisfied – since some users would think that the banners were associated with Playboy Enterprises.

(Continued on page 18)

Keyword-Based Bannner Ads on the Web May Infringe Trademark Rights, Ninth Circuit Holds

(Continued from page 17)

The Ninth Circuit decision repeatedly referenced several facts that it obviously found important. First, the search engines mandated that adult advertisers buy a package of more than 400 keywords, which included "playboy" and "playmate"; these terms could not be deleted from the package (even though almost all of the other words in the package were descriptive non-trademark words). This apparently indicated to the court that the search engine insisted on profiting from Playboy's valuable mark. Second, many of the resulting banner advertisements are either "confusingly labeled" or unlabeled – thus promoting, or at least doing nothing to prevent, consumer confusion.

Trademark Analysis

In conducting its trademark analysis, the Ninth Circuit initially noted that Playboy's strongest argument was for "initial interest confusion," the doctrine first applied to the Internet in the Ninth Circuit's controversial ruling in *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036 (9th Cir. 1999). It summarized the *Brookfield* rule as follows: "Although dispelled before an actual sale occurs, initial interest confusion impermissibly capitalized on the goodwill associated with a mark and is therefore actionable trademark infringement."

Playboy argued that keyword-based advertisements initially confuse Internet users, who, after conducting a search for Playboy's trademarks, are confronted with unlabeled advertisements pertaining to adult material, which invite the user to "click here." As the court described Playboy's theory, "users may follow the instruction, believing that they will be connected to a PEI site." When they are connected to the advertiser's site, they will realize it is not Playboy's site, but, under the "initial interest confusion" theory, the harm is done at that point, because the advertiser has been introduced to a new potential customer. The court agreed with this theory, finding the keyword advertisement factually indistinguishable from the metatags involved in *Brookfield*.

Its analysis on some of these factors may be challenged as results-oriented. For example, the court assumed that Internet users searching for adult-oriented material are "easily diverted."

Interestingly, the Ninth Circuit did not rest its decision solely on initial interest confusion. Rather, it determined that "to be certain" of the result, it needed to "test PEI's theory using this circuit's well-established eight-factor test for the likelihood of confusion." This referred to the *Sleekcraft* factors, the Ninth Circuit's version of the standard trademark infringement factors.

The court first focused on the most important factor, evidence of actual confusion. Playboy had submitted an expert consumer study that it asserted found 22 to 29 per cent of consumers confused (at least initially) by the keyword-based advertisements. The search engines had submitted no contrary study, and, though Playboy's study was subject to criticism, it clearly created a genuine issue of material fact on this key element. Thus, on this factor alone, the appeals court found the district court's summary judgment improper.

The next factor addressed — the strength of the mark — gave the court the opportunity to comment on the theory (embraced by the district court) that the words "playboy" and "playmate" were used for their primary dictionary meaning, not for their trademark meaning. The court found the theory "absurd" since Internet users "obviously" did not use the words in those senses. The court also found sufficient evidence that Playboy's trademarks had attained secondary meaning (trademark meaning).

The court found most of the other trademark-infringement factors to favor Playboy. Its analysis on some of these factors may be challenged as results-oriented. For example, the court assumed that Internet users searching for adult-oriented material are "easily diverted." This assumption was based on no empirical evidence, and one could as readily assume that Internet users are savvy about banner advertisements and unlikely to be unwillingly diverted. Similarly, the court in somewhat circular fashion presumed that some banner ads infringed Playboy's mark, held that the search en-

(Continued on page 19)

Keyword-Based Bannner Ads on the Web May Infringe Trademark Rights, Ninth Circuit Holds

(Continued from page 18)

gine's intent to profit from such conduct was illegitimate, and then found that this intent supported a finding of infringement.

At several points, the court pointed to facts that it found troublesome. Chief among these were the facts that the search engines required that "playboy" and "playmate" be purchased as part of the adult-oriented keyword package, and that the search engines did not either require the advertiser to label its advertisements, or provide such labels themselves. The court indicated that if the ads were labeled (for example, with the name of a Playboy competitor, such as Penthouse), such labels would dispel consumer confusion.

Trademark Defenses

After finding at least a genuine issue of fact on consumer confusion – under both the initial interest confusion test, and the standard multi-factor test – the court then turned to the search engines' defenses.

The key defense was "nominative use." That defense, a subset of the broader "descriptive use" defense, refers to the situation where it is essential to use a trademark to identify what one is referencing. One cannot refer to "Disney World," for example, without using that trademark. In this case, the court found that the search engines were not using "playboy" or "playmate" in their nominative sense – for example, to compare their advertisers' products to those of Playboy Enterprises. Rather, the search engines and advertisers were using the marks "to identify consumers who are interested in adult-oriented entertainment."

The court also rejected a "fair use" defense on the ground that a confusing use can never be a fair one. And it found inapplicable the search engines' "functional use" defense; the doctrine prevents one party from monopolizing a functional design, and Playboy's trademarks contained no unprotectable functional attributes.

The court also dealt with Playboy's trademark dilution claim, and similarly found issues of fact that precluded the summary judgment that the district court had granted. On this point, it noted that on remand the district court will have to apply the new test dilution under the Supreme Court's decision in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), which requires proof of actual dilution.

Status of Keyword-Based Advertising

Because of the summary judgment status of the case, the Ninth Circuit's decision does not definitively resolve keyword-based advertising. Both the trademark infringement and dilution issues have been remanded to the district court – albeit with a clear sign that the Ninth Circuit disfavors the practice, at least where the trademarks are sold in packages and the resulting banner ads are unlabeled or confusingly labeled. However, there will be room at trial for full evidence on consumer confusion, and the evidence could well develop differently from the Ninth Circuit's assumptions, particularly if it shows that Internet users understand that banner ads aren't necessarily sponsored by the companies whose marks were searched.

With the Ninth Circuit's ruling, U.S. law on keyword searching, like that of the first few decisions in Europe, tends to weigh against the sale of trademarks as keywords.

With the Ninth Circuit's ruling, U.S. law on keyword searching, like that of the first few decisions in Europe, tends to weigh against the sale of trademarks as keywords. In both Germany and France, trial courts have reportedly ruled in favor of trademark owners in similar situations. In one other U.S. case, filed around the same time as the Playboy case, Estee Lauder, the plaintiff, was reported to have worked out an early favorable settlement.

The *Google* case on the horizon, however, could bring a different perspective to this case. Cases like *Playboy v. Netscape* and the European cases, arising out of Overture's practices (such as the bundling that the Ninth Circuit found objectionable, and listing of advertised sites directly above the legitimate search results) presented the best case for trademark owners. Google's

(Continued on page 20)

Keyword-Based Bannner Ads on the Web May Infringe Trademark Rights, Ninth Circuit Holds

(Continued from page 19)

declaratory judgment action, based as it will be on Google's practices (including refusal to sell ads keyed to known trademarks, and clear separation between search results and advertisements), is likely to present the best case for search engines.

In short, in the keyword advertising, the Ninth Circuit's decision is an important step, but it leaves much still to be decided – and the incipient Google case could well contribute an altogether different perspective to this issue.

Criticism of Initial Interest Confusion

Beyond its substantive conclusion, the *Playboy v. Netscape* decision may be significant for its concurring opinion by Judge Marsha S. Berzon, which is highly critical of the *Brookfield* "initial interest confusion" doctrine. That doctrine is significant in Internet law; it has been used by trademark owners in the context of challenging use of their marks in domain names, metatags, invisible text, and other contexts, including, of course, key word advertising. And *Brookfield* is the centerpiece case for this theory and its application to the Internet.

But using real world analogies, Judge Berzon suggested that the initial interest confusion doctrine penalizes the sound retail practice of offering consumers useful choices.

Brookfield involved two similarly named websites, with some overlapping coverage. The court found that the junior trademark user's use of the trademark MOVIE BUFF in metatags could lead users to the senior user's website, where they might linger, even though they would realize it wasn't their intended destination. The court in *Brookfield* analogized the situation to one where an ambiguous sign leads a driver off the highway, where he finds, instead of his commercial destination, a competitive establishment. The driver is not misled when he enters the establishment, but was diverted to its vicinity by trademark confusion.

Judge Berzon acknowledged, as the full panel had held, that the keyword advertising situation was "analytically similar" to the situation found to present initial interest confusion in *Brookfield*. But using real world analogies, Judge Berzon suggested that the initial interest confusion doctrine penalizes the sound retail practice of offering consumers useful choices.

She asked the reader to consider a hypothetical shopping trip to Macy's, where a consumer looked for Calvin Klein goods, and on her way to that section, was deliberately confronted with Macy's cheaper house brand, deliberately designed to appeal to Calvin Klein buyers. Has Macy's infringed Calvin Klein's mark? More pointedly, Judge Berzon described Internet merchants like Amazon.com that deliberately present consumers with choices of other products based on consumers' searches. Her decision questioned whether the law should penalize such presentations of choices, particularly given, in the keyword advertisement context, "the minimal inconvenience in directing one's web browser back to the original list of search results."

While recognizing *Brookfield* as controlling law, Judge Berzon called it "unsupportable" and illogical, and openly invited *en banc* reconsideration of the decision. Given the extent to which *Brookfield* is relied on by trademark owners in Internet cases, if this invitation is accepted, it will be a major development with wide implications.

Playboy was represented by Barry G. Felder of Brown Raysman Millstein Felder & Steiner LLP, Los Angeles. Netscape and Excite were represented by Jeffrey K. Riffer of Jeffer, Mangels, Butler & Marmaro LLP, Los Angeles.

Mark Sableman is a partner with Thompson Coburn LLP in St. Louis.

Court Holds Pop Up Ads Violate Trademark Law Under "Initial Interest Confusion" Test

Ruling Conflicts with Two Other Decisions with Same Defendant

By Celia Goldwag Barenholtz

Three different federal district judges considered the online advertising of WhenU.com, Inc. in 2003. WhenU won the first two rounds, when judges in Virginia and Michigan rejected challenges to WhenU's advertising under both the copyright and trademark laws. *See U-Haul Intern., Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D. Va. 2003) and *Wells Fargo & Co. v. WhenU.com*, 2003 WL 22808692 (E.D. Mich. 2003).

On December 22, 2003, however, a New York federal district court took a different view and issued a preliminary injunction against WhenU. *1-800 Contacts, Inc. v. WhenU.com and Vision Direct, Inc.*, 02 Civ. 8043, 2003 U.S. Dist. LEXIS 22932 (S.D.N.Y. Dec. 22, 2003). Judge Deborah A. Batts agreed that WhenU's online advertisements do not violate the copyright laws. Invoking the initial interest confusion doctrine, however, Judge Batts held that the inclusion of the plaintiff's trademarked web address (or "URL") in WhenU's software directory is likely to constitute trademark infringement.

Judge Batts held that the inclusion of the plaintiff's trademarked web address (or "URL") in WhenU's software directory is likely to constitute trademark infringement.

WhenU is a marketing company which has developed a software called SaveNow which displays advertisements, including pop-up ads, on the computer screens of participating consumers. Consumers download WhenU's software from the Internet, generally as part of a package of revenue-generating software that supports a free software product. The software includes a directory comprised of over 40,000 web addresses, search terms and key word algorithms sorted into various categories (for example, eye-care) in much the same way as the Yellow Pages indexes businesses. The directory uses these elements to analyze SaveNow users' Internet activity.

WhenU includes web addresses in the directory solely as an indicator of a consumer's interest. Thus, if a user typed www.1800contacts.com into his browser window, or attempted to search for 1-800 Contacts, the software would detect that activity, determine that the consumer was interested in eye-care products, and might — depending on various timing and other internal limitations of the system — display an ad for a competing eye-care product. The 1-800 URL is just one of hundreds of elements in the eye-care category that gauge consumer interests.

The advertisements generated by WhenU's software are clearly labeled. They all contain the SaveNow logo and other distinctive branding features and state on the face of the advertisement that they are a "WhenU.com" offer. They do not display anyone's marks other than those of WhenU and its advertisers.

The plaintiff in this case, 1-800 Contacts, sells replacement contact lenses through its 1-800 telephone line and through its website. On October 9, 2002, it filed a complaint and moved for a preliminary injunction against WhenU and Vision Direct, a former WhenU advertiser, alleging that the display of WhenU ads on a SaveNow user's computer screen at the same time as a 1-800 webpage was displayed infringed 1-800's copyright in its website and its trademark "1-800 Contacts."

The Copyright Claim

Judge Batts had no trouble disposing of the copyright claim. 1-800 argued that the display of a SaveNow advertisement on a user's screen in one window at the same time as the user was displaying content from plaintiff's copyrighted website in another window constituted both an unauthorized display of plaintiff's website and a derivative work. Noting that users have the ability to modify the appearance of a website on their computer screens in many ways, Judge Batts ruled that "to hold that computer users are limited in their use of Plaintiff's website to viewing the website without any obstructing windows or programs would be to subject countless computer users and software developers to liability for copyright infringement and con-

(Continued on page 22)

Court Holds Pop Up Ads Violate Trademark Law Under "Initial Interest Confusion" Test

(Continued from page 21)

tributory copyright infringement." Judge Batts also rejected the argument that WhenU's advertisements create derivative works, finding that WhenU's advertisements are neither "fixed" nor alter the plaintiff's website.

In so ruling, the court was clearly concerned about the implications of plaintiff's expansive reading of the copyright act given the ability of computer users to simultaneously display multiple applications on their desktops, including applications in overlapping windows. As the court explained, "if obscuring a browser window containing a copyrighted website with another computer window produces a 'derivative work,' then *any* action by a computer user that produced a computer window or visual graphic that altered the screen appearance of Plaintiff's website, however slight, would require Plaintiff's permission. A definition of 'derivative work' that sweeps within the scope of the copyright law a multi-tasking Internet shopper whose word-processing program obscures the screen display of Plaintiff's website is indeed 'jarring'. …"

Thus, the 1-800 decision is notable because it applies the initial interest doctrine to conduct which does not involve the direct diversion of consumers from one site to another.

Trademark "Use"

With respect to the trademark claim, however, Judge Batts took a different tack. Declining to follow the reasoning of the *U-Haul* and *Wells Fargo* opinions, Judge Batts found that 1-800 was likely to prevail on its claim that WhenU's inclusion of the 1-800 URL in its software directory and the resulting side-by-side display of WhenU advertisements with the 1-800 website constitute trademark infringement.

Judge Batts gave short shrift to WhenU's argument that it was not using the 1-800 mark within the meaning of the Lanham Act because it did not use the mark in the advertising of goods or services. Judge Batts held that by including the 1-800 URL in its directory and displaying advertisements at the same time as web pages bearing plaintiff's marks were on display, WhenU was effectively using the 1-800 mark to sell its advertisers' goods and services.

Judge Batts also brushed aside WhenU's contention that its advertising is at most a form of comparative advertising. Although Judge Batts did not expressly address the issue of comparative advertising, she clearly viewed WhenU's contextual advertising as an improper effort to take advantage of the plaintiff's good will. As Judge Batts put it: "WhenU's advertisements are delivered to a SaveNow user when the user directly accesses Plaintiff's website — thus allowing Defendant Vision Direct to profit from the goodwill and reputation in Plaintiff's website that led the user to access Plaintiff's website in the first place."

Initial Interest Confusion

Next, the court turned to the doctrine of initial interest confusion. Reading the doctrine expansively, Judge Batts applied the initial interest doctrine to conduct that admittedly does not involve the actual diversion of computer users. In previous cases applying the initial interest confusion doctrine to the Internet context, the defendant had either used the plaintiff's trademarked domain name in a misleading way that tricked consumers into accessing the defendant's site *or* used the plaintiff's trademarks in their metatags or keywords in order to generate misleading search results that caused the user to access the defendant's site believing it to be the plaintiff's. As Judge Batts acknowledged, WhenU software does not divert computer users from the plaintiff's site. A SaveNow user who types the 1-800 URL into his browser is connected to the 1-800 website. While he might also be shown a SaveNow advertisement, the advertisement would not take him to a different web page unless he affirmatively elected to click on the ad itself. Thus, the *1-800* decision is notable because it applies the initial interest doctrine to conduct which does not involve the direct diversion of consumers from one site to another. Judge Batts explained her rationale in

(Continued on page 23)

Court Holds Pop Up Ads Violate Trademark Law Under "Initial Interest Confusion" Test

(Continued from page 22)

these words: "[t]he harm to Plaintiff from initial interest confusion lies not in the loss of Internet users who are unknowingly whisked away from Plaintiff's website" but rather "the possibility that, through the use of pop-up advertisements" WhenU's advertisers would "gain crucial credibility" with consumers.

Finally, Judge Batts applied the eight "*Polaroid* factors" to WhenU's use of the 1-800 mark and concluded that a likelihood of confusion had been shown. In so doing, the judge compared the mark used by WhenU in its directory to the plaintiff's mark, even though consumers never see the directory. The court did not compare the plaintiff's mark to what consumers actually see, *i.e.* the SaveNow advertisements themselves. Acknowledging that in an ordinary trademark infringement case the consumer sees or hears the parties' marks, the court concluded that "[i]n the Internet context, the issue is not whether the WhenU or Vision Direct marks themselves are similar to the Plaintiff's marks, but whether the marks used by the Defendants (whether actually seen by the consumer or not) are so similar to Plaintiff's mark that similarity could ultimately cause consumer confusion." Not surprisingly, given its determination to compare identical marks without taking the setting in which they appear into account, the district court concluded that the "*Polaroid*" factors weighed in favor of the plaintiff.

WhenU has filed a notice of appeal in the *1-800* case, and argument in the Second Circuit is expected to occur as early as March 2004.

Plaintiff was represented by Marshall R. King and Terence P. Ross of Gibson, Dunn & Crutcher, L.L.P. in New York.

Celia Goldwag Barenholtz is a partner of Kronish Lieb Weiner and Hellman LLP in New York. She represents WhenU in the Wells Fargo and 1-800 cases.

Lawsuit Against Consumer Complaint Websites Dismissed

By Thomas Burke

A U.S. District Court judge in Wisconsin has dismissed on personal jurisdiction grounds, a lawsuit alleging unfair competition, false advertising, disparagement and trademark infringement claims against the operator of the BadBusinessBureau.com and RipOffReport.com consumer websites. *Hy Cite Corporation v. BadBusinessBureau, L.L.C.* No. 03-C-0421-C, 2004 WL 42641 (W.D. Wis. Jan. 8, 2004) (Crabb, J).

Neither the "purposeful availment" or the effects" test of jurisdiction could be satisfied.

Hy Cite, a Wisconsin based marketer of china and porcelain dinnerware, sued the consumer-oriented websites after more than 30 complaints were submitted to the websites regarding its products. BadBusinessBureau.com and RipOffReport.com feature complaints submitted by consumers about various businesses. Businesses that receive complaints about them may post a rebuttal, but they are screened by the Defendant and charged a fee to post multiple rebuttals. (Hy Cite alleged that when it inquired about responding to the complaints that had been filed against the company, it was told that it would have to pay $50,000 to the defendant to respond.)

The corporate defendant owner of the consumer websites — BadBusinessBureau.com LLC — is a limited liability company organized under the laws of St. Kitts/ Nevis, West Indies. In support of its motion to dismiss, defendant established that it owned and operated no assets in Wisconsin, that it had accepted no donations from anyone in the state, sold no advertising to Wisconsin companies through either of its websites, didn't coordinate any class action lawsuits against Wisconsin-based companies, and had no office in the state. Other than Hy Cite's email communications with defendant and the sale of a single book to a Wisconsin resident through one of its websites, defendant had no "targeted contact" with the state of Wisconsin.

While the court's 13-page decision focused on defendant's lack of purposeful contact with the state — and in-

(Continued on page 24)

Lawsuit Against Consumer Complaint Website Dismissed

(Continued from page 23)

deed, easily dismissed Hy Cite's claims on the grounds that neither the "purposeful availment" or the "effects" test of jurisdiction could be satisfied — the court also rejected plaintiff's defamation and trademark infringement theories for establishing jurisdiction based on content. "The facts of the record do not indicate that defendant creates the text of the consumer complaints. It is the consumers that are using plaintiff's name and making allegedly defamatory statements. If defendant is not creating the text, then defendant is not purposefully directing its activities toward any particular company or state," citing to *Nelson v. Bulso*, 149 F.3d 701, 704 (7th Cir. 1998). As to Hy Cite's inference that defendant created the headings for the consumer complaints "and that these headings themselves constitute trademark infringement," the court also denied that this alleged conduct was enough to show that defendant had targeted the state of Wisconsin. Finally, the court ruled that Hy Cite had failed to explain how defendant's alleged use of metatags supported the court's exercise of jurisdiction and had thereby waived this claim.

According to a published report, defendant is owned by Ed Magedson, a self-proclaimed consumer advocate. CNETNews.com reports that Magedson, an Arizona resident, incorporated his company in the Caribbean to avoid frivolous lawsuits. Ironically, federal law offers constitutional protection for libel claims and Section 230 of the 1996 Communications Decency Act provides broad immunity for tort claims based on online content that is prepared by third parties.

Plaintiff was represented by John C. Scheller of Michael Best & Freidrich, LLP, Madison, Wisconsin. Defendant was represented by Sonali S. Srivastava, Lafollette, Godfrey & Kahn, in Madison; and Maria Crimi Speth of Jabur & Wilk, P.C., Phoenix, Arizona.

Thomas Burke is a partner with Davis Wright Tremaine in San Francisco.

Internet Subscriber Not Entitled to Consequential Damages for Service Break

Description of User as "Spammer" Not Defamatory

A New York federal district court granted summary judgment to the ISP Earthlink on breach of contract, defamation, wire tap and related claims brought by a subscriber whose e-mail account was temporarily shut down after he was erroneously identified as a "spammer." *Hall and Big Bad Productions v. Earthlink Network, Inc.*, 2003 WL 22990064 (S.D.N.Y. Dec. 19, 2003) (Owen J.).

In 1997, Earthlink shut down plaintiff's e-mail account after a third party ISP, UUNet, erroneously identified plaintiff as a "spammer." Plaintiff's account name "lot99" was also posted on a web list of e-mail abusers. Plaintiff's service was restored after six days. Plaintiff, an independent film maker, alleged the shut down caused him $1 million in lost profits because it interfered with his marketing of a film; that being identified as a "spammer" was defamatory; and that the retention of his e-mails during the shut down was a violation of the wire tap act.

The court granted summary judgment to Earthlink on all claims. First, the court held that the claim for lost profits was "entirely too speculative." *Id.* at *2. Second, the court held that the term "spammer" was not defamatory per se– at least when used in 1997 before spam e-mail became the "subject of the major opposition it is today." *Id.* at *1 n. 1. Third, the court rejected plaintiff's argument that Earthlink intercepted his e-mails in violation of the Federal Wiretap Act. The court found that the e-mails were received and stored "precisely where they were sent." *Id.* at *2. Finally it rejected plaintiff's request that the court recognize two new related claims "negligent appropriation of electronic communications" and "intentional appropriation of electronic communications."

Plaintiff was represented by Andrew Grosso of Andrew Grosso & Associates, Washington, D.C. and Nicholas Damadeo in Smithtown, NY.

Use of Copyrighted Art Work in Television Commercial Held *de minimus* by Sixth Circuit

By Herschel P. Fink

Producers of television commercials and programming, as well as of motion pictures, in which copyrighted art works may appear in the background, can take comfort from a recent decision of the Sixth Circuit Court of Appeals finding such appearances *de minimus*, and not actionable. *Gordon v. Nextel Communications and Mullen Advertising*, 345 F3d 922 (6th Cir. 2003), *affirming*, 2001 U. S. Dist. Lexis 25048 (E.D. Mich, 2001).

Artist Sued Over Use of His Works as Background Art in Commercial

The decision arose from a popular Nextel, 30 second commercial produced by Mullen Advertising featuring a patient in a dentist's chair demonstrating two-way text messaging on his cell phone, while his mouth is clamped open with retractors for a root canal procedure. The set for the commercial featured wall decorations obtained from a commercial "prop house," including two illustrations used to "set the scene," one of a dental bridge, and the other illustrating a root canal procedure.

The Sixth Circuit went on to hold that "observability" of the protected work in the allegedly infringing work is the key factor in determining de minimus status.

The two illustrations were the works of a medical illustrator, and were reproduced from an educational chart that the artist had created and sold commercially to dentists. Although there was testimony that the "prop house" rented only works that had been copyright licensed for commercial use, in fact these were not so licensed. The artist sued, claiming the copyright for his medical art works had been infringed by their unauthorized reproduction in the television commercial.

The defendants moved for summary judgment, claiming that the appearance of the dental illustrations in the commercial was both a "fair use," and *de minimus*. The district court granted summary judgment on both grounds.

Copying Was De Minimus: Therefore No Need to Consider Fair Use Defense

On appeal, the Sixth Circuit held that "a court will examine the fair use defense only if the *de minimus* threshold for actionable copying has been exceeded," citing *Ringgold v Black Entertainment Television*, 126 F3d 70, 77 (2nd Cir. 1997). Going on to hold that the *de minimus* threshold had not been exceeded, the Sixth Circuit held that a *de minimus* finding requires the alleged infringer to demonstrate that the copying of protected material is so trivial "as to fall below the qualitative threshold of substantial similarity, which is always a required element of actionable copying." *Ringgold*, 126 F3d at 74.

The Sixth Circuit went on to hold that "observability" of the protected work in the allegedly infringing work is the key factor in determining *de minimus* status. "Observability," the Sixth Circuit said, "is determined by the length of time the copyrighted work appears in the allegedly infringing work, as well as the prominence in that work as revealed by the lighting and positioning of the art work," again citing to *Ringgold*.

The Sixth Circuit adopted as a *de minimus* test the regulation issued by the Librarian of Congress providing for royalties to be paid by public broadcasting entities for use of published pictorial and visual works. (37 C.F.R. §253.8). That regulation distinguishes between a "featured" display and a "background and montage" display, setting a higher royalty for the former.

"The Librarian has defined a 'featured' display as a 'full screen or substantially full screen display for more than three seconds,' and a 'background or montage' display as '[a]ny display less than full-screen or full-screen for three seconds or less.'"

While the dental bridge illustration was visible for more than three seconds, it appeared only in the background, and never in clear focus. The root canal illustration did appear fleetingly full frame and in focus, but defendants argued that "the viewers' attention is drawn to the words 'root canal,'

(Continued on page 26)

Copyrighted Art in Commercial Held *de minimus* by 6th Cir.

(Continued from page 25)

which are not copyrightable." The Court agreed, concluding:

> it is apparent that the use of the Bridge illustration does not rise to the level of actionable copying. The Bridge illustration is never in focus and appears only as distant background.
>
> While the use of the Root Canal illustration presents a closer question, we find its use also to be *de minimus*.... [T]he primary impact of the use of the Root Canal illustration in the commercial comes from the focus on the words, which are not copyrightable. The initial focus on the illustration itself is very brief. Because Gordon's illustrations appear fleetingly and are primarily out of focus, we find their use to be *de minimus*.

345 F3d at 924-925.

Robert C. Brandenburg and John E. Nemazi of Brooks & Kushman, Southfield, MI, represented Plaintiff-Appellant.

Herschel P. Fink, a partner in the Detroit firm of Honigman Miller Schwartz and Cohn, along with partner Cynthia G. Thomas, represented the defendants.

California Appeals Court Reverses Default Libel Judgment Against Non-Resident

No Jurisdiction Over Operator of Passive Website

A California appellate court reversed a $100,000 default libel and false light judgment entered against a Canadian defendant, holding that creating a "passive website"on the Internet is, by itself, insufficient to subject a non-resident to jurisdiction in California. *Rambam v. Prytulak*, 2004 WL 25229 (Cal.App.2 Dist. Jan. 5, 2004) (marked not for publication).

After discussing at length defendant's efforts to challenge jurisdiction, and the extent to which he fell afoul of court rules, the court concluded that defendant properly appealed the default judgment. Accepting defendant's unchallenged averments that he is a Canadian citizen with no current contacts to California, the court held there was no jurisdiction over him, citing *Pavlovich v. Superior Court*, 29 Cal.4th 262, 274 (Cal. 2002) ("Creating a site, like placing a product into the stream of commerce, may be felt nationwide – or even worldwide – but, without more, it is not an act purposefully directed toward the forum state.").

Plaintiff was represented by Gary Kurtz. Defendant represented himself.

Supreme Court Denies Cert. in Internet Libel Case

The U.S. Supreme Court refused to hear an appeal from a pro se defendant who was found to have libeled her former university professor. *Wagner v. Miskin*, 660 N.W.2d 593 (N. Dak. 2003), *cert. denied*, 2004 WL 76779 (Jan 20, 2004). The North Dakota Supreme Court held that its courts had personal jurisdiction over the non-resident defendant because the complained of statements on her website <www.undnews.com> were directed at plaintiff, a North Dakota resident. Distinguishing *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 123 S.Ct. 2092 (2003), the court held that defendant's website specifically "targeted" the state by linking to articles about the University of North Dakota, plaintiff, his lawyer and this litigation. 660 N.W. 2d at 598.

Ninth Circuit Affirms Summary Judgment for "Food Chain Barbie" Artist

In what might be the end of a protracted legal battle between toy maker Mattel and the self-proclaimed "artsurdist" Tom Forsythe over his use of Barbie dolls in photographs, the Ninth Circuit affirmed summary judgment in favor of Forsythe on copyright, trademark and related state law claims. *Mattel Inc. v. Walking Mountain Productions*, 2003 WL 23018285 (9th Cir. Dec. 29, 2003). *See also MediaLawLetter* March 2001 at 25; and September 2001at 30. In a decision authored by Judge Harry Pregerson, joined by Judges Thomas and Oberdorfer, the court found that Forsythe's works were parodies protected by the First Amendment.

Photos of Barbie Dolls Were Non-infringing Fair Use

At issue were a series of 78 photographs entitled "Food Chain Barbie" that depicted Mattel's world famous Barbie doll in absurd and often sexualized positions. The court held that they were parodies protected by the fair use defense because they turned Barbie's meaning as "the ideal American woman" and a "symbol of American girlhood" literally and metaphorically "on its head." *Id.* at *7. The court rejected survey evidence from Mattel that some consumers did not interpret the photos as parodies, holding that whether a work is a parody is a question of law, not a matter of public majority opinion. *Id*. at *6.

Relying on its decision in *Mattel, Inc. v. MCA Records, Inc*., 296 F.3d 894 (9th Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003) (rejecting trademark claims over use of Barbie in a song title and lyrics), the court held that defendant's photographs were protected commentary on the Barbie mark which has attained cultural significance and a "role outside the bounds of trademark law." *Id.* at 11.

Mattel was represented by Adrian M. Puretz, Michael T. Zeller, Edith Ramirex and Enoch Liang of Quinn Emmanuel Urquhart Oliver & Hedges in Los Angeles. Forsythe was represented by Annette L. Hurst, Douglas A. Winthrop and Simon J. Frankel, of Howard, Rice, Nemerovski, Canady, Falk & Rabkin in San Francisco and Peter J. Eliasberg, ACLU Los Angeles.

Jury Verdict in England Against Wall Street Journal Europe

On December 19, 2003, a London jury returned a verdict in favor of a Saudi company and its president on their libel claims against the *Wall Street Journal Europe*. *Mohammed Abdul Latif Jameel and Abdul Latif Jameel Company Limited v The Wall Street Journal Europe,* No. HQ 02 X00582 (High Court December 19, 2003) (Eady, J). Mr. Jameel was awarded £30,000 in damages and his company another £10,000.

At issue was a front page article published in the *Wall Street Journal Europe* on February 6, 2002 with the headline "Saudi Officials Monitor Certain Bank Accounts: Focus Is on Those With Potential Terrorist Ties." The article identified the Jameel Group as one of the companies being monitored.

On January 20th, 2004, Mr. Justice Eady, who presided over the trial, issued a lengthy opinion setting out his reasons for rejecting the defense of qualified privilege to the newspaper. A copy of this decision is available through www.courtservice.gov.uk.

The February *MediaLawLetter* will feature a detailed article on this case.

International Libel Roundup: Recent Cases of Note

By Charles Glasser

Canada Follows Gutnick, Asserts Jurisdiction over US Business for Press Releases Available on Internet

The Ontario Superior Court of Justice issued a ruling on December 9, 2003 holding that a U.S. company whose allegedly defamatory press releases were available online in Canada was subject to jurisdiction there. *Barrick Gold Corporation v. Blanchard & Company*, 03-CV-244956CM3. The U.S. company had only minimal non-speech related contacts with Canada. The parties are competitors in the investment-grade gold coin market.

In denying defendant's motion to dismiss on jurisdiction and *forum non conveniens* grounds, the court examined Canada's multi-factored jurisdictional test which considers whether the forum court has a “real and substantial connection” with the subject matter of the litigation. *See, e.g., Muscutt v. Courcelles* (2002) 60 O.R. (3d) 20 (C.A.). The court found that the availability of the press releases in Ontario through the Internet and its alleged damaging effect in Canada were sufficient grounds for asserting jurisdiction.

Citing favorably the Australian High Court's decision in *Dow Jones v. Gutnick*, the Court added that the *Gutnick* approach “establishes a rule that would have as its effect a strong incentive for people who do post such material to ensure that it is fair and accurate and responsible in its content.” In addition, the court recognized that although the Canadian libel judgment may not be enforceable in the U.S., it nevertheless “may have real value” because “the vindication of one's reputation is as important as any monetary award of damages.”

Ex-Jamaican P.M. Loses Two Libel Cases in Same Week

In mid-December Jamaican courts rejected the qualified privilege defense in two separate libel cases brought against former Prime Minster Edward Seaga, a current member of Parliament and leader of that nation's JLP opposition party. Both cases turned on the occasion of the statements, neither of which were found to be privileged, despite being arguably matters of public interest. In one case, Seaga attacked a local businessman's intelligence and integrity at a political rally. The businessman, Kenneth Black, is a contributor to the ruling PNP party. The trial court rejected Seaga's qualified privilege defense that Seaga “had a responsibility to pronounce on the issues which were of public importance.” Seaga has agreed to pay Black $500,000 JMD (approximately $8,000 USD) in damages.

Seaga's other loss also came from comments made in non-governmental but public meetings. The Supreme Court ordered Seaga to pay $3.5 million JMD (approximately $58,000 USD) to a retired police commissioner who Seaga claimed was fired from his job because of his political bias. These comments were made by Seaga at a JLP party meeting. Rejecting Seaga's claim of qualified privilege, the Court noted that the privilege would have attached had Seaga made the comments in the legislative chamber in his role as a member of Parliament. Seaga is expected to file an appeal to the Privy Council, the ultimate appellate court for Commonwealth countries.

Philippine Radio Station Pays for Insulting Words; Senate Eyes Decriminalizing Libel

A Philippine radio station was ordered to pay 76,000 PHP (approximately $1,300USD) for insulting the manager of a competing station on the air. The December 6, 2003 ruling found that calling the plaintiff “stupid,” “a moron,” “a braggart” an “ugly fool” and a “coward” was motivated by hate and malice, and “served no purpose but to malign the complainant.” Philippine law has no protection for opinion or epithets that are not addressing matters of public interest.

That nation’s senate has introduced revisions to its libel statutes, most notably removing the sentencing provisions from the penal code which provide for jail sentences against persons found guilty of libel. Under the new bill, libel would be subject to civil fines, co-extensive with a private right of action. “We are pushing for the passage of this bill to do away with a situation where the law of libel is being used, especially by people in authority, to stifle the freedom of expression,” Senator Aquilino Pimentel said in a public statement.

Charles Glasser is Media Counsel at Bloomberg News.

Paris Court Convicts Journalist for Receiving Documents in Violation of Judicial Confidentiality

Decision Conflicts with ECHR Rulings

By Julie Herzog

On October 23, 2003, the Paris Criminal Court convicted journalist Gilles Millet for knowingly receiving documents in violation of judicial confidentiality after he was found in possession of a judicial investigation report that he knew was covered by judicial confidentiality. He was fined 1,000 Euros. Under French law most aspects of judicial proceedings, including statements and documents actually filed with the court, are generally deemed to be secret

Millet was investigating the February 1998 murder of Corsica prefect Claude Erignac for the French newspaper *L'EvPnement du jeudi*. Rejecting his claim that the prosecution violated Article 10 of the European Convention of Human Rights (the "Convention"), the court held that Millet's prosecution was:

> "a necessary measure in a democratic society to protect the reputation and rights of others, one of which being the presumption of innocence, to prevent the disclosure of confidential information, and to guarantee the authority and impartiality of the judiciary."

TGI Paris, 17th chamber, October 23, 2003.

The conviction illustrates the strong protection afforded judicial confidentiality under French law, and the looming clash between such protection and Article 10 of the Convention.

ECHR Case Law

The ECHR considered the issue of liability for receiving of documents covered by judicial confidentiality in the case of *Fressoz and Roire v. France*. (*Fressoz and Roire v. France*, No. 29183/95 January 21, 1999) (available at www.echr.coe.int). This case arose out of a labor conflict in the French motor company Peugeot. Claude Roire, a journalist at the French satirical newspaper *Le Canard enchaîné*, published an article titled "Calvet turbo-charges his salary" illustrated by a copy of three tax assessment forms detailing the company chairman and managing director's "total taxable income," documents that are normally held by the tax authorities. The article explained that, while refusing his employees a pay rise of less than 2%, Mr Calvet awarded himself an increase of 45.9% in two years.

Roire and the newspaper's publishing director, Roger Fressoz, were then charged with handling copies of tax returns obtained through a breach of professional confidence. Reversing the judgment of the Paris Criminal Court, the Paris Court of Appeals sentenced Mr Fressoz and Mr Roire, respectively, to fines of 10,000 and 5,000 FRF (approximately $1,500 and $750). The decision was affirmed by the French Supreme Court, the *Cour de Cassation*.

The French Court concluded that while Mr Roire claimed he received the documents by anonymous mail, the tax assessments must have been obtained through a breach of professional confidence by an unidentified tax official. Therefore, the French Courts convicted Fressoz and Roire not for disclosing information about Calvet's income but for receiving a confidential document. It is relevant to note that the income of major company managers is published regularly in the financial press. Therefore, the information disclosed in the article was not secret.

ECHR Held Punishment of Reporters Violated Article 10

Reversing, the ECHR disregarded the distinction made by the French authorities between the information and the document in which it is contained, arguing that the conviction of the journalists for the technical offence of wrongful handling "disguised what was really a desire to penalize them for publishing the information."

Article 10 of the Convention authorizes restrictions to freedom of expression when they are "necessary in a democratic society" to protect the reputation and rights of others, to prevent the disclosure of confidential infor-

(Continued on page 30)

Paris Court Convicts Journalist for Receiving Documents in Violation of Judicial Confidentiality

(Continued from page 29)

mation, and to guaranty the authority and impartiality of the judiciary. It is not enough that a restriction pursues a legitimate aim, it must correspond to a "pressing social need" – a particularly relevant limitation in press cases.

In *Goodwin v. The United Kingdom*, No. 00017488/90 (March 27, 1996) (available at www.echr.coe.int), the ECHR recognized the important role of the press as a public watchdog, and ruled that the strongest protection should be afforded to journalistic sources to preserve the free flow of information. Although journalists have "duties and responsibilities" and must abide by the law, a journalist's conviction can only be upheld if an "overriding requirement in the public interest" is at stake. While national authorities generally enjoy a margin of appreciation to determine what is a "pressing social need," when the press is involved, the "margin of appreciation is circumscribed by the interest of democratic society in insuring and maintaining a free press." As a result, the court in *Goodwin* concluded that "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."

ECHR cases suggest that it should be irrelevant whether a journalist's source obtained information through the infringement of national regulation so long as the information disclosed is of interest to the public.

Protection for Judicial Confidentiality Under French Law

In contrast, French law has generally approved the punishment of journalists to maintain judicial confidentiality. In 2001, the *Cour de Cassation* upheld the conviction of the French newspaper *Paris Match* for publishing pictures taken by the police in the course of an investigation of an armed robbery. It held that the publication of the pictures:

> far from enlightening the readers on a subject of general interest, contributes on the one hand to disclose information that were to remain secret... and on the other hand to a lack respect and to infringe on the presumption of innocence...the pictures' legend mentioning expressly that the individuals could play an essential role in the commission of the offences.

Cass. crim., 13 novembre 2001, Legipresse No. 188-III, p. 3 (available at www.legifrance.gov.fr).

In another recent decision, the *Cour de Cassation* upheld the conviction of the author of "Les Oreilles du Président," for reproducing reports of phone taps that were part of a judicial investigation file on phone-tapping at the Elysée palace in Paris. Cass. crim. 19 juin 2001, Legipresse No. 185-III, p. 161 (available at www.lexinter.net).

The conviction of Gilles Millet is consistent with this precedent and the emphasis given by French Courts to judicial secrecy. The position that such secrecy is necessary in a democratic society and that it preserves the authority and impartiality of the judiciary and the presumption of innocence remains to be tested before the ECHR.

Gilles Millet was represented by Georges Kiejman. The public ministry was represented by Béatrice Angelelli, vice attorney general. The Court was composed of Judge Anne-Marie Sauterant, Judge Catherine Beziot and Judge Philippe Jean-Draeher.

Julie Herzog is an associate with Willkie Farr & Gallagher in Paris.

Eleventh Circuit Rules Police Officer Cannot Be Sued for Arresting News Photographer During Riot Coverage

By Dana J. McElroy

A police officer is entitled to qualified immunity for arresting a news photographer covering the riots in the aftermath of government agents' removal of Elian Gonzalez from the home of his Miami relatives, the Eleventh Circuit Court of Appeals has ruled. In a decision by Judge Stanley Marcus, the court reversed the Southern District of Florida's denial of the police officer's motion for summary judgment and held that the officer had probable cause to arrest the photographer and that she did not use excessive force. *Durruthy v. Pastor*, *No. 02-17017, 2003 U.S. App. LEXIS 24048, 17 Fla. L. Weekly Fed. C86 (11th Cir. Nov. 26, 2003)*.

The case arose from the April 2000 arrest of plaintiff, freelance cameraman Albert Durruthy, by defendant, City of Miami police officer Jennifer Pastor, while Durruthy was trying to videotape the arrest of another photographer during coverage of riots in Miami. Specifically, the record established that Durruthy was videotaping the arrest when another police officer instructed him to get off the street. Durruthy complied with the instruction, but continued to film the arrest as he "backpedaled" toward the sidewalk. As Durruthy approached the sidewalk, Pastor grabbed him from behind, and with another officer, pulled him to the ground. The officers then struggled to pin Durruthy's arms behind his back in order to apply handcuffs. Durruthy, who pleaded with the officers that he was "going peacefully" and to watch out for his "bad arm," injured his shoulder in the struggle. The officers charged Durruthy for allegedly obstructing the arrest of the other cameraman.

After prosecutors dropped the misdemeanor charge, Durruthy filed the action against the City of Miami and Pastor, alleging that Pastor had violated his Fourth Amendment rights by the unlawful arrest and use of excessive force. Pastor moved for summary judgment, asserting qualified immunity, i.e., that she was acting within her discretionary authority at the time of the alleged wrongful acts and thus was immune from suit. Pastor specifically asserted that she had probable cause to arrest Durruthy for obstructing an arrest. Additionally, although Pastor did not charge Durruthy with these offenses, Pastor argued she had probable cause to arrest him for walking in the street where "sidewalks are provided" and for refusing a police order to leave the street.

The district court denied Pastor's motion. *See Durruthy v. City of Miami*, *235 F.Supp.2d 1291 (S.D. Fla. 2002)*. The court found that Durruthy had complied with the police order to get off the street, even if he had continued to videotape while doing so. The court held that the Florida statute prohibiting walking in a street with sidewalks was inapplicable because no vehicles were in the street during the time period at issue. Finally, the court held that Pastor used excessive force against Durruthy because he was an obvious member of the media, was not protesting and had complied with the officer's requests.

Officer Had Probable Cause for Arrest and Did Not Use Excessive Force

Reversing, the Eleventh Circuit first held that Pastor had probable cause to arrest Durruthy for walking in a street where sidewalks were provided. The court reasoned that although Durruthy was not charged with this offense, Pastor was shielded by qualified immunity as "long as she had probable cause to arrest Durruthy for any offense." Because Durruthy clearly was walking in the middle of a street with sidewalks, he violated the statute.

In so ruling, the court rejected the notion that Durruthy did not violate the statute because its intended purpose was otherwise satisfied, i.e., no cars were present. The court likened this to the situation where a driver commits a traffic infraction by running a red light even when no other cars are present. The court also rejected Durruthy's assertion that he previously had been allowed by other officers to enter the street to shoot videotape, stating that the evidence on this point was too vague and that there was no evidence that Pastor was aware of the alleged permission. Finally, the court ruled inapplicable a City of Miami Police Department internal order that proscribed the "warrantless arrest of media personnel for non-felonious acts arising out of the pursuit of news gathering function" without express permission from higher authorities.

(Continued on page 32)

Eleventh Circuit Rules Police Officer Cannot Be Sued for Arresting News Photographer During Riot Coverage

(Continued from page 31)

As to Durruthy's claims that Pastor used excessive force during the arrest, the court disagreed with the district court's conclusion that no force whatsoever was acceptable under the circumstances. In this regard, the court state that "some force" is allowed, even where the crime charged is not serious. Further, even if force had been unnecessary, the court stated that the force used by Pastor during the arrest was "de minimus" and "far less than our Court has sustained in other contexts."

Dissent Sharply Critical

In a strongly-worded dissent, Judge Norman H. Stahl argued that Pastor clearly violated Durruthy's constitutional rights by an unlawful and unnecessary arrest. The dissent cited to apparent and "troubling" facts which established that Durruthy clearly did not obstruct the arrest of the other cameraman, that police were not clearing the area at the time, that Pastor was aware Durruthy was a member of the media attempting to gather news and that she ignored his repeated assertions that he would "go peacefully." Moreover, Pastor was clearly aware of the obvious pain and injury she was inflicting during the arrest, after which Durruthy was held in a police van for six hours without medical care.

The dissent rejected Pastor's invocation of the statute proscribing walking in a street with sidewalks, characterizing it as "after-the-fact excuse for her actions." Finally, the dissent criticized the majority's rejection of the City of Miami Police Department's internal policy concerning arresting the media during newsgathering, pointing out that the police chief had explained it was intended to grant a "higher degree of courtesy to members of the media than to average citizens and that if a member of the media complies with a police officer's request to move, such compliance should be the end of the incident."

Ronald Jay of Miami, Fla. and Robert Glazier of Miami Lakes. Fla. represented defendant Pastor; Marc A. Wites, Wites & Kapetan, P.A., Deerfield Beach, Fla. represented plaintiff Durruthy.

Dana J. McElroy is a shareholder with Gordon, Hargrove & James, P.A. in Ft. Lauderdale, Florida.

Pennsylvania Shield Law Does Not Apply to Non-Confidential Sources in a Criminal Case

By Amy Ginensky & Michael E. Baughman

The Pennsylvania Supreme Court clarified the reach of the state Shield Law, 42 Pa. C.S.A. § 5942, holding that it does not protect reporters from having to disclose unpublished non-confidential conversations with criminal suspects. *Commonwealth v. Bowden*, 2003 WL 22977461 (Pa. Dec. 19, 2003). The Court's decision, authored by Justice Nigro and joined by three other justices, was the first time the Court took on the scope of Pennsylvania's shield law since 1987. The Court did suggest that a First Amendment privilege was available to protect unpublished information; however, on the facts before it, the Court found the qualified First Amendment privilege was overcome.

Reporters Interviewed Accused Murderer

Mark Bowden, then a reporter for *The Philadelphia Inquirer*, published a series of articles based on his pretrial conversations with Brian Tyson who was accused of murdering a drug dealer. Linn Washington, Jr., a reporter for the Philadelphia Tribune, also spoke with Tyson and wrote several editorial pieces about the case. While Tyson admitted to shooting the dealer, he raised self defense at trial.

Shortly before trial, the District Attorney's Office subpoenaed Bowden and Washington, seeking the production of "all handwritten or otherwise memorialized notes of interviews or phone conversations with Brian Tyson." The reporters moved to quash the subpoenas on the grounds that, although no confidential sources were at issue, their notes relating to interviews with Tyson were newsgathering material and "sources" protected from disclosure by the Pennsylvania Shield Law and the First Amendment reporter's privilege.

Trial Court Orders Disclosure and Issues Fines for Contempt

The trial court found that the Pennsylvania Shield Law protected only confidential sources and, because Tyson was a disclosed, non-confidential source, the reporters should be compelled to testify as to what their notes reflected he said to them. Moreover, the trial court found that the reporters' First Amendment privilege was overcome because they were the only sources of Tyson's statements to them, and those statements could be relevant in rebutting the defendants' contention that he acted in self defense.

The reporters filed appeals with the Superior Court and the Supreme Court to stay the order pending an emergency appeal, but those requests were denied. At trial, the reporters agreed to testify to confirm the accuracy of published information. However, they continued to refuse to testify about unpublished information or to produce their notes. The trial court held the reporters in contempt, and imposed a fine of $100 per minute until the reporters complied with her order. At the end of the trial, the fine totaled $40,000 per reporter.

On appeal, the Superior Court affirmed the trial court's decision that the reporters were not protected by any privilege, but it also found that the trial court's fines were excessive, and remanded for a new hearing on the fines. *Commonwealth v. Tyson*, 800 A.2d 327 (Pa. Super. 2002). Both the Commonwealth and the reporters appealed.

Pennsylvania Supreme Reviews Shield Law

The reporters relied on *In re Taylor*, 193 A.2d 181 (Pa. 1963) for the argument that the statute protects unpublished, non-confidential material. There the Supreme Court ruled that two reporters' unpublished notes and recordings of conversations with the target of a corruption probe – whether or not confidential – were absolutely protected by the Shield Law. The *Taylor* court concluded that the term "source of information" in the Shield Law included documents, as well as persons, and thus precluded the compelled disclosure of documentary information in a reporter's possession.

The current status of the *Taylor* decision was somewhat unclear. More recently in *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (1987), the Supreme Court refused to apply the Shield Law to protect

(Continued on page 34)

Pennsylvania Shield Law Does Not Apply to Non-Confidential Sources in a Criminal Case

(Continued from page 33)

disclosure of unpublished information in a defamation action.

The reporters argued that *Hatchard* should be limited to issues of actual malice in defamation actions. The Supreme Court declined to read *Hatchard* narrowly, and instead "read [*Taylor*] as standing only for the proposition that documents are to be considered sources where their production, even with all names redacted, could breach the confidentiality of a human source." *Bowden*, 2003 WL 22977461 at *6. Because the suspect's statements to the reporters were not confidential and did not threaten the identity of any other confidential source, the majority found that the reporters were not protected by the Shield Law.

Justices Cappy and Castille, in dissent, argued that *Taylor* was on all fours with the facts of the case and could not be distinguished.

The bright spot in the Bowden decision is that the First Amendment privilege appears to be alive and well in the Pennsylvania state courts, as well as the federal courts.

The First Amendment Argument

The Pennsylvania Supreme Court next addressed the reporters' argument that they should not have been compelled to turn over their notes under the qualified First Amendment reporters privilege. The court began by noting that the Third Circuit has interpreted *Branzburg v. Hayes*, 408 U.S. 665 (1972), as creating a qualified privilege for reporters subject to subpoenas to refuse to disclose unpublished material. While noting that this interpretation of *Branzburg* was not universally accepted, the Court "declined" the Commonwealth's invitation to find that there was no privilege available to reporters whatsoever. While the Court did not definitely endorse the existence of a qualified First Amendment privilege — assuming without deciding it existed — it suggests that the Pennsylvania Supreme Court will continue to adhere to the Third Circuit's interpretation of *Branzburg* based on that Court's "general practice of deferring to the Third Circuit concerning federal questions." *Bowden*, 2003 WL 22977461 at *9 n.10. Thus, the bright spot in the *Bowden* decision is that the First Amendment privilege appears to be alive and well in the Pennsylvania state courts, as well as the federal courts.

In this case, the court found that no privilege applied under the traditional three prong analysis of the First Amendment test – 1) that the party demonstrates it has exhausted other means of obtaining the information; 2) that the party demonstrate that the only source of the information is the journalist or his sources; and 3) that the information be crucial to the moving party's claim.

Because the suspect made his comments directly to the reporters, the court found that they were the only source of the information, noting that "the Commonwealth could not have forced [Tyson] to produce the statements without running afoul of the Fifth Amendment guarantee against compelled self-incrimination." The Court further emphasized that the information the Commonwealth sought —verbatim notes of what Tyson said — were unique pieces of evidence, and that substitute evidence would not have been acceptable. With respect to the final prong, the Court found that the evidence sought was "crucial" to the Commonwealth's case because it was "relevant and important." (The Court rejected — at least in the context of a criminal case — defendants' argument that the test of whether information is "crucial" should depend on whether or not the claim fails or succeeds without the evidence.) The Court found that the testimony was relevant and important because "the Commonwealth could have used those statements to impeach Tyson's credibility once he took the stand to proclaim that the shooting was in self defense."

The Court Remands For Further Consideration of the Appropriate Sanction

Finally, the Supreme Court affirmed the Superior Court's decision to vacate the $40,000 contempt sanction. While the Supreme Court did not hold that the fine was

(Continued on page 35)

Pennsylvania Shield Law Does Not Apply to Non-Confidential Sources in a Criminal Case

(Continued from page 34)

necessarily improper, it did find that the trial court abused its discretion "as the decision-making process underlying the trial court's sanction order reflects a failure to apply the standards" a court must consider in selecting a sanction. *Id.* at *18. Specifically, the trial court failed to consider whether the magnitude of the fine was appropriate in light of the reporters' conduct, and whether the fine would have been effective in coercing the reporters to comply with the Court's order. The Court remanded the case to the trial court to reconsider the fine, but noted that the court may not increase the sanction, as the Commonwealth had not appealed the sanction.

Amy Ginensky and Michael Baughman at Dechert in Philadelphia represented Mark Bowden in this case, together with Robert Heim, Michael Berry and Robert Clothier (now a partner at High Swartz in Norristown, Pennsylvania).

Pennsylvania Supreme Court Finds No Right of Access to Legislator's Phone Records

But Paper's § 1983 Claims Alleging Discriminatory Access Survive Motion to Dismiss

By Robert C. Clothier

In issuing yet another recent decision of special interest to the media, the Pennsylvania Supreme Court decided that the press and public have no constitutional or common law right of access to telephone records of a member of the Pennsylvania General Assembly. The Court, however, ruled that the allegations that the State Representative had improperly conditioned access to such telephone records and retaliated against the requesting newspaper and reporter were sufficient to survive a motion to dismiss. *Uniontown Newspapers, Inc. v. Lawrence Roberts*, 2003 WL 23014383 (December 24, 2003) (available online at http://www.courts.state.pa.us/Index/Opinions).

The Request, the State Representative's Response and the Proceedings Below

In April 2000, the *Herald-Standard*, a newspaper based in Uniontown, Pa. (south of Pittsburgh), and its reporter, Paul Sunyak, asked Lawrence Roberts, a member of the Pennsylvania General Assembly, for copies of telephone records (long distance and cell, for both office and home) for which Roberts sought reimbursement from the House of Representatives.

In response, Roberts allegedly told the *Herald-Standard* that he would allow the paper to examine the records only if a different reporter was assigned to review them. The paper rejected the condition. Roberts allegedly also urged the paper to prohibit the reporter from covering his activities.

A month later, Roberts provided copies of the records to a local radio station and stated he was withholding the records from the *Herald-Standard* because he believed it was biased. He also stated that he would consider providing the records if the paper's counsel absolved him of wrongdoing in connection with them.

Subsequently, the *Herald-Standard* and its reporter filed a lawsuit in Pennsylvania's Commonwealth Court seeking an order declaring that they had a constitutional and common law right of access to the telephone records (Count I), that Roberts denied their equal protection rights under § 1983 by selectively denying access to the records (Count II) and that he retaliated against them for exercising their First Amendment right of free speech (Count III).

On Roberts' preliminary objections (Pennsylvania's version of a motion to dismiss), the Commonwealth dismissed the lawsuit, and the paper and reporter appealed to the Pennsylvania Supreme Court.

(Continued on page 36)

PA Ct. Finds No Right of Access to Legislator's Phone Records

(Continued from page 35)

No Common Law Right of Access

The parties agreed that the Pennsylvania Right to Know Act does not apply to Roberts, a member of the legislative branch of government. Instead, the *Herald-Standard* and Sunyak argued for a common law right of access to the telephone records. They relied substantially on *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) and Pennsylvania cases finding a common law right of access to judicial records, *e.g.*, *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987) (common law right of access to search warrant affidavits).

The Pennsylvania Supreme Court disagreed. In a decision authored by Justice J. Michael Eakin and joined by three other justices, it held that the common law right of access set forth in *Fenstermaker* "has never been enlarged to include the legislative branch." The Court explained that Pennsylvania's Right to Know Act "codified" and "supplanted" any common law right of access. Since the General Assembly did not subject itself to the Right to Know Act, the Court concluded, there is no common law right of access to the General Assembly's records. The Court did not explain why the Right to Know Act "supplanted" the common law with respect to the General Assembly but not with respect to the judiciary – other than that there is longstanding precedent providing for a common law right of access to judicial records.

No Constitutional Right of Access

Alternatively, the *Herald-Standard* and its reporter argued that they have a First Amendment and Pennsylvania constitutional right of access to Roberts' telephone records.

To ascertain the existence of any such First Amendment right, the Court looked to the two part "logic" and "experience" test set forth in *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1 (1986). Under that test, the Union-Herald and its reporter were required to "allege and prove [that] access has traditionally been afforded to the public and that access 'plays a significant positive role in the functioning of the particular process in question." *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986).

The Court's analysis of these factors was slight. It focused almost entirely on various provisions of the Pennsylvania Constitution that, the Court noted, "make a commitment to open government, but they do not imply an infinite scope" and are limited to "legislative proceedings and sessions, not administrative records." The Court also found, without elaboration, that access to the requested telephone records has not been "traditionally afforded to the public at large." Although the Court never addressed the "logic" part of the test, the Court went on to conclude that "there is no First Amendment right of access to legislative telephone records."

The Court then turned to Article I, § 7 of the Pennsylvania Constitution, which the Union-Herald and its reporter contended provided an independent right of access that is "more expansive" than the First Amendment. The Court agreed that this provision is broader than the First Amendment. For example, it codifies "the proscription of prior restraints on speech, whereas the federal Constitution prohibits prior restraints in most situations based upon the common law."

But the Court held that "we find no right of access to legislative records beyond the proceedings of the Legislature. Article I, § 7 may be read to protect the right to *publish* information about the Legislature, but it has not been so broadly interpreted to include a heightened right to *gather* information from the Legislature" (emphases in original). Thus, it "provides no more expansive rights of the press to gather information than the First Amendment." While the Court found the policy bases for access to be "laudable," the "remedy" lay with the legislature, not the courts.

No Legislative Immunity under the Speech or Debate Clause of the Pa. Constitution

Count II of the paper's complaint took issue with Roberts' refusal to provide access to the records to the paper except on certain conditions (the paper's reporter must be removed from the story and the paper's counsel must agree to absolve him of wrongdoing in connection with the records), and Count III alleged that Roberts refused to provide such access because he was "displeased" with the paper's reporting on Roberts. The lower court dismissed these counts, holding that Roberts' enjoyed immunity from § 1983 claims under the Pennsylvania Constitution's Speech or Debate Clause, which is substantively similar (if not identical) to that in the U.S. Constitution.

(Continued on page 37)

PA Ct. Finds No Right of Access to Legislator's Phone Records

(Continued from page 36)

The Supreme Court disagreed. The Court explained that the "issue is not about a newsmaker denying access" – as the lower court had held. Rather, the Union-Herald and its reporter "alleged unequal treatment by a government official who conditioned access on the exclusion of the reporter and a pardon by the press." The Court held that "individual discriminatory and retaliatory distribution of records by a legislator are not protected activities" under the Speech or Debate Clause. *See, e.g., Hutchinson v. Proxmire*, 443 U.S. 111 (1979), *United States v. Brewster*, 408 U.S. 501, 512 (1972).

Allegations of Discriminatory Access Sufficient to State § 1983 Claim

The Court then turned to the merits of these claims. Regarding the claim of discriminatory access (Count II), the Court held that such allegations were sufficient to survive Roberts' motion to dismiss. The Court again relied on *Capital Cities*, where the Third Circuit held that a state agency's granting access to those news seekers favorably disposed to it, while denying access to those it considered unfriendly, may be an actionable equal protection claim. *See also Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986). The fact that the reporter was the only one discriminated against by Roberts did not preclude the equal protection claim: "There is nothing in the equal protection analysis of *Capital Cities* suggesting equal protection claims for classes of one are prohibited."

The Court also reinstated the newspaper's and its reporter's claim that Roberts had retaliated against them for exercising their First Amendment rights of free speech (Count III). To establish a prima facie claim of retaliation, the newspaper and its reporter needed to allege that they were engaged in a constitutionally protected activity, that Roberts' actions caused them to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity and that the adverse action was motivated at least in part as a response to the exercise of their constitutional rights. *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998). The Court ruled that "there is no question" that facts sufficient to establish a prima facie retaliation claim were alleged.

Two justices dissented from the Court's reinstatement of the Section 1983 claims, asserting that no state action was implicated by Roberts' acts. Justice William Lamb explained: "In this case, there is no state action involved in a legislator's release of his protected telephone records; and, reporters with hurt feelings are not a protected class. The reporter, who works for a newspaper, which buys ink by the barrel, surely has a more effective avenue of recourse than Section 1983."

The Larger Context

This case is just part of a recent trend in the Pennsylvania Supreme Court towards a reduction in access to public records and proceedings. In *LaValle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001), the Court held that internal, pre-decisional, deliberative documents are not public under the Pennsylvania Right to Know Act, even though a purpose of that Act, and Pennsylvania's Sunshine Act, is to permit citizens to witness the deliberations of its governmental decision-makers. And in *Kennedy v. Upper Milford Township Zoning Hearing Bd.*, 834 A.2d 1104(Pa. October 27, 2003), the Court ruled that quasi-judicial deliberations of agencies may properly be closed to the public. In both cases, the Court strongly endorsed the policies underlying what is called the deliberative process privilege, without actually creating such a privilege under Pennsylvania law (although one Pennsylvania lower court has since adopted such a privilege).

At the same time, the Court has increased the amount information that litigants and the government can subpoena from the media. *See Commonwealth v. Bowden & Washington*, 2003 WL 22977461 (Pa. December 19, 2003) (Pennsylvania Shield Law protects only confidential source information, not the broader category of unpublished information), discussed in this issue of the MediaLawLetter.

Roberts was represented by C. Clark Hodgson, Jr. of Stradley Ronan Stevens & Young in Philadelphia, Pennsylvania. The Union-Herald and its reporter were represented by Charlie Kelly of Sinclair, Jackson, Reinhart & Hayden, LLC, in Canonsburg, Pennsylvania.

Robert C. Clothier is a partner at High, Swartz, Roberts & Seidel, LLP in Norristown, Pennsylvania.

Voire Dire Closed in Martha Stewart Case
Second Circuit Grants Expedited Appeal

On January 15, Judge Miriam Cedarbaum, the district court judge presiding over the trial of Martha Stewart, filed an order closing *voir dire* proceedings. *US v. Stewart*, No. 03 CR 717 2004 WL 65159 (S.D.N.Y. Jan. 15, 2004). In lieu of an open courtroom, Judge Cedarbaum ruled that the court would release redacted transcripts of the closed proceedings the following day. Relying on *United States v. King,* 140 F.3d 76 (2d Cir. 1998), the court found that, because of the extensive publicity surrounding the trial, jurors would not likely give "full and frank" answers to *voir dire* if the proceedings were open.

The court ordered *voir dire* closed without providing any notice to the press or public or opportunity to be heard. As a result, a coalition of many news organizations, including ABC, American Lawyer Media, the Associated Press, Bloomberg, CBS, CNN, Fox, Gannett, the *Daily News*, Dow Jones, NBC, *Newsday*, the *New York Post*, the *New York Times*, Reuters, and the *Washington Post*, filed a motion the following day, asking Judge Cedarbaum to vacate or modify her order, on the grounds that, under the Supreme Court's decision in *Press-Enterprise v. Superior Court of California*, 464 U.S. 501 (1984), the press and public have a First Amendment right of access to attend *voir dire*. The district court rejected the motion, and, on Tuesday, January 20, the media coalition appealed to the Second Circuit, asking that the Court take the case on an expedited basis. The Second Circuit granted the motion for expedited appeal, and is scheduled to hear argument on Monday, January 26.

The media coalition is represented by David A. Schulz and Alia Smith of Levine Sullivan Koch & Schulz in New York.

Delaware Supreme Court Agrees to Allow Cameras into Some Civil Courts

On December 10, 2003, the Delaware Supreme Court authorized expanded media coverage on a six-month experimental basis in state Chancery and Superior courts. Previously, cameras had only been allowed in the Delaware Supreme Court. An opinion letter by Chief Justice E. Norman Veasey entitled "The Value of Experimentation with Electronic Media in Delaware Trial Courts" is available on the court's website <http://courts.state.de.us/supreme/>.

Under the program, civil court judges now have discretion to permit still cameras and broadcast and television recording equipment in non-jury civil cases upon written request. The Delaware Chancery Court hears many high profile corporate business cases.

The Delaware Bar Bench Media Conference had been advocating for cameras in courts since 1994. After languishing in rule-making limbo for nearly a decade, the Bar Bench Media Conference renewed its plea in late 2002. Chief Justice Veasey noted in his opinion letter that advances in media technology now make camera coverage less distracting – at least to proceed "cautiously and incrementally."

Montana Supreme Court Holds That Businesses May Not Assert "Individual Privacy Rights" Under Montana Constitution

By Kevin Twidwell

Reversing previous Montana cases, the Montana Supreme Court has held that businesses may not assert "individual privacy" rights under the Montana Constitution when they are attempting to withhold publicly-filed documents that they claim contain trade secrets and other confidential proprietary information. *Great Falls Tribune et al v. Montana Public Service Commission*, 2003 MT 359, 2003 WL22971304 (Mont. Dec. 18, 2003). The opinion and the parties' briefs are available at: <www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-9573>.

In a challenge brought by a dozen media organizations seeking access to documents that an electricity supplier filed with the state Public Service Commission ("PSC"), the unanimous Court found that the framers of Montana's constitution intended that only humans – not business entities such as corporations – assert a right to "individual privacy" that must be balanced against the public's "right to know" when determining whether such documents should be disclosed to the public.

The unanimous Court found that the framers of Montana's constitution intended that only humans – not business entities such as corporations – assert a right to "individual privacy" that must be balanced against the public's "right to know."

The ruling does not, however, mean that all documents filed with a public agency are now open to the public. Instead, the Court clarified that although businesses may not assert a Constitutional right to privacy, they may still resist disclosure of sensitive business information under trade secret laws or under the due process and equal protection clauses of the constitution that protect against public takings of private property. 2003 MT 359, slip op. at 15, 2003 WL22971304 at *7.

In another important aspect of the ruling, the Court found that the PSC may no longer issue generic protective orders allowing it to withhold documents based on mere representations by public utilities that the information they submit contains trade secrets or other confidential materials. 2003 MT 359, slip op. at 21-27, 2003 WL22971304 at *10-11.

Newspaper Challenges Protective Order

The case arose after a reporter for the *Great Falls Tribune* was denied copies of documents the Montana Power Company, now known as Northwestern Energy, LLC, was required to file with the PSC. The PSC granted a protective order based on the company's representations that the documents contained trade secrets and other confidential proprietary information.

The news organizations challenged the PSC decision in state district court. The court denied a motion to dismiss, finding that the PSC failed to balance MPC's rights of "individual privacy" with the public's right to know under Article II, Section 9, of the Montana Constitution. The clause states:

> No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of *individual privacy* clearly exceeds the merits of public disclosure.

Art. II, Sec. 9, Mont. Const. (emphasis added).

The Montana Supreme Court had previously held that businesses had a constitutional right of "individual privacy" that could outweigh the public's constitutional right to know. *See, e.g., Mt. States, Etc v. Dept. of Pub. Serv. Reg.* (1981), 194 Mont. 277, 634 P.2d 181; *Associated Press, Inc. v. Department of Revenue*, 2000 MT 160, 300 Mont. 233, 4 P.3d 5.

After denying the motions to dismiss, the district Court held a three-day evidentiary hearing and ordered the release of some MPC documents while ordering other categories of documents to remain confidential.

Corporations Do Not Have Individual Privacy Rights Under the Montana Constitution

Among its arguments on appeal, the media argued that a trade secret may not be withheld unless the value of the trade secret is balanced against the merits of public disclosure, as

(Continued on page 40)

Montana Court Holds That Businesses May Not Assert "Individual Privacy Rights" Under Montana Constitution

(Continued from page 39)

set forth in Article II, Section 9. Although MPC did not assert protection from disclosure under a theory of privacy, the Montana Supreme Court used the case to clarify that the framer's of Montana's Constitution "intended to limit the Montana State constitution's protection of privacy to natural human individuals." 2003 MT 359, slip op. at 11-13, 2003 WL22971304 at *6-7.

The Court explained that the Delegates to the 1972 Constitutional Convention used the words "right of individual privacy" when describing the only exception to the public's right to know what its government is doing and again used the word "individual" in the Constitutional section that follows the right-to-know provision. Article II, Section 10 states:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

The Court held that by using the word "individual," the Delegates intended the privacy exception to apply only to people.

> Accordingly, this Court hereby expressly overrules *Mt. States*, and its progeny, to the extent the decisions rely on the Article II, Section 9 constitutional balancing test of the right of "individual privacy" against the public's right [to know] as a basis for protecting trade secrets and other confidential proprietary information of non-human entities.

2003 MT 359, slip op. at 14-15, 2003 WL22971304 at *6.

The Court concluded that although "non-human entities" do not have privacy rights under the Montana Constitution, a business may still "enjoy confidentiality of its property interest under Montana statutory law, such as the Uniform Trade Secrets Act … or protection against the "taking" of private property for public use without just compensation under federal and state constitutions." 2003 MT 359, slip op. at 15, 2003 WL22971304 at *7. As such, companies' trade secrets, and other confidential information they provide to the State may be protected by the due process and equal protection clauses of the state and federal constitutions.

No Blanket Protective Orders

The Montana Supreme Court also held that the PSC's procedural rules were constitutionally flawed. Under its rules, the PSC was allowed to issue "generic protective orders" to utilities that represented to the commission that confidential information would be submitted or was likely to be requested in the approval process. The Court found that the rules unconstitutionally shifted the burden of proof to the public to challenge a public utility's claims of confidentiality. This created a presumption of confidentiality that conflicts with government officials' affirmative duty to make all of their records and proceeding available to the public inspection or scrutiny. 2003 MT 359, slip op. at 21-22, 2003 WL22971304 at *10-11.

The court held that an entity seeking a protective order from the PSC must support its claim of confidentiality with a detailed affidavit demonstrating prima facie evidence that the materials constitute protected property rights. Further, the Court ordered that the agency must now undertake an independent review of the utilities' records and affidavits before issuing protective orders. 2003 MT 359, slip op. at 21-22, 2003 WL22971304 at *10-11.

Guidance on Trade Secret Law

Finally, the court held that the media should have exhausted its administrative remedies before the PSC instead of directly filing an action in the state district court. 2003 MT 359, slip op. at 15-17, 2003 WL22971304 at *8. Along those lines, the Court held that the PSC must be the agency to first determine whether the documents requested by the media are protected from disclosure. 2003 MT 359, slip op. at 22-24, 2003 WL22971304 at *12-13.The Court, however, provided some guidance on trade secret law.

Under Montana's Uniform Trade Secret Act, a party's efforts to maintain the information's secrecy must be reasonable under the circumstances. The Court held that what is reasonable when a utility is compelled to file contracts with a state agency is different from an exchange of information between private parties.

In other words, one might expect a more encompassing definition of a trade secret in litigation between private parties than would be recognized when a utility files a document with the PSC. Certainly, the fact that the con-

(Continued on page 41)

Montana Court Holds That Businesses May Not Assert "Individual Privacy Rights" Under Montana Constitution

(Continued from page 40)

tracts, although private, were negotiated for the benefit of the public must be taken into consideration. 2003 MT 359, slip op. at 24, 2003 WL22971304 at *12.

In light of its rulings on the various issues, the Court reversed the District Court's conclusions and ordered the District Court to remand to the PSC the issue of whether the individual documents are confidential. 2003 MT 359, slip op. at 24-25, 2003 WL22971304 at *12-13.

Peter Michael Meloy and Jennifer S. Hendricks of the Meloy Law Firm in Helena, Montana represented the news organizations. Robin A. McHugh, special attorney general, represented the Montana Public Service Commission. Marjorie L. Thomas and Michael P. Manion represented Northwestern Energy, LLC.

Amici were: John Alke of the Helena, Montana, firm Hughes, Kellner, Sullivan & Alke (Qwest Corp and Montana-Dakota Utilities Co.); and former University of Montana Constitutional Law Professor Larry M. Elison and Missoula attorney Matthew Clifford (on issue of "individual privacy.").

Kevin A. Twidwell is with the law firm of Garlington, Lohn & Robinson, PLLP, Missoula, Montana.

Colorado Federal Court Enjoins Criminal Libel Prosecution

College Student to Pursue Constitutional Challenge to State Law

On January 9, 2004, a Colorado federal district court granted an emergency order enjoining local Colorado police and prosecutors from investigating or bringing charges against a college student for criminal libel. *Mink v. Dominguez, et al.*, (D. Colo. Jan. 9, 2004) (Babcock J.). The court also ordered that a computer seized from the student be returned. On a subsequent court hearing on January 20th, the Weld County district attorney filed formal notice that it would not pursue any charges, but the student's challenge to the constitutionality of Colorado's criminal defamation statute, as well as his claim for civil damages, will continue to be heard by the court.

This case vividly illustrates how criminal defamation statutes can be arbitrarily and abusively applied and it presents a compelling case that such laws be declared entirely unconstitutional.

College Student Publishes Satiric Website

The lead plaintiff in the civil action is Thomas Mink, a 24-year old student at the University of Northern Colorado ("UNC"). This past fall he started a website called "The Howling Pig," which contains commentary and satire about the UNC community. The homepage states the site is intended to permit people "to vent frustration or post insightful social and political commentary" related to UNC. The address is www.geocities.com/thehowlingpig.

On December 12, 2003, City of Greeley police officers executed an extraordinarily broad search warrant at plaintiff's home, seeking any computer systems, electronic storage media, and related documents, as well as all correspondence, journals, and any other of his communications in printed form. Mink was told he was being investigated for "felony criminal libel." His computer was seized by police and he was later told it was being examined for evidence and that he would likely be charged.

The affidavit in support of the search warrant stated that the basis of the investigation was a complaint by UNC Professor Junius Peake. The site spoofs Peake, featuring an altered photograph of the professor with the caption: "Our founder, spiritual leader, and the inspiration behind The Howling Pig, Mr. Junius Puke is currently the editor-in-

(Continued on page 42)

Colorado Court Enjoins Criminal Libel Investigation

(Continued from page 41)

chief. Mr Puke is taking a break from his well-earned, corporate endowed sinecure at a small western university in order to assist in the publication of The Howling Pig. The old photo from Mr. Puke's rebellious days as a roadie for KISS is a symbolic return to a time before his days on Wall Street where he managed to luck out and ride the tech bubble of the nineties like a $20 whore and make a fortune." A copy of the search warrant and supporting affidavit are available through www.aclu-co.org/.

On January 8, 2004 the Colorado ACLU filed a complaint in federal district court seeking to enjoin the prosecution, asserting § 1983 violations, and seeking to obtain a declaratory judgment that Colorado's criminal libel statute is unconstitutional on its face and as applied.

Colorado Statute Was Limited to "Private Libels"

Colorado's criminal libel statute, Colo. Rev. Stat. § 18-13-105, does not require actual malice nor does it recognize truth as an absolute defense in all circumstances, but it has been upheld as applied to private libels by the state supreme court in *People v. Ryan*, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991), *cert. denied*, 502 U.S. 860 (1991). The statute provides that:

> (1) A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel. (2) It shall be an affirmative defense that the publication was true, except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living.

In *Ryan*, an unsympathetic defendant was charged with criminal libel for distributing "Wanted" posters depicting an ex-girlfriend and accusing her of prostitution, child abuse, having AIDS and VD, among other things. The trial court dismissed the indictment finding the statute unconstitutional because it lacked an actual malice requirement. The Colorado Supreme Court reversed, ruling that while the statute would be unconstitutional as applied to statements about public figures and issues of public concern, it could apply to "purely private libels." 806 P.2d at 938-9 ("in a purely private context, a less restrictive culpability standard may be used to meet the state's legitimate interest in controlling constitutionally unprotected conduct injurious to its citizens.").

As to the truth defense, the statute recognizes truth as an affirmative defense except as to "libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." Indeed, the latter appears to refer to true "private facts." The Colorado Supreme Court held that the issue of truth was not properly raised on appeal and did not address this portion of the statute.

Arguments Against Statute

Plaintiff's brief argues that under *People v. Ryan, supra,* the Colorado statute cannot be applied constitutionally in a case involving a public official and/or figure, such as Professor Peake, because it permits conviction without proof of actual malice. Alternatively, it cannot be applied to statements about private figures on matters of public concern.

The brief also argues that the Colorado statute is facially unconstitutional because it omits falsity as an element of the crime, an issue not addressed in *Ryan*, and because key elements of the statute are impermissibly vague.

A. Bruce Jones and Marcy Glenn of Holland & Hart, Denver, Colorado represented Mink on behalf of the Colorado ACLU.

Other U.S. Criminal Libel Developments

Minnesota Legislator Pleads Guilty to False Campaign Advertising

Minnesota State Representative Dick Borrell pleaded guilty in early January to violating a Minnesota election law that makes it a crime to publish false information about an opponent in campaign advertising and literature. Borrell was indicted by a grand jury in April 2003 for literature distributed during the 2002 campaign which claimed that write-in candidate Darren Knight had been charged with unfair campaign practices and criminal defamation. In fact, Borrell had filed a complaint, but Knight was never charged. Borrell pleaded guilty to two counts of committing a gross misdemeanor, but did not admit specific wrongdoing. As part of his plea, Borrell agreed to pay $1,500 in court costs, to not commit a similar offense for one year, and to apologize to the county attorney and to Knight.

The unusual statute under which Borrell was charged, Minn. Stat. § 211B.06, makes it a misdemeanor to make knowingly false statements about another candidate's "character" in campaign materials, advertisements or letters to the editor, that are " designed or tends to" defeat a candidate for nomination or election. The statute was recently amended in 1998 after a previous version was held unconstitutionally overbroad in *Minnesota v. Jude*, 554 N.W.2d 750 (Minn. Ct. App. 1996) (finding statute failed to require actual malice).

Election Libel Claim Rejected in Montana

A claim that the successful candidate for Gallatin County Auditor violated Montana law by misrepresenting the record of her incumbent opponent was rejected on January 12, 2004 by the state's Commissioner of Political Practices. *In the Matter of the Complaint Against Jennifer Blossom* (Mont. Comm'r of Pol. Practs., Jan. 12, 2004), *available through* <www.state.mt.us/>.

During her 2002 campaign, Jennifer Blossom made several claims regarding the job performance of the that incumbent, Joyce Schmidt. After Blossom won the election, Schmidt's husband filed a complaint with the state Commissioner of Political Practices, alleging that Blossom had violated Mont. Stat. § 13-37-131. This statute allows the commissioner or a county attorney to file a civil action against a person who "misrepresent[s] a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false." The penalty for the civil offense is a fine up to $1,000.

The complaint alleged that Blossom had violated the statute by claiming that Schmidt was late paying vendors, was "notorious" for working 32-hour weeks, was responsible for an error in distribution motor vehicle tax money, and that she was unwilling to use the county's new accounting software.

The Commissioner of Election Practices, Linda Vaughey, found that the complained of statements were not false and, in addition, that there was no evidence of actual malice.

Tribal Criminal Defamation Charges for E-mail Critic

A member of the Walker River Paiute Tribe in Nevada was scheduled to go on trial January 23, 2004 on charges of criminally defaming a tribal official. The charges stemmed from an e-mail that 60-year-old Patty Hicks sent to another tribe member criticizing tribal Water Resource Coordinator Elveda Martinez. Martinez is overseeing the federally-financed reconstruction of the 1935 Weber Dam, which the Bureau of Indian Affairs has said is in imminent danger of collapse. The e-mail stated that "every one of her projects have been flops and couldn't be finished. ... As far as I am concerned, she should be in prison for raping our tribe"; and was part of defendant's campaign to recall two of the tribe's council members. Under tribal law, Hicks could be sentenced to a six-month jail term if convicted.

In 2003, seven members of the Citizen Potawatomi Nation in Oklahoma were charged with tribal criminal defamation for political advertisement posted on the Internet accusing the tribal chairman of undermining a tribal member's candidacy for vice chairman. *See MLRC MediaLawLetter*, Feb. 2003, at 15. Those charges were dropped when the tribe's attorney general and assistant attorney general both refused to prosecute the case.

Rhode Island District Court Denies Motion to Stay in Reporter's Privilege Case

A federal district court in Rhode Island denied investigative reporter James Taricani's motion to stay pending appeal an order compelling him to divulge the identity of a confidential source suspected of criminal contempt. *In re Special Proceedings*, 2003 WL 22994279 (D. R.I Dec. 15, 2004) (Torres, J). But the court granted a 30 day stay to appeal to the First Circuit for a stay.

A special prosecutor is investigating the leak of surveillance videotapes from the criminal investigation of several officials of the City of Providence for extortion, bribery, and various other offenses. Copies of the tapes were given to defense counsel and were leaked to Taricani and portions were broadcast on local news.

The leak of the videotapes was an apparent violation of an earlier-issued protective order in the on-going criminal investigation of official corruption in Providence. The special prosecutor's investigation does not target the reporter. Instead the court refers to the reporter as "a material witness" who knows the identity of the person who leaked the videotapes. *See MediaLawLetter* October 2003 at 19.

In its October 2, 2003 order, the court found that reporters do not have a First Amendment privilege to refuse to "respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *See In re Special Proceedings*, 2003 WL 22284124 at *5 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 690-91 (1972)).

California Appeals Court Reins in Punitive Damage Awards

By Theodore J. Boutrous, Jr. and Thomas H. Dupree, Jr.

On November 25, 2003, the California Court of Appeal issued a landmark ruling in a non-media case, *Romo v. Ford Motor Company*, 113 Cal. App. 4th 738, cutting a $290 million punitive damage award to $23 million, and likely establishing a major new precedent in the law of punitive damages. The case involved the largest punitive damage award ever affirmed in a personal injury case in U.S. history, and the largest such award ever upheld in *any* case by a California court.

The decision from California's Fifth Appellate District is one of the first major cases involving the application of last year's Supreme Court ruling in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003). In *State Farm*, the Supreme Court clarified and strengthened the constitutional limitations on punitive damage awards, making clear that such awards must be reasonable and proportionate to the harm suffered by the plaintiff—and emphasizing the important duty of appellate judges to review such awards closely and with rigor.

The Court of Appeal's opinion on remand reflects the extent to which State Farm transformed the law of punitive damages.

Jury Awarded Plaintiff $290 Million in Punitive Damages

The *Romo* case arose from a car accident involving a 1978 Ford Bronco. The plaintiffs alleged that the Bronco's roof was defective, and a jury found in their favor, imposing a $290 million punitive damage award against Ford. Although the trial judge found the award tainted by juror misconduct and set it aside, the California Court of Appeal reinstated the award in full and the California Supreme Court declined review.

Ford asked the United States Supreme Court to hear the case. While Ford's petition for certiorari was pending, the Court decided *State Farm*. The Court then granted Ford's petition, vacated the award, and remanded the case to the California Court of Appeal for reconsideration in light of the new *State Farm* standards. *See* 123 S.Ct. 2072 (2003).

State Farm Decision Fundamentally Alters Punitive Damage Analysis

The Court of Appeal's opinion on remand reflects the extent to which *State Farm* transformed the law of punitive damages. The court began by recognizing that in *State Farm*, the Supreme Court "went beyond the 'guideposts'" it had established in its famous *BMW v. Gore* decision, and "articulated a constitutional due process limitation on both the goal and the measure of punitive damages." 113 Cal. App. 4th at 749. The result, the court concluded, "is a punitive damages analysis that focuses primarily on what the defendant did to the present plaintiff, rather than the defendant's wealth or general incorrigibility." *Id.*

In reaching this conclusion, the court noted that its initial opinion had applied "the broad standards for punitive damages established by California case law"—namely, that the purpose of a punitive award could be "to actually deter a practice or course of conduct by depriving the wrongdoer of profit from the course of conduct or making such conduct so expensive it put the wrongdoer at a competitive disadvantage." *Id.* at 748-49. *State Farm*, the court explained, "impliedly disapproved of this broad view of the goal and measure of punitive damages" in favor of "the more limited, historically based view of punitive damages" that focuses on the harm to the particular plaintiff in the case at bar. *Id.* at 749.

The court then recognized a central holding of *State Farm*: that in all but the most extreme cases, a punitive damage award that is more than ten times the compensatory damage award violates due process, and that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* at 752 (quoting *State Farm*, 123 S. Ct. at 1524). The court also noted that *State Farm* "fundamentally altered" the relevance of criminal penalties in determining whether a punitive damage award is excessive, emphasizing the Supreme Court's observation that "[p]unitive damages are not a substitute for the criminal process, and the remote

(Continued on page 46)

CA Appeals Court Reins in Punitive Damage Awards

(Continued from page 45)

possibility of a criminal sanction does not automatically sustain a punitive damages award." *Id*. (quoting *State Farm*, 123 S. Ct. at 1526).

Applying these new standards, the court held that the $290 million punitive award was excessive and unconstitutional. The court accordingly remitted the award to $23.7 million, which it noted "is approximately five times the total compensatory damages award in this case." *Id*. at 763. Such an amount, the court emphasized, is "near the top of the permissible range" allowed by the Constitution. *Id*. at 755.

In reducing the award, the court noted that with regard to the personal injury claims asserted by some of the plaintiffs, "a large portion of the compensatory damages award was for noneconomic damages," primarily emotional distress. *Id*. at 762. The court reasoned that because noneconomic damages "likely involved considerations similar to the punitive damages award, a somewhat lesser multiplier is appropriate as to those damages." *Id*. This insight tracks *State Farm*'s admonition that courts "must look at the *nature* of the compensatory damages award, with the result that a lower multiplier will be appropriate if the compensatory damages award for the particular tort already compensates for the 'outrage and humiliation' that punitive damages are primarily intended to condemn." *Id*. at 752 (quoting *State Farm*, 123 S. Ct. at 1525).

Punitive damage awards, in the rare cases where they are appropriate, must be reasonable and proportionate to the actual harm caused to the plaintiff.

The court also determined that in two respects, "the jury was fundamentally misinstructed concerning the amount of punitive damages it could award." *Id*. at 753 (emphasis removed). First, it was erroneously instructed that it should consider the defendant's "financial condition" in determining an appropriate award; such an instruction, the court explained, "fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs." *Id*.

Second, although the jury was given some guidance as to the threshold for the imposition of punitive damages, it was *not* told of the constitutional limitations on the amount it could award. The harm from this omission was exacerbated by the improper arguments of plaintiffs' counsel, who urged the jury to impose a punishment large enough to force Ford to recall all of its 1978 Broncos and "crush them to dust." *Id*. Counsel further exhorted the jury to impose an award of such size that "the resulting publicity" would reach Bronco owners throughout the country. The court condemned this tactic, declaring that "[t]hese considerations are impermissible under *State Farm* and plaintiffs' argument served to magnify the impact of the misinstruction." *Id*. at 754.

Conclusion

Although the long-term effect of the *Romo* decision remains to be seen, its immediate impact is clear: punitive damage awards, in the rare cases where they are appropriate, must be reasonable and proportionate to the actual harm caused to the plaintiff. They are not to be used to punish a defendant for alleged harm to other persons not before the court, or to force a defendant to make changes in its business practices on a national scale. *Romo* will likely serve as an important precedent for defendants fighting arbitrary and excessive punitive damage awards.

Theodore Boutrous is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Thomas Dupree is an associate in the firm's Washington, D.C. office. They were lead counsel for Ford Motor Company in the Supreme Court and appellate proceedings on remand in the Romo case.

Last month MLRC published an analysis of the Supreme Court's campaign finance decision by Eric Mogilnicki and Stacy Beck of Wilmer, Cutler & Pickering, members of the legal team that successfully defended the constitutionality of the Bipartisan Campaign Reform Act. Here is another perspective on the impact of the case on the broadcast media from a lawyer with one of the organizations that challenged the Act.

Supreme Court Upholds Campaign Finance Law

By Jerianne Timmerman

Last month the Supreme Court rejected First Amendment and other challenges to all major provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA). *McConnell, et al. v. Federal Election Commission*, *et al*., No. 02-1674 (Dec. 10, 2003). This decision will significantly affect how political parties, interest groups, corporations and unions participate in the federal election process. The decision, which upholds restrictions on speech about political issues in the context of campaign finance reform, also raises questions about other areas where the Supreme Court may be willing to defer to Congress' adoption of speech-restrictive legislation.

The Court accepted with very little question that preventing just the appearance of corruption in federal elections was a sufficiently important interest to justify both contribution limits themselves and laws preventing the circumvention of those limits.

In January 2002, Congress enacted BCRA, the most comprehensive campaign finance legislation in three decades, and it became effective on November 6, 2002 (following the congressional elections). Dozens of individuals, national, state and local political parties, interest groups and trade associations, including the National Association of Broadcasters, combined to file 11 lawsuits, which together challenged all of BCRA's major provisions. These plaintiffs included some very interesting political bedfellows, such as the American Civil Liberties Union (ACLU) and the National Rifle Association (NRA), and the Chamber of Commerce and the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO).

The legislation provided for expedited review by a three-judge panel in the District of Columbia with an appeal straight to the Supreme Court. On May 1, 2003, the three-judge court issued a decision consisting of four opinions totaling approximately 1600 pages, which may enter the Guinness Book of World Records as the longest-ever district court decision. In a split opinion, the court struck down some and upheld other major provisions of BCRA, but the majority failed in a number of instances to agree on the reasoning for some of their key holdings.

The need to reach a definitive decision on BCRA's constitutionality before the 2004 election cycle began in earnest impelled the Justices of the Supreme Court to return from their summer vacations nearly a month early. On September 8, 2003, the Justices heard four hours of oral argument from an all-star cast of attorneys, including Solicitor General Theodore Olson, former Solicitors General Kenneth Starr and Seth Waxman, and leading First Amendment advocate Floyd Abrams. On December 10, the Court produced a 300-page opinion upholding virtually all the challenged provisions of BCRA. The key provisions of BCRA – including those most relevant to the broadcast media – and the Court's treatment of them are summarized below.

Supreme Court Upheld All the Core Provisions of BCRA

The core provisions of BCRA include restrictions on the use of "soft money" and the airing of "issue ads" in federal elections. Title I of BCRA places severe restrictions on the ability of political parties to raise and spend soft money (*i.e.*, funds that are not subject to the limitations, prohibitions and reporting requirements of pre-existing federal election law). BCRA prohibits national parties from spending, soliciting or receiving soft money, and prohibits federal candidates and officeholders from raising or spending soft money in connection with a federal election. BCRA also places very significant limits on the use of soft money by state and local parties to engage in

(Continued on page 48)

Supreme Court Upholds Campaign Finance Law

(Continued from page 47)

certain "federal election activities" (*e.g.*, voter registration drives and "get-out-the-vote" efforts), and prohibits state and local parties, candidates and officeholders from spending soft money on communications that support or oppose a clearly identified candidate for federal office.

By a 5-4 vote, the Court upheld these restrictions on parties, candidates and officeholders against both First Amendment and federalism-related challenges. In evaluating Title I, the Court declined to apply strict scrutiny, but applied "closely drawn" scrutiny, the less rigorous standard of review applicable to campaign contribution limits under *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court rejected claims that the speech and associational burdens of BCRA were fundamentally different from the burdens of the contribution limits upheld in *Buckley*. *McConnell v. FEC*, Opinion of Justices Stevens and O'Connor for the Court at 24-32.

Two factors seemed key in the Court's decision rejecting First Amendment claims that BCRA's restrictions on parties and officeholders using soft money for various activities, including speech-related ones, were overbroad or not sufficiently closely drawn to match the important governmental interest in preventing corruption. First, the Court accepted with very little question that preventing just the *appearance* of corruption in federal elections was a sufficiently important interest to justify both contribution limits themselves and laws preventing the circumvention of those limits. *Id*. at 26, 33-45. This acceptance was crucial because the record lacked evidence of actual or *quid pro quo* corruption resulting from the existence of soft money. Second, the Court concluded that its less rigorous review showed "proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise." *Id*. at 27. This latter rationale drew considerable scorn from Justice Scalia, and his opinion characterized the area of campaign finance as one in which Congress exhibits self-interest rather than expertise deserving of special deference from the courts. *See McConnell,* Opinion of Justice Scalia, concurring in part and dissenting in part, at 3-5, 15-18.

Title II of BCRA prohibits corporations and labor organizations from making "electioneering communications" with the use of general corporate or treasury funds. Electioneering communications are broadcast, cable or satellite communications that (1) refer to a federal candidate; (2) are aired 60 days before a general or 30 days before a primary election; and (3) reach 50,000 or more persons. Although many observers believed that the Court would strike down these restrictions on the speech of private entities, the Court upheld Title II by a 5-4 vote. Two factors appeared key to this decision. First, the Court emphasized that unions and corporations can still organize and administer segregated funds (*i.e.*, political action committees or "PACs") to make electioneering communications; thus, BCRA, is merely a *regulation* of, not a ban on, expression. *McConnell*, Opinion of Justices Stevens and O'Connor for the Court at 97-98. (And the Court spent considerable time at oral argument trying to determine the practical difficulties and burdens associated with setting up, and engaging in speech through, PACs.) Second, the majority regarded Title II as complementary to Title I, and necessary for the effectiveness of Congress' overall regulatory scheme. *See id*. at 18-22.

Campaign Advertising Restrictions Upheld

More specifically, the Court rejected claims that BCRA's restrictions on electioneering communications was both overbroad and underinclusive. *Id*. at 98-101. The Court concluded that the vast majority of ads (even "issue ads") broadcast in periods prior to an election had an electioneering purpose, so the justifications previously found in *Buckley* to limit the types of corporate and union funds used for "express advocacy" (*i.e*., ads that explicitly said "Vote for or against Jane Smith") applied equally to electioneering communications that merely refer to a candidate. *Id*. at 99-100. The Court also rejected arguments that the prohibition on broadcast and cable advertisements was underinclusive because it did not apply to print or Internet advertising. The majority stated that the record showed that corporations and unions financed a "virtual torrent" of television ads, so Congress could justifiably conclude that remedial legislation was needed to staunch the flow of money for broadcast ads. *Id*. at 101.

The NRA also challenged the provision that excludes news items and commentary from the electioneering communications definition, arguing that it unconstitutionally

(Continued on page 49)

Supreme Court Upholds Campaign Finance Law

(Continued from page 48)

discriminated in favor of media companies. This exclusion was made so that broadcast stations, whose licensees are often corporations, can continue to run news stories and commentary about candidates and elections, without falling afoul of the ban on electioneering communications. The Court summarily rejected the NRA's argument, finding the media exemption to be "wholly consistent with First Amendment principles." *Id.* at 102. As an interesting aside, recent press reports have indicated that the NRA is now eager to purchase radio or television stations, so it can take advantage of this media exemption. One presidential candidate, Senator John Kerry, has already written to the Federal Election Commission, opposing the emergence of "NRA TV." John Eggerton, *Kerry Takes Aim at "NRA-TV,"* Broadcasting & Cable at 20 (Dec. 15, 2003).

Two more minor provisions of BCRA particularly concern broadcasters. Section 305 — entitled "Limitation on availability of lowest unit charge for Federal candidates attacking opposition" — is certainly one of the most constitutionally questionable provisions of BCRA, as it was explicitly designed to reduce the number of "attack" or "negative" ads in federal elections. For those readers blissfully ignorant of the intricacies of political broadcasting regulation, "lowest unit charge" is the favorable rate that broadcasters by statute must give to candidates for their ads in certain time periods before primaries and general elections. Section 305 places limits on the availability of the lowest unit charge for radio and television ads that even refer to another candidate for the same office. To receive a station's lowest unit charge for any ad, federal candidates under BCRA must either (1) provide the station with a written certification that the programming does not refer to an opposing candidate; or (2) if the programming does refer to an opposing candidate, the written certificate must state that the programming also includes a specific visual or audio statement by the candidate personally identifying himself and stating that the candidate has approved the broadcast. Section 305 is accordingly referred to as the "stand by your ad" provision.

Despite Section 305's clear regulation of content, the Court determined by a 6-3 vote that challenges to this section were nonjusticiable. Although Senator McConnell testified that he plans to run ads critical of his opponents in the future and that he ran such ads in his last election campaign, the Court found the Senator's alleged injury too remote temporally to satisfy the Article III standing requirement that a plaintiff demonstrate an "injury in fact" that is "actual or imminent," especially since Senator McConnell will not be running for reelection until 2008. *McConnell*, Opinion of Chief Justice Rehnquist for the Court at 3-4. Presumably, a federal candidate who is denied the lowest unit charge in 2004 could challenge this provision without delay.

Finally, Section 504 of BCRA significantly extends broadcasters' existing record keeping requirements. To oversimplify, Section 504 does two main things. It more or less enacts in statutory form the disclosure and record keeping requirements relating to ads run by candidates that the Federal Communications Commission (FCC) has by rule long imposed on broadcasters. It also greatly expands the requirements about disclosing and keeping records of rate and other information about certain issue ads run by third parties. Specifically, for any programming that communicates "a message relating to any political matter of national importance," a broadcaster must now keep in the station's public file, among other things: (1) a record of each request to purchase time and whether the station accepted or rejected the request; (2) the rate charged for the programming and the class of time purchased; (3) the date and time on which the programming aired; (4) the issue to which the programming refers; and (5) information about the purchaser, including name, other contact information, and information about officers/directors/board members of the purchaser. Although the three-judge district court panel had unanimously struck down these extensive record keeping requirements given the absence of any evidence that they served a substantial governmental interest, the Supreme Court reversed by a 5-4 vote.

Congress could justifiably conclude that remedial legislation was needed to staunch the flow of money for broadcast ads.

Court Referred to Outdated Fairness Requirement

For the disclosure and record keeping requirements relating to candidate ads that essentially enacted FCC rules into statute, the Court concluded that, on the present record, it could not find the long-standing FCC regulations to be un-

(Continued on page 50)

Supreme Court Upholds Campaign Finance Law

(Continued from page 49)

constitutional, so it could not strike down the statutory provisions. *McConnell*, Opinion of Justice Breyer for the Court at 8. For the new issue ad requirements, the Court found that they survived a facial challenge. In a particularly unfortunate portion of the opinion, the Court said that these record keeping requirements seem likely to help determine whether broadcasters are fulfilling their obligations under the FCC's regulations to "afford reasonable opportunity for the discussion of conflicting views on issues of public importance," or whether they too heavily favor entertainment, discriminating against public affairs broadcasts. *Id.* at 10. This statement is simply incorrect, as there is *no* FCC requirement that broadcasters afford reasonable opportunity for the discussion of conflicting views on important public issues – and there hasn't been since 1987 when the FCC determined to no longer enforce the Fairness Doctrine. *See In re Syracuse Peace Council*, 2 FCC Rcd 5043, 5055 (1987) (concluding that Fairness Doctrine violated First Amendment and did not serve the public interest), *affirmed, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

Although the Court rejected all facial challenges against the disclosure and record keeping requirements of Section 504, the Court left open the possibility of an "as applied" challenge, depending on how the FCC interprets and applies that section. *McConnell*, Opinion of Justice Breyer for the Court at 11-13. However, the FCC has not yet commenced a proceeding to adopt rules to implement Section 504, even though the 2004 federal election cycle is well underway.

Decision Increases Congress' Leeway to Regulate Campaigns

Now that the Supreme Court has upheld BCRA, what will be the long-term impact? It is probably unrealistic to think that BCRA will succeed in severing "the oldest connection" between politics and money. Troy, *Money and Politics: The Oldest Connection*, Wilson Quarterly (1997) (surveying the role of money in elections since colonial times and the unsuccessful attempts of reformers to remove the influence of money). Many clever lawyers are currently employed to find loopholes around and gaps in the prohibitions of BCRA, and they will most likely succeed. Indeed, the Court assumed this to be the case. *See McConnell*, Opinion of Justices Stevens and O'Connor for the Court at 27. The Court's decision does, however, increase Congress' leeway in addressing campaign finance issues, so in a few years there may be further efforts to pass additional campaign finance legislation to plug any perceived holes in BCRA.

With regard to broadcasters specifically, BCRA left intact the existing political broadcasting regime of reasonable access for federal candidates and equal opportunities and discounted advertising rates for federal, state and local candidates. *See* 47 U.S.C. §§ 312(a)(7); 315. BCRA therefore has a relatively limited impact on broadcasters – the question is whether Congress will now be encouraged to pass further campaign finance legislation that more directly affects the broadcast industry.

Most observers agree that BCRA's restrictions on the ability of political parties to raise and spend soft money will weaken the position of parties in the electoral process. Parties will especially be weakened relative to PACs, as corporations and unions will now utilize PACs to make electioneering communications. Some may doubt that weakening broad-based parties while strengthening narrowly focused PACs will improve the federal election process.

The long-term effects of the Supreme Court's BCRA decision on First Amendment jurisprudence are difficult to gauge at this time. Observers concerned about the Court's willingness to defer to Congress' adoption of restrictions on core political speech certainly hope that such deference will not be shown in First Amendment cases outside the context of campaign finance reform. In particular, one hopes that the court will be less dismissive of overbreadth claims in other contexts than it appeared in upholding Title II of BCRA. In the near term, it may also be instructive to see if the Court in the other contexts appears reluctant to entertain facial challenges to speech restrictions or more strictly interprets the standing requirement in First Amendment cases.

Jerianne Timmerman is Associate General Counsel of the National Association of Broadcasters which was one of the organizations that challenged the constitutionality of the Bipartisan Campaign Reform Act of 2002.

Iraq War Media Update

New Year's Injuries End Deadly Year for Journalists

Three *Los Angeles Times* reporters and five Iraqis working for the newspaper were injured in the bombing of a Baghdad restaurant on New Year's Eve, capping a year of deadly attacks on journalists. The injured *Los Angeles Times* reporters were among approximately 35 people injured in the car bombing of a restaurant in Baghdad. Eight people were killed in the bombing.

The Committee to Protect Journalists, www.cpj.or, reported that 36 journalists were killed worldwide in 2003. Reporters Sans Frontiers, www.rsf.org, found 42 killings of journalists. Both organizations attributed the largest share of the deaths to the conflict in Iraq: CPJ said that 13 journalists were killed by hostile acts in Iraq, while six more died from illness or accidents. RSF counted 14 deaths of reporters and media workers covering the war in Iraq, and 15 injured. RSF's total death toll was its highest since 1995, when it found that 49 journalists were killed. CPJ's highest year was 1994, when it counted 66 killings. The difference in the two organization's calculations is based on cases found and the extent to which media staff, such as drivers, are included in the total.

In 2003 several press organizations created the International News Safety Institute, www.newssafety.com. The organizations mission is to promote better safety training practices for journalists and media staff, particularly in war zones and other areas of conflict.

RSF Report Faults Pentagon Brass For Death of Reporters

Reporters Without Borders released its findings regarding the April 8, 2003 incident in which a U.S. tank fired on the Palestine Hotel in Baghdad killing two journalists and injuring three others. The report faults U.S. military commanders who did not inform troops that the Palestine Hotel served as a headquarters for journalists covering the war.

> "It is inconceivable that the massive presence of journalists at the Palestine Hotel for three weeks prior to the shelling, which was known by any TV viewer and by the Pentagon itself, could have passed unnoticed. .... The question is whether this information was withheld deliberately, because of misunderstanding or by criminal negligence."

While the report concludes that "[t]he firing of a tank shell at the hotel was not ... a deliberate attack on journalists or the media," it also chastises officials for actions and statements which the report says:

> "amounted to creating two kinds of journalists – those who were 'embedded' and so able to report on the fighting while under the protection of U.S. forces and those who were advised to leave the war zone or face being ignored, with all the risks involved since the U.S. Army was washing its hands of all responsibility."

RSF criticizes the Pentagon's August 12, 2003 report on the incident – which concluded that firing upon the hotel was "a proportionate and justifiably measured response" to the threat involved (*see MLRC MediaLawLetter*, Aug. 2003, at 61) – as incomplete. It calls on the Pentagon to reopen its inquiry into the incident, in order "to answer the real questions raised by their deaths."

The report, titled *Two Murders and a Lie*, was written by French journalist Jean-Paul Mari, who investigated the incident which assistance from the French magazine *Le Nouvel Observateur*. It is available online at http://www.rsf.org/IMG/pdf/Palest_hotel_report.pdf.

Media Employees Allege Mistreatment During Detention

Reuters filed a complaint with Pentagon officials alleging that four Iraqis working for media organizations – three for Reuters and one for NBC – who were detained for three days by U.S. forces were mistreated. The four media employees were detained January 2, 2004 near Fallujah, after a American helicopter was shot down, killing one American soldier and injuring another. Military officials said that insurgents disguised as reporters had shot at troops guarding the wreckage in the aftermath of the crash.

(Continued on page 52)

Iraq War Media Update

(Continued from page 51)

Reuters driver Alaa Noury said that he was traveling with the four men when the group were fired upon by U.S. troops. They drove away rapidly, with the soldiers in pursuit. The troops eventually captured the four media employees, while Noury made it back to Bhagdad.

The detained employees were Reuters TV cameraman Salem Uraiby, NBC cameraman Ail Mohoammed Hussein Badrani, Reuters TV employee Ahmad Mohammad Hussein Badrani, and driver Sattar Jabar Badrani. The three Badranis are related.

According to a report in the British *Guardian* newspaper, the troops put bags over the detainees' heads, told then that they would be send to the American detention center in Guantanamo Bay, Cuba, and whispered, "Let's have sex" to the prisoners. The newspaper report also alleged that soldiers forced the blindfolded detainees to stand with their hands raised for several hours. The nephew of Uraiby told the newspaper that his uncle had been stripped naked and a shoe shoved into his mouth. American Brigadier General Mark Kimmitt told the paper that the complaint was being investigated.

Publisher Convicted for failing to Register as Foreign Agent

The publisher of a small Arabic language newspaper in suburban Chicago was convicted January 13, 2004 of failing to register as a foreign agent while monitoring Iraqi exiles on behalf of the regime of Saddam Hussein. *U.S. v. Dumeisi*, No. 03-664 (N.D. Ill. jury verdict Jan. 12, 2004) (Conlon, J). Khaled Dumeisi could be sentenced to up to 10 years in prison at a sentencing hearing scheduled for March 30.

Among the evidence presented at the six day trial was a videotape of Dumeisi praising Saddam Hussein at a 2001 dinner at the Iraqi consulate in New York, and documents recovered from Iraq describing that nation's surveillance activities in the U.S. A former Iraqi intelligence official also testified for the prosecution using a pseudonym, and the court prohibited reporters and courtroom sketch artists from describing or depicting his physical appearance.

Dumeisi was represented by William H. Theis of the Federal Defender Program and James Russell Fennerty of James R. Fennerty & Associates, LLC in Chicago.

Pentagon Grants Iraqi Media Development Contract

The U.S. Defense Contracting Command has awarded a one year $96 million contract to Harris Corporation of Melbourne, Florida to develop Iraq's formerly state run media into a "modern media organization for the Iraqi people." Harris sells and develops communications equipment. Under the contract, Harris will be responsible for providing equipment, training, operations support and programming for two national FM radio stations, two television networks, and for the country's existing national newspaper, *Al Sabah*. The company has hired companies from Lebanon and Kuwait as subcontractors to assist in the project.

The former state media have been an issue since coalition forces toppled the Hussein regime and took over the facilities. In August, the coalition-installed head of Iraqi television resigned, claiming that funding was inadequate for the network to compete with other Arab broadcasters. *See MLRC MediaLawLetter,* Aug. 2003, at 52.

Meanwhile, an American-funded, Arabic-language satellite television network is set to begin broadcasting to the Middle East within a few weeks. The new network, which will be overseen by the government agency that operates Radio Free Europe and Radio Liberty (directed at the former Soviet Union), will be a 24-hours news operation with studios in Washington, D.C. and bureaus in the Middle East.

ETHICS CORNER

Pre-Litigation Issues for Media Lawyers in the Post-*Zabulake* World

By David B. Smallman

Attorneys have been confronted during the past year with the implications of a spate of cases that address the scope of a litigant's duty to preserve electronic documents and the consequences of failure to do so. In the most recent decision arising from discovery in *Zubulake v. UBS Warburg LLC,* now pending in federal district court in the Southern District of New York, the court outlined specific guidelines for preserving backup data. 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003). One aspect of this topic not yet fully explored concerns ethical issues that may arise for media lawyers who advise their clients about retention of reporters' notes and other newsgathering materials.

Insofar as such advice is often used to establish newsroom retention policies and procedures well in advance of known claims or litigation, it may appear that the concern is largely theoretical. But practical realities suggest otherwise. The retention of reporters' notes, has, of course, long generated debate about the respective benefits and disadvantages of such material if litigation arises. One recent case, *Suzuki Motor Corp. v, Consumers Union*, 330 F.3d 1110 (9th Cir.), *cert. denied*, 124 S. Ct 468 (2003), pointedly demonstrates how plaintiff's counsel can utilize unpublished contemporaneous information to fend off summary judgment in a libel action. In *Suzuki Motor Corp.*, a divided panel of the Ninth Circuit declined to apply the independent examination" rule and relied upon unpublished text, video material and other testimony about events leading up to the article. In a 2-1 decision, the court allowed the case to proceed to trial, holding that the car company had "presented sufficient evidence to allow a reasonable jury to conclude, by clear and convincing evidence," that Consumers Union had made . . . two statements with actual malice."

Another case decided in 2003, *Metropolitan Opera Association v. Local 100*, 212 F.R.D. 178 (S.D.N.Y 2003), granted judgment for plaintiff because of discovery abuses, including production of electronic data. This highlights the risks lawyers face if they are found to have participated in and supervised discovery inconsistent with the rules of civil procedure and acted willfully and in bad faith in failing to comply with discovery requests.

But what are a media lawyer's ethical obligations in advising clients about retention of electronic data before litigation ensues? A brief review of the circumstances in which attorneys acquire early knowledge of potential evidence, the parameters for preservation of electronic data established by recent case law, and some of the relevant ethical rules, provides a starting point for further analysis.

What are a media lawyer's ethical obligations in advising clients about retention of electronic data before litigation ensues?

A Wealth of Stored Data

Reporters these days create information on a host of electronic devices, such as PDAs, digital voice recorders and cameras, and laptop or desktop computers. Other information, such as hand written notes, documents, and photographs, are converted to digital form by scanning. Such electronic data is communicated to colleagues and sources via e-mail and related attachments, *e.g.* PDF, and stored locally on zip or external hard drives, memory sticks and similar products. Large volumes of accumulated data can reside remotely on tape drives or mirrored on backup servers. All of this means that a huge reservoir of electronic data is generated in the newsgathering process in both obvious and subtle ways. Not surprisingly, litigants have become savvy about electronic document discovery, resulting in judicial resolution of disputes that create precedent for future conduct.

Knowledge of "Incidents"and "Threatened" Suits

Because some potential plaintiffs now engage in proactive measures to head off or influence stories prior to publication, editors, producers and their media counsel may have knowledge of stored data that could be construed to contain warnings of incipient claims.

(Continued on page 54)

Pre-Litigation Issues for Media Lawyers in the Post-*Zabulake* World

(Continued from page 53)

Documents gathered or created in connection with obtaining insurance also provide a traceable means of discerning awareness of potential evidence: the initial or renewal applications for media liability insurance policies generally seek disclosure of "loss history" in connection with underwriting considerations. This includes suits actually brought or simply "threatened."

A typical insurer's question appears as follows:

> In the past ten (10) years, has the Applicant been sued or *threatened with suit* for any act, error, or omission relating to the gathering or communicating of information, including but not limited to libel, slander, any form of invasion of privacy or appropriation of name or likeness, infringement of copyright or trademark, infliction of emotional distress, false arrest, wrongful entry, or trespass? If "Yes," please describe in detail the circumstances of each suit *or threat of* suit, including the identity of the claimant, the factual and legal basis for the claim, and the disposition.

The message is undeniable that media lawyers should take note of these developments when considering advice about the substance and implementation of document retention policies with respect to reporters' electronic data

Other forms request disclosure of "incidents" that may give rise to a claim against the media insured, seeking disclosure even broader than actual threats of litigation. And yet another trail of potential evidence may be found in judicial records created prior to litigation. Some states, such as New York, permit discovery before commencement of an action, either in aid of establishing the basis for suit or to preserve information (*e.g.*, CPLR § 3102(c)). All of the above routes can provide an avenue for media lawyers to become aware of electronic data that could become the subject of discovery in libel suits or in actions alleging newsgathering torts and related claims.

Scope of the Duty to Preserve Stored Electronic Materials

In *Zubulake v. UBS Warburg LLC*, 2003 WL 22410619 (S.D.N.Y. Oct. 22, 2003) (S.D.N.Y. Oct. 22, 2003), the district court specified guidelines for preserving stored electronic data. The court stated that "the broad contours of the duty to preserve are relatively clear" – it "extends to information that is relevant to the claims or defenses of *any* party, or which is relevant to the subject matter involved in the action." *Id.* at *3.

The court further held that "[a] party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter." *Id.* at *4. Importantly, the court goes on to state: "Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Id.* Though the court excluded, as a general matter "inaccessible backup tapes" used for disaster recovery, it did not exclude such tapes if information about 'key players' was known to exist on such tapes and the information was not otherwise available.

While other courts are now citing to *Zubulake* or refining their own guidelines, *see, e.g.*, *Thompson v. United States Dept. Of Housing and Urban Dev.*, 2003 WL 22963931 (D. Maryland Dec. 12, 2003); *Wiginton v. Ellis*, 2003 WL 22439865 (N.D. Ill. Oct. 27, 2003), the message is undeniable that media lawyers should take note of these developments when considering advice about the substance and implementation of document retention policies with respect to reporters' electronic data – and not just backup tapes, but all types of information located in electronic storage, from the mundane to the exotic.

Ethical Obligations

Both the ABA Model Rules of Professional Conduct and the Model Code of Professional Responsibility, as adopted in the disciplinary rules of the State Courts, have provisions that should be consulted in helping to assess how to approach the ethical aspect of the disclosure obligation prior

(Continued on page 55)

Pre-Litigation Issues for Media Lawyers in the Post-*Zabulake* World

(Continued from page 54)

to litigation. Model Rule 3.4, for example, provides in relevant part:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material *having potential evidentiary value*. A lawyer shall not counsel or assist another person to do any such act .... (emphasis added).

Another ethical guideline can be found in DR 7-109, which states in relevant part:

> A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce.

The proposition that a lawyer should not unlawfully obstruct access to, alter, or conceal evidence, standing alone, is straightforward and not especially controversial. Less clear, however, is how ethical guidelines concerning the "potential evidentiary value" of stored electronic data can and should be assessed by counsel. Consider the following. In *Suzuki Motors Corp. v. Consumers Union, supra*, the majority rejected the independent examination standard on review of summary judgment, arguably broadening, in the Ninth Circuit, the scope of potentially relevant evidence of actual malice at least up to the summary judgment stage. Query: does the media lawyer practicing in the Second Circuit have a basis to reject the potential evidentiary value of certain stored electronic data that a lawyer practicing in San Francisco must now consider? What about conflicts of law issues?

Similarly, with case law evolving on almost a daily basis with respect to the duty to preserve and disclose certain electronic data, what steps must the media lawyer take to assess the client's "legal obligation to reveal or produce evidence?" Is the digital voice data of a confidential source interview preserved on a reporters' iPod evidence of mere bias irrelevant to the outcome of the case or is it evidence of actual malice at least at the pretrial stage?

Zubulake and progeny could be read to suggest that to the extent reporters' unpublished notes and records are routinely saved and stored electronically – and because doing so is easy and relatively inexpensive – media lawyers might have some obligation to advise that such records be retained (or at least not deleted or wiped) during a period before litigation when there is reasonable knowledge that the evidence may be relevant to anticipated litigation. And, depending upon whether litigation was threatened, further advice might address whether such data should be backed up, at least for the same length of time as other business records. Alternately, it could be argued that a "threat or anticipation of litigation" standard triggering retention of electronic records creates an unworkable premise where "threats" of litigation exist as part of the background "noise" of the news business. Imposition of broad, but inchoate retention policies upon the media (and, indirectly, upon their lawyers under ethical rules) could raise First Amendment concerns because of impermissible burdens placed upon newsgathering activities.

In due course, bar associations and the courts will likely have opportunities to issue formal opinions concerning the interplay between attorneys' ethical obligations and their role in counseling media clients about electronic document retention policies. Until then, it may be helpful to revisit old advice in light of new case law and refresh recollections about the applicable disciplinary rules in your jurisdiction.

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