

MEDIALAWLETTER

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Thank You Jim Stewart!!

Jim Stewart hit the ground running when he became President of the Defense Counsel Section in January 2005. Truth be told, he – like his predecessors – began the segue into the role in the prior December. Jim did his homework in preparing for the job. He reviewed what was being done in the Section. He came to lunch and visit with the staff of the MLRC in New York – a visit that has now established a new tradition for incoming DCS Presidents.

And then, he took off with the Defense Counsel Section. He set out goals, and darn if he and we didn't meet them.

He wanted MLRC to energize all of its committees – and energize them he did. The MLRC/DCS Committees had a gangbuster year in 2005.

He wanted MLRC to reach out to media lawyers in Canada. And as a result, MLRC held our first set of interactive, conference sessions in May 2005 in Toronto.

He wanted MLRC to do more to reach out to members on the West Coast. And in addition to encouraging us to continue our annual conference at and with Southwestern Law School, MLRC set the ground work for the first ever MLRC California Chapter, which held its first organizing meeting this month.

He wanted MLRC to make sure that members had at their fingertips the resources to deal with issues that often come at them on an urgent and emergency basis, recognizing that not all MLRC member lawyers handle media emergencies every day. And out of that is arising the **MLRC PANIC BOOK**, which should be in member hands shortly.

Oh sure, Jim has that low key, Midwestern aura about him. His style is soothing, common-sense, and very very smart but not showy. But his ability to pick good leadership, to develop programs and projects that are creative and yet imminently useful, and to motivate us all to do our best work, is remarkable and in a class unto itself. And, as we all would resoundingly agree, Jim is a genuinely classy man and lawyer and leader.

We are so grateful to him for his leadership of the DCS in 2005. And, of course, we have no intention of letting him stray too far. He will serve on the DCS Executive Committee for another year as Emeritus and, we all hope, forever in the MLRC.

Sandra Baron
Executive Director

Cert. Petition Filed in *Hatfill v. New York Times*

Newspaper Seeks Review of Libel by Implication Ruling

On January 17, 2006, the *New York Times* filed a [petition for certiorari](#) in the United States Supreme Court, seeking review of the Fourth Circuit's split decision in *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. 2005). That decision reinstated claims for libel and intentional infliction of emotional distress arising out of the publication of op ed columns criticizing the FBI's investigation into the anthrax mailings of 2001, which plaintiff claims implicitly accuse him of being the anthrax mailer. See *MLRC MediaLawLetter* August 2005 at 5; *MLRC MediaLawLetter* October 2005 at 23.

Procedural History

In November 2004, the United States District Court for the Eastern District of Virginia dismissed the lawsuit brought by Steven Hatfill, a scientist who the attorney general once described as a "person of interest" in connection with the FBI's investigation into the anthrax mailings that left five people dead. Hatfill's claims were based on a series of columns by Nicholas Kristof, criticizing the FBI for its lackadaisical handling of the investigation and questioning why it had not taken steps to either "indict" or "exonerate" Hatfill. The district court rejected Hatfill's contention that the columns implied that he was the anthrax mailer even though the columns expressly disavowed any such implication: "[c]riticizing the propriety of the FBI's investigation and raising questions of legitimate concern to the public is not the same as a direct accusation of wrongdoing," especially where the columns contained specific warnings that "a thorough FBI investigation may well exculpate him of any wrongdoing." *Hatfill v. New York Times*, 2004 WL 3023003 (E.D. Va. 2004). It likewise rejected Hatfill's claim for intentional infliction of emotional distress on a number of grounds, including that it impermissibly sought to end-run the First Amendment limits to a libel claim.

The petition argues that the Court has never articulated the constitutionally required standard when libel by implication is alleged on the basis of an unstated meaning.

In August of 2005, however, a divided panel of the Fourth Circuit reversed that decision, finding that that statements in the columns were "capable" of defamatory meaning, that is, they could be read to accuse Hatfill (implicitly) of committing the anthrax attacks. 416 F.3d 320 (4th Cir. 2005). The panel majority rejected the notion that Kristof's various disclaimers that Hatfill should be presumed innocent were sufficient to defeat the libel by implication claim on a motion to dismiss, because other statements in the columns, read alone, could convey that very implication. The majority rejected the view that a trial court should weigh the reasonable meaning of the columns as a whole in deciding a threshold motion.

The majority also reinstated the claim for intentional infliction of emotional distress, finding that the allegation that the Times had "intentionally published false charges accusing [plaintiff] of being responsible for the anthrax mailings . . . without giving [him] an opportunity to respond," asserted sufficiently "outrageous" conduct to state a claim. The panel doubted that Hatfill could prevail on the emotional distress claim at trial if he could not convince the jury of his libel claim, but found no constitutional impediment to the cause of action as alleged.

The Times petitioned for reconsideration, and in October, the Fourth Circuit by a split vote of 6-6 denied a request for rehearing *en banc*. Judge Wilkinson filed a vigorous dissent, joined by Judges Michael and King. 427 F.3d 253 (4th Cir. 2005). In their view, the panel majority had read Virginia law "aggressively" and "expansively" in a manner that "not only portends liability for valuable public commentary but aggravates, rather than alleviates, the constitutional tensions inherent in the defamation field."

Petition for Certiorari

Following the denial of rehearing or rehearing *en banc*, the *Times* petitioned for certiorari, presenting the following questions to the Court:

(Continued on page 6)

Cert. Petition Filed in *Hatfill v. New York Times**(Continued from page 5)*

1. Does the First Amendment limit the actionable defamatory implications arising from a publication about a matter of public concern to those that a recipient would reasonably conclude the publication, taken as a whole, was intended to convey?
2. Does the First Amendment preclude liability for the tort of intentional infliction of emotional distress based upon the alleged publication of a false and defamatory implication, when the challenged publication involves a matter of public concern and was not written for the specific purpose of inflicting harm on the plaintiff?

The petition argues that the Court has previously recognized a constitutional limit to the alleged meanings of a word that can support a claim for libel, but has never articulated the constitutionally required standard for policing the line between protected and unprotected speech when libel by implication is alleged on the basis of an unstated meaning. It noted the inconsistency between the Fourth Circuit holding and prior decisions of the Supreme Court, and a great confusion among the lower courts on the proper treatment of claims for libel by im-

plication. The Constitution cannot permit liability to be imposed, the Times argues, on the basis of an implied meaning that is not reasonably conveyed by a publication read as a whole.

The petition further argues that the Court should examine the extent to which the First Amendment limits tort claims for the intentional infliction of emotional distress premised on an allegation that a news report or commentary about a matter of public concern is not only false, but “outrageous.” Lower courts have adopted a variety of inconsistent approaches to deal with the constitutional concerns presented by such claims: Some refuse to find newsworthy reporting “outrageous,” even if false; some limit plaintiffs to their remedies under the law of libel; and, others require plaintiffs to plead and prove that the report was published for the specific purpose of causing harm to the plaintiff. The *Times* urged the Court to grant certiorari to provide guidance in resolving the uncertainty, which was only compounded by the Fourth Circuit’s decision to reject any limitation to the tort as applied to publications.

The New York Times is represented by in-house counsel David McCraw and David Schulz, Lee Levine and Jay Ward Brown, Levine Sullivan Koch & Schulz LLP.

***Hatfill v. New York Times* – Petition for Certiorari**

Reasons for Granting the Writ

“The First Amendment limits the range of defamatory meanings that may be punished through libel litigation to the ‘reasonable’ meanings of words in the context they are used. *Greenbelt Coop. Publ’g Co. v. Bresler*, 398 U.S. 6 (1970). This Court, however, has never articulated the constitutionally required standard for policing the line between protected and unprotected speech when a libel by implication is alleged on the basis of an unstated meaning.

This issue is vitally important because the existing First Amendment protections for speech about matters of public concern all turn on the actionable meaning conveyed by a challenged publication. The constitutional obligation of a plaintiff to prove both falsity and fault provides no meaningful protection for the freedom of expression if liability can be imposed, as the Fourth Circuit held it can be here, on the basis of an implied meaning that is not reasonably conveyed by a publication construed as a whole.

The common law has typically required that allegedly defamatory publications be considered in their entirety and in context to determine if an actionable implication is reasonably conveyed, but the Fourth Circuit rejected this approach. Instead, it held that a libel claim can properly be based on an implication that specific statements, considered in isolation, are “reasonably capable” of conveying, without assessing their reasonable meaning in light of the publication as a whole.

This approach conflicts with this Court’s precedents construing the First Amendment as well as those of several courts of appeals and state court of last resort. The holding below imposes substantial burdens on the freedom of speech and of the press and, if permitted to stand, will inhibit criticism of the government and penalize speech about public matters in violation of the First Amendment.”

Iowa Appeals Court Reinstates Sports Columnist's Libel by Implication Claim

Sufficient Evidence That Newspaper Intended to Imply Unprofessional Conduct

The Iowa Court of Appeals this month reinstated a freelance sports columnist's libel by implication claim against a newspaper and sports editor who penned a column critical of plaintiff's work. *Stevens, v. Iowa Newspapers, Inc., and Susan Harman*, No. 5-732 / 04-0987 (Iowa App. Jan. 19, 2006) (Huitink, P.J., and Mahan and Hecht, JJ.).

In an unusual libel lawsuit by a journalist against a newspaper, the court held that reasonable jurors could find that the newspaper intended to imply that plaintiff fabricated his columns when the newspaper wrote that plaintiff "rarely attended events about which he wrote."

Background

The plaintiff, Todd Stevens, was a freelance sports columnist for the *Ames Tribune*, published by Iowa Newspapers, Inc. In 2002, the newspaper's sports editor, Susan Harman wrote a generally sympathetic column about the resignation of Iowa State University's then associate athletic director.

Stevens drafted a column containing a contrary view about the athletic director and criticizing Harman's article for not including comments from university coaches – who arguably supported Stevens' dim view of the associate athletic director.

The newspaper refused to publish Stevens column. Dissatisfied Stevens informed the paper he would no longer write for it and asked to publish a final "farewell" column. The newspaper agreed, but decided that Harman would also write a column outlining the newspaper's position, presenting them in a "point-counterpoint" fashion.

In his farewell column, Stevens wrote that he had been censored and that his First Amendment rights had been violated by the newspaper. Harman responded by criticizing Stevens, stating, among other things, that he

(1) "rarely attended events upon which he wrote columns"; (2) that his rejected column "contained numerous factual errors and unsubstantiated claims"; and (3) that even a redraft "continued to include fatal factual errors and near libelous characterizations."

Stevens sued the paper and Harman for libel. The trial court granted summary judgment to the defendants, finding that the first statement was substantially true where plaintiff admitted that he attended only eighteen percent of the over 300 events about which he wrote.

The remaining statements were published without actual malice and were protected opinion.

Jurors could find that the newspaper intended to imply that plaintiff fabricated his columns when the newspaper wrote that plaintiff "rarely attended events about which he wrote."

Appeals Court Decision

On appeal, the Court affirmed dismissal of claims over the second and thirds statements criticizing plaintiff's proposed column. Saying that the column contained "numerous factual errors" had some factual support and therefore could not have been published with actual malice. And the statement that the column contained "near libelous characterizations" was protected opinion since "there is simply no way to prove or disprove that something is near libelous."

But the court reinstated the libel by implication claim over the first statement, holding that under Iowa law literally true statements can be actionable.

[W]e are not convinced that statements bearing a false implication are more worthy of legal protection than those capable of direct or literal defamatory meaning, we conclude Stevens's claim does not fail as a matter of law because it was literally true

Among the cases cited in support of this proposition was the Fourth Circuit's decision in *Chapin v. Knight-*

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Iowa Appeals Court Reinstates Sports Columnist's Libel by Implication Claim

(Continued from page 7)

Ridder, Inc., 993 F.2d 1087 (4th Cir.1993) which recognized libel by implication claims but held that the defamatory implication must have been intended or endorsed.

Was the Implication Intended?

The Iowa court found sufficient evidence that the defamatory implication was intended based on the sports editor own deposition testimony. Among other things, she testified that she intended to convey the notion that Stevens "very often would not do the legwork to support the columns, whether it be attending events or making the necessary phone calls, talking to players, talking to coaches" – but conceded that personal attendance at events was not essential for a columnist like Stevens.

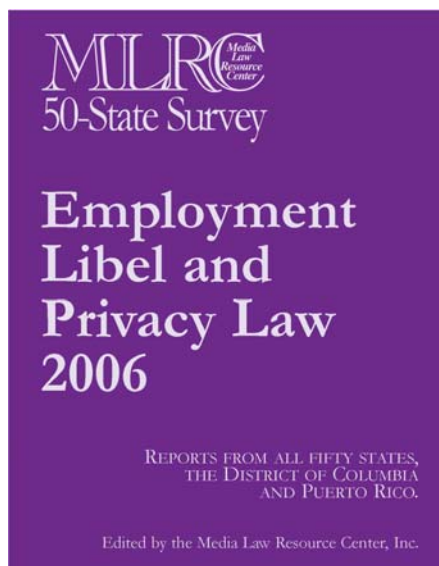
Viewing this evidence at the summary judgment stage in a light most favorable to plaintiff, the court concluded that:

A reasonable person could find that while Harman knew journalistic standards do not require issue columnists to attend the events they write about, her opinion implied the opposite. We also believe a reasonable juror could find Harman intended to convey to readers the message that Stevens was professionally incompetent or otherwise incredible.

Plaintiff was represented by Theodore F. Sporer of Sporer & Ilic, P.C., Des Moines. Iowa Newspapers and reporter Susan Harman were represented by Michael Cox and Elizabeth M. Callaghan of Koley Jessen, P.C., Omaha, Nebraska.



50-STATE SURVEYS



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Court Grants Summary Judgment on Privacy Claims Over Publication of Open Casket Photo of Soldier Killed in Iraq

By S. Douglas Dodd

Harper's Magazine Foundation, publisher of Harper's Magazine and internationally known photojournalist Peter Turnley were granted summary judgment in a federal court action brought by the biological father and the maternal grandfather of an Oklahoma Army National Guard soldier who was killed in Iraq. *Showler and Davidson v. Harper's Magazine Foundation and Peter Turnley*, No. 05-178-S (E.D. Okla. Dec. 22, 2005) (Seay J.).

The Court granted summary judgment in its entirety to Harper's and Turnley in the lawsuit which included claims for common law invasion of privacy, statutory misappropriation, intentional infliction of emotional distress, fraud and misrepresentation, constructive fraud, unjust enrichment and negligent hiring, retention and supervision.

The case focused on a photograph taken by Turnley and published in the August 2004 edition of *Harper's Magazine* which showed the open casket of Sgt. Kyle Brinlee Showler ("Sgt. Brinlee") at the conclusion of his funeral. The Court found in favor of the defendants on each of plaintiffs' seven causes of action.

Background

Sgt. Kyle Brinlee was killed in action in Iraq on May 11, 2004. He was the first Oklahoma National Guard soldier to be killed in combat since the Korean Conflict in the early 1950s. His death in Iraq and events surrounding his funeral and burial in Pryor, Oklahoma were listed as the number one news story of 2004 by his home town newspaper *The Daily Times*.

Anticipating a very large crowd, Sgt. Brinlee's family elected to hold his funeral service in the community's largest indoor venue, the Pryor High School auditorium. They also anticipated press coverage and the funeral director

designated an area in the back of the auditorium for the press. Turnley, along with other members of the press, including photographers from three newspapers, the *Associated Press* and a television pool videographer, attended the funeral and photographed events before, during and after the service.

Turnley did not meet either of the plaintiffs before or during the funeral service. He introduced himself to plaintiff Showler after the conclusion of graveside rites, expressed his condolences and offered to provide Showler copies of some of the photographs he took at the funeral services. Showler indicated he would like to have the photos and gave Turnley his address.

When the photo essay, entitled "THE BEREAVED, Mourning the Dead in America and Iraq" appeared in the August 2004 edition of Harper's, Showler saw a copy of the magazine and claimed to suffer emotional distress as a

result of seeing the open casket photograph.

Plaintiffs' claimed that Turnley's open casket photograph from the funeral was outrageous, that it invaded the privacy of Sgt. Brinlee's family and misappropriated Sgt. Brinlee's image for advertising and commercial purposes. Plaintiffs also alleged that Turnley was instructed by and agreed with the funeral director not to take photographs of the open casket. Turnley denied there was any restriction as to what he could photograph and further denied any agreement to not photograph the open casket.

These allegations formed the basis of plaintiffs' claims for misrepresentation, fraud and construc-

tive fraud. Plaintiffs also claimed that Harper's and Peter Turnley were unjustly enriched by publication of the open casket photograph and entry of the photo essay in news photography competitions.



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Oklahoma Court Dismisses Privacy Claims Over Publication of Open Casket Photo of Soldier Killed in Iraq

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Finally, Plaintiffs alleged that Harper's knew or should have known that Turnley had a propensity to obtain and publish controversial and objectionable photographs. Defendants Harpers and Turnley denied each and every one of plaintiffs' claims and in November 2005, moved for summary judgment on all claims.

First Amendment Defenses

Granting summary judgment, the Court addressed a number of First Amendment issues. The Court noted that the use of a name or picture by the media in connection with a newsworthy event, such as Sgt. Brinlee's funeral, is protected by the First Amendment. The Court found that Plaintiffs were seeking to restrain Defendants' First Amendment right to distribute an informative photo essay of a newsworthy event and that in order to prevail Plaintiffs were required to show that their privacy interests outweigh First Amendment concerns. This, the court found, they could not do. The Court noted the well-settled law that the First Amendment provides protection for news coverage of public events. It then found it was undisputed that the funeral of the decedent was a public event and having previously found that the funeral was newsworthy, the Court turned to Plaintiffs allegations of a family privacy interest.

Favish Distinguished

The Court distinguished *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), because the photograph in question was not a government photograph and was taken at a public, newsworthy event. The Court found that *Favish*, which dealt with a request for government photographs under the Freedom of Information Act, was not applicable in this case where "the scene documented in the photograph was the same scene the funeral attendees observed."

The Court further found that *Favish* was not applicable because the defendants did not interfere with the plaintiffs' burying of their loved one. Plaintiffs made all decisions regarding the funeral and burial. The Court found that attendance at Sgt. Brinlee's funeral and view-

ing of his open casket could have been limited to the family or even the plaintiffs, but that "Plaintiffs chose to open it to all comers."

The Court found no invasion of privacy by virtue of Peter Turnley taking or Harper's publishing the photograph in question. The Court went on to find that the plaintiffs' right to privacy in burying their loved one does not outweigh the right of the public to view this newsworthy photograph under the circumstances of this case. "If the plaintiffs wanted to grieve in private they should not have held a public funeral and had a section reserved for the press." In fact, the Court found that the plaintiffs appeared to have put the death of their loved one in the public eye intentionally to draw attention to his death and burial.

In addition to the recognizing the First Amendment protections that applied to Harper's and Turnley, the Court found other support for Defendants' entitlement to summary judgment on all of plaintiffs' claims. Of particular note to the news media is the Court's finding that plaintiffs could not establish that the publication of the photograph in question was so outrageous and extreme as to go beyond all possible boundaries of decency.

The Court found it important that the plaintiffs made the decision to have an open casket funeral because the decedent's body "looked fine" and found that the picture was an accurate depiction of the decedent in the casket. Finally, the Court cited the Texas case of *Cox Texas Newspapers, L.P. v. Wootten*, 59 S.W. 3d 717 (Tex. Ct. App. 2001) and agreed that mere publication of a picture of a dead body is not enough to constitute extreme and outrageous conduct.

The plaintiffs have filed a Notice of Appeal in the Tenth Circuit U.S. Court of Appeals (Case No. 06-7001).

S. Douglas Dodd, Michael Minnis and Raymond H. Tipton, III of Doerner, Saunders, Daniel & Anderson, L.L.P. in Tulsa, Oklahoma, represented the Harpers Magazine and photographer Peter Turnley in this case. Plaintiffs were represented by Douglas Stall and Marcus Ratcliff of Latham, Stall, Wagner, Steele & Lehman, P.C. in Tulsa.

Texas Appeals Court Grants Summary Judgment to Religious Publisher

Cult Label an Ecclesiastical Matter

By Thomas J. Williams

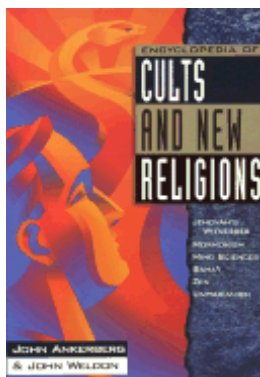
A libel plaintiff not expressly connected to the defamatory language in a publication has no cause of action unless a “reasonable reader” could conclude that the language in question applied to the plaintiff, a Texas Court of Appeals held in rendering judgment in defendants’ favor in a libel suit concerning the book *Encyclopedia of Cults and New Religions*. *Harvest House Publishers, et al v. The Local Church, et al*, 2006 WL 23548 (Tex.App. – Houston [1st Dist.], January 5, 2006) (Radack, C.J.).

Reversing a trial court’s denial of the defendants’ Motion for Summary Judgment, the Houston First Court of Appeals also held that “being labeled a ‘cult’ is not actionable because the truth or falsity of the statement depends upon one’s religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law.”

Background

The Local Church, its publishing arm Living Stream Ministry, and approximately ninety-five (95) congregations from around the country sued Harvest House Publishers, publisher of the *Encyclopedia of Cults and New Religions*, and John Ankerberg and John Weldon, the book’s authors, in a Texas state court in 2001, claiming that the book “attribute[d] to ‘cults’ and therefore to plaintiffs” various conduct including certain criminal acts, such as prostitution, rape, child molestation and murder.

The 700-page book contained a 16-page introduction, 57 separate chapters describing various religious groups, including a one and a quarter page chapter on The Local Church, and a 66-page “Doctrinal Appendix.” The characteristics of “cults” on which the suit was based were described in the Introduction and the Appen-



dix. The Local Church was not named in the Introduction and only mentioned twice in the Appendix, but not in the appendix passages alleged to be defamatory.

The plaintiffs did not contend that the chapter about The Local Church contained defamatory language. Instead, the Court of Appeals interpreted the “gist of the church’s complaint [to be] that, by calling it a ‘cult’ and including a chapter on it in the book, the publisher and authors have accused it of every ‘immoral, illegal and despicable action’ mentioned in the book.”

Interlocutory Appeal

After the trial court denied their Motion for Summary Judgment, the defendants appealed under the Texas interlocutory appeal statute, arguing that the

“Being labeled a ‘cult’ is not actionable because the truth or falsity of the statement depends upon one’s religious beliefs, which cannot and should not be tried in a court of law.”

“foundational context” of the book “centers on doctrinal . . . issues of theology,” and that the Introduction “cannot be reasonably interpreted to defame every group in the book.”

The Court of Appeals first considered whether the label “cult” is actionable, then turned to the issue of “whether the negative attributes and practices attributable to ‘cults’ are actionable.”

Noting that the Introduction defined “cult” as “a separate religious group generally claiming compatibility with Christianity but whose doctrines contradict those of historic Christianity and whose practices and ethical standards violate those of biblical Christianity,” the court concluded that “whether a group’s doctrines are compatible with Christianity depends upon the religious convictions of the speaker.” Concluding that the Establishment Clause of the First Amendment prohibits civil courts “from deciding theological matters, or . . . making religious belief the subject of tort liability,” the court held that “being labeled a ‘cult’ is not actionable.”

The plaintiffs claimed that statements in the book regarding alleged criminal acts by “cults” were action-

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Texas Appeals Court Grants Summary Judgment to Religious Publisher

(Continued from page 11)

able even if The Local Church was not directly mentioned in connection with them, a claim the court reviewed by analyzing “group libel” cases.

The court held that for a defamatory statement directed to a group to be actionable, “it must create the inference that all members of the group have participated in the activity that forms the basis of the libel suit.” The court held that the test is whether a “reasonable reader” would interpret the book to accuse all groups named in it of criminal activity and, relying on *New Times v. Isaacks*, 146 S.W.3d 144 (Tex. 2004), said that the test focuses not on “whether some actual readers were misled by the publication, as they inevitably will be, but whether the hypothetical reasonable reader could be.”

Holding that “no reasonable reader could conclude that the book accuses the church . . . of rape, murder, child molestation, drug smuggling, etc.,” the court rendered judgment in defendants’ favor.

Thomas J. Williams of Haynes and Boone, LLP, Fort Worth; and Donald D. Jackson and Lynne Liberato of Haynes and Boone, LLP, Houston represented defendants together with J. Shelby Sharpe of Sharpe, Reynolds & Tillman, Fort Worth. Plaintiff The Local Church and the other plaintiffs were represented by Barry Langberg and Deborah Drooz of Stroock & Stroock & Lavan, Los Angeles; Douglas M. Selwyn of Davis & Selwyn, Houston; and Craig T. Enoch of Winstead, Sechrest & Minick, Austin.

Motion to Vacate \$2 Million Libel Verdict Denied

Massachusetts Superior Court Judge Charles Johnson this month denied a post-trial motion by the *Boston Herald* to vacate a \$2 million libel award against it because of misconduct on the part of the plaintiff. See [Murphy v. Boston Herald](#), No. 02-2424B (Mass. Super. Ct. ruling Jan. 19, 2006); see also *MLRC MediaLawLetter* Oct. 2005 at 20, Dec. 2005 at 9.

As reported last month, the plaintiff, Massachusetts Superior Court Justice Ernest B. Murphy, who won a libel trial against the *Boston Herald* last year, apologized for writing letters on court stationery telling the newspaper it had “zero chance” of reversing the verdict and demanding an additional \$1.25 million to settle the case.

The *Herald* cited the letters as part of a “campaign to attempt to intimidate” the newspaper into relinquishing its constitutionally-protected rights of appeal. The newspaper sought to vacate the judgment under Mass. R. Civ. Pro. 60, which, like the federal counterpart, provides that a court may relieve a party from a final judgment for, inter alia, “misconduct of an adverse party.”

Book Publisher Can Appeal Denial of Summary Judgment

Public Figure Ruling "Affects a Substantial Right"

The South Carolina Court of Appeals ruled last month that a book publisher is entitled to appeal a denial of summary judgment on the ground that the denial "affects a substantial right" – thereby avoiding, for now, what could be an unnecessary trial. *Moosally v. W. W. Norton & Company, Inc.*, No. 3769 (S.C. App. Dec. 2005).

This is the second pre-trial appeal in these five year-old lawsuits. The first appeal handed down by the Court of Appeals in April 2004 affirmed the dismissal of the author and his source on jurisdictional grounds, but reinstated claims against W.W. Norton holding it had sufficient contacts to subject it to jurisdiction in South Carolina. *See* 358 S.C. 320, 594 S.E.2d 878, 32 Media L. Rep. 1642 (Ct.App. 2004); *MLRC MediaLawLetter* April 2004 at 28.

The South Carolina Court of Appeals will now review the issue of plaintiffs' status and a statute of limitations issue regarding one plaintiff's claim.



Background

At the center of the dispute is the 1999 book, *A Glimpse of Hell*, an account of the 1989 explosion on board the battleship *USS Iowa* which claimed the lives of 47 sailors and the subsequent investigation. The explosion was the worst disaster in peace time United States Navy history.

The plaintiffs include the commanding officer, executive officer and operations officer of the *Iowa* and the Navy captain assigned to lead the technical aspect of the Navy's \$25,000,000 investigation. Later, a separate lawsuit was brought by a sailor who gave invaluable service in helping to save the ship in the aftermath of the explosion.

The two lawsuits were consolidated for a trial that was scheduled to start this past summer.

Summary Judgment Motion

This year W.W. Norton moved for summary judgment against all plaintiffs on the grounds they were public figures,

limited purpose public figures, and public officials; and there was no clear and convincing evidence of actual malice. (It also moved for dismissal of the sailor's claim on the additional ground that it was time barred by the two-year statute of limitations for libel actions in South Carolina.)

At a hearing in May 2005, W.W. Norton argued that plaintiffs were public figures and/or officials because they had substantial responsibility and control of a battleship with a crew of over 1,600 officers and sailors and the investigation to determine the cause of the explosion.

Moreover, the book was devoted entirely to a matter of immense public interest. The explosion and subsequent events were reported extensively by the broadcast and print media. It was a focus of two *60 Minutes* programs, a *20/20 News Magazine* program, a documentary on The History Channel and extensive House and Senate Armed Services Committee hearings, in addition to other hearings on Capitol Hill.

To show that the sailor's claim was time barred, W. W. Norton submitted, among other things, an affidavit from its CFO with a spreadsheet showing the book was shipped to bookstores and customers more than 2 years prior to the commencement of the action. One of its customers was a dot.com company which sells a wide array of merchandise, including books, over the internet. The dot.com company provided an affidavit that it received its books and then shipped them to its customers in 28 states more than 2 years prior to the action. Bookstores in 3 different states gave affidavits that they received their books and had them on their shelves for sale to the public more than 2 years before the sailor's filing.

Trial Court Ruling

The trial judge denied the publisher's motions first ruling that plaintiffs were private figures for purposes of their libel lawsuit. He also ruled the statute of limitations argument was a novel issue that needed to be developed by a trial on the issues – which could then be clarified on appeal.

(Continued on page 14)

Book Publisher Can Appeal Denial of Summary Judgment

(Continued from page 13)

The publisher filed separate appeals of the rulings based on S.C. Code Ann. § 14-3-330(2), a statute allowing an immediate appeal when an order affects a substantial right by striking a defendant's answer or any part of it. The ruling struck the publisher's constitutional and statute of limitations defenses.

Plaintiffs moved to dismiss the appeals on the ground the appeals were interlocutory. In its reply, W. W. Norton countered that the reason for the statute was to protect litigants in cases such as the one presented on appeal. W.W. Norton argued there was no reason to spend weeks in a jury trial before appealing the ruling on plaintiffs' status.

The statute of limitations argument was more problematic. The state Supreme Court had recently ruled that the denial of a motion for summary judgment on statute of limitations grounds is non-appealable interlocutory

order. *See, Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (Ct.App.1999).

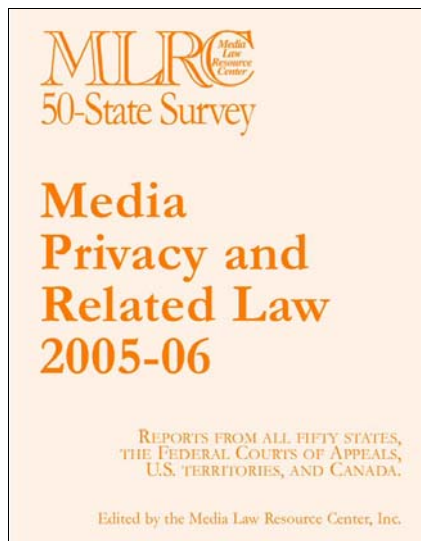
W.W. Norton argued that the Supreme Court's ruling in *Davis* was distinguishable because the court's opinion was based on defendant's right to raise the issue again at trial and receive a full and fair hearing. In this case, the trial judge had already announced that he thought the issue could only be determined by an appellate court thus rendering meaningless a motion for directed verdict at trial.

In December 2005, the Court of Appeals ruled in favor of W.W. Norton, holding it had a right of appeal under S.C. Code Ann. § 14-3-330(2). Initial briefs are in late February, 2006. The Court of Appeals will likely rule in mid-2007.

John J. Kerr of Buist Moore Smythe McGee P.A. in Charleston, South Carolina represents W.W. Norton. Plaintiffs are represented by Stephen F. DeAntonio of Charleston, SC.



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Pennsylvania Court Holds That Ordinary Discovery Standards Apply to Internet Libel Cases

Law Firm Entitled to Discover Who Posted Alleged Defamatory Statements

A Pennsylvania trial court this month held that ordinary discovery standards apply when a libel plaintiff seeks to discover the identity of anonymous internet posters. *Klehr Harrison Harvey Branzburg & Ellers, LLP v. JPA Development, et al.*, No. 2095 EDA 2004, 2006 WL 37020 (Pa. Comm. Pleas Jan. 4, 2006) (Sheppard, J.).

The court specifically rejected the analysis of the Delaware Supreme Court in the recent case of *Cahill v. Doe*, No. 266, 2005 WL 2455266 (Del. Oct. 5, 2005), which held that a public figure libel plaintiff must satisfy a summary judgment standard before obtaining the identity of an anonymous defendant. See *MLRC MediaLawLetter* Oct. 2005 at 13. The court also rejected a similar formulation adopted by

the New Jersey appellate court in *Dendrite International v. Doe*, 775 A.2d 756 (2001).

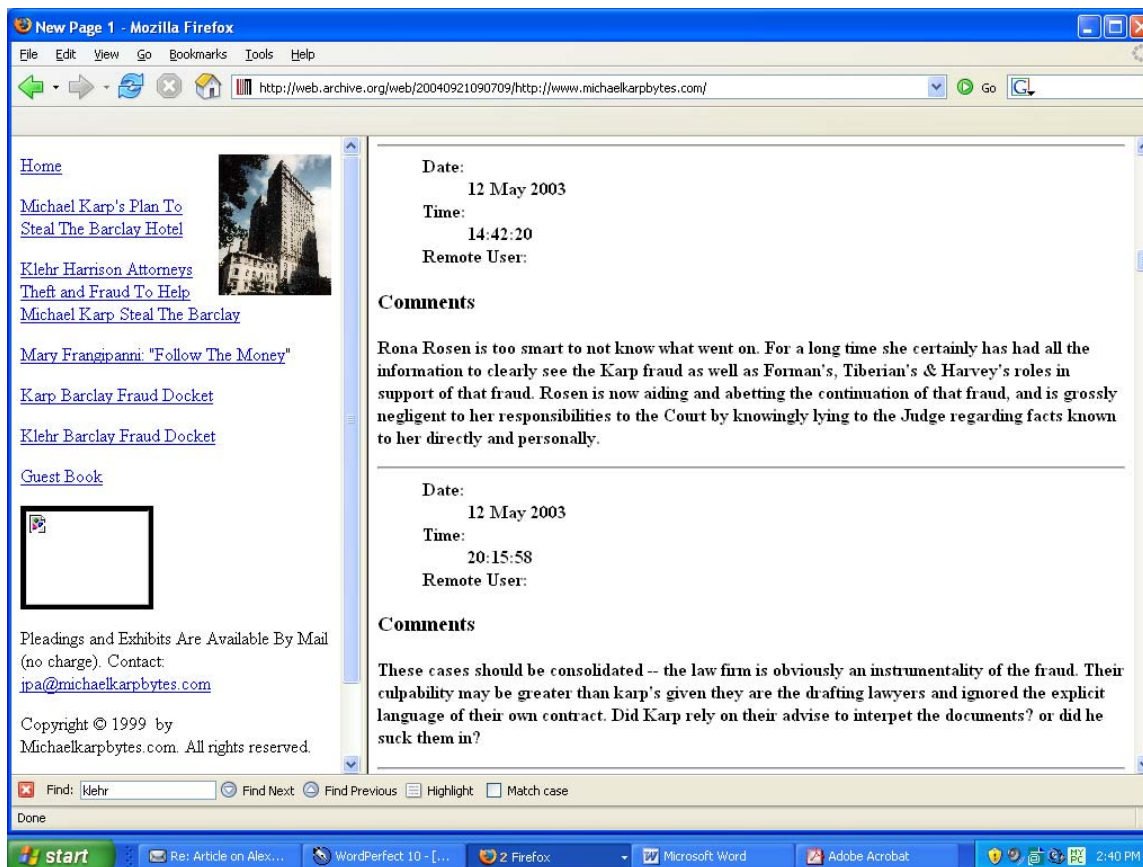
While acknowledging that First Amendment protection attaches to anonymous speech, the Pennsylvania court concluded that existing discovery rules, such as relevance and limits on burdensome requests, adequately protect First Amendment interests.

The implementation of new standards in anonymous internet libel cases "will likely do more harm than good."

Background

Plaintiff, Klehr Harrison Harvey Branzburg & Ellers, LLP, ("Klehr") is a Philadelphia-based law firm. Defendants are a development company and a management company and their sole-owner principals. The parties are on opposite sides in a bitter construction financ-

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Pennsylvania Court Holds That Ordinary Discovery Standards Apply to Internet Libel Cases

(Continued from page 15)

ing dispute involving separate claims of breach of contract and fraud.

In connection with these ongoing claims, the defendants created two websites that discussed and posted pleadings from that case. The websites also contained a "Guest Book" that allowed visitors to post comments.

Numerous postings on the sites attacked lawyers at Klehr. Among them: that a lawyer at Klehr "is now aiding and abetting ... fraud"; that another lawyer is "a sleazebag who lies ... to the Court ... on regular basis; and that the firm is "without ethics."

Klehr sued for libel, alleging that defendants had either created the defamatory postings or directed them to be posted. In a prior ruling, the trial court held that the complained of statements were defamatory per se. (Klehr also sought a preliminary injunction against the defendants, which was apparently granted by the trial court, but rejected on appeal. *See Klehr v. JPA Development, et al.*, (Sup. Ct. Dec. 21, 2005) (unpublished)).

Klehr served discovery requests on the defendants and their webhosting companies to obtain the identities of the posters. Defendants moved for a protective order.

Defamatory Statements on the Internet

The court began by acknowledging the "democratizing power" of the internet, but noted that "the power comes at a price" – such as defamatory falsehoods and hoaxes that "may be almost impossible to

root out." Citing Lidsky, *Silencing John Doe: Defamation Discourse in Cyberspace*, 49 Duke L. J. 855, 884-885 (2000).

The court reviewed the *Cahill* and *Dendrite* decisions and concluded that the implementation of new standards in anonymous internet libel cases "will likely do more harm than good."

The court also reviewed a Pennsylvania Supreme Court decision involving anonymous speech on the internet, *Melvin v. Doe*, 836 A.2d 42 (Pa. 2003). *Melvin* involved a sitting judge's libel claim against the creator of a website who criticized the judge for "misconduct."

The trial court in *Melvin* ordered Doe's identity revealed. The Pennsylvania Supreme Court held that the order was a collateral one subject to interlocutory appeal, noting in dicta that "the court-ordered disclosure of [Doe's identity] presents a significant possibility of trespass upon First Amendment rights."

The court in *Klehr* reasoned that the Pennsylvania Supreme Court in *Melvin* did not suggest the adoption of any heightened standard, but simply that constitutional arguments be considered. It then concluded that the constitutional issues are adequately addressed by existing discovery rules.

In the instant case, the court found that the discovery request was relevant, made in good faith and did not unreasonably burden the defendants.

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Wisconsin Court Dismisses “Terrorist Link” Lawsuit

Statements Not Of and Concerning Plaintiff Corporation

By Joseph P. Thornton

Despite headlines that mentioned a “suspected terrorist link” and that a “former gas station owner may have been a 9/11 plotter,” a Wisconsin Circuit Court judge dismissed a libel complaint, ruling the allegedly false statements were not “of and concerning” the plaintiff corporation that currently operates the station. *AAP Petroleum, Inc. v. Gannett Satellite Information Network, Inc.*, No. 05-CV-566 (Fond du Lac County Jan. 3, 2006) (Wirtz, J.).

Background

Hearing is believing, unless an accent makes the speaker hard to understand – or the next day headlines are too hot to swallow. Jaws dropped at a Fond du Lac city council meeting this summer when a Homeland Security Special Agent allegedly said a recently deported resident had been a “9/11 plotter.”

The deported man, Fayrad Hussain, was convicted in 2004 of running a brides-for-hire/marriage fraud conspiracy out of a local Citgo gas station. Hussain paid Fond du Lac women to marry Pakistani nationals so they could get green cards to stay in the U.S.

Special Agent Stillings of the Milwaukee office of Homeland Security was at a city council meeting to award commendations to six Fond du Lac officers who helped federal agents in the investigation.

Officers and their spouses posed for pictures with Special Agent Stillings; and the Council President read a proclamation issued by Homeland Security. The remarks by the Special Agent described the marriage fraud scam and mentioned the street address of the Citgo station where criminal activity occurred. Speaking longer than expected, the Special Agent also said:

“The problem is, Frankie, or Fayrad Hussain, it is clear, does not have the best interest of the United States at heart.... He’s in Pakistan right now cursing America and that’s where he belongs... So, I don’t want to make light of this situation, but I really need to tell you guys that the city of Fond du Lac dodged a bullet.”

When reporters pressed for confirmation and more details as Stillings left the meeting, he chuckled, “I’ve probably already said too much.”

The four column head in *The Reporter* on July 28, 2005 read: “Suspected terrorist linked to Fond du Lac,” with the subhead: “Former gas station owner may have been 9/11 plotter.” The right two columns featured a photo of the Citgo station, and the caption:

“This service station at 324 N. Main St., now under new ownership, was the base of a bride-for-scams in 2002 lead by a man officials say may have had ties to the 9/11 terrorist attacks and Osama Bin Laden. Fayrad “Frankie” Hussain, the former owner of the station, has since been convicted in Eastern District Court in Milwaukee and deported.”

After the item hit the AP wire, U.S. Immigration and Customs Enforcement issued a statement that “several media outlets in Fond du Lac, Wis. ... erroneously reported the agent’s comments due to ‘an unfortunate misunderstanding....’ Special Agent Stillings said that Hussain was ‘an applauder’ of 9/11, not a ‘plotter’ of 9/11.” The newspaper ran extensive reaction coverage on July 29, including statements by the City Council President and others who believed the agent said “a plotter” and not “an applauder.” Audio from the cable access coverage of the meeting was posted to the paper’s web site and a transcript was published among six other next-day stories.

Gas Station Owner Sued for Libel

AAP Petroleum, Inc., a Wisconsin corporation formed by Hussain’s wife after his arrest, said it operated the Citgo station and was defamed by the newspaper’s coverage. Its retraction demand claimed the current operators were being threatened and called terrorists as a result of the article. After the paper declined to publish a retraction, AAP filed a libel complaint in circuit court.

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Wisconsin Court Dismisses “Terrorist Link” Lawsuit

(Continued from page 17)

Wis. Stat. §895.05 states that a libel plaintiff may not file suit unless it first demands a retraction of the particular statements alleged to be false. AAP’s demand and complaint claimed the Immigration and Customs Enforcement press release proved that the statements about Hussain being a “suspected terrorist” were false. Plaintiff’s counsel argued that publication of a false headline regarding terrorism next to a picture of the gas station defamed the corporation that operated the station.

Motion to Dismiss

The newspaper moved to dismiss the complaint arguing that the article was not “of and concerning” the Plaintiff. Hussain was not alleged to be a current owner or operator, so the plaintiff corporation lacked standing to claim defamation regarding Hussain. Even if the terrorist allegations were false, the statements were directed only at Hussain and the period of time when he operated the service station. The caption carefully stated the depicted Citgo station was “now under new ownership” and neither AAP Petroleum, Inc. nor its officers, directors or shareholders were identified in any of the newspaper coverage.

In response to the newspaper’s motion and brief, plaintiff filed a First Amended Complaint, attaching letters and a reaction story to make its point about identification. Letters attached to the amended complaint alleged lost sales from former customers who believed the terrorist link applied to the current owner or boycotted the store because of lingering doubts, despite the Immigration and Customs Enforcement press release. In addition, the plaintiff now claimed Hussain had never been an owner of the station, an additional false statement plaintiff claimed created liability.

Plaintiff argued that publication of the photo of the station next to the offending headline and article amounted to identification of the Plaintiff by reasonable inference. Plaintiff contended those facts presented a jury question since under Wisconsin law a defamatory communication may identify the person defamed by express words or by reasonable inference. Wis. JI-Civil 2500.

At oral argument, the newspaper argued that even if Hussain never owned the station, to publish so defamed neither Hussain nor the plaintiff corporation. Defendant cited clear efforts by the newspaper within the story, subhead and caption to distinguish the convicted, deported felon from the current, unidentified operators of the Citgo gas station.

Under the plaintiff’s theory, no newspaper could report on past criminal activity at a business location without fear of suit. Picking up on that theme, Judge Wirtz asked plaintiff’s counsel whether he believed the media could describe a recent violent crime that occurred at a hotel chain property without fear of being sued for publishing a photo and its address.

Even if certain false statements were published, they were not “of and concerning” the plaintiff corporation and its shareholders.

Ruling from the bench, Judge Robert J. Wirtz granted the motion to dismiss the first amended complaint. Wirtz held that even if certain false statements were published, they were not “of and concerning” the plaintiff corporation and its shareholders. All potentially actionable statements were directed at Hussain, and at no time was there an express identification of the plaintiff. Whether plaintiff was reasonably identified or identifiable was a question of law, not a question of fact so dismissal was appropriate.

Joseph P. Thornton and Tiffany Wohlfeil of Godfrey & Kahn, S.C., were counsel for the newspaper. Timothy Edwards of Madison represented the plaintiff.

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North Carolina Newspaper Wins Summary Judgment in Libel Fight with Former County Commissioner

By John Bussian

Following a year's worth of discovery after an initial denial of summary judgment, a North Carolina trial court this month granted the Durham *Herald-Sun's* motion for summary judgment in a limited purpose public figure libel case. *Bowser v. Durham Herald Company*, No. 4CV 04017 (Durham Sup. Ct. Jan. 17, 2006) (Spencer, J.).

Background

The plaintiff, former County Commissioner Joe Bowser, sued the newspaper over a May 2004 article that stated he "attempted to pressure" a county employee on behalf of one of his friends. Plaintiff argued that the use of the single word "pressure" to describe his conduct toward a state employee created a triable issue of actual malice.

The commissioner took the position that a public record upon which the news report was based did not contain the word "pressure" and that *The Herald-Sun* knew that the word was not used and should not have been used to characterize the commissioner's conduct.

At the time the *Herald-Sun* filed its first summary judgment motion, the paper asked the trial court to stay discovery because none was needed to decide whether the fair report privilege immunizes the publisher against liability. Superior Court Judge Michael Rivers-Morgan denied both motions, prompting the plaintiff's request for production of all the *Herald-Sun's* editorials concerning the commissioner and prompting the *Herald-Sun's* deposition of the commissioner.

The commissioner testified in deposition that the publication of the article cost the commissioner re-election in 2004. And eventually, the plaintiff's counsel deposed the *Herald-Sun* reporter who wrote the article, and pressed a line of questioning about whether the *Herald-Sun* had been a consistent critic of the commissioner's performance in office. By the time of the hearing on the paper's summary judgment motion, the commissioner argued only that it acted with actual malice in choosing the word "pressure" to summarize part of the public record on which the article was based.

Summary Judgment Decision

Superior Court Judge James C. Spencer made short work of the argument that an inference of actual malice could be drawn from *The Herald-Sun's* word choice.

The summary judgment effort was stymied in part by a dearth of North Carolina case law discussing actual malice evidence. In fact, there are only a handful of reported public official libel cases in North Carolina courts. And only one – a limited purpose public official case – involved a failed attempt to show actual malice by clear and convincing evidence, the summary judgment standard in North Carolina courts.

Moreover, only in the last three years has the North Carolina Supreme Court expressed a preference for summary disposition of actual malice-based claims by allowing interlocutory appeal of the denial of summary judgment motions in these cases.

These factors operated to give some trial judges in North Carolina, where few libel cases are filed, pause in considering a dispositive motion early in the litigation.

Armed with law from other states, particularly the Texas Supreme Court's 2005 decision in *Freedom Newspapers of Texas v. Cantu*, 168 S.W.3d 847 33 Media L. Rep. 1907 (Tex. 2005), the *Herald-Sun* was able to lay the plaintiff's argument to rest.

In the complained of newspaper article, readers were alerted early in the report that *The Herald-Sun* was summarizing contents of a public record describing the commissioner's conduct. The source document, a letter from a county employee filed in connection with an Ethics Code complaint against the commissioner, was excerpted in several places in the newspaper article.

And the commissioner himself was quoted in response to the allegations. Under these circumstances, the paper challenged the public official-plaintiff to show that the paper's summary was anything other than a rational interpretation of the commissioner's political doublespeak. When the plaintiff failed to meet the challenge, Judge Spencer entered summary judgment for *The Herald-Sun*.

There is no word yet on whether the plaintiff will appeal.

John Bussian, of The Bussian Law Firm PLLC in Raleigh, NC, represented the Herald-Sun in this case. Plaintiff was represented by Charles Putterman of Raleigh, NC.

Federal Court Dismisses All Claims Over Advocacy Ad

Advertisement Criticizing AARP Was Non-Commercial Protected Speech

A federal district court this month dismissed libel, false light, misappropriation and emotional distress claims against an advocacy group that used a photograph of plaintiffs in an ad criticizing the AARP. *Raymen v. United Senior Association, Inc.*, No. Civ. A. 05-486, 2006 WL 151791 (D. D.C. Jan 20, 2006) (applying Oregon law) (Walton, J.).

The same court had granted a temporary restraining order against further publication of the ad. *See* 2005 WL 607916 (D.D.C. Mar. 16, 2005). In a short opinion last year, the court simply treated the advocacy ad as a commercial advertisement and concluded that plaintiffs were likely to succeed on their misappropriation claim. The parties later stipulated to a preliminary injunction.

But this month, citing the benefit of additional briefing, the court granted a motion to dismiss, ruling that plaintiffs failed to state a cause of action for any of their claims.

Plaintiffs, a same-sex couple, participated in a gay wedding ceremony in Oregon. The Oregon *Tribune* covered the ceremony and photographed the couple kissing. The photo was published in the *Tribune* and on the newspaper's website.

Defendant, United Senior Association, Inc. ("USA Next") copied the photograph from the newspaper's website and used it in an ad criticizing the American Association of Retired Persons ("AARP"). Viewers who clicked on the ad would be taken to USA Next's website which contained information about its position on Social Security reform, as well as information on how to donate money to USA Next.

The ad was published on the website of *The American Spectator* magazine from Feb. 15-21, 2005.

Plaintiffs brought suit, alleging that the ad libeled them and portrayed them in a false light but implying they were unpatriotic and did not support the U.S. military. They also alleged that the ad constituted misappropriation and caused them severe emotional distress.

Libel and False Light Claims

Granting defendant's motion to dismiss all claims, the court first held that the ad was not capable of a defamatory meaning – thereby defeating both the libel and false light

claims. Nothing on the face of the advertisement was defamatory to the plaintiffs. Rather, as a whole "the only message the advertisement sends is that the AARP allegedly supports gay marriage and does not support the United States military."

The only reasonable interpretation of the ad with regard to the plaintiffs is that they are a gay couple and support gay marriage, which are true representations.

Misappropriation Claim

Dismissing the misappropriation claims the court first noted that there can be no claim "when a person's picture is used to illustrate a noncommercial, newsworthy article." Moreover, a

publication may still be protected even if it has "commercial undertones if it concerns a legitimate matter of public concern."

The plaintiffs argued that the ad was commercial in nature since it solicited donations and sought to increase USA Next's membership. The court found this argument "unpersuasive."

First, nothing in the ad itself sought donations. Rather, viewers would have to click on the ad to access USA Next's website containing solicitations for donations. This "detached solicitation" could not elevate the ad "to a level where it can be deemed commercial in nature."

The ad, according to the court, clearly related to matters of public concern – the AARP's alleged views on gay marriage and opposition to the military. In this regard, the photograph was used in a manner "directly related to issues of public concern."

Emotional Distress Claim

Finally, the court dismissed plaintiffs' emotional distress claim. It found that the use of the newspaper photograph taken in a public place "does not come close to demonstrating outrageous conduct."

Plaintiffs were represented by Christopher Wolf and Bruce Boyden of the Washington D.C. office of Proskauer Rose LLP. Defendants were represented by James Arthur Johnson, Semmes, Bowen & Semmes, Baltimore, MD, Robert R. Sparks, Jr., McLean, VA; and Thomas Wilson, Berliner, Corcoran & Rowe, LLP, Washington, DC.



Foot Doctor Strikes Out Against San Francisco Chronicle, Barry Bonds

Libel Suit Fails on Grounds of Truth

By Karl Olson

A former San Francisco podiatrist has struck out in a defamation lawsuit against the San Francisco Chronicle, baseball superstar Barry Bonds, and former San Francisco 49er running back Roger Craig. *Carver v. Bonds, et al.*, 37 Cal.Rptr.3d 480 (Cal. App. Dec. 29, 2006) (Munter, J.).

The Court of Appeals affirmed a lower court ruling which dismissed Dr. Andrew Carver's libel lawsuit against the newspaper and the athletes over an article about the doctor's "Wall of Fame" – pictures in his office of many athletes – and his claims to have treated many prominent athletes including Bonds, Craig and former 49er legend Joe Montana.

The Court found that part, but not all, of the article was a privileged fair and true report of a state investigation of Carver which ended in the revocation of his license. The Court also found that Carver was a private figure. But Carver lost because of the most basic defense of all – truth: "Given all of what plaintiff does not dispute or effectively controvert, it appears to be substantially true, on the record of this case, that he did in fact exaggerate his relationships with famous athletes to market his practice as the article charged."

Newspaper Article Was True

There were a wealth of facts which established the basic truth of the *Chronicle* article, along with a wealth of facts which portrayed Dr. Carver in a less-than-flattering light.

The article said virtually all of the work plaintiff had done on famous athletes whose visages adorned a "Wall of Fame" in his office was to treat them for orthotics – i.e., custom designed shoe inserts. The Court of Appeal noted that by plaintiff's own admission, in a declaration he filed opposing the *Chronicle*'s anti-SLAPP motion, most of the work he had done on professional athletes involved casting players for orthotics.

For example, while Carver told the *Chronicle* in the first of several interviews, "I took care of Bonds most

recently, I've done Montana a lot," it turned out all he had done for the Hall of Fame quarterback Joe Montana was fit him for orthotics and take care of an ingrown toe-nail.

Carver's claim to have taken care of San Francisco Giants superstar Bonds was a large part of the lawsuit. Carver, in an apparent effort to land a job with the Sacramento Kings basketball team, told a Kings official he had provided Bonds with orthotics. Carver told the *Chronicle*: "I can certainly tease about that. I can say that happens to be the year he hit 73 home runs, but come on, obviously I know that I didn't hit any balls over the fence. But you know, he didn't have any foot injuries that year."

A Giants spokesman told the newspaper that Bonds denied using Carver's orthotics, and Bonds himself was quoted in the newspaper saying of Carver, "I don't like that man. I don't like that man. He's a liar."

Carver claimed Bonds' comment defamed him, and sued both the newspaper and Bonds for the comment. The Court of Appeal indicated, without deciding, that Bonds' comment may have been protected rhetorical hyperbole: "In the context of an outspoken athlete's flip-pant remarks before a game about someone he dislikes, the word 'liar' would seem to be merely an expression of contempt."

But the Court went on to say,

"even if the statement were potentially defamatory under the circumstances, plaintiff must nevertheless make a prima facie showing that it was substantially false, and he has failed to carry that burden. Bonds has declared, and plaintiff has not denied, that plaintiff threatened to lie to the press about him, and reneged on an offer to provide him with free orthotics. Bonds was justified in calling plaintiff a liar in view of those undisputed facts.... We likewise think the term 'liar' is broad enough to encompass someone who commits or threatens the dishonest acts Bonds described. Since it appears from the evidence that there was

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Foot Doctor Strikes Out Against San Francisco Chronicle, Barry Bonds

(Continued from page 21)

substantial truth to Bonds' charge that plaintiff lied in his dealings with him, plaintiff has not established a probability of prevailing on his defamation claim against Bonds."

The case teaches a few basic truths about libel litigation and California anti-SLAPP motions. Under the California anti-SLAPP statute, the moving party can submit evidence both to establish the applicability of the statute and its defenses to the libel claim. The plaintiff must provide admissible evidence in response.

The Chronicle provided 16 declarations, from the plaintiff's former patients, former employees, professional athletes, fellow doctors, and a state regulator, showing the truth of the article. Carver provided only his own in response. While plaintiff's

broad and carefully-worded declaration attempted in sweeping terms to deny the article's truth, the Court meticulously viewed the evidence, and even while resolving factual disputes in Carver's favor found that plaintiff hadn't denied the truth of substantial parts of the article and hadn't denied many of the statements made in support of the motion. Thus, he fell short of establishing a prima facie case of libel.

The Court also disposed of plaintiff's defamation claim against former San Francisco 49er superstar Roger Craig. Craig was quoted in the article as saying he didn't

remember Carver, and said, "I would remember him, trust me, if I had a relationship with him."

Carver, in opposing the anti-SLAPP motion, submitted a signed photo of Craig saying, "To Andrew, Thanks for taking care of my feet," a photo which Carver's counsel brandished at oral argument.

The Court found that Craig's "I would remember him" quote wasn't a provably false statement:

"Insofar as it appears from plaintiff's declaration, he may have seen Craig only twice, both times more than a decade before Craig was asked about him.

***The Court meticulously
viewed the evidence and
found that plaintiff hadn't
denied the truth of substantial
parts of the article.***

Thus, it was understandable that Craig would not remember having a 'relationship' with him. But whether Craig remembered plaintiff, and would have remembered him if they had had a relationship, turned in any

event on the strength of Craig's memory of distant and isolated events, and on what he considered a 'relationship' – entirely subjective matters rather than provably false factual assertions."

Karl Olson of Levy, Ram & Olson in San Francisco represented the Hearst Corporation, publisher of the San Francisco Chronicle, and the two Chronicle reporters who wrote the article, Mark Fainaru-Wada and Ulysses Torassa. He does not have a "Wall of Fame" in his office. Plaintiff was represented by Carleton L. Briggs.

February 28, 2006

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Tenth Circuit Hears Oral Argument on Constitutional Challenge to Colorado's Criminal Libel Law

By Steven D. Zansberg

On January 9, 2006, the Tenth Circuit heard oral argument in the case of *Thomas Mink v. Suthers, Buck, et al.*, a case challenging the constitutionality of Colorado's criminal libel statute.

Background

The constitutional challenge arose after law enforcement authorities in Greeley, Colorado obtained a search warrant for and seized computer files of college student Thomas Mink, publisher of "The Howling Pig" an online parody newspaper.

"The Howling Pig" had hosted articles ridiculing a University of Northern Colorado professor Junius Peake. The Professor complained to the local District Attorney's Office, which authorized the execution of a search warrant on Mink's computer.

The Colorado ACLU, on behalf of Thomas Mink, filed a § 1983 civil rights action in Colorado federal court, and obtained a temporary restraining order requiring return of Mink's computer. Subsequently, the District Attorney for Weld County, Colorado issued a memorandum stating that he would not press charges under the criminal libel statute based upon the first three editions of "The Howling Pig."

Challenge to the Statute

In 2004, U.S. District Court Judge Lewis Babcock ordered the dismissal of Mink's claim challenging the constitutionality of Colorado's criminal libel statute, finding that Mink lacked standing because he was unable to satisfy the "credible fear of prosecution" requirement. See 344 F. Supp.2d 1231 (D. Colo. 2004).

Judge Babcock also dismissed Mink's § 1983 claim against the Assistant District Attorney who had authorized the search warrant, finding that she was entitled to absolute judicial immunity. In addition, Judge Babcock dismissed

Mink's claim under the Privacy Protection Act against the assistant prosecutor, finding that she had not participated in the execution of the search warrant. Mink appealed the District Court's order dismissing all of his claims.

Tenth Circuit Argument

On January 9, 2006, oral argument was heard by Judges Ebel, O'Brien and Tymkovich of the Tenth Circuit. The panel focused much of its questioning on how the facts of the present case could be distinguished from a case decided January 5, 2006 by the Tenth Circuit, *Winsness v. Yocom*, Tenth Circuit Case No. 04-2475.

In *Winsness*, the Tenth Circuit found that two plaintiffs who had challenged Utah's anti-flag burning statute could not proceed with their facial challenge to that statute,

because the case had been mooted by sworn declarations from two prosecutors granting assurances that they would not

bring any prosecutions under Utah's anti-flag burning statute against the plaintiffs or anyone else unless the statute was significantly amended to cure its defects under *Texas v. Johnson*, 491 U.S. 397 (1989).

Plaintiff's lawyer, Bruce Jones of Holland & Hart in Denver, argued that the *Winsness* case made clear that the District Court erred in finding that Mink lacked standing to assert a constitutional challenge to the criminal libel statute. Because Mink clearly faced a credible fear of prosecution at the outset of the case, the appropriate analysis was one of mootness, not standing.

When Judge Ebel asked what evidence there was that Mink faced a credible threat of prosecution at the outset of the case, Jones pointed out that the District Attorney had admitted in his answer that Mink faced a credible threat of prosecution when the lawsuit was filed.

Jones then explained that the District Attorney's memo stating he would not bring charges against Mink based only upon the first three editions of "The Howling



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Tenth Circuit Hears Oral Argument on Constitutional Challenge to Colorado's Criminal Libel Law

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Pig" was a far cry from the sworn affidavits that had been tendered by the prosecutors in the *Winsness* case.

Because *Winsness* establishes that prosecutors seeking to moot a case post-filing face an extremely heavy burden, the District Attorney's unsworn memorandum in this case failed to meet that standard. Accordingly, Jones argued, the case was not moot, and the Court should address the constitutional challenge to Colorado's criminal libel statute.

Questions on Merits Appear Promising

When the panel turned their attention to the merits of the facial challenge to Colorado's criminal libel statute, their questions illuminated the glaring constitutional infirmities of the law. Judge Ebel asked whether the Colorado Supreme Court's ruling in *People v. Ryan*, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991), limited the application of the criminal libel statute only to purely private figure and private matter subject matter statements.

Jones answered that *Ryan* still allowed the imposition of criminal sanctions on statements of public concern (so long as they were not about public officials or public figures) without requiring the prosecution to prove actual malice. Hence, under *Garrison v. Louisiana*, the statute was unconstitutional.

Judge Tymkovich asked whether even in a purely private figure/private matter case, the government bears the burden of persuasion on all elements of the crime, including falsity. Jones answered that he believes it does.

The questions posed to the Assistant Attorney General on the merits of the constitutional challenge were even more encouraging. Judge Tymkovich asked pointedly whether under the First Amendment a statute criminalizing speech must have a fault requirement when applied to speech on matters of public concern.

Judge Ebel made clear that the Colorado Supreme Court had not stated in the *Ryan* decision that the statute could not be applied to matters of public concern, but only matters of public concern regarding a public official or public figure.

When the Assistant Attorney General cited to three separate Colorado Supreme Court decisions, two of which

involved claims for civil libel, Judge Tymkovich stated that it seemed odd to argue that all a citizen would need to do would be to read three separate Colorado Supreme Court decisions in order to understand what was the reach of the criminal libel statute: "Doesn't that create quite a bit of uncertainty – the need to read three Supreme Court cases? What kind of notice is that providing to an ordinary member of the public?"

The panelists also peppered the Attorney General about the inadequacy of the prosecutors' assurances of their lack of intent to bring charges under the statute. Judge Tymkovich (who was on the panel that had decided the *Winsness* decision) pointed out that in the *Winsness* case there was a "definitive affidavit" tendered by the prosecutor, but that there was no affidavit whatsoever in this case.

Judge Ebel stated that mootness presented a much harder showing for the government to make than lack of standing. He stated that the government's disavowal of an intention to proceed with prosecution must not be strategic, but permanent.

The panel spent precious little time addressing the other arguments presented on appeal concerning immunity to the Assistant D.A., and practically no discussion of the Privacy Protection Act claim.

Further Briefing Authorized

At the close of oral argument, Bruce Jones asked the panel whether it would welcome additional briefing on the import of the recently-decided *Winsness* decision. The panel granted the request and ordered both parties to file simultaneous five-page briefs distinguishing or explaining the *Winsness* decision and how it applied to the current case.

Steven Zansberg, a partner with Faegre & Benson in Denver, Colorado, wrote an amicus brief to the Tenth Circuit on behalf of the Associate Press, Bloomberg News, Dow Jones and MLRC. Bruce Jones of Holland & Hart in Denver argued on behalf of the plaintiff Thomas Mink and "The Howling Pig." Assistant Attorney General William Allen argued on behalf of the State of Colorado. David Brougham of Hall & Evans in Denver argued on behalf of Assistant District Attorney Susan Knox.

Ninth Circuit Affirms Dismissal of Gennifer Flowers' Libel Case

By Laura R. Handman and Matthew A. Leish

In what may be the last chapter of the long-running Gennifer Flowers saga, the Ninth Circuit has affirmed the dismissal of Flowers' defamation and conspiracy claims against Hillary Rodham Clinton, George Stephanopoulos, and James Carville. In a brief, unpublished opinion issued on January 9, 2006, the Court found that Flowers' conspiracy claim against Senator Clinton was time-barred and that her "failure to present evidence of actual malice is fatal to each claim against Carville and Stephanopoulos." *Flowers v. Carville*, 2006 WL 42033 (9th Cir. 2006) (Brunetti, Kozinski and Hogan, JJ.).

Background

Flowers, who famously alleged during the 1992 presidential campaign that she had had a long-term affair with then-Governor Bill Clinton, had sued Stephanopoulos, Carville, Hillary Rodham Clinton, and Little, Brown and Company (the publisher of Stephanopoulos' memoir *All Too Human*) for libel, false light invasion of privacy, and conspiracy based on statements made in 1998 by Stephanopoulos and Carville on *Larry King Live*, in 1999 by Stephanopoulos in *All Too Human*, and by Stephanopoulos in 2000 on *The Tim Russert Show*.

Each of the allegedly defamatory statements referred to reports that were broadcast in 1992 on CNN and KCBS regarding whether the tapes Flowers had made of her phone conversations with then-Gov. Clinton and played at her press conference in January of 1992 had been "selectively edited."

Chief Judge Philip M. Pro of the District of Nevada originally dismissed all of Flowers' claims in 2000. 112 F. Supp.2d 1202 (D. Nev. 2000). On appeal, the Ninth Circuit (Kozinski, J.) affirmed in part and reversed in part, holding that Flowers "must be given at least some chance to seek" evidence to support her "uphill battle" of demonstrating that the defendants acted with actual malice. 310 F.3d 1118, 1131 (9th Cir. 2002).

On remand, the district court granted the defendants' motion to bifurcate discovery, with initial discovery lim-

ited to the issue of actual malice in light of the Ninth Circuit's reasoning. In November of 2003, Judge Pro dismissed the conspiracy claim against Sen. Clinton (the only remaining claim against her) on statute of limitations grounds. Judge Pro found that Nevada's 4-year statute of limitations for the conspiracy claim began to run no later than April 1995, because Flowers was aware by that date of all necessary facts giving rise to her claim that defendants had conspired to discredit her. 292 F. Supp.2d 1225 (D. Nev. 2003).

Then, on March 10, 2004, Judge Pro granted summary judgment on each of the remaining claims against Carville, Stephanopoulos and Little, Brown, finding that Flowers had failed to uncover any evidence of actual malice. 310 F.Supp.2d 1157 (D. Nev. 2004).

Judge Pro held that the "gist or sting" of the CNN and KCBS reports was "that the tapes were probably suspect" and rejected Flowers' claims that Stephanopoulos and Carville had ignored "obvious warning signs" such as the CNN expert's qualifier that there might be an innocent explanation for the breaks in the audio. Judge Pro also held that, even if the reports were ambiguous, Stephanopoulos and Carville's statements that the reports had concluded that the tapes were "doctored" or "selectively edited" was a "rational interpretation" and did not constitute actual malice.

Judge Pro further found that Flowers had failed to present any admissible evidence to support her unsubstantiated allegations that the tape experts hired by CNN and KCBS were somehow "shills" for the Clinton campaign. Finally, as to Little, Brown, Judge Pro held that the fact that Little, Brown's attorneys vetted *All Too Human* and would have been aware of the qualifying language in the news reports did not provide a sufficient basis for a reasonable jury to find actual malice.

Ninth Circuit Decision

Flowers appealed once again to the Ninth Circuit as to all defendants except Little, Brown. In its unsigned January 9 opinion affirming the grant of summary judgment, the Ninth Circuit panel, consisting of Judges Koz-

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Ninth Circuit Affirms Dismissal of Gennifer Flowers' Libel Case

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inski, Brunetti, and Hogan (sitting by designation), first found that the conspiracy claim against Senator Clinton was time-barred because the claim accrued no later than April 1995, more than four years before Flowers first named Senator Clinton as a defendant. Turning to the defamation claims against Stephanopoulos and Carville, the Court found that Flowers had failed to present evidence of actual malice and that "no reasonable jury could find that either defendant (1) knew that Flowers' audiotapes were not 'doctored' or 'selectively edited,' (2) knew or ignored obvious signs that the news reports regarding the audiotapes were false, or (3) intentionally or recklessly made statements that were materially different from the news reports."

Flowers' attorneys are reportedly considering whether to file a *certiorari* petition to the Supreme Court.

Laura R. Handman, a partner in the Washington, D. C. office of Davis Wright Tremaine LLP, and Matthew A. Leish, a partner in the New York office of Davis Wright Tremaine, represented George Stephanopoulos and Little, Brown and Company. Hillary Rodham Clinton is represented by David E. Kendall and Kenneth J. Brown of Williams & Connolly, LLP in Washington, D. C. James Carville is represented by William Alden McDaniel, Jr. in Baltimore, MD. Gennifer Flowers is represented by Judicial Watch, Inc. in Washington D.C.



50-STATE SURVEYS

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Statements About Preservation Dispute Not Defamatory

Statements Did Not Impugn Plaintiff's Character or Abilities

By Damon E. Dunn

An Illinois trial court dismissed a defamation complaint with prejudice after finding that the plaintiff could not amend to allege defamation *per quod*. *Vigilante v. Pioneer Newspapers, Inc. and Beth Baxter*, (Case No. 05 L 62032).

Background

Plaintiff, Antoinette Vigilante, sued Pioneer Newspapers, Inc. and one of its sources, Beth Baxter, over a news report published in the *Wilmette Life* newspaper that described efforts by preservation groups to save from demolition a potential landmark residence (the "Skiff House") in the exclusive Village of Winnetka.

Vigilante had purchased the residence and then applied for permission to demolish it. Preservationist groups, including Baxter, mobilized to save the Skiff House and received widespread publicity throughout the Chicago area.

Vigilante filed a two-count defamation complaint in the Circuit Court Of Cook County, Illinois, citing the following false and defamatory statements from the newspaper's interview of Baxter:

- "[T]here are two potential buyers who could spare the dwelling from the wrecker's ball, but they are awaiting a definitive answer from its new owner, Antoinette Vigilante, on whether she would take such an offer."
- "Vigilante purchased the home for \$1.8 million and had a set price of \$2.45 million, which two buyers agreed to consider, but were told that they would have to wait three weeks to see the inside."

Vigilante sought damages "in excess of one million dollars, plus attorneys' fees and costs." Pioneer moved to dismiss on the grounds, *inter alia*, the complained of

statements were not defamatory *per se* as a matter of law, were capable of an innocent construction and substantially true when read in context.

Alternatively, despite its million dollar plus *ad damnum*, the complaint did not allege special damages for defamation *per quod*. Baxter, the quoted source, also argued that the statements were not within the categories of words considered defamatory *per se* in Illinois and sought sanctions.

In response to the motions, Vigilante characterized her action as one for defamation *per quod* rather than defamation *per se*. In reply, the defendants took the position the words were not defamatory as a matter of law and reiterated that the complaint failed to allege special damages.

The publisher argued that extrinsic circumstances should not be permitted to render defamatory an objectively innocuous statement.

Trial Court Dismisses

After argument on December 18, 2005, Judge Mary K. Rochford granted the defendants'

motions to dismiss the complaint, finding that the statements were not defamatory and the complaint failed to allege special damages. The Court agreed that, even if some of the statements might prove false, they did not defame Vigilante in view of Pioneer's reporting that Vigilante had properly applied for a permit and therefore had the legal right to demolish or sell the Skiff House.

Vigilante then sought to amend the complaint to allege extrinsic facts and special damages, arguing that she was a prominent person in a small town where the issue of "teardowns" was particularly controversial so that the report injured her local reputation, that defendants had misstated relevant financial details and so impaired the marketability of the Skiff House and the negative publicity caused her to sell the house for several hundred thousand dollars less than expected.

The publisher argued that, taking all of the above arguments as true, even under a *per quod* theory, extrinsic circumstances should not be permitted to render defamatory an objectively innocuous statement. The lack of

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Statements About Preservation Dispute Not Defamatory

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objective standards would impose a “chilling effect” on speech because the speaker could not anticipate all of the circumstances that might give rise to liability. Defamation therefore should require, at a minimum, a statement objectively in derogation of the plaintiff’s integrity or abilities.

The Court ultimately ruled that, even if the statements were false and Vigilante alleged special damages, Vigilante could not, as a matter of law, allege circumstances under which the language might be considered defamatory. Thus no amendment could state a

cause of action and therefore the court dismissed the complaint with prejudice.

The Court then denied Baxter’s motion for sanctions against plaintiff, finding that the complaint was not the equivalent of a SLAPP filing.

Damon E. Dunn and Neil M. Rosenbaum of Funkhouser, Vegosen & Dunn Ltd. in Chicago represented Pioneer Newspapers. Beth Baxter was represented by Richard F. Friedman of Neil & Leroy, LLC. Plaintiff was represented by Vanessa C. Fry of the Law office of Gregory Catrambone.

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Paul Smith and Lee Levine

Department of Defense May Not Invoke Blanket Privacy Exemption to Withhold Information About Guantanamo Bay Detainees

By Adam Rappaport

The Department of Defense cannot invoke a blanket privacy exemption to the Freedom of Information Act as grounds to withhold the names and identifying information about detainees at Guantanamo Bay, the U.S. District Court for the Southern District of New York recently held. *Associated Press v. United States Department of Defense*, No. 05 CV 3941 (JSR) (S.D.N.Y. Jan. 4 and Jan. 23, 2006).

In response to the Associated Press's FOIA request for transcripts of tribunals that determined whether the detainees were "enemy combatants," DOD eventually provided transcripts that redacted any kind of information that could be used to identify the detainees. Its only justification was that releasing the information would invade the privacy of the detainees and put them and their families at risk.

In an opinion issued January 4, 2006, Judge Jed Rakoff held that DOD had not established any legitimate privacy interest, and therefore could not redact the identifying information across the board. Judge Rakoff elaborated on these points in a January 23 opinion denying DOD's motion for reconsideration, and ordered DOD to produce unredacted copies of the transcripts. However, he stayed this order while DOD decides whether to appeal his decisions.

Background

In response to the attacks of September 11, 2001, the U.S. government captured hundreds of "enemy combatants" in Afghanistan and other places around the world. The government designated these men "enemy combatants" based on its conclusion that they had ties to al-Qaeda or other terrorist organizations. Since January 2002, about 750 of these detainees have been housed for some period at the Naval Base at Guantanamo Bay, Cuba.

Over the next several years, detainees at Guantanamo and elsewhere challenged the process by which they were designated enemy combatants and the legality

of their imprisonment by the United States. Ultimately, in *Rasul v. Bush*, 124 S. Ct. 2686 (2004) and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), the Supreme Court ordered, among other things, that detainees have the right to a determination of their status as enemy combatants by an impartial decision maker. In response, DOD created a "Combatant Status Review Tribunal" ("CSRT") to serve as a forum for detainees to contest their status. From July 2004 through January 2005, 558 tribunals were convened.

While DOD announced that it planned to have open hearings for the CSRTs, in practice DOD made it difficult for journalists to attend many of them. For example, DOD regularly conducted hearings on days which reporters were not allowed to be at Guantanamo, scheduled multiple hearings for the same time (even though only one reporter per organization at a time was allowed on the Guantanamo base), and scheduled other proceedings at Guantanamo that conflicted with the CSRTs.

On November 4, 2004, AP submitted to DOD a FOIA request seeking: (1) transcripts of all testimony given by detainees at the CSRT hearings; (2) written statements given to the CSRTs by the detainees; and (3) any documents provided by a detainee to his assigned Personal Representative. Notwithstanding repeated assurances that AP's request was being expedited, and that documents would be forthcoming, DOD did not turn over a single document until after AP filed a lawsuit in April 2005.

Beginning in May, DOD produced approximately 3900 pages of documents related to 369 separate CSRTs. However, DOD redacted any information in the documents produced that it believed could be used to identify the detainees or witnesses. This included their names, ages, nationalities, addresses, home locales, and a variety of other information.

DOD claimed the right to withhold identifying information under FOIA's Exemption 6, which permits an agency to withhold "personnel and medical files and similar files" when disclosure "would constitute a clearly unwarranted invasion of personal privacy." 5 U.

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DOD May Not Invoke Blanket Privacy Exemption to Withhold Information About Guantanamo Bay Detainees

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S.C. § 552(b)(6). This was the only exception invoked by DOD – it did not claim that withholding the information was necessary to protect national security.

DOD Moves for Summary Judgment

In June, DOD moved for summary judgment. It argued that disclosure of personal identifying information which could link a specific detainee to particular testimony may be withheld under Exemption 6 because it could place detainees or their families in danger if terrorists or others were displeased by something the detainee said. DOD recognized that Exemption 6 requires this privacy interest to be weighed against the public interest in the information, but argued that the redacted documents were sufficient to inform the public about how the CSRTs functioned. As a result, DOD contended, the identifying information could be categorically redacted.

AP responded that DOD could only withhold the information if it revealed little or nothing about the government's conduct. Identifying information about the detainees is useful to the public's understanding of DOD's actions, AP argued, in that it reveals who the government has detained, helps the public understand the validity of the procedures DOD used in making its determinations of enemy combatant status, and sheds light of allegations of misconduct and abuse at Guantanamo Bay. AP also asserted that FOIA's privacy exemption did not allow DOD to keep secret the names of people who had been subject to a government tribunal convened to determine their liberty.

Judge Rakoff's initial response to the motion was to question whether the detainees themselves agreed with DOD that keeping their identities secret was in their best interest. In two orders, he noted that it would not be difficult to ask the detainees because they were in custody. The judge rejected DOD's arguments that the court did not have the authority to order the government to ask the detainees their opinion, that their views were irrelevant to his decision, and that it would be a heavy logistical burden to do

so. Taking an unusual but not unprecedented step, he ordered DOD to give to each detainee a questionnaire asking whether or not they wanted identifying information about them released to the AP, and to provide him with the responses.

DOD complied. Of the 317 detainees who were given the form, 63 said they wanted their identifying information released, 17 said they did not, 35 returned the form without checking either box, and 202 did not return the form at all.

Summary Judgment Denied

With this additional information in hand, Judge Rakoff denied DOD's motion for summary judgment on January 4, 2006. FOIA strongly favors a policy of disclosure, he

noted, and the government carries a heavy burden to show that disclosure is "clearly unwarranted." In this case, the only privacy interest DOD asserted was on behalf of the detainees, but just 17 of 317 of them said they wanted their identities kept confidential, the judge said.

Moreover, none of the detainees had any expectation of privacy with respect to the information they provided at the CSRTs, he held. "Most of the information was provided by them in formal legal proceedings before a tribunal, and nothing in the record suggests that they were informed that the proceedings would remain confidential in any respect." Jan. 4 Opinion and Order at 4.

The court then distinguished *United States Dep't of State v. Ray*, 502 U.S. 164, 172 (1991), a case in which the Supreme Court upheld the government's assertion of Exemption 6 in denying access to identifying information about Haitian "boat people." These refugees were intercepted by the Coast Guard and returned to Haiti. The State Department later interviewed them to make sure they were not being persecuted for trying to emigrate. Unlike here, Judge Rakoff said, in *Ray* the Haitians who agreed to be interviewed and provide information expressly were promised confidentiality by the U.S. government, and had relied on that promise.

Judge Rakoff's initial response to the motion was to question whether the detainees themselves agreed with DOD that keeping their identities secret was in their best interest.

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DOD May Not Invoke Blanket Privacy Exemption to Withhold Information About Guantanamo Bay Detainees

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Furthermore, in *Ray* the returnees' fear of retaliation and embarrassment when they got back to Haiti was so well founded that the U.S. government demanded that Haiti not retaliate, and interviewed the people returned under strict promises of confidentiality. By contrast, Judge Rakoff said, DOD failed to come forward in this case "with anything but thin and conclusory speculation to support its claim of possible retaliation." Jan. 4 Opinion and Order at 5. This "meager and unparticularized showing" was not sufficient to meet either the standards of Rule 56 or FOIA, Judge Rakoff concluded. *Id.*

As a result, DOD failed to establish "any cognizable privacy interest on the part of the detainees that would warrant the across-the-board application of Exemption 6 the defendant here seeks." *Id.* at 6. The court allowed in a footnote that it was "conceivable" in the "particular circumstance of a particular detainee" DOD could meet its burden, but that it had only sought a blanket redaction of all information "even remotely tending to identify any of the detainees."

Reconsideration Denied

Immediately after Judge Rakoff issued the opinion, DOD moved for reconsideration. The only issue DOD raised was that while the court considered the privacy interests of the detainees itself, it overlooked the interests of their families, friends, and associates. In a January 23 opinion and order, the court denied reconsideration, and elaborated on its earlier reasoning.

The court first held that DOD had not raised the privacy interests of third parties in any cognizable way prior to the motion for reconsideration. Jan. 23 Opinion and Order at 4-6. Even if it had, Judge Rakoff added, the motion still would be denied on substantive grounds. If the detainees themselves had no reasonable expectation of privacy in the information they provided to the CSRTs, he reasoned, third parties would have even less of an expectation that the information would be kept confidential. *Id.* at 6.

Bolstering the discussion in the January 4 opinion, Judge Rakoff again addressed the detainees' expectation of privacy during the CSRTs. Most of the identifying

information was provided by the detainees "in sworn testimony at quasi-judicial hearings that were visibly recorded by the equivalent of a court reporter" and at which the press was present, he noted. *Id.* at 10. Furthermore, before each detainee testified the "Tribunal President" explained the CSRT process, without suggesting that any information provided would be kept private. *Id.* at 11. Accordingly, Judge Rakoff concluded, there was no evidence that the detainees had any expectation of privacy.

In addition, the government provided no evidence for its claim that the family, friends, and associates of the detainees could be subject to embarrassment or retaliation if their identities were revealed. These "wholly conclusory and grossly speculative assertions" were not entitled to any deference, the court said. *Id.* at 13.

As there was no protectable privacy interest in the redacted identifying information, the court said it did not need to balance the privacy concerns of third parties against the public interest in disclosure. However, in a footnote, Judge Rakoff said that AP's argument that the public interest would prevail appeared to be strong. For example, he said, several of the detainees claimed that there were people in their villages who could attest to their innocence. Without the names of the people or their villages, he said, it was impossible for AP to follow up on these assertions.

The Court Enters Final Judgment for AP

During oral argument on the motion for reconsideration, DOD indicated that if the motion were denied, it did not plan to offer any further evidence. As a result, Judge Rakoff entered final judgment in favor of AP in his January 23 opinion, and ordered DOD to produce unredacted copies of the transcripts to AP by January 30. However, the court then agreed to stay the order until February 23 while DOD decided whether it would file an appeal.

Dave Schulz, Adam Rappaport, and Nicole Auerbach of Levine Sullivan Koch & Schulz, L.L.P. represented the Associated Press in this case. Defendant was represented by Assistant United States Attorney Elizabeth Wolstein of the United States Attorney's Office for the Southern District of New York.

Second Circuit Says Access Requests Must Be Decided Promptly

Chastising a district court for its slow pace in deciding a media request for access to judicial documents, the Second Circuit issued a decision this month stating forcefully that such requests should be decided quickly because of the presumptive First Amendment right of access. *Lugosch v. Pyramid Co. of Onondaga*, No. 05-3620-CV, 2006 WL 45865 (2d Cir. Jan. 10, 2006) (Katzman, Minor, Wesley, JJ.).

The parties to the underlying litigation had filed thousands of documents under seal in connection with a motion for summary judgment. The Herald Company, a Newhouse newspaper in upstate New York, moved to intervene in June 2004. It requested a prompt hearing, but the district court wrote that it did “not share the Proposed Intervenor’s sense of urgency in terms of expediting the within matter.”

The matter was fully briefed by September 2004. After repeated requests from the newspaper that the court decide the motion, a magistrate judge issued an order more than six months later, holding the motion “in abeyance” pending the determination of the summary judgment motion.

On appeal, the Second Circuit held that the district court erred not only in failing to make the specific, on-the-record findings to justify its denial but also in failing to act expeditiously.

“We take this opportunity to emphasize that the district court must make its findings quickly. Our public access cases and those in other circuits emphasize the importance of immediate access where a right to access is found.”

Michael J. Grygiel of McNamee, Lochner, Titus & Williams, P.C., Albany, NY, represented The Herald Company. A more detailed article on the case will appear in next month’s newsletter.

California Restriction on Access to Divorce Pleadings Held Unconstitutional

In a published opinion, a California appellate court this month ruled that a new section of the state’s Family Code restricting public access to divorce pleadings is unconstitutional. *Burkle v. Burkle*, No. B181878, 2006 WL 147612 (Cal. App. Jan. 20, 2006) (Boland, Cooper, Rubin JJ.).

Family Code section 2024.6, enacted in 2004, requires a court, upon request of a party to a divorce proceeding, to seal any pleading that list the location or identifying information about the financial assets and liabilities of the parties.

Ronald W. Burkle, a high profile businessman, invoked the statute to seal documents in his ongoing divorce proceeding. The Los Angeles Times, Associated Press and the California Newspaper Publishers Association were granted leave to intervene.

The appellate court found that historical tradition and the institutional value of open proceedings – apply with equal force in divorce cases as in any other ordinary civil case. Although privacy interests may override the First Amendment in specific cases, the court found that the Family Code section was not narrowly tailored to serve that interest. “Because less restrictive means of achieving the statutory objective are available,” the section 2024.6 is “unconstitutional on its face as an undue burden on the First Amendment right of public access to court records.”

Karlene W. Goller; Davis Wright Tremaine, Kelli L. Sager, Alonzo Wickers IV and Susan E. Seager, for Intervenor Press Organizations Los Angeles Times Communications LLC, The Associated Press and California Newspaper Publishers Association.

The New Hampshire Supreme Court Reaffirms, But Refines, the State Constitutional Right of Access to Court Records

By William L. Chapman

In *Associated Press v. New Hampshire*, Justice James Duggan, writing for a unanimous court, reaffirmed that Part I, Articles 8 and 22 of the New Hampshire Constitution create “a rebuttable presumption of openness that is inherent in the constitutional right of access and the burden is always on the party seeking to rebut that presumption.”

Continuing, the court stated that “even where a sufficiently compelling interest is demonstrated, a court record may not be kept sealed unless ‘no reasonable alternative to nondisclosure exists’ and the ‘least restrictive means available’ is utilized to serve the interest that compels nondisclosure.” The court added: “The motivations of the party seeking disclosure are irrelevant to the question of access.”

Background

The case arose when six media organizations – The Associated Press, Inc., Hearst-Argyle Properties, Inc., Independent Publications, Inc., Keene Publishing Corp., Newspapers of New Hampshire, Inc., and Seacoast Newspapers, owned by Dow Jones & Company – challenged a law enacted in August 2004 that restricts access to financial affidavits in divorce cases.

Part 1 of the law requires that all financial affidavits be sealed upon filing with the court; part 2 makes it a misdemeanor to disclose a financial affidavit to an unauthorized person; while part 3 put the burden on the party seeking disclosure to show “by clear and convincing evidence that the public interest served by release of the information outweighs the private interest served by maintaining the privacy of the financial affidavit.”

Part 3 required that in balancing the two interests “the right of public access shall not, absent further cause, constitute sufficient evidence to overcome the presumption of privacy” in the law.

Access Under N.H. Law

The Supreme Court first ruled there is a constitutional right of access in *Petition of Keene Sentinel*, which involved access to sealed records in a divorce case. The court reaffirmed *Petition of Keene Sentinel* in *Douglas v. Douglas*, a case in which the trial court applied the standards and procedures required by *Petition of Keene Sentinel* to unseal financial affidavits in a divorce case. The law challenged by the media organizations was enacted in response to the *Douglas* case.

The Court refined its holding in *Petition of Keene Sentinel* by adopting a more precise analysis to determine what court records are presumptively open. It adopted the “two-part test of experience and logic” developed by the U.S. Supreme Court in a line of cases addressing access to criminal trials under the First Amendment. Under the experience and logic test, a court asks “whether the place and process have historically been open to the press and

A court record may not be kept sealed unless ‘no reasonable alternative to nondisclosure exists’ and the ‘least restrictive means available’ is utilized.

general public’ and ‘whether public access plays a significant positive role in the functioning of the particular process in question.’”

Applying the test to financial affidavits, the court first ruled that domestic relations proceedings “historically have been open to the press and general public” and that “public access plays a significant role in the functioning of the court in domestic relations proceedings by ‘enhance[ing] the quality and safeguard[ing] the integrity of the fact finding process... [and] foster [ing] an appearance of fairness, thereby heightening public respect for’ domestic relations proceedings.” The court stated that because domestic relations proceedings involve “children and families,” that “only heightens the need for openness and public accountability.”

However, that a specific type of proceeding satisfies the logic and experience test does not mean that all records filed in the proceeding will be presumptively open. In a further refinement, the court stated that for

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**The New Hampshire Supreme Court Reaffirms, But Refines,
the State Constitutional Right of Access to Court Records**

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the presumption to apply the record must be “important and relevant to an adjudication by the court.” In that circumstance, access will “insure that court proceedings are conducted fairly and impartially and that the judicial process is open and accountable.” The court concluded that financial affidavits meet this standard “because they are important and relevant to a determination made by the court in its adjudicatory function in connection with a presumptively open proceeding.”

Turning to the new law, the Court stated that the Legislature “with sufficient justification” may create “a procedure by which a narrow category of documents is made confidential upon filing with the court.” But without explaining what the justification was, and in a statement that appears to defy logic, the court held that part 1 is “a reasonable restriction on the public’s right of access to court records ... *so long as the financial affidavits retain their status as presumptively open* and the public is afforded procedural safeguards required by the constitutional right of access” (emphasis added).

The procedural safeguards are that (i) the party opposing the unsealing demonstrate “a sufficiently compelling interest that would justify preventing disclosure of the document,” and (ii) the court conclude that “no reasonable alternative to nondisclosure exists” and use the “least restrictive means available” to serve the interest that requires nondisclosure.

The court did not rule on the constitutionality of part 2 of the law, which makes the unauthorized disclosure of a financial affidavit a misdemeanor. It found that part 2 “is not in the classic mold of prior restraint, there being no prior injunction against publication,” and declined to rule because no issue of “punishment is before us today.” In doing so, the court may have been influenced by the State’s concession that part 2 “is a prior restraint,” suggesting that it is unlikely to enforce part 2.

Finally, the court struck down part 3 for three reasons. First, “it places the burden of proof upon the proponent of disclosure, rather than the proponent of nondisclosure.” Second, “it abrogates entirely the public right of access to a class of court records.” Third, “it is not narrowly tailored to serve the allegedly compelling interest of the State in protecting its citizens from identity theft.”

In so ruling, the court made clear that the State’s “generalized concern” for an “individual’s fundamental right to privacy” was not sufficient to overcome the presumption of openness. “[P]rivacy interests [must be] articulated with specificity.”

Further, and importantly, the court squarely rejected the requirement that a party seeking access must demonstrate some interest “greater than the public right of access to court records.” The court did so because “the motivations of the party ... are irrelevant to the question of access” and the right of access is grounded in the New Hampshire State Constitution.

Prior to *The Associated Press* media organizations were able to argue that all court records are presumptively open. Now they must refine their argument to meet the “logic and experience” test and standard of “important and relevant” to the court’s adjudicatory function. Once they do, however, the party opposing disclosure will have to make a substantial and particularized showing to overcome the state constitutional right of access.

William L. Chapman of Orr & Reno, P.A., Concord, New Hampshire, represented the media organizations.

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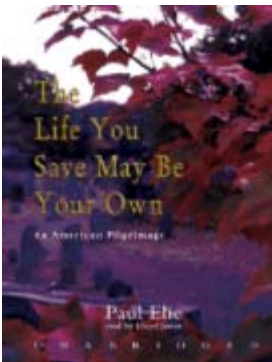
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Copyright Claim Over Book Review Photo Survives Summary Judgment

No Fair Use as a Matter of Law

In a case testing the fair use defense, a California federal court denied a newspaper's motion for summary judgment in a copyright infringement suit over the newspaper's use of a photograph taken from a book being reviewed. *Harris v. San Jose Mercury News*, Case No. C 04-05262 CRB. (N.D. Cal. Jan. 3, 2006) (Breyer, J.). The court, however, will consider certifying the issue for interlocutory appeal to the Ninth Circuit.



Background

Plaintiff, Christopher R. Harris, is a photographer and photojournalism instructor. In 1982 while on assignment for *Esquire* magazine, Harris photographed author Walker Percy.

In 2003 the photograph was used in a book by author Paul Elie entitled *The Life You Save May Be Your Own: An American Pilgrimage* about four prominent American Catholic authors, including Walker Percy. Harris was paid \$600 for use of his photo of Walker Percy in the book. His agreement with Elie specified that the photograph could not be used for promotional purposes.

A publicity package promoting the book was sent to the *Mercury News*, and it decided to review the book. To illustrate the review, the *Mercury News* reproduced the cover, a jacket photo of Elie, and four photographs from the inside the, including Harris's photograph of Walker Percy.

The version of the Percy photograph produced in the book (and the review) was not the complete image; the image was significantly cropped. The Percy photograph was attributed to Harris in the review, but the attribution did not include a copyright symbol (©), which had accompanied the photo credit in the book.

Harris sued, asserting copyright infringement, violation of section 1202 of the Digital Millennium Copyright Act (removal of copyright management information), and state unfair competition claims. A motion for judgment on the pleadings was granted in part and denied in part, resulting

in the filing of an amended complaint that omitted the state law unfair competition claims.

Judge Charles Breyer (brother of U.S. Supreme Court Justice Breyer) then set a hearing on a motion for summary judgment focused on the defense of fair use, and ordered the parties to take discovery limited to the issue of fair use. After discovery was completed on the fair use issue, the *Mercury News* moved for summary judgment.

Fair Use Factors

The evidence regarding the first three fair use factors (the purpose and character of the use, the nature of the copyrighted work, and the amount and substantiality of the portion used in relation to the copyrighted work as a whole) was essentially undisputed.

Most of the discovery –and the briefing – focused on the fourth fair use factor, *i.e.* the effect of the use upon the potential market for or value of the copyrighted work. The evidence established that there are only two potential markets for the use of any existing photographic image: (1) a potential market for rights or licenses to reproduce the photograph, and (2) a potential market for prints of the photograph.

The *Mercury News* introduced evidence showing that in the twenty-three years since the photograph was taken, Harris had licensed the photograph only three times, and never for use in a book review. Harris had never taken or licensed any photograph for use in a book review. The evidence also showed that Harris had sold only two prints of the photograph.

Expert testimony and declarations established that it was the practice of many newspapers to reproduce interior photographs from books in reviews of those books without seeking permission or making payment.

Thus, the *Mercury News* argued that there was no market for paid licenses to use the copyrighted work in book reviews, and that Harris could not demonstrate that any alleged future lack of licensing or print sales was attributable to its use.

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Copyright Claim Over Book Review Photo Survives Summary Judgment

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Relying primarily on the testimony of Jane Kinne, a photo researcher and stock photo agency representative, Harris claimed that the *Mercury News*' use of the photograph had deprived him of a license fee, had diminished his ability to license the photograph for subsequent use by other newspapers or book review publications (who allegedly would not use a photograph that had appeared in another review), had diminished his ability to sell prints of the photograph through "overexposure" of the work (because buyers of photograph prints would only want images that were not well known), and had diminished the perception of the quality of the work by distributing a poor quality, newsprint reproduction.

District Court Decision

After consideration of the lengthy summary judgment papers, Judge Breyer denied the motion for summary judgment in a two-page decision. The decision does not specifically address the fair use factors.

The decision characterized the *Mercury News*' fair use defense as an argument that "the use of the photo was the equivalent of a pictorial quotation from the book," although that was not a principal argument by the *Mercury News*.

The decision then stated:

"Yet the photograph was obviously marked as a copyrighted photograph in the book, both on the page the photograph appeared [sic] and then again in the credits in the back of the book. In other words, the photograph was a copyrighted work within a copyrighted work. Therefore, the Court does not concur with defendant's analogy. Photographs taken for

aesthetic purposes, as plaintiff's photograph is reasonably inferred to be, are 'creative in nature and thus fit squarely within the core of copyright protection.' ... As a result, the Court cannot say as a matter of law that use of a copyrighted photograph in a book review, in which the book clearly states that the photograph is copyrighted, constitutes fair use."

Harris's attorney issued a press release, claiming that Harris had been "vindicated." According to an article published by his college newspaper, Harris has asserted that "the outcome of the lawsuit ... may mean jail time for the *Mercury News* editor who approved the publication."

However, at the subsequent case management conference, Judge Breyer stated that there are "serious questions on fair use," and that he would consider a motion to certify the decision for appeal.

Harris has now filed a second amended complaint, adding a class action claim for injunctive relief on behalf of other photographers whose photographs have appeared in reviews in the *Mercury News*.

A hearing has been set for March 24, 2006 on motions by the *Mercury News* to dismiss or strike the amended complaint (a procedure Judge Breyer adopted in lieu of having separate motions opposing leave to amend and to dismiss the amended complaint), and to certify the decision denying the motion for summary judgment for interlocutory appeal.

The *Mercury News* is represented by James Chadwick of DLA Piper Rudnick Gray Cary in San Francisco. Harris is represented by Robert A. Spanner, of Trial & Technology Law Group, in Menlo Park, Ca.

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Google's Cached Websites Not Copyright Infringement

Fair Use as a Matter of Law

In an interesting internet copyright decision, a Nevada federal district court this month ruled that the standard search engine practice of storing, or “caching,” copies of websites is not a copyright infringement. *Field v Google Inc.*, No. CV-S-04-0413-RCJ-LRL (D. Nev. Jan. 12, 2006) (Jones, J.).

The court ruled that the standard practice of search engines to store copies of websites is done under an implied license and is, moreover, protected as fair use as a matter of law.

Background

Plaintiff Blake Field brought an action against Google for copyright infringement. He claimed that Google violated his exclusive rights to reproduce and distribute copies of the copyrighted works on his website because internet users were able to access the works by clicking on Google’s “cached” link, accessing a stored version of the website.

Like most search engines, Google has a program – Googlebot – that scours the internet, locating and analyzing web pages, and cataloging the pages into Google’s searchable index. Part of that process includes copying the web code of the site in a temporary repository, or cache.

When Google provides results to a search, it also generally includes another link labeled “cached.” By clicking

Yet, Field alleged that “Google directly infringed his copyrights when a Google user clicked on a ‘Cached’ link to the Web pages containing Field’s copyrighted works and downloaded a copy of those pages from Google’s computers.”

Downloading Websites

In an interesting analysis, the court first found that there could be no direct infringement as alleged by the plaintiff because when a user clicks on the “cached” link, it is the user, not Google, who “creates and downloads a copy of the cached Web page.” Accordingly, the court granted summary judgment for Google on the issue of non-infringement, and said, the “automated, non-volitional conduct by Google in response to a user’s request does not constitute direct infringement.”

Nonetheless, assuming Google was engaged in direct copyright infringement, all four of Google’s defenses were recognized by the court.

Implied License / Estoppel

Typically, when a website does not want a search engine to cache its pages, what is known as a “no-archive” meta-tag is added to the code, telling the Googlebot not to store the site. Field was familiar with this practice and knew that the “no-archive” meta-tag would have prevented his site from being cached.

However, Field did not include this meta-tag on his site. Because he knew that meant Google would cache his website, the court determined

that Field’s conduct was “reasonably interpreted as the grant of a license to Google for that use.”

The same arguments were made on Google’s estoppel defense. Additionally, to meet the elements of es-

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this link, instead of going to the website, you download a version stored in Google’s server. A disclaimer appears at the top of the page, linking to the original website, and stating that the page may not be the most current version and is merely the latest version stored by Google.

Google's Cached Websites Not Copyright Infringement

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toppel, Google noted that it had no way of knowing that Field didn't want his site cached. Had Field made his preference known, Google would not have provided the link.

Fair Use

The fair use analysis largely turns on "whether and to what extent the new work is 'transformative'." *See Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Here, the court was quick to note that the Google cache system serves a different purpose than the plaintiff's original work. The cached links add a new element by allowing users to access information when the original page is down or not available. This use benefits "the public by enhancing information-gathering techniques on the internet." *See Kelly v Arriba Soft Corp.*, 336 F.3d 811 (2003).

In addition, cached links allow users to "detect changes that have been made to a particular Web page over time." "Such comparisons can reveal significant differences that have political, educational, legal or other ramifications," the court reasoned.

Precisely because the page is cached, Google can "automatically highlight the user's query in the copy." *Id.* This is an important distinction because it helps users determine quickly whether the page is relevant to their search, allowing them to "more quickly find and access the information they are searching for..."

For the aforementioned reasons, because Google makes clear to users that the cached page is not the origi-

nal page, and site owners can disable the cache feature "within seconds," the copying and distributing of Field's copyrighted works was transformative."

Once a work is determined transformative, the remaining copyright factors are less relevant. Yet, the court looked to other factors in its analysis. First, the court noted that Field provided his copyrighted works on the internet free of charge for all the world to see. Field even added a specific text file, known as "robots.txt," which ensured that web search engines would include his site in their search results.

Therefore, "the nature" of the works weigh[ed] only slightly in Field's favor." *Id.* And because the works were free, there was certainly no evidence that Google "had any impact on any potential market for those works."

Additionally, Google used no more of the works than necessary in granting access to them, although that meant the entire page here. Finally, while Google was operating in good faith, Field, "deliberately ignored the protocols that would have instructed Google not to present "Cached" links."

Balancing these factors, the court held that Google's use was a fair use of the works as a matter of law.

Google was represented by David H. Kramer, Michael B. Levin, and William O'Callaghan of Wilson Sonsini Goodrich & Rosati in Palo Alto, CA; and Kelly A Evans, Snell & Wilmer in Las Vegas, NV. Plaintiff acted pro se.

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<http://www.medialaw.org/TrialTales>

Eighth Circuit Rejects Media Liability as Conduit for False Advertising

By Mark Sableman

The Eighth Circuit this month upheld dismissal of a Lanham Act false advertising case that sought to make a directory publisher liable merely for making available a particular yellow pages classification. *American Association of Orthodontists v. Yellow Book USA*, No. 04-3521 (8th Cir. Jan. 24, 2006) (Loken, Beam, Molloy, JJ.).

Background

The case grew out of an underlying dispute between orthodontists and general dentists. Most states allow general dentists to practice orthodontics, the science of correcting irregularities in the teeth. However, advanced training in orthodontics is also available, and dentists who complete that training, many of whom belong to the American Association of Orthodontists ("AAO"), believe that they are better qualified to perform orthodontics work than general dentists, and that only they should be called "orthodontists."

Yellow Book USA maintains several classifications of dentists and orthodontists in its Yellow Page directories, including one titled "Dentists-Orthodontists," and it accepts advertisements from general dentists under that classification.

AAO, representing its members, brought suit against Yellow Book USA under Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), claiming that Yellow Book USA was liable for false advertising and false association by permitting such listings.

Lanham Act Decision

In the U.S. District Court for the Eastern District of Missouri in St. Louis, Yellow Book USA moved to dismiss on the grounds that the complaint failed to state a cause of action and that AAO lacked standing because it did not compete directly with Yellow Book USA.

Chief Judge Carol E. Jackson granted the motion, and AAO appealed. The Eighth Circuit affirmed on both

grounds in a unanimous opinion by Chief Judge James Loken, issued on January 24, 2006.

One of Yellow Book USA's key themes in both the trial and appellate courts was that AAO's false advertising or false association claims should be asserted against individual dentists who it believes are misrepresenting their services, abilities, or affiliations, not against Yellow Book USA, a mere publishing intermediary.

With respect to the failure to state a claim, the Eighth Circuit noted that Missouri law did not prohibit general dentists from performing orthodontic services, and that AAO's complaint rested on the theory that use of Yellow Book USA's "Dentist-Orthodontist" classification represented to the general public that a general dentist was qualified to perform orthodontics.

The Court held that because Yellow Book USA was a publisher, it was not a proper party for the false advertising claim.

The Court found that any relief in favor of AAO on this point "would usurp the function of the state licensing authorities to determine who may advertise themselves as qualified to provide this type of professional dental services," and would compel the Court to make inappropriate "in gross" judgments about the qualifications of various general dentists to perform orthodontics.

Accordingly, the Court found that AAO's Lanham Act claim, seeking to enjoin acceptance of dentist listings in the "Dentist-Orthodontists" classification, failed to state an actionable claim.

On the standing issue with respect to AAO's false association theory, the Eighth Circuit held that even on the "far-fetched" allegation that Yellow Book USA's listings could confuse the public as to whether AAO or its members approved the listings, the injunction AAO sought against the listing of general dentists would not redress that category-confusion issue, and hence standing was lacking.

On the false advertising claims, the Court acknowledged both the majority rule limiting Lanham Act false advertising suits to competitors, and the minority "multi-

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Eighth Circuit Rejects Media Liability as Conduit for False Advertising

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factor test” focused “on the protection of commercial interests in the prevention of competitive harm.”

The Court held that standing was lacking under either test because of Yellow Book USA’s status as a publisher, which merely provides an advertising forum for others. The Court held that because Yellow Book USA was a publisher, not a provider of orthodontic services in competition with AAO’s members, it was not a proper party for the false advertising claim.

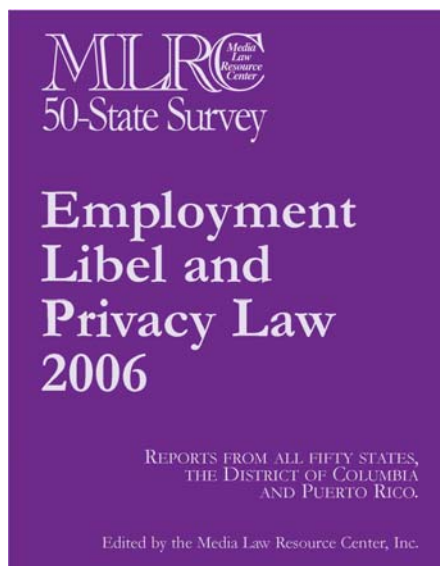
Rather, the Court stated, “a claim that a particular general dentist is guilty of false advertising by being included in Yellow Book USA’s orthodontists listings should be brought against the dentist whose lack of education, training, or experience is being challenged by an AAO member (or by AAO as an associational plaintiff).”

In its briefs, AAO had argued for broad media liability under the Lanham Act, including full liability for directory publishers whenever they are put on notice of alleged false advertising by their customers. Yellow Book USA argued against this theory on statutory, standing and First Amendment grounds, and the Eighth Circuit’s holding on standing clearly rejects that extension of media liability.

Mark Sableman and Sharon Rosenberg of Thompson Coburn LLP in St. Louis represented Yellow Book USA. Richard Walsh, Neil F. Perryman, Michael J. Hickey and Bridget G. Hoy of Lewis Rice & Fingersh, L.C. in St. Louis represented American Association of Orthodontists.



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Texas Broadcasters Resist Grand Jury Subpoena for Unaired Footage

By Thomas J. Forestier

Media lawyers and their clients across the country know that the lack of a reporter's privilege in Texas creates an uphill battle for news media who resist local state prosecutors' attempts to obtain evidence for criminal investigations.

Recently, KPRC-TV, a Post-Newsweek Station and the NBC affiliate in Houston, Texas, challenged several grand jury subpoenas issued by the Harris County District Attorney's Office, succeeding in getting the subpoenas quashed in part.

Background

Prosecutors in the Consumer Fraud Division of that office served multiple grand jury subpoenas duces tecum on KPRC-TV seeking to obtain unaired videotape footage created by KPRC-TV during two separate investigations regarding predatory home lending practices and a fraudulent dog consignment business.

While KPRC-TV had cooperated with the District Attorney's Office in the past by providing videotape on stories that had aired, KPRC-TV concluded that the District Attorney had gone too far in demanding production of raw unedited video footage from a story that was not yet fully developed and had not been broadcast.

KPRC-TV argued that the Harris County District Attorney's Office was abusing its grand jury subpoena power and was improperly attempting to conduct trial discovery by using a grand jury subpoena in lieu of a trial subpoena or search warrant.

Upon receipt of the subpoenas, KPRC-TV attempted to negotiate a resolution with the District Attorney's Office by offering to allow prosecutors to view the raw unaired footage and take notes in lieu of having to turn over the videotape. KPRC-TV also offered to preserve the tapes for potential production in the future in the unlikely event the case proceeded to trial.

The District Attorney's Office rejected the proposal and continued to demand copies of all raw video footage. One prosecutor stated that he needed physical possession of the raw unaired footage for trial and that he could not rely on a "hearsay peek" of the footage and face the possibility of a protracted fight for it later on the eve of trial.

Arguing that the District Attorney's Office had admitted they were really seeking this footage for trial purposes rather than the grand jury process, KPRC-TV challenged this abuse of the grand jury subpoena process and filed motions to quash the subpoenas. KPRC-TV argued that the Texas Legislature, by enacting a statute that restricted the use of search warrants on the media

(see TEX. CODE CRIM. PROC. ANN. art. 18.01(e)), had recognized the need to provide some level of protection and privacy to newsrooms, reporters and their work product.

KPRC-TV relied on *Thurman v. State*, 861 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1993, no writ) and *Healey v. McMeans*, 884 S.

W.2d 772 (Tex. Crim. App. 1994), in which the courts recognized the potential for prosecutors to abuse their grand jury subpoena power and the inconsistency and dangers of allowing a prosecutor to use a grand jury subpoena to obtain evidence that could not be seized through the use of a search warrant.

KPRC-TV argued that allowing prosecutors to obtain unaired material would severely disrupt the newsgathering process and discourage sources from speaking with television station reporters, who would face the risk of being perceived as acting as investigators for the government.

KPRC-TV also argued that the state was improperly using grand jury subpoenas to obtain evidence for trial, which according to a December 2005 study commissioned by the Texas Supreme Court, would likely never occur. That study indicated that less than two out of a 100 criminal cases filed in Texas state courts proceed to

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KPRC-TV argued that the Texas Legislature, by enacting a statute that restricted the use of search warrants on the media, had recognized the need to provide some level of protection and privacy to newsrooms, reporters and their work product.

Texas Broadcasters Resist Grand Jury Subpoena for Unaired Footage

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trial. KPRC-TV argued that the state was imposing a premature and unnecessary burden on the media to turn over evidence for a trial that statistically was unlikely to occur.

Subpoena Quashed in Part

After conducting an in camera inspection of the subject videotapes, State District Judge Mark Kent Ellis of the 351st District Court conducted a hearing on January 10, 2006 and granted KPRC-TV's motions to quash in part by ruling that KPRC-TV did not have to release the raw video footage for the story that had not aired.

Judge Ellis ordered that KPRC-TV only had to produce certain outtakes relating to previously broadcast stories. Judge Ellis explained that he could only partially quash the subpoenas because Texas' highest criminal court, the Court of Criminal Appeals, had ruled in the *Healey* decision that a grand jury subpoena could not be quashed based on a reporter's privilege.

However, recognizing the importance of the freedom of the press and the increasing erosion of media independence, Judge Ellis concluded that KPRC-TV should not have to produce the raw video footage for the investigative report that had not yet aired. Judge Ellis stated, "Ever

since the Constitution was issued, its been chipped away at. I'm sympathetic with the needs of a press to be free."

A representative of the Houston Chapter of the American Civil Liberties Union attended the January 10, 2006 hearing to express support for KPRC-TV. He argued that allowing the District Attorney access to the unaired raw footage would ultimately harm law enforcement because it would decrease the willingness of individuals to come forward with information to the media.

According to published reports, the District Attorney's Office was not pleased with the ruling but decided not to appeal the ruling. KPRC-TV was pleased with the decision because the court agreed with KPRC-TV that its investigative reporter and her work product were entitled to some level of protection based on freedom of the press concerns even though Texas did not recognize a traditional reporter's privilege.

Thomas J. Forestier, a shareholder in the Woodlands, Texas office of the law firm of Winstead, Sechrest & Minick, P.C., and his associate, Kyle R. Watson, represented KPRC-TV in these proceedings. Valerie Turner and Russel Turbeville, assistant District Attorneys, represented the Harris County District Attorney's Office.



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Ninth Circuit Dismisses Yahoo!'s Declaratory Judgment Suit Over French Action

No Personal Jurisdiction and/or Lack of Ripeness Bars Suit

In a 100 page decision, a fractured eleven judge en banc panel of the Ninth Circuit dismissed Yahoo!'s declaratory judgment action seeking a ruling that French court orders against the global internet company are not recognizable or enforceable in the United States. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 2006 WL 60670 (9th Cir. Jan. 12, 2006).

By a vote of eight to three, the panel held that there was personal jurisdiction in California over the French defendants to hear the case. But three of these eight – Judges Fletcher, Schroeder and Gould – concluded that the case was not ripe for adjudication. Their votes, together with the three judges who rejected personal jurisdiction – Judges Ferguson, O'Scannlain and Tashima – formed a six judge majority to dismiss the case.

Judges Hawkins, Fisher, Paez, Clifton and Bea formed the minority who found both personal jurisdiction, ripeness and a strong First Amendment reason to decide the case.

Background

In April 2000, the French civil rights groups, La Ligue Contre Le Racisme et L'Antisemitisme ("LICRA") and L'Union des Etudiants Juifs de France ("UEJF") filed suit in France against Yahoo! complaining that Nazi-era items, including knives, swastikas, and photos of concentration camps, were available on Yahoo!'s auction websites accessible to French residents. The French Criminal Code Section R645-2 makes it illegal to possess, sell or display publicly Nazi uniforms, emblems or insignias.

The French groups also complained that French residents could access Holocaust denial, pro-Nazi and anti-Semitic websites through Yahoo!'s servers.

In May and November 2000, the French court issued interim rulings ordering Yahoo! to destroy "all Nazi-related messages, images and text stored on its server"

under penalty of a daily fine of 100,000 Euros for non-compliance. It also ordered Yahoo to "take any, and all measures" to ensure that the materials were not available to French residents.

Yahoo! did not appeal the French court ruling, but instead brought a declaratory judgment action in California. It also adopted new policies prohibiting the auctioning or advertising of items "that promote or glorify groups that are known principally for hateful and violent positions directed at others based on race or similar factors." The new policy, adopted independently of the litigation according to Yahoo!, proved to be significant to the ultimate decision to dismiss Yahoo!'s claim. Following the change in policy, LICRA and UEJF took no further substantive action in the French courts, but the French action is not final.

In 2001 Judge Jeremy Fogel granted summary judgment to Yahoo! holding that the French decisions were contrary to the First Amendment and U.S. public policy. *See* 169 F.Supp.2d 1181, 1194 (N.D. Cal.2001) ("the First Amendment precludes enforcement within the United States"); *LDRC LibelLetter* Nov. 2001 at 37.

In 2004, a split three judge panel of the Ninth Circuit reversed, ruling that there was no personal jurisdiction over the French defendants. *See* 379 F.3d 1120, 32 Media L. Rep. 2185 (9th Cir. 2004). This decision was vacated last year when a motion for rehearing en banc was granted. *See* 399 F.3d 1010 (9th Cir. Feb 10, 2005).

En Banc Decision

The en banc panel first addressed the issue of personal jurisdiction over the French defendants. Calling it a "close question," an eight judge majority found there was personal jurisdiction over the defendants based on three factors: 1) the cease and desist letter sent to Yahoo!; 2) service of process on Yahoo! in California; and

***As currently framed,
however, Yahoo!'s suit
comes perilously close to
a request for a forbidden
advisory opinion."***

(Continued on page 44)

Ninth Circuit Dismisses Yahoo!'s Declaratory Judgment Suit Over French Action

(Continued from page 43)

3) the French court's orders directing Yahoo! to take action in California. The third factor was the most important one to the majority because it showed that LICRA and UEJF's suit was expressly aimed at California.

The three dissenters vigorously rejected this conclusion, calling it "not true." "LICRA and UEJF's suit sought French court orders directing Yahoo! to perform significant acts locally in France, not in California.... LICRA and UEJF had one aim and one aim only: to prevent French citizens from using "Yahoo.fr" and "Yahoo.com" to access illegal anti-Semitic hate merchandise in France. They were plainly concerned with Yahoo!'s actions within France, regardless of where those actions emanated from."

Ripeness

Although mindful of the First Amendment issues at stake, Judges Fletcher, Schroeder and Gould, who voted for exerting person jurisdiction over the French defendants went on to find the matter not ripe for adjudication on prudential grounds. They noted that while there was a live dispute when Yahoo! first filed suit in federal district court, Yahoo!'s voluntary change of policy made it "unclear how much is now actually in dispute."

"First Amendment issues arising out of international Internet use are new, important and difficult. We should not rush to decide such issues based on an inadequate, incomplete or unclear record. We should proceed carefully, with awareness of the limitations of our judicial competence, in this undeveloped area of the law. Precisely because of the novelty, importance and difficulty of the First Amendment issues Yahoo! seeks to litigate, we should scrupulously observe the prudential limitations on the exercise of our power."

"Yahoo! wants a decision providing broad First Amendment protection for speech and speech-related activities on the Internet that might violate the laws or offend the sensibilities of other countries. As currently framed, however, Yahoo!'s suit comes perilously close to a request for a forbidden advisory opinion."

Act of State Doctrine

In an interesting analysis, Judges Ferguson, O'Scannlain and Tashima wrote that they would have dismissed the case not on ripeness but on the common law act of state doctrine, i.e., that "the court of one country will not sit in judgment on the acts of government of another, done within its own territory."

"The criminal statutes of most nations do not comport with the U.S. Constitution. That does not give judges in this country the unfettered authority to pass critical judgment on their validity, especially where, as here, the criminal statute embodies the determined will of a foreign sovereign to protect its borders from what it deems as morally reprehensible speech of the worst order."

The Dissent

Finally, it was the dissenters – Judges Hawkins, Fisher, Paez, Clifton and Bea – who analyzed the case through a First Amendment lens. They concluded that the majority imposed "a heightened standard on a U.S. plaintiff seeking to vindicate its First Amendment rights when that plaintiff is challenging a foreign prior restraint." "The extraordinary hurdles the majority creates are inconsistent with our established jurisprudence protecting this country's tradition of free expression."

The uncertainties about the impact of the French court orders on Yahoo! could have been resolved by fact finding at the district court level, the dissenters found. Concluding that the "majority creates a new and troubling precedent for U.S.-based Internet service providers who may be confronted with foreign court orders that require them to police the content accessible to Internet users from another country."

Yahoo! was represented by Michael Traynor, Cooley, Godward, Castro, Huddelson & Tatum, San Francisco, CA; and Robert C. Vanderet, O'Melveny & Myers, Los Angeles, CA. Defendants were represented by Robert A. Christopher, Coudert Brothers, Palo Alto, CA; Randol Schoenberg, Burris & Schoenberg, Los Angeles, CA; and Mark D. Lebow, Sokolow Carreras, New York, NY.

France to Consider New Protections for Journalists' Sources

By Benjamin Sarfati

French Justice Minister Pascal Clement announced on January 11, 2006 that the protection of journalists' sources is to be fully enshrined in French law. No bill has yet been presented to the French Parliament, but the Minister of Justice has nominated a working group to draft a proposed amendment to France's Press Law.

This article examines the existing French law and some of the issues the new bill may address.

The European Court of Human Rights has recognized that the protection of journalists' sources is one of the "basic conditions for press freedom" under Article 10 of the European Convention on Human Rights. *Goodwin v United Kingdom*, (1996) 22 EHRR. 123 (court order that journalist reveal the identity of his source violated Article 10).

More recently in *Roemen and Schmit v. Luxembourg*, [2003] ECHR 51772/99, the ECHR reiterated this principle in the context of newsroom searches, finding that the search of journalist's home and office to uncover a source is an even "more drastic measure than an order to divulge the source's identity."

France's press law, including criminal offenses for libel and breach of confidentiality, are provided by the 1881 law of Press Freedom ("Press Law"). However, no specific provision protecting journalists' sources exists in France's Press Law.

The only provision related to such protection is Article 109 of the French Code of Criminal Procedure. Article 109 provides that: "Any journalist called and heard as a witness to testify upon information gathered during the exercise of his activity, is free not to disclose the origin of such information."

This rule only applies to testimony in criminal cases (many libel cases are brought as criminal proceedings) – and it does not cover documents or other information acquired during the course of newsgathering which can be searched in the course of a criminal investigation.

Article 56-2 of the French Code of Criminal Procedure provides that a search of the premises of a press or audio-visual communications business may only be made by a judge or prosecutor who ensures that such investigations do not violate the freedom of exercise of the profession of journalist and do not unjustifiably obstruct or delay the dissemination of information.

Newsroom Searches

In several recent French criminal cases, journalists whose premises were searched by the police raised as a defense that such a search was prejudicial to the right to protect their sources. Indeed, several journalists have been sued for violation of confidentiality of information arising from a search. In this respect, their premises have been searched in order to discover how the journalist acquired documents from a criminal investigation file.

French courts have allowed journalists to raise as a defense to searches the confidentiality of their sources (TGI Paris, 17th Chamber, 7 January 1991). But more recently the courts' position has changed, particularly in criminal investigations over leaks of information to the press.

In December 5, 2000 the French Criminal Court decided that searches at journalists' premises were valid, rejecting the argument that this violated Article 10. In the recent COFIDIS case – an investigation of doping by cyclists – French police in January 2005 searched the offices and premises of the weekly news magazine *Le Point* and the sports daily *L'Equipe* to discover who leaked information about the investigation to the press.

This case was widely reported in the press and led French press organizations to raise the issue with the Government. Their requests for better protection helped inspire the French Justice Minister's announcement, where he said that any breach of the right to protect sources should only be permitted in "exceptional" cases and "when the nature of the offense and particular gravity justify it."

Belgium's recently enacted law to protect sources may have also played a part in the French announcement. The new Belgian law passed in April 2005 provides for an almost absolute protection of sources, except in criminal cases to prevent serious physical injury.

At the time of writing this update, neither the Minister nor the government has provided any further information, let alone a time, when such bill will be deposited or an indication of the precise contents of such a bill. But the Minister's announcement gives hope that the protection of journalists' sources will be extended from a testimonial privilege to a broader right to protect information identifying confidential sources.

Benjamin Sarfati is a partner with Taylor Wessing in Paris.

A Right to “Short Reports” on Events of Public Interest

New EU Draft Directive

By Dianne Vander Cruyssen
and Marie-Claire McCartney

The much-debated and long-awaited proposal from the European Commission for an Audiovisual Media Services Directive (which is intended to replace the Television Without Frontiers Directive 89/552/EEC) was published on December 13, 2005.

The aim of the draft Directive is to establish a legal framework for the broadcast of all audiovisual content on all media platforms in Europe (i.e. including internet and mobile platforms which did not fall under the scope of the 89 Directive).

While old style TV broadcasters are pleased with the loosening of the old regulatory regime, the draft Directive is not proving to be very popular with the new media industry. However, amidst all the fall-out, you may have missed another significant change. The draft Directive also includes a proposal for a new “right”, which has been variously described as “an explicit right to access”, “a right to information”, “news access” or “a right of short reporting.”

Contained in Article 3(b) of the draft is an explicit right of access to “events of high interest to the public.” The draft Directive makes clear that those broadcasters exercising exclusive rights concerning an event of public interest must grant to other broadcasters the right to use short extracts for the purposes of general news programming on fair, reasonable and non-discriminatory terms (taking due account of the exclusive rights). Draft Recital 27 states that “as a general rule” short extracts should be no longer than 90 seconds.

The official aim of this short reporting right (set out in draft Recital 27) is to safeguard the fundamental freedom to receive information and to encourage the trans-frontier circulation of reporting on Member States’ media events.

The Directive makes a critical (and much criticised) distinction between “linear” and “non-linear” audiovisual media services. The general rule of thumb is that a service

will be classified as one or the other depending upon who decides the timing of transmission, and to a lesser extent whether schedules for such transmission actually exist.

In general terms, a “linear” service will be a service which is scheduled by a broadcaster and is pushed out to end-users by a broadcaster. A “non-linear” service is defined in the proposed Directive as being “any audiovisual media service where the user decides upon the moment in time when a specific programme is transmitted on the basis of a choice of content selected by the media provider.” The short reporting right applies to linear services, meaning that its main use will be in relation to live media events (which are,

by necessity, scheduled).

Exclusive-rights holders may find it unpleasant to hand over one and half minutes of prime coverage for which they have paid a premium, and parties are likely to have a very different idea of exactly what constitutes “fair, reasonable and non-discriminatory terms taking due account of exclusive rights”.

Exclusive rights holders will not want the premium revenue streams promised by developing digital technologies to be drained by the proposed right to short reporting, yet such a right will plainly be of interest and benefit to news broadcasters and agencies throughout Europe.

The proposed Directive will still be subject to debate and possible amendment, and with such diverse opinions in the industry, it is clear that changes to the text may yet be expected. Internet Service Providers will be lobbying hard, having so far expressed deep concerns that the proposed Directive will merely introduce regulation of the internet by the backdoor. News organisations will want to follow the developments as they unfold towards implementation, as the exclusive rights holders will seek to protect their exclusivity as strenuously as possible against the news organisations seeking to obtain access to the footage, albeit in limited form.

Dianne Vander Cruyssen and Marie-Claire McCartney are lawyers with Reynolds Porter Chamberlain in London.

The official aim of this short reporting right is to safeguard the fundamental freedom to receive information and to encourage the trans-frontier circulation of reporting on Member States’ media events.

UK Appeals Court Affirms Libel Award to British MP

Tone of Articles, Lack of Comment from Plaintiff Defeat Qualified Privilege

The Court of Appeals of England & Wales this month affirmed a £150,000 verdict in favor of George Galloway, a controversial left-wing member of the British Parliament, in his libel suit against the *Daily Telegraph* newspaper. *Galloway v. Telegraph Group Ltd.*, [2006] EWCA Civ 17 (Jan. 25, 2006) (Clarke, Chadwick, Laws, JJ.).

At issue in the case were articles published in April 2003 based on documents discovered by a *Telegraph* reporter in the Iraqi foreign ministry in Baghdad. They appeared to show that Galloway had been receiving £375,000 annually from Iraq, had obtained lucrative oil-for-food program contracts and was using a charity he established for personal gain.

The articles reported on the content of the documents and also reported that Galloway denied their authenticity and denied that he had taken money from Saddam Hussein. But the paper also published an editorial on the subject headlined “Saddam’s little helper,” which included the remark that “there is a word for taking money from enemy regimes: treason.”

Bench Trial

The case was tried without a jury in December 2004 before High Court Justice Mr. Eady. The newspaper did not attempt to prove that the allegations against Galloway true, but argued that publication was privileged under the *Reynolds* defense and privileged under a theory of neutral reportage.

In a lengthy opinion Mr. Justice Eady rejected both defenses, finding instead that the publications constituted an irresponsible “rush to judgment.” [2004] EWHC 2786 (High Court Dec. 2, 2004).

He faulted the newspaper for not giving Galloway more time to review and respond to all the charges made by the paper and for not taking steps to verify the documents. He concluded that the paper was under no social or moral duty to report the allegations against Galloway.

And he went on to find that the tone adopted by the newspaper had not been neutral; not only did they adopt the allegations, they “embraced them with relish and fervor. They then went on to embellish them...”

Appeals Court Affirms

Affirming the Court of Appeals, largely adopted Mr. Justice Eady’s reasoning. It did not dispute that the documents recovered in Baghdad were of great interest to the public, but it faulted the newspaper for adopting the allegations in the documents as true.

It appears to us that the newspaper was not merely reporting what the Baghdad documents said but that, as [Mr. Justice Eady] held, it both adopted and embellished them. It was alleging that Mr Galloway took money from the Iraqi oil-for-food programme for personal gain. That was not a mere repeat of the documents, which in our view did not, or did not clearly, make such an allegation. We agree with the judge that, although there were some references to allegations, the thrust of the coverage was that The Daily Telegraph was saying that Mr Galloway took money to line his own pockets.

[2006] EWCA Civ 17 at ¶ 59.

The Court also found that there “was no great urgency” to publish and the newspaper’s scoop would still have been available if it made further investigation or allowed Galloway to address all the allegations made in the articles. The articles did not, according to the court, contain “the gist of the claimant’s side of the story in response to the allegations of personal gain.”

The Court of Appeal also rejected the newspaper’s argument that recent European Court of Human Rights decisions required a more lenient standard for reporting allegations.

In *Selisto v. Finland*, No. 56767/00 (ECHR Nov. 16, 2004), for example, the European Court of Human Rights (“ECHR”), reversed a libel judgment against a Finish reporter who wrote a series of articles suggesting serious misconduct by a doctor.

The court found that the articles covered an important matter of public interest and were protected notwith-

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UK Appeals Court Affirms Libel Award to British MP

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standing the fact that they selectively drew from public documents and did not report that the doctor was never charged with criminal wrongdoing.

“[I]t is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.”

The Court of Appeal noted that “Strasbourg cases are of course relevant” but concluded that specific cases like *Selisto* were fact specific and therefore of “limited assistance” in deciding cases. In fact, the Court concluded

that the recent ECHR cases cited by the *Telegraph* essentially incorporated “the same principles as identified by the House of Lords in Reynolds.” Thus there was no need to alter the balance struck by the trial court.

Finally, the court found no reason to lower the damage award of £150,000 given the seriousness of the allegations against Galloway.

Galloway was represented by barristers Richard Rampton QC and Heather Rogers and the firm Davenport Lyons. The *Daily Telegraph* was represented by barristers James Price QC and Matthew Nicklin and the firm Dechert.

Financial Times Settles Libel Suit With London Brokerage Firm

On the eve of trial, the Financial Times newspaper this month agreed to pay London-based brokerage firm Collins Stewart Tullett £2.5 million and issue an apology over an article published in 2004 that recounted a former company employee’s allegations of misconduct by the firm.

The brokerage firm was seeking £37 million in damages for losses allegedly caused by the article. In October 2004, Mr. Justice Tugendhat issued a decision rejected the company’s claim for £230.5 in special damages based on the decline in the value of stock after the Financial Times’s article was published. *See Collins Stewart Ltd v. The Financial Times Ltd.* [2004] EWHC 2337 (QB).

Save the Date

November 8, 2006

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The Cost of Protecting California's Royalty

By Kent Raygor & Demery Ryan

Hollywood's paparazzi may have rung in the New Year with a little less enthusiasm than usual this year. That's because, on January 1, a new law went into effect in California that extends the scope of Section 1708.8 of the California Civil Code, better known as the "[Anti-Paparazzi Act](#)," to include liability for assault.

Of course, plain-old garden variety assault (Cal. Penal Code § 240: "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another") was already actionable in California, which raises a few questions: Why does California need a special cause of action for assault by paparazzi? Who benefits? And at what cost?

The Original Law

The Anti-Paparazzi Act was first enacted in 1999 in the wake of the tragic death of Princess Diana, who was killed in a car accident after photographers pursued her vehicle. Although it was eventually determined that the accident was due to the fact that the driver of Princess Diana's car was intoxicated and reckless, the role that the photographers played in the accident brought a great deal of public awareness to the issue of overly-aggressive paparazzi.

The law as enacted in 1999 created liability for two new privacy torts: "physical invasion of privacy" and "constructive invasion of privacy." More specifically, the statute established liability for trespass with the intent to capture any type of visual image or sound recording. In the case of constructive invasion, the trespass is made through the use of a visual or auditory enhancing device.

Once liability is established, the person whose privacy is invaded is entitled to various remedies and damages, including up to three times the amount of any gen-

eral and special damages resulting from their actions, punitive damages, disgorgement of ill gotten gains, and injunctive relief. Furthermore, any person who directs, solicits, or induces another to engage in either physical or constructive invasion of privacy is also liable for both general and punitive damages.

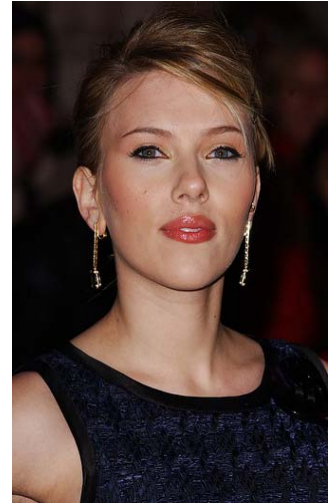


Photo by Will Rise

The Revised Law

At least where the paparazzi are concerned, movie stars are America's royalty. So it is no surprise that a spate of recent car accidents caused by photo-hungry paparazzi chasing celebrities such as Lindsey Lohan

and Scarlett Johansson would provoke the California legislature to expand the scope of the statute. California State Assembly Member Cindy Montañez (D-San Fernando), who drafted the new law, has confirmed that these incidents inspired the changes to the Anti-Paparazzi Act.

Specifically, the changes create an additional privacy tort for assault committed with the intent to capture any type of visual image or sound recording of a plaintiff. Note that this new language is not limited to celebrity or public figure plaintiffs and is not limited to paparazzi.

Anyone who commits an assault to photograph someone is liable, even if no privacy is invaded. An individual who commits an assault of this kind is liable for the full panoply of damages described by the original text of the law, and, as with the original law, any person who directs, solicits, or induces another to engage in such an assault is liable for general and punitive damages. Assembly Member Montañez has said that the intent of these changes is to deter paparazzi from aggressive behavior by taking away the financial incentive.

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The Cost of Protecting California's Royalty

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A Cost Benefit Analysis

An individual who commits an assault – whether in an attempt to get a photograph or in line at the grocery store – should be held liable for their actions. However, it is not clear why the law that creates liability for assault in a grocery store or any other place is insufficient to impose liability for assault by a photographer.

For example, Governor Arnold Schwarzenegger – who doubtless had few reservations about signing the bill into law – was himself involved in a run-in with the paparazzi, when they surrounded his vehicle with their cars in 1998. As a result of that incident, which took place before the first iteration of the Anti-Paparazzi Act went into effect, both photographers were convicted of misdemeanor false imprisonment, and one of reckless driving.

To the extent that the Anti-Paparazzi Act is intended to deter paparazzi, as Assembly Member Montañez has stated, it seems unlikely that piggybacking a financial penalty on top of criminal charges is going to do much to increase the deterrent effect, and in any event tort damages for assault have always been available. And if redundant liability is the benefit of the law, then what are the costs?

Critics of the law, such as the California Newspaper Publishers Association, contend that there are serious issues about the constitutionality of the law, including the fact that it holds all photographers – paparazzi and traditional news journalists alike – to the same standard. This could have a chilling effect on constitutionally-protected newsgathering. Furthermore, the law provides a mechanism for public figures, both movie stars and politicians, to control their image in the media.

By simply filing a suit based on the law, a public figure could suppress an embarrassing photograph, even if obtained without incident. If so, the law would allow privacy concerns to trump free speech. These issues have never been tested in the California courts, and therefore remain of interest to First Amendment advocates.

Another potential cost with the law is the vagueness and overbreadth of the language that imposes vicarious liability on anyone who “directs, solicits, actually induces, or actually causes another person to commit an assault” with the intent to capture any type of video image or sound recording. The issue of what amount of behavior crosses the threshold for vicarious liability is left unresolved by this language.

Would a celebrity gossip magazine editor who tells a paparazzo that he will pay him \$1,000,000 for the first picture of Angelina Jolie's and Brad Pitt's baby, but provides no further instruction, be liable if the paparazzo commits an assault in pursuit of the photo? Would the editor of a gourmet food magazine who has a standing offer for pictures of celebrity chefs dining at other chefs' restaurants be liable if a paparazzo assaults Emeril Lagasse at Nobu?

It is axiomatic that preventing assaults is a societal good. However, without satisfactory answers to these questions about constitutionality, vagueness and overbreadth, the new Anti-Paparazzi Act may not be the right vehicle for achieving this good.

Kent R. Raygor and Demery Ryan are with Sheppard Mullin Richter & Hampton LLP in Los Angeles, Ca.

February 28, 2006

International Libel & Privacy: Navigating the Minefield

Bloomberg News, 731 Lexington Avenue (58th Street)

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New Law Prohibits Anonymous Harassing Internet Communications Could Raise Constitutional Questions If Applied To Web Sites And Blogs

By Samir C. Jain And Stephen M. Obenski

In December 2005, Congress passed a new statute that, with surprisingly little public discussion or notice, expands a pre-existing prohibition on anonymous harassing phone calls to cover communications made via the Internet. *Violence Against Women and Department of Justice Reauthorization Act*, Pub. L. No. 109-162 § 113 (effective Jan. 5, 2006) (“the Act”).

Some observers have suggested that the new law is so broadly worded that prosecutors could use it to target anonymous annoying e-mails, web sites, and postings on blogs, message boards, and other public fora, raising significant First Amendment concerns.

The pre-existing law, section 223 of the Communications Act, provides that it is illegal to “make[] a telephone call or utilize[] a telecommunications device ... without disclosing [one’s] identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications.” 47 U.S.C. § 223(a)(1)(C).

The new law does not change this language. Instead, it expands the definition of “telecommunications device” to include “any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet.” 47 U.S.C. § 223(h)(1)(C).

Previously, an “interactive computer service” had been explicitly excluded from the reach of section 223.

Although the statute on its face appears to sweep broadly and to cover potentially any type of anonymous “communications” via the Internet, there is little to confirm that Congress intended such broad coverage. The Act generally made changes to the law designed to address the problem of violence against women, and Congress appears to have wanted to give prosecutors more power to bring charges against suspects in anonymous stalking cases that occur entirely online.

Further, there is some suggestion that Congress intended to expand the law to include new technologies such as voice over Internet protocol so that a perpetrator could not escape the reach of section 223 simply based on the technology used to place a voice call.

For example, Senator Biden wrote a summary of the law in which he describes it as encompassing “any device or software that uses the Internet and possible Internet technologies such as voice over internet services.” See 151 Cong. Rec. S13763 (daily ed. Dec. 16, 2005).

Beyond that, Congress’s intent is unclear. Representative McDermott (D-Wash.), who claims credit for

drafting the provision, issued a press release implying that the law was intended only to assist prosecutors in e-mail stalking cases and claiming that it “does not affect online message boards or anonymous online posting.” *McDermott Succeeds with Federal Law Against Cyberstalking*, Jan. 11, 2006,

<http://www.house.gov/mcdermott/pr060111.html>.

Although the statute on its face appears to sweep broadly and to cover potentially any type of anonymous “communications” via the Internet, there is little to confirm that Congress intended such broad coverage.

Commentators Have Voiced Concerns

Nevertheless, some commentators have voiced concerns that the statute now appears to encompass virtually any type of anonymous online speech (e.g., on web sites, message boards, and blogs) that is intended to “annoy” one or more readers. See, e.g., Declan McCullagh, *FAQ: The new ‘annoy’ law explained*, C|Net News.com, Jan. 11, 2006, http://news.com.com/FAQ+The+new+annoy+law+explained/2100-1028_3-6025396.html; Eugene Volokh, *Annoying Anonymous Speech Online*, Jan. 10, 2006, <http://volokh.com/posts/1136923654.shtml>.

Any such reading of the statute would appear to raise serious constitutional concerns on at least three grounds. First, even prior to the Act, section 223 had already been found unconstitutional as applied to political speech.

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New Law Prohibits Anonymous Harassing Internet Communications

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In *U.S. v. Popa*, 187 F.3d 672, 676-78 (D.C. Cir. 1999), a court reversed the conviction of a man who made a number of anonymous insulting phone calls to the U.S. Attorney. Even though the defendant made the calls with the intent to annoy, harass or abuse the recipient, the court found that the statute was not narrowly tailored because it covered non-threatening political speech.

In light of *Popa*, section 223 is likely also generally unenforceable against anonymous Internet communications of a political nature.

Second, the expanded statute might be challenged as unconstitutionally overbroad. Section 223 has survived such challenges in the past, but the case law suggests the statute was upheld only due to the unique nature of telephone communications.

In particular, in *U.S. v. Bowker*, 372 F.3d 365, 378-80 (6th Cir. 2004), the court found that the law was not overbroad, in part because recipients of anonymous harassing phone calls could not easily avoid anonymous harassing calls without changing phone numbers (and the caller's anonymity made it difficult for the listener to identify and confront or avoid the caller), and in part because the court read the ban to cover only communications intended to instill fear in the victim rather than ones intended to promote discourse.

These justifications might not apply as easily to a ban on anonymous Internet web sites, blogs, or mailing lists, which may annoy some readers but not others. The annoyed readers could more easily avoid the offending sites and mailing lists in the future, and the less targeted nature of the communication is less likely to induce fear and annoyance in the first place. Therefore, the expanded statute appears on its face to burden substantially more protected speech than its predecessor.

Third, the statute might be challenged as unconstitutionally vague because it fails to provide "notice that will enable ordinary people to understand what conduct it prohibits," or it authorizes "arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527 U.S. 41, 52 (1999). In particular, the statute's use of the word "annoy" could potentially encompass any amount of

anonymous, online content, and it may well be difficult or impossible for an online speaker to know what may "annoy" one of the myriad readers of a bulletin board or other online forum.

To be sure, courts have held that the statute requires the defendant to have a *specific intent* to annoy, harass, etc., and thus the statute presumably would not apply merely because a particular reader was annoyed at a comment. See *U.S. v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978). Further, courts have held that, although the word "annoy" standing alone might be vague, read together with "abuse, threaten, or harass," it covers only conduct intended to instill fear in the recipient. See *U.S. v. Bowker*, 372 F.3d 365, 382-83 (6th Cir. 2004) (also noting evidence of legislative intent to protect innocent individuals from fear and harassment).

Conclusion

In sum, by expanding the reach of 223 from situations largely confined to one-to-one conversations to speech that reaches numerous recipients who the speaker often will not even know, the recent changes to section 223 raise or at least exacerbate significant constitutional concerns. Although protecting individuals from stalking or actual harassment is undoubtedly an important policy goal, the statute as written appears to go well beyond that goal and threatens to chill protected speech.

Samir Jain is a partner, and Stephen Obenski an associate, at WilmerHale in Washington, D.C.

September 27-29, 2006
NAA/NAB/MLRC Media Law Conference
Arlington, Virginia

Attorneys Not Exempt From Colorado's Consumer Protection Act

Plaintiff Alleged He Was Misled By Firm's Advertisements

By Brian S. Faughnan

Television advertisements by lawyers are often intensely criticized by certain segments of the bar as being undignified and unprofessional, while vigorously defended by others, usually, if not exclusively, on First Amendment grounds. Traditionally, the only potential liability exposure faced by lawyers and law firms that choose to advertise on television has involved the risk of disciplinary proceedings being pursued by bar regulators.

As a result of the unanimous ruling this month by the Colorado Supreme Court in *Crowe v. Tull*, No. 04SA385 (Colo., Jan. 9, 2006), lawyers and law firms who advertise in Colorado now must include another potential source of liability on their radar screen – liability for damages under the Colorado Consumer Protection Act (“CCPA”).

Background

The CCPA, Colorado's version of the Uniform Deceptive Trade Practices Act, prohibits, among other things, representing “that goods, food, services, or property are of a particular

standard, quality or grade, or that goods are of a particular style or model, if he knows or should know that they are of another” and advertising “goods, services, or property with intent not to sell them as advertised.” Although the exact wording can vary from state to state, most states have a similar statutory prohibition against certain acts considered to qualify as deceptive trade practices.

Whether attorneys could be held liable under the CCPA – an issue of first impression in Colorado – arrived on the Colorado Supreme Court's doorstep as the result of a

Lawyers and law firms who advertise in Colorado now must include another potential source of liability on their radar screen – liability for damages under the Colorado Consumer Protection Act.

lawsuit filed by Richard Crowe against his former attorneys – Marc Tull and the law firm of Franklin D. Azar & Associates (“the Azar Firm”).

Mr. Crowe was involved in a multi-car accident in Colorado Springs that, according to a police report, occurred when a teenager, driving a Dodge Ram truck, ran a

stop sign and collided, at an estimated impact speed of forty-five miles per hour, with Mr. Crowe's two-door Honda.

In connection with the crash, and in addition to the heavy damages sustained by his vehicle, Mr. Crowe “suffered numerous physical injuries, including mild traumatic brain injury with speech impairment.”

Mr. Crowe alleged that he retained the Azar Firm based on having seen its television advertisements both before and after his automobile accident. The Azar Firm airs television advertisements throughout Colorado that make claims including: (1) that they will always “obtain as much as we can, as fast we can” for their clients; (2) “In a wreck, get a check;” and (3) that Franklin Azar, its President, is the “strong arm” when it comes to dealing with insurance company adjusters.

After retaining the Azar Firm, Mr. Crowe was advised by Mr. Tull, one of its lawyers, to accept a \$4,000 settlement offer that was made by the truck driver's insurance company. Mr. Crowe complied with Mr. Tull's advice and settled his claim in full for \$4,000.

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Attorneys Not Exempt From Colorado's Consumer Protection Act

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Client Sued His Lawyers

Subsequently, Mr. Crowe sued Mr. Tull and the Azar Firm for, *inter alia*, malpractice, as well as for an alleged violation of the CCPA. Mr. Crowe was dissatisfied with the representation he received, contending that his case was not appropriate for settlement because he had not yet achieved maximum medical improvement and that the value of the settlement he was advised to accept was deficient given that, at the time of settlement, he already had lost wages of more than \$7,000 and medical and rehabilitation costs in excess of \$17,000.

The trial court dismissed Mr. Crowe's CCPA claim against Tull and the Azar Firm as being duplicative of Mr. Crowe's malpractice claim because the "actual practice of law" was not a commercial activity regulated by the CCPA.

Colorado Supreme Court Decision

The Colorado Supreme Court exercised its original jurisdiction to reverse the trial court and remand the proceedings to provide Mr. Crowe with an opportunity to pursue the merits of his alleged CCPA claims against Tull and the Azar Firm concluding that "under the best interpretation of the Act's plain language and consistent with its legislative intent" attorneys may be found liable for CCPA violations.

The Court brushed aside arguments that CCPA should not apply to attorneys by focusing both upon the lack of a specific exclusion of attorneys from the scope of the CCPA and the fact that "the CCPA does refer to deceptive trade practices in the pursuit of one's 'vocation,'" a term it noted had been defined by *Black's Law Dictionary* as "one's occupation or profession."

In so doing, the Colorado Supreme Court also expressly declined to adopt "a judicially forged distinction between the professional and entrepreneurial activities of attorneys" such as that created by the Washington Supreme Court in *Short v. Demopolis*, 691 P.2d 163 (Wash. 1984).

Examining the proposed amended complaint that the trial court refused to permit Mr. Crowe to file, the Colorado Supreme Court summarized the theory of his case against Tull and the Azar Firm for deceptive advertising:

The Azar firm, he argues, is a "personal injury mill" and its business plan is to advertise extensively, take

on more case than it could reasonably expect to litigate, and settle those cases prematurely to maintain cash flow without regard to obtaining full value for its clients. Crowe contends that his injury was caused when he was misled by the Azar firm's advertisements into believing the firm would obtain the full value of his claim when it had no intention of doing so.

In its ruling, the Colorado Supreme Court acknowledged the growth in legal advertising and that such advertising "today potentially affects a large swath of the public via television, print media, radio, and the internet." The *Crowe* court opined that "[a]ttorney advertising is likely to have the most impact on the unsophisticated and the underprivileged segments of the public that are most in need of safeguards," and that the "potential for consumer targeting demonstrates the need for the same protections against deceptive legal advertising as exist for other purveyors of goods and services" under the CCPA.

Taking no position on the merits of Mr. Crowe's claims, the Colorado Supreme Court stressed that, in order to ultimately prove a claim for relief under the CCPA against Tull and the Azar Firm, Mr. Crowe will have to satisfy each of the five elements required of a plaintiff bringing any claim under the CCPA.

The CCPA does not provide a remedy for a purely private wrong because one of the elements of a claim requires that an unfair or deceptive trade practice "significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property." Thus, the *Crowe* court stressed that liability under the CCPA for an attorney will normally not be coextensive with acts resulting in attorney malpractice claims because "those cases in which a lawyer's actions will have an impact beyond the private contract with the client will be few and far between."

Plaintiff Richard E. Crowe was represented by Joseph R. Winston of the Winston Law Firm, P.C. and Patric L. LeHouillier of LeHouillier & Associates both of Colorado Springs, Colorado. Defendants Marc B. Tull and Franklin D. Azar & Associates were represented by Thomas B. Quinn and Jennifer C. Forsyth both of White and Steele, P.C. in Denver, Colorado.

Brian S. Faughnan is with Armstrong Allen in Memphis, Tennessee.

ETHICS COLUMN

Future Conflict Waivers *What They Mean to You*

By Ronald C. Minkoff

The expansion of media and entertainment companies and the law firms that represent them comes with a price: an increased risk of conflicts of interest. Identifying and addressing a conflict is hard enough when the law firm actually knows about it, but it becomes even more difficult when the conflict does not exist yet but might arise in the future.

Private law firms, particularly those with specialized practices such as libel, trademark and patent law, are increasingly asking new clients to waive these “future” or “prospective” conflicts in order to protect themselves and their existing clients, who are often the new client’s business competitors. Now, a recent ethics opinion, ABA Formal Opinion 05-436 (May 11, 2005), has made obtaining these future conflict waivers easier than ever.

Conflicts and Conflict Waivers

Future conflicts, and future waivers, generally arise from conflicts of interest involving firm clients (“client conflicts”). Client conflicts can loosely be divided into two types: current client conflicts (governed mainly by MR 1.7 and 1.8) and former client conflicts (governed by MR 1.9).

All lawyers know that the most common method for addressing client conflicts is to obtain a waiver from one or both clients (as the circumstances require). The Model Rules tell us what a lawyer must do in order to obtain such a waiver. First, the lawyer must decide if the conflict is “consentable.”

While former client conflicts are always consentable [see MR 1.9], current client conflicts are not. The Model Rules specifically identify two types of non-consentable conflicts: those where multiple representation is prohibited by law (such as where state law prohibits a lawyer from representing two criminal defendants) (MR 1.7(b)(2)), and those where the multiple representation involves one client suing another in the same litigation. MR 1.7(b)(3).

But these are not the only non-consentable conflicts. Multiple representation is prohibited any time “the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation” to each client. MR 1.7(b)(1) and Comment 15.

If the lawyer finds that the conflict is consentable, she must then obtain the client’s “informed consent.” MR 1.7(b)(4); 1.9(a). Informed consent means consent given “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” MR 1.0(e).

This means that the lawyer must provide *detailed* information about the conflict and its implications to the client. And the lawyer must get the client’s informed consent “confirmed in writing.” As we will show, these requirements are what make obtaining future waivers so complicated – and so problematic.

What is a Future Conflict?

Consider two examples of future conflicts:

Example 1: Law Firm A represents three major newspapers (B, C and D). One of the firm’s partners is contacted by a fourth newspaper (E), and asked to do their libel screening work. Before taking on the representation, Law Firm A asks E to sign a waiver stating that if, at any time in the future, E finds itself adverse to B, C or D in a matter unrelated to E’s libel screening work, E will not claim that Law Firm A is disqualified from representing B, C or D in that matter.

Example 2: Media company X is a long-standing client of Law Firm W. One day, X tells Law Firm W that it is starting a joint venture with media company Y, which Law Firm W has never represented, and wants Law Firm W to represent the two companies in putting the deal together. (Assume they

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have already worked out the material terms, and there is no real adversity). Law Firm W asks Y to sign a waiver stating that in the event a dispute breaks out between X and Y in the future, Y agrees that Law Firm W can represent X in that dispute, and continue to represent X in other matters whether or not related to the joint venture.

In both examples, the law firm is anticipating a conflict that has not yet arisen, *and may never arise*. Newspaper E may never find itself in a dispute with Newspapers B, C or D. And X and Y may form their joint venture and live happily ever after.

But the law firm, intent on protecting its relationships with its existing clients, seeks a waiver with respect to these future contingencies. By their very nature, the contingencies can be described only vaguely, if at all. The exact details of the conflict, such as the nature of the future dispute, the amount at stake, or whether the client's confidential information will be implicated, simply cannot be known.

And there lies the rub. If we cannot know exactly what the conflict will be, how can we determine if it is consentable? And how can we provide the details needed to obtain the client's informed consent?

The Early Resistance to Future Waivers

Because of these vagaries, courts initially frowned on future waivers. For instance, in *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978), the case on which Example A is based, the court refused to accept a waiver by Gulf, a new client of the law firm, that allowed the firm to continue to represent long-standing client United Nuclear Corporation ("UNC") if a dispute arose between them.

The Court considered the future waiver too vague, particularly because it "depends on the underlying proposition" --- which the court thought legally unsupportable --- "that a client would, or even may, authorize an attorney to utilize" attorney-client privileged information "against him." *Id.* at 228.

The court was even more critical of the future waiver in *Worldspan, L.P. v. The Sabre Group Holdings, L.P.*, 5

F. Supp. 2d 1356 (N.D. Ga. 1998). There, Worldspan (a start-up airline) signed a conflict waiver stating that the law firm, which represented many of Worldspan's competitors, "will not be precluded from representing a client who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN. . . ." *Id.* at 1359 (emphasis added).

The court called the waiver too "ambiguous," noting that it does not even "impliedly foreshadow [the] future directly adverse litigation" which eventually occurred. *Id.*

These decisions are consistent with ABA Formal Opinion 93-372 (April 16, 1993), which for years set the standard for future waivers --- and set it very high. The Opinion took a "guarded view" of future waivers, noting that the inability to predict the exact circumstances of the future conflict required the lawyer to "revisit[]" the situation at the time the future conflict actually arose, and to make a *de novo* evaluation of consentability under MR 1.7.

Similarly, the need to obtain "informed consent" required the future waiver to be quite specific --- to, at the very least, "identify either the potential opposing party or at least a class of potentially conflicting clients," and possibly "the nature of the likely matter and its potential effect on the client" as well.

The opinion noted the reluctance of courts to enforce future waivers where the client was consenting to allow the law firm to use against it, on behalf of another client, attorney-client information obtained in the representation. The opinion concluded: "The closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified, the more likely it will be that [the] prospective waiver is consistent" with the "informed consent" requirement of the Model Rules.

Landscape Changes --- Formal Opinion 05-436

All this began to change at the turn of the century, as several trial court decisions [see, e.g., *Visa U.S.A., Inc. v. First Data Corp.*, 241 F.Supp.2d 1100, 1106-07 (N.D. Cal. 2003)] (approving future waiver by First Data Corp. that

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allowed law firm to continue to represent First Data's major competitor, Visa, in future matters "including litigation in which we have not been engaged to represent you . . . and in which [Visa] would be adverse to you in matters unrelated to those that we are handling for you"); *General Cigar Holdings, Inc. v. Atladis, S.A.*, 144 F. Supp.2d 1334, 1339 (S.D. Fla. 2001) (finding informed consent when future waiver given by "knowledgeable and sophisticated parties") and a new Restatement [see Restatement (Third) of the Law Governing Lawyers § 122, cmt. d (prospective waiver acceptable if "client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent")] accepted future waivers, particularly by sophisticated clients.

The trend continued in February 2002, when the ABA approved the Ethics 2000 Commission's revisions of the Model Rules. Those revisions included new Comment 22 to MR 1.7, which specifically approved future waivers as long as certain basic procedures were followed.

This Comment stated that the "effectiveness" of future waivers "is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails," so that "the more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding."

Significantly, however, even an "open-ended" and "general" waiver will be sufficient if "the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise," and particularly if the "experienced" client is independently represented by counsel and the "consent is limited to future conflicts unrelated to the subject of the representation."

Formal Opinion 05-436 (May 11, 2005) represented the culmination of all of these developments. The ABA Standing Committee on Ethics and Professional Responsibility determined that Comment 22 had so changed the law on future waivers that Formal Opinion 93-372 had to be withdrawn.

The Committee accepted that Comment 22 allowed future waivers under the circumstances set forth in the earlier Formal Opinion, but emphasized that Comment 22's support of open-ended waivers, albeit under limited circumstances, went much further. In particular, the Standing Committee noted that one of Formal Opinion 93-372's principal concerns – that a future waiver would permit a lawyer to use a client's privileged communications against her – had been mooted by Comment 22's requirement that an open-ended future waiver involve a conflict "not substantially related to the subject of the prior representation."

The Standing Committee carefully defined that phrase to mean "that the future [conflicts] as to which the client's consent . . . is sought do not involve the same legal dispute that is the subject of the lawyer's present representation of the consenting client, and are not of such a nature that the disclosure or use by the lawyer of information relating to the representation of the consenting client would materially advance the position of the future clients."

Tips for Future Waivers

We recognize that the language of Comment 22 and Formal Opinion 05-436 is pretty abstract, and that the law on future waivers is hardly settled. But Formal Opinion 05-436 and the cases that it follows create some clear guidelines that law firms seeking, and clients signing, future waivers should keep in mind:

- A future waiver should always be in writing.
- The client should be given an opportunity to consult with independent counsel.
- The more specific a future waiver is as to the nature of the future conflict and its implications for the client, the more likely it is to be enforced.
- General, open-ended waivers are permitted only if the client is "a sophisticated user of legal services" represented by independent counsel (e.g., a large corporation, with in-house lawyers to protect it), and if the future conflict involves matters not substantially related to the work the law firm is doing for the consenting client.

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- A future waiver allowing a lawyer to reveal or use a client's confidential information against the client will be very carefully scrutinized and is unlikely to be permitted.
- The future conflict must be "consentable" under MR 1.7(b)(1), (2) or (3), and that determination must be made *both* when the future waiver is signed *and* when the future conflict actually arises. If the conflict is not consentable at either time, the waiver will not be valid.
- Even if the future conflict is consentable when it arises, the law firm still may have to obtain informed consent from the client it wishes to represent in the later matter.

Future waivers are becoming more and more common, as law firms look to protect themselves in an increasingly competitive marketplace. Corporate clients, and their in-house legal staffs, must be increasingly vigilant in evaluating these waivers so as to avoid the embarrassment and expense of finding, months or years down the road, that they have consented to having their lawyers turn against them at a critical moment.

Ronald Minkoff is a partner at the New York law firm Frankfurt Kurnit Klein & Selz. Mr. Minkoff is a litigator whose practice emphasizes the law of lawyering. He is an Adjunct Professor of Professional Responsibility at Brooklyn Law School and the President of the Association of Professional Responsibility Lawyers (APRL). Pavani Thagirisa, an associate at Frankfurt Kurnit, assisted with this article.

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February 28, 2006

International Libel & Privacy: Navigating the Minefield

Bloomberg News
731 Lexington Avenue (58th Street)

Reception at 6:00 p.m.

Panel discussion at 7:00 p.m. with

Stephen Fuzesi, Jr. (Newsweek), Charles J. Glasser, Jr. (Bloomberg News),
Elisa Rivlin (Simon & Schuster) and Kurt Wimmer (Covington & Burling),
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