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LDRC Libel Defense Resource Center

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Protecting the First Amendment in Cyberspace: Supreme Court Invalidates Communications Decency Act

By Paul M. Smith and Risa L. Goluboff

As the 1997 Term came to a close, the Supreme Court issued a strongly worded decision holding that key provisions of the Communications Decency Act ("CDA"), in which Congress attempted to regulate dissemination of "indecent" and "patently offensive" speech over the Internet, were facially invalid under the First Amendment. Affirming a three-judge federal district court in the consolidated cases of *Reno v. American Civil Liberties Union* and *American Library Association v. Department of Justice*, Justice John Paul Stevens wrote for a seven-member majority that flatly rejected the Government's efforts to justify a law that made it a crime to transmit sexually explicit non-obscene speech over the Internet unless speakers could show that they had made reasonable, good faith efforts to prevent receipt of that expression by minors. In so doing, the Court recognized what Congress did not: restrictions like those embodied in the CDA would devastate the free flow of ideas on the "vast democratic fora of the Internet."

The basic problem with the regulatory approach adopted by Congess in the CDA is that it is impossible for most Internet speakers to screen recipients for age, so that speakers were left with little choice other than to refrain from an entire category of constitutionally protected, often socially valuable speech. The Court found that such a content-based restriction would effectively ban constitutionally protected material from reaching adults, thereby violating the First Amendment. Writing separately, Justice Sandra Day O'Connor, joined by Chief Justice William H. Rehnquist, would have invalidated the CDA, not on its face, but as applied in nearly all circumstances. The decision did not address the unchallenged provisions of the CDA regarding online obscenity, child pornography, and harassment.

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Strict Scrutiny for a Novel Medium

As a result of the extensive factual record amassed by the district court, the Supreme Court developed an impressive understanding of the actual and potential capabilities of the Internet. Placing this novel medium in the context of more familiar media, Justice Stevens determined that restrictions of speech on the Internet deserved the most stringent review. The Court rejected the Government's arguments for a lower standard of scrutiny, based on analogies to case law involving commercial distribution of printed material to children *(Ginsberg v. New York*, 390 U.S. 629 (1968)), radio broadcasts (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)), and the zoning of adult movie theatres (*Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986)).

In particular, the Court contrasted the constitutional status of the Internet with the lesser First Amendment scrutiny applied to regulation of broadcast media. It reasoned that, unlike television and radio, the Internet is not invasive: affirmative steps, often beyond the capabilities of small children, are necessary to access materials online, and indecent material online is almost always preceded by warnings about content. In addition, the Court found differences with regard to a speaker's ability to screen her expression and target her audience prior to speaking. Whereas radio and television are controlled by a small number of people who can plan -- and pre-screen -- expression, the Internet is comprised of an extremely large number of individuals engaging in an unlimited amount of low-cost but relatively unscreenable activities. Moreover, unlike broadcast carriers, Internet users are unable to restrict many postings to particular times of the day or geographic locales.

Unnecessarily Broad Restrictions

Having decided that the restrictions on Internet expression deserve strict scrutiny, the Court moved on to determine whether a compelling government interest might nevertheless justify the Act. While acknowledging the importance of protecting children from harmful materials, the Court reaffirmed the principle that such an interest does not justify unnecessary restrictions on adult access to constitutionally protected expression. It emphatically rejected characterization of the CDA as a narrowly tailored, effective way to restrict indecent speech from reaching the eyes and ears of babes.

Citing the district court's extensive findings, the Court saw no basis for the Government's claims that speech among adults could continue as long as children were protected. Because of the immense fluidity of the Internet, users of "chat rooms" or "news groups" and speakers posting Web sites would essentially have to assume the presence of minors at all times. And, while the Act created a specific defense for speakers who screen the audience by asking for credit cards or adult ID's, the Court recognized that use of this option was not possible for anyone other than an operator of a Web site, and that even most would-be Web speakers would find such screening impracticable. The Court likened this Web-only alternative to defending a law banning leaflets and newspapers on the ground that publication of books is still permitted. The ironic result of the credit card defense, the Court noted, would be that only commercial pornographers--those most likely to be able to afford and to use screening technology--would be fully protected, while institutions like the Carnegie Library would either have to cull their holdings, risk prosecution, or remove their sites altogether. A much more technologically feasible, financially tenable, constitutionally valid restriction would be for users themselves to restrict their children's access to the Internet.

Too Vague to Pass Muster

The Court's analysis reached beyond the practical realities of limiting Internet expression. Justice Stevens also ruled that the words used in the statute to define the speech at issue -- "indecent" and "patently offensive" -- were both too broad and too vague to satisfy the First Amendment (although, because of this First Amendment holding, the Court saw no need to decide whether the terms were too vague to satisfy the Fifth Amendment). The Government argued that since the CDA's language was similar to one prong of the three-part test for obscenity upheld in *Miller v. California*, 413 U.S. 15 (1973), it too should be constitutional. The Court, however, saw no logic to this argument: the fact that a three-part test adequately defines a category of regulated speech does not mean that each of its parts would suffice on its own. The Court found the faults in the legal standard particularly problematic because the penalties inflicted were criminal and harsh, and the statute applied to both commercial and noncommercial users.

Last Ditch Efforts to Salvage the CDA

The Government attempted to salvage part of the Act, arguing that at least some of its potential applications would pass

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constitutional muster. The Court, however, followed its traditional practice of facially invalidating provisions that, in a substantial percentage of their applications, violated the First Amendment. Justice O'Connor, while agreeing with much of the majority's analysis, would have followed the Government's lead on this issue, upholding the Act on its face but invalidating all but one of its applications -- where an adult deliberately transmits indecent material knowing "that all of the recipients are minors."

Implications, Inconsistencies, and Open Questions

Several aspects of the Supreme Court's first explorations of cyberspace will be of great interest for First Amendment scholars and practitioners alike. In addition to the landmark holding of the case itself, *Reno v. ACLU* has potentially significant implications for other areas of First Amendment law, revealing inconsistencies in the Court's free speech doctrine, and leaving open some difficult questions for the future.

Vague or Not So Vague?

While explicitly harmonizing its opinion with past precedent, the Court implicitly changed its attitude toward a particular aspect of First Amendment jurisprudence. Its perception that the words "indecent" and "patently offensive" are constitutionally vague departs rather pointedly from the decision in *Denver Area Educ. Telecom. Consortium v. FCC*, 116 S.Ct. 2374 (1996). *Denver Area* upheld a statute allowing cable system operators to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Justice Breyer's plurality opinion, joined by Justice Stevens, suggested that the meaning of this phrase was sufficiently defined by the case law applying the *Miller* obscenity test. Using almost identical language, the CDA prohibited speech that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs." Despite the similarities, as we have noted, the *ACLU* Court stated that the "uncertainty [of the language used in the CDA] undermines the likelihood that the CDA has been carefully tailored" and found the *Miller* analogy inapt.

The reasons for these apparently conflicting analyses presumably have much to do with the nature of the statutes at issue. *Denver Area* upheld a provision authorizing cable operators to bar a category of programming from leased channels. The CDA was a *criminal* statute that applied, not to programs that could be reviewed by lawyers, but to a whole range of forms of expression by individual citizens using the Internet, including spontaneous "chat."

The Rights of Teenagers

The *ACLU v. Reno* Court expressly left open the question whether restrictions on access to indecent material by older minors could violate the constitutional rights of those minors themselves. Justice O'Connor in her separate opinion, by contrast, argued that the Court should have flatly rejected such a claim. This issue remains to be resolved in a future case.

Unnecessary Restrictions

Perhaps the most important question the Court left open in *Reno v. ACLU* is whether there may be circumstances in which adult access to constitutionally protected materials could be banned in order to protect children from such materials. The Court reaffirmed that the Government's interest in protecting children from harmful material does not justify "an *unnecessarily* broad suppression of speech addressed to adults." Adopting this language from *Sable*, 492 U.S. at 126, and more recently *Denver Area*, 116 S.Ct. at 2374, the Court has used words that might be read as avoiding the question of how the First Amendment would apply in a situation where it is shown that suppression of speech among adults is the only way to prevent access by a substantial number of children. The Court has never expected, and did not expect in the present case, to find alternative mechanisms that will protect children perfectly. It has never determined, however, how many children slipping through the cracks would justify banning the material altogether, nor whether such a ban would be constitutional in that context.

In *Sable*, for example, the Court demonstrated that it did not require complete protection when it stated that "only a few of the most enterprising and disobedient young people would manage to secure access to such messages." It was willing to countenance some level of access for minors in order to preserve adult access. Justice Scalia's concurring opinion in *Sable* pointed out precisely this fact: "I think it correct that a wholesale prohibition upon adult access to indecent speech cannot be adopted merely because the FCC's alternate proposal

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could be circumvented by as few children as the evidence suggests. But where a reasonable person draws the line in this balancing process--that is, how few children render the risk unacceptable--depends in part upon what mere 'indecency' (as opposed to 'obscenity') includes." Justice Scalia, then, would create a balancing test that included not only the protection of children and the access of adults but also the breadth of the definition of the restricted material. Despite the *Sable* Court's acknowledgment that "[i]t may well be that there is no fail-safe method of guaranteeing that never will a minor be able to access the dial-a-porn system," the Court was satisfied that reasonably effective methods were available. That Court thus found it unnecessary to address whether it would be constitutionally permissible to restrict adult speech in a case where there was no other alternative.

More recently, writing for the plurality in *Denver Area*, Justice Breyer arguably undertook a balancing of the interest in "protecting children from exposure to patently offensive depictions of sex" and the harm of imposing an "unnecessarily great restriction on speech." In his concurrence/dissent, Justice Thomas recognized and criticized the plurality's "open invit[ation]" to balance these interests.

In *Reno v. ACLU*, because the Court determined that alternatives existed which would reasonably protect children while not suppressing adult speech, the Court again did not have to decide the constitutionality of suppressing adult speech where no such alternatives were available. It remains to be seen how the Court would respond to a case in which child protection and adult access are incompatible and mutually exclusive practical realities.

As the Internet continues to grow, Congress will no doubt resume its attempts to construct boundaries through its uncharted territories. When it does, it should use as its compass *Reno v. ACLU*, in which the Court deftly navigated cyberspace for the first time. Armed with substantial information and a protective eye toward the First Amendment, the Court's historic decision will go a long way toward fostering the potential of a medium "'as diverse as human thought'" itself.

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Reno v. ACLU: A Commercial Speech Authority

By P. Cameron DeVore

On June 26, 1997, the Supreme Court announced its 7-2 decision in *Reno v. American Civil Liberties Union*, ___ S. Ct. ___, 1997 WL 348012, affirming the decision of a three-judge federal district court that Internet restrictions in the Communications Decency Act of 1996, "abridge[d] . . . 'the freedom of speech' protected by the First Amendment."

The decision is not only an eloquent reaffirmation of the heavy burden of proof imposed by the First Amendment on would-be regulators of speech, but provides powerful authority for commercial speakers challenging, for example, governmental restrictions on billboard advertising, most frequently supported by municipalities on the grounds that there is a "special solicitude" for protection of children that diminishes application of the *Central Hudson* four-part test. After the Supreme Court denied certiorari on April 28 in the Baltimore billboard cases (*e.g.*, *Anheuser-Busch v. Schmoke*, ___ F.3d ___ (4th Cir. 1996), *cert. denied*, ___ S. Ct. ___ (1997)), local municipalities have flocked toward adoption of Baltimore-type zoning bans on billboard advertising of tobacco and alcohol beverages, based on the Fourth Circuit's assertion that "special solicitude" for children substantially diluted the *Central Hudson* test by justifying great deference to local legislative judgments.

Notable elements of the Court's decision in *ACLU v. Reno* that will aid commercial speakers are set forth below. It should be pointed out that Justice Stevens' opinion attempted to distinguish commercial speech from the speech regulated by the Communications Decency Act (*e.g.*, "unlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities . . ."). Justice Stevens' reference to *Ginsberg* and *Pacifica* in this context is puzzling, given the fact that neither case turned on the "commercial" nature of the speech or speaker. On the other hand, Justice Stevens relied in part on commercial speech authorities in holding that the Act impermissibly limited adult communication in its attempt to restrict children's access to indecent materi-

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als.

> The Court recognized that parental control of educating their children to deal with troublesome speech is fundamental, and precedes the state's interest in protecting children. (*E.g.*, "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" [quoting *Ginsberg v. New York*, 390 U.S. 629 (1968)], and "it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder." [Quoting *Prince v. Massachusetts*, 321 U.S. 158 (1944).]

The Court broadly distinguished the trio of cases most often relied upon by would-be commercial speech regulators to support its theory of "special solicitude" for children.

> *Ginsberg v. New York, supra*: The Court distinguished *Ginsberg* as upholding a prohibition against sales to minors that "does not bar parents who so desire from purchasing the magazines for their children."
>
> *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978): The "seven dirty words" case was specifically limited to the broadcasting context, and distinguished as approving a regulation that did not carry a criminal penalty.
>
> *Renton v. Playtime Theatres*, 475 U.S. 41 (1956): Most usefully for commercial speech arguments, *Renton*, the "secondary effects" adult theatre zoning case, was distinguished as not being based on content. ("Thus, the [Act] is a content-based blanket restriction on speech and, as such, cannot be properly analyzed as a form of time, place, and manner regulation.") In contrast, restrictions on billboard advertising of tobacco or alcohol beverages are quintessential content regulation.

Positively, the Court placed major reliance on the three cases most often cited by commercial speakers in attacking the "child/solicitude" argument:

> *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989): *Sable* struck down a federal "dial-a-porn" prohibition, largely because government may not "reduc[e] the adult population . . . to . . . only what is fit for children."
>
> *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983), striking down a federal ban on mailing contraceptive advertising because "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." The repeated citation of *Bolger* is particularly telling because, in spite of the observation by Justice Stevens that the banned Internet communications were not "commercial speech," *Bolger* is clearly a commercial speech decision.
>
> *Carey v. Population Services Int'l*, 431 U.S. 678 (1977): Another commercial speech case, cited for the proposition that "[w]here obscenity is not involved, we have consistently held that the fact that protected speech may be offensive to some does not justify its suppression."

The Court finally noted in discussing these key authorities that "*Sable* thus made clear that the mere fact that a statutory regulation of speech was

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> enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity. As we pointed out last Term [in *Denver Area*], that inquiry embodies an 'over-arching commitment' to make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'
>
> Equally plainly, the Court rejected the government's argument that the Act could be sustained because it "leaves open ample alternative channels of communication." The Court held that "alternative channels" was simply an element of the "time, place, and manner" analysis, inapplicable where government regulates speech on the basis of its content.
>
> Even though the Court distinguished *Pacifica* as dealing with the broadcast medium, and cited the "history of extensive government regulation of the broadcast medium" and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), Justice Stevens was careful not to unguardedly present the broadcast regulation cases as established First Amendment doctrine, alluding, for example, to the "scarcity of available frequency *at . . . [the] inception*" of government regulation of the broadcast medium (emphasis added).

In short, *Reno v. ACLU* is a vital reaffirmation, in the context of the Internet, of fundamental First Amendment jurisprudence, arguably equally applicable to the constitutional evaluation of restrictions on commercial speech.

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Supreme Court Upholds Compelled Agricultural Advertising

By P. Cameron DeVore

On June 25, 1997, the Supreme Court decided *Glickman v. Wileman Bros. & Elliott, Inc.*, ___ U.S. ___, ___ S. Ct. ___, 1997 WL 345357, upholding Federal Department of Agriculture marketing regulations imposing assessments on peach, plum, and nectarine growers and handlers to finance generic product advertising and promotion. The Court was quick to emphasize that the advertising regulations were part of a detailed set of marketing orders, displacing a competitive fruit market with a highly regulated one.

The Court reversed the Ninth Circuit which had struck down the advertising program as impermissible under both *Central Hudson* part three (requiring "direct and material advancement of a substantial governmental purpose"), and part four ("no more extensive than necessary"). 58 F.3d 1367 (9th Cir. 1995).

In an opinion written by Justice Stevens for Justices Breyer, Ginsburg, Kennedy, and O'Connor, the Court reversed the circuit not because of a failure to properly apply *Central Hudson* parts three and four but because application of *Central Hudson* was "inconsistent with the very nature and purpose of the collective action program at issue here." Instead, the Court held that there was no First Amendment issue raised by the federal program, and rather that it was "simply a question of economic policy for Congress and the Executive to resolve." In short, the Court decided this was a purely economic regulation, reviewed under a reasonableness standard requiring only that the ad program be "germane" to the goals of the overall marketing program.

Justice Stevens distinguished several lines of First Amendment authorities:

> First, the marketing orders imposed no restraint on the freedom of any producer to communicate any message to any audience [thus distinguishing, *inter alia*, *Central Hudson*, 447 U.S. 557 (1980), *Virginia Pharmacy*, 425 U.S. 748 (1976), and *44 Liquormart*, 517 U.S. ___ (1996)]. Second, they do not compel any person to engage in any actual or

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> symbolic speech [thus distinguishing, *inter alia*, *West Virginia Board of Ed. v. Barnett*, 319 U.S. 624 (1943), *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995)]. Third, they do not compel the producers to endorse or finance any political or ideological views [thus distinguishing, *inter alia*, *Abood v. Detroit Board of Education*, 431 U.S. 109 (1977), and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)]. Indeed, since all of the respondents are engaged in the business of marketing California nectarines, plums, and peaches, it is fair to presume that they agree with the central message of the speech that is generated by the generic program. Thus, none of our First Amendment jurisprudence provides any support for the suggestion that the promotional regulations should be scrutinized under a different standard than that applicable to the other anticompetitive features of the marketing orders [i.e., the rational basis standard appropriate for scrutiny of purely economic regulations].

Justice Stevens, a strong proponent of enhanced First Amendment protection of commercial speech, as evidenced by his opinion in *44 Liquormart*, was obviously comfortable with a non-First Amendment categorization of the federal marketing program. The Court also rejected respondents' arguments that the generic advertising assessments impinged on their speech rights because they "reduce[d] the amount of money that producers have available to conduct their own advertising." The Court recognized that the regulation "does compel financial contributions that are used to fund advertising," but distinguished *Abood*, which had struck down a Michigan "agency shop" requirement that public employees pay union dues, on grounds that they funded "political and ideological" speech unrelated to collective bargaining. In *Glickman*, in contrast, the Court said that "requiring respondents to pay the assessments cannot be said to engender any crisis of conscience."

The Court concluded:

> Although one may indeed question the wisdom of such a program, its debatable features are insufficient to warrant special First Amendment scrutiny. It was therefore error for the Court of Appeals to rely on *Central Hudson* for the purpose of testing the constitutionality of the market order assessments for promotional advertising . . . . The mere fact that one or more producers "do not wish to foster" generic advertising of their products is not a sufficient reason for overriding the judgment of the majority of market participants, bureaucrats, and legislators who have concluded that such programs are beneficial.

Justice Souter, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, dissented and would have affirmed the Ninth Circuit result:

> The legitimacy of governmental regulation does not validate coerced subsidies for speech that the government cannot show to be reasonably necessary to implement the regulation, and the very reasons for recognizing that commercial speech falls within the scope of First Amendment protection likewise justifies the protection of those who object to subsidizing it against their will.

The dissent disagreed that the compelled speech precedents distinguished by the Court were based solely on the impermissibility of requiring political, religious, or doctrinal expression.

> What stood against the claim of social unimportance for commercial speech was not only the consumer's interest in receiving information . . . , but the commercial speaker's own economic interest in promoting his wares. "[W]e may assume that the advertiser's interest is a purely economic one. That hardly disqualifies him from protection under the First Amendment." (Citing *Virginia Pharmacy*.)

Justice Souter stated that he believed it was correct to apply *Central Hudson*, and that the government's regulation here would not pass even part two of the test, requiring a substantial governmental interest, because the authorization of the "compelled advertising programs is so random and so

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randomly implemented, in light of [the government's] stated purposes, as to unsettle any inference that the Government's asserted interest is either substantial or even real." Similarly, he would have held that the program failed *Central Hudson* part three because the Government failed to show how the program directly advanced its interests -- which "alone should be fatal to the Government here, which has the burden to establish the factual justification for ordering a subsidy for commercial speech. Mere speculation about one or another possibility does not carry the burden. . . . There is no evidence of this in the record here."

Finally, Justice Souter agreed with the Ninth Circuit's conclusion under *Central Hudson* part four that the failure of the mandatory scheme to deny growers/handlers any "credit toward their assessment for some or all of their individual advertising expenditures" would be a "far less restrictive and more precise way to achieve the Government's stated interest." Justice Souter concluded:

> Although the Government's obligation is not a heavy one in *Central Hudson* [*i.e.*, is not "strict scrutiny"], and the cases that follow it, we have understood it to call for some showing beyond plausibility, and there has been none here. I would accordingly affirm the judgment of the Ninth Circuit.

Justice Thomas, joined by Justice Scalia in part, separately dissented because he "continue[s] to disagree with the use of the *Central Hudson* balancing test and the discounted weight given to commercial speech generally," as expressed in his concurrence in *44 Liquormart*. "Because the regulation at issue here fails even the more lenient *Central Hudson* test, however, it, a *fortiori*, would fail the higher standard that should be applied to all speech, whether commercial or not." Justice Thomas concluded

> What we are now left with, if we are to take the majority opinion at face value, is one of two disturbing consequences: either (1) paying for advertising is not speech at all, while such activities as draft card burning, flag burning, armband wearing, public sleeping, and nude dancing are, or (2) compelling payment for third party communication does not implicate speech, and thus the Government would be free to force payment for a whole variety of expressive conduct that it could not restrict. In either case, surely we have lost our way.

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Recently Published: *Newsgathering and the Law* by C. Thomas Dienes, Lee Levine and Robert C. Lind (983 pages, Michie 1997). As a collaboration between academic and practicing attorneys, the work is a thorough compendium of the legal issues surrounding newsgathering. In addition to devoting a chapter each to a number of media access rights (including access to judicial proceedings, judicial records, attorneys and jurors, public places and events, executive and legislative branches, federal government records, and state government records), the authors also examine the legality of various newsgathering techniques, and the shield laws, and constitutional and common-law privileges protecting newsgathering. The organization and thoroughness of this book should make it a practical and useful guide for media attorneys, interested reporters, and commentators alike.

Where Official Record Motion Fails, Actual Malice Motion Succeeds

By Carol Jean LoCicero

Because a news article referring to a municipal official's car as a "travelling love nest" was in some sense based on an ambiguous government report, a Florida trial court recently granted the *Sarasota Herald-Tribune*'s motion for summary judgment based on lack of actual malice. *Miles v. the Sarasota Herald-Tribune Co.*, Case No. 95-1427 CA (Fla. Cir. Ct., Charlotte Country, motion granted July 8, 1997). An earlier motion to dismiss, based on the official record reporting privilege, failed because the Court perceived a factual issue about whether the article was fair and accurate. The U.S. Supreme Court's little-used decision in *Time, Inc. v. Pape*, however, allowed the paper to make largely the same motion on actual malice grounds. This time it won.

***Pape* Applied Successfully in Wisconsin & Florida**

The article was based on a lengthy government investigative report. The report concluded that the head of the municipality's largest department had engaged in sex with another employee on city property, on city time. The *Herald-Tribune* published a series of articles on the government's investigation and its conclusions. One article included colorful details that concededly were not contained in the text of the investigator's conclusions and some statements that were extrapolations by the reporter from testimony in the background materials attached to the report. The paper said that the official's car was a "travelling love nest" known by other employees as "the one-headed, two-headed vehicle." The latter term apparently referred to the tendency of one passenger's head to disappear from sight when the car was parked.

If a public official plaintiff had not been involved, the paper might have been faced with a costly jury trial. The *Pape* decision allowed the paper a second bite at the apple. At least where a public official or public figure and a government document are involved, an actual malice summary judgment motion should naturally follow any denial of a motion to dismiss on privilege grounds.

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Wisconsin Affirms Summary Judgment Under *Pape* Rational Interpretation Doctrine

By Robert Dreps

The Wisconsin Supreme Court now has affirmed a decision from last year granting summary judgment to the *Milwaukee Journal Sentinel*, under the rational interpretation doctrine of *Time, Inc. v. Pape*, in a defamation lawsuit brought by a former public official. In *Torgerson v. Journal/Sentinal Inc.*, Nos. 95-1098 and 95-1857 (Wis. June 11, 1997), John W. Torgerson sued the newspaper over two articles describing his concurrent positions as Deputy Insurance Commissioner and the co-owner of a title insurance agency. The Office of Commissioner of Insurance regulates the title insurance industry. The Court concluded, as a matter of law, that there was insufficient evidence of actual malice for Torgerson to avoid summary judgment.

Libel Claim Based on Allegation of Conflict of Interest

The newspaper articles claimed Torgerson, as deputy commissioner, involved himself in a rule change affecting the title insurance industry despite "warnings" in two letters from the State Ethics Board "to avoid a conflict of interest by staying out of title insurance regulation." The articles reported as well that Torgerson had said several months earlier "that he had stayed out of title insurance matters" as a public official.

Torgerson complained that the articles falsely implied that he had abused his public position to advance his personal business interests. Torgerson argued that the Ethics Board had given him "advice," not warnings, to avoid potential conflicts of interest and had expressly advised him that state law did not prohibit his involvement in title insurance matters that did not directly affect his business.

For evidence of actual malice, Torgerson cited earlier articles by the same reporter that Torgerson said

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more accurately described the Ethics Board's advice and the reporter's "destruction" of various documents related to this story, including his interview notes with the legal counsel for the State Ethics Board, after the newspaper had received a retraction request. The reporter knew litigation was likely, the plaintiff alleged, raising an inference that the notes would have provided evidence of actual malice.

The newspaper argued that any alleged implications of unethical conduct or improper motives could not be proved true or false and were privileged as fair comment on the performance of a public official. There was no evidence of actual malice, moreover, because the reporter had rationally interpreted the Ethics Board's ambiguous advice to Torgerson. It was irrelevant that the reporter had discarded his notes from these and many other stories when he was assigned smaller space in the newsroom, the newspaper asserted, because nobody disputed what was said in those interviews.

Articles a Rational Interpretation of Documents

In its unanimous decision, the court first acknowledged its duty to review the record independently in public figure libel actions, shouldering a "constitutional responsibility that cannot be delegated to the trier of fact," *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). Therefore, it held, summary judgment is an important and favored method for adjudicating public figure defamation actions. *Torgerson* at 14. The court did not decide whether a defamation plaintiff, under state procedural rules, must present clear and convincing evidence of actual malice to avoid summary judgment. *Id.* at 16. The court applied that standard to this case, however, because the plaintiff had not raised the issue.

The court ruled it cannot "infer actual malice sufficient to raise a jury issue from the deliberate choice of a rational interpretation of ambiguous materials." *Torgerson* at 20, citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971). When a journalist reports on an ambiguous government document, the journalist's choice of one interpretation from a number of possible rational interpretations does not create a jury issue of actual malice. The court held that the reporter had rationally interpreted the Ethics Board's ambiguous advice that Torgerson should "err on the side of caution in avoiding situations of potential conflict" between his public duties and private interests as a warning to stay out of title insurance matters.

Reporter's Destruction of Notes Irrelevant

The court also noted that a reporter's destruction of notes is ordinarily sufficient evidence of actual malice to defeat summary judgment. *Id* at 23. It criticized the journalist for discarding his notes and the newspaper for not preventing that. But after reviewing the contrasting outcomes of *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert denied*, 485 U.S. 993 (1988) and *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085 (7th Cir. 1990), the court held that a jury could not infer actual malice from the missing notes because they were not relevant. The Ethics Board's legal counsel had affirmed in a deposition what he had told the reporter about Torgerson's statements to him. Any inference of actual malice based upon the discarded notes "is of little or no weight when the uncontroverted deposition testimony makes the plaintiff's assertion no more than a mere possibility. A motion for summary judgment cannot be denied on such a remote possibility, whether or not the clear and convincing standard is applied." *Torgerson* at 26-27.

Robert Dreps is with the firm LaFollette & Sinykin in Madison, WI and represented Journal/Sentinal, Inc. in this matter.

Second Circuit Applies New York's *Immuno* Privilege for Opinion

By Kevin Goering

On July 17, 1997, the United States Court of Appeals for the Second Circuit, applying the privilege under New York law for opinion, recognized that statements of "conjecture and rumor" are, in the appropriate context, protected as a matter of law. *Levin v. McPhee*, No. 96-7408, slip op. (2d Cir. July 17, 1997). In its 18 page unanimous decision, the Court affirmed in virtually all respects the earlier decision of District Judge Louis A. Kaplan which had granted pre-answer motions to dismiss filed by defendants John McPhee, *The New Yorker*, and Farrar, Straus & Giroux. *Levin v. McPhee*, 917 F.Supp 230 (S.D.N.Y. 1996) (see March 1996 *LDRC LibelLetter* at p. 5). Judges Feinberg and McLaughlin concurred in the panel's opinion authored by Chief Judge Jon O. Newman.

A Mysterious Fire

This libel case was commenced in 1995 by plaintiff Ilya D. Levin, based upon a *New Yorker* article authored by John McPhee and a subsequent book published by defendant Farrar, Straus & Giroux. The book and article entitled "*The Ransom of Russian Art*" described the life of Norton Dodge, an American collector of art works of dissident artists in the former Soviet Union. One of the artists discussed in the story is Evgeny Ruhkin, a prolific and colorful dissident painter who died in a mysterious fire in his Leningrad studio in 1976. In one section of the story, Mr. McPhee described the circumstances surrounding Ruhkin's death. The author recounted the undisputed fact that the night of the fire, Ruhkin was in his studio with plaintiff Levin, Evgeny Esaulenko, a now deceased writer, and Ludmila Boblyak, Mr. Esaulenko's wife. Ruhkin and Boblyak died in the fire while Levin and Esaulenko survived.

The book describes five different "versions" advanced by different sources to explain Ruhkin's death. In a passage which the Court considered significant, the author notes that "the death of Ruhkin quickly became a story variously told, and with about as many versions as there were tellers, and since it was also a story seemingly known to silent narrators its mystery had been preserved." *Id.* at 5. The five versions reported in the book are not consistent with each other. For example, one version accuses the K.G.B. of burning the studio without being aware that Ruhkin was in it. Two other versions raise the possibility that the K.G.B. intended to kill Mr. Ruhkin and the possibility that the fire was an accident. Still another version raised the possibility that Ruhkin's wife had a role in the killing. This version also mentions the "possibility" that plaintiff Levin committed the murder for the K.G.B. The final version, recounted by Ruhkin's widow, directly accuses Esaulenko and K.G.B. "murderers" of perpetrating the crime.

The New Yorker article contained two of the versions of Ruhkin's death described in the book. The first version in the article related "Dodge's version," surmising that the K.G.B. may have set the fire without knowing that Ruhkin was present, while the second version was that of Ruhkin's wife which did not even mention plaintiff Levin.

Plaintiff alleged that the book and article were defamatory because they falsely stated or implied that he was involved in Ruhkin's death and that he was involved in some way with the K.G.B. In addition to his libel claim, he asserted a claim for intentional infliction of emotional distress.

Motions to Dismiss

All three defendants filed motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). *The New Yorker*'s first argument was that the statements about Levin were not capable of a defamatory meaning. All defendants argued that these statements were protected by the New York constitutional opinion privilege recognized in *Immuno A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S. 2d 906 (1991). *The New Yorker* also argued that the statements in the article were substantially true and the book publisher argued that the book passages were protected by the neutral reportage privilege. All defendants also moved to dismiss the claim for intentional infliction of emotional distress for failure to state a claim.

In the lower Court, District Judge Kaplan ruled that New York law should apply to the issues surrounding the publication of the book and article, even though plaintiff Levin is now a resident of the District of Columbia. This ruling was based in part on Levin's implicit agreement in the District

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Court that New York law should apply. The Court rejected the defense that the statements were not capable of a defamatory meaning, based upon the Court's reading of Ruhkin's widow's version which accused Esaulenko of being a murderer and in which she elsewhere referred to the plural "murderers". The District Court rejected the argument that the passages were protected as a matter of law by the neutral reportage privilege, but agreed that both the book and the article were protected by the *Immuno AG* privilege. Moreover, the Court dismissed plaintiff's claim for intentional infliction of emotional distress because the claim is duplicative of the defamation claim and because it failed to allege sufficiently "outrageous" conduct under New York law.

Opinion Under New York Law

The Second Circuit affirmed Judge Kaplan's ruling in almost all respects. First, Judge Newman agreed with the district court that both the book and the article are reasonably capable of a defamatory meaning. Next, the court recognized that although the Supreme Court in *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990), held that the United States Constitution offers no wholesale protection for so-called "expressions of opinion" if those expressions "imply assertions of objective fact," it recognized that New York's *Immuno AG* test "does and is intended to differ from the inquiry required under the First Amendment." *Levin v. McPhee, slip op.* at 15. The New York analysis from *Immuno AG* "begins by looking at the content of the whole communication, its tone and apparent purpose." *Id.* It is a three-stage inquiry: first, the court looks at the language for any precise meaning; second, the court determines whether the statement is susceptible of being proven false; and third, the court evaluates the context for what it conveys to the reader. *Slip op.* at 14.

The court noted, however, "that the thrust of the dispositive inquiry under both New York and Constitutional law is 'whether a reasonable reader could have concluded that [the publications were] conveying facts about the plaintiff'." *Id.* In the court's formulation of the text, "when the defendant's statements, read in context, are readily understood as conjecture, hypothesis, or speculation, this signals the reader that what is said is opinion and not fact." *Id.* at 16. The Second Circuit cautioned, however, that even conjecture, hypothesis or speculation "may be actionable if the statements in question imply that the speaker's opinion is based on the speaker's knowledge of facts that are not disclosed to the reader." *Id.*

In applying the three-part test it had outlined, the court of Appeals focused on the "author's clear signals to indicate to the reader that the versions of the events surrounding the studio fire were nothing more than conjecture and speculation." *Id.* at 17. Accordingly, the court held that "a reasonable reader would understand that any allegations of murder, especially any implicating Levin, are nothing more than conjecture and rumor." *Id.* at 18. The Court found it unnecessary to discuss the parties' other alternative theories for dismissal of the libel claims (including the neutral reportage doctrine) and affirmed the dismissal of the claim for intentional infliction of emotional distress.

The Second Circuit's unanimous opinion represents the first significant application of the *Immuno AG* privilege in that Court.

Kevin W. Goering, a partner in the firm Coudert Brothers, Christine M. Hoey, of Coudert brothers, and Devereux Chatillon, Vice President and General Counsel of The New Yorker, represented The New Yorker in this case.

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OH Court Grants Summary Judgment in 12-Plaintiff, 37-Count Libel/Privacy Suit

Issues of: Newsworthiness, Implication and Innocent Construction

BLASTS PSYCHOLINGUIST

By Jonathan Hart

On July 8th, seven years and 37 claims after *The Toledo Blade* published an ambitious eight-day series based largely on Internal Affairs records obtained from the Toledo Police Division through vigorous pursuit of a public records request, an Ohio trial court entered summary judgment against ten police officers and the two former wives of a deceased police officer who had sued the paper on various libel and invasion of privacy theories. In an extraordinarily thoughtful 162-page opinion, Judge William J. Skow expressed the hope that his ruling "will be read and interpreted as a strong statement of the primacy of the freedom of the press, especially in relation to lawsuits filed by public officials." *Early v. The Toledo Blade Co.*, No. 90-3434 (Ohio C.P., Lucas County, July 8, 1997).

"It is hoped that this opinion will be read and interpreted as a strong statement of the primacy of the freedom of the press, especially in relation to lawsuits filed by public officials."

The litigation arose out of a series bearing the general headline "The Secret Files of Internal Affairs" that ran in *The Blade* in the summer of 1990. The series chronicled claims of misconduct by police officers during the 17-year history of the Internal Affairs Unit. Each daily installment focused on a different topic, including police violence, sexual misconduct, domestic violence involving police officers, police errors that resulted in injury or death, misuse of weapons, and drug and alcohol abuse by police officers.

The plaintiffs brought claims for libel and various forms of invasion of privacy. The plaintiffs' false light claims were dismissed in 1991, since Ohio does not recognize this cause of action. The libel, private facts, and intrusion on seclusion claims were addressed in the court's recent opinion. The opinion is remarkable for its scope, for its patient analysis of a massive record, and for its eloquent articulation of fundamental First Amendment principles. Of particular interest are the court's application of Ohio's protective innocent construction rule; its recognition that the newsworthiness of a story is determined by reference to the subject matter of the story as a whole, not by whether the identity of an individual mentioned in the story is itself newsworthy; its unambiguous rejection of the testimony of a self-described "psycholinguist" who purported to testify, as he had with some success in previous Ohio proceedings, on the hidden meanings embedded in the articles and on linguistic clues that the reporters published the stories with actual malice; and its reaffirmation that a public official cannot prevail on a libel by implication claim absent evidence that the defendant publisher intended, or at least was aware of, the alleged implication.

Application of Ohio's Innocent Construction Rule

The court rejected many of the plaintiffs' defamation claims based, in part, on application of Ohio's broad innocent construction rule, which provides that "if allegedly defamatory words are susceptible to two meanings, one defamatory and one innocent, the defamatory meaning should be rejected, and the innocent meaning adopted." *See Yeager v. Local Union 20*, 6 Ohio St. 3d 369, 372 (1983). The plaintiffs' defamation claims failed because even if the challenged statements were susceptible to the defamatory meanings alleged by the plaintiffs, they were also subject to construction as innocent, non-defamatory statements.

Standard for Determining Newsworthiness of Publishing a Victim's Name

Several of the plaintiffs argued in their invasion of privacy claims that their names should not have been published in the series. The articles were actionable, according to the plaintiffs, because their identities, unlike the events into which they were drawn, were of no legitimate concern to the public. The court noted that each of these plaintiffs was a blameless victim, and opined that their identification did not enhance the credibility or integrity of *The Blade's* series.

Relying on *Florida Star v. B.J.F.*, 491 U.S. 524, 537

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(1989), however, the court found that in determining whether a story is newsworthy, and therefore not actionable, the court should look to whether the general subject matter of the story is newsworthy, not to whether the identity of a particular plaintiff is newsworthy. Because the events reported on were of legitimate concern to the public, identification of the plaintiffs was protected. And although the court did not applaud the journalistic decision to name innocent victims, it unflinchingly reaffirmed that journalistic decisions must be left to journalists, not to courts: "the legal analysis of an invasion of privacy by publication of private facts claim does not involve an evaluation of journalistic fairness."

Court Rejects Testimony of Psycholinguist

To support the contention that certain of *The Blade's* statements had defamatory meanings and were published with actual malice, the plaintiffs proffered the opinion of an expert in "psycholinguistics," Professor P.K. Saha of Case Western. The court found the bulk of Professor Saha's psycholinguistic analyses to be "strained, attenuated, tortured or balderdash." Based on the "preposterous" nature of this expert testimony, the court opined that the field of psycholinguistics "barely rises to the category of junk science." The court therefore struck his testimony in its entirety.

Libel by Implication

Several of the plaintiffs claimed that even if the text of *The Blade's* reports was accurate, *The Blade* defamed them by implication or innuendo. The court found, however, that when a public official brings a libel by implication claim, proof of actual malice requires evidence that the defendant was, at the very least, aware of the existence of the alleged implication. Without such knowledge by definition, a defendant *cannot* publish with knowledge of the falsity of the implication or with reckless disregard for such falsity. Under this logical view, many of the plaintiffs' claims failed; the plaintiffs could not establish that *The Blade* had foreseen the posited implications. The court called the plaintiffs' argument that actual malice can be found even where the defendant had no awareness of an allegedly defamatory implication, "a considerable leap" from the rule of *New York Times v. Sullivan*.

Postscript

A lengthy "Postscript" to the Opinion noted that the purpose and effect of *The Blade's* series were "in keeping with the valued role of a free press in our society." The court found that "some important community benefits inured as a result of the series," including, among other things, the formation of a Citizen Advisory Review Board to review complaints of police misconduct and the elimination of the "seamy, contemptible practice of individual officers dispensing 'courtesy cards' " that allowed favored friends and relatives to avoid being held accountable for offenses for which other citizens are routinely penalized. But it was *The Blade's* vigorous defense of this massive lawsuit that the court hoped would have the most lasting effect:

> It is hoped that this opinion will be read and interpreted as a strong statement of the primacy of the freedom of the press, especially in relation to lawsuits filed by public officials. And, it is hoped that the media will be less left to speculation as to what might or might not be deemed actionable. If any of these aspirations become reality, then The Blade's spirited and total defense of this multi-plaintiff, multiple claim action will sound echoes well beyond the relatively narrow boundaries of the "Secret Files" series itself. Because, if this opinion and The Blade's vigorous defense can inhibit the lodging of future and specious defamation and privacy actions, then other publications will be spared the chilling and enormously expensive experience of deciding what should be well-defined, well-protected, and well-understood rights.

The Toledo Blade Company was represented by Fritz Byers of Toledo and by Jonathan Hart and Michael Kovaka of member firm Dow, Lohnes & Albertson, PLLC of Washington, D.C.

LDRC would like to thank the following interns for their contributions to this month's LDRC LibelLetter:

Erik Bierbauer, NYU Law School
Patrick McCabe, NYU Law School
Ted Smoot, Columbia Law School

Brian Wilson Autobiography: Mom's Suit Dismissed

Statements Argued to be Implication and Opinion About Brother Left Behind for Trial

By R. Bruce Rich and Elizabeth Weiswasser

The federal district court in New Mexico (Judge Conway) recently dismissed a libel action brought against HarperCollins Publishers Inc. by the mother of Brian Wilson -- a founder of the popular musical group, The Beach Boys -- based upon plaintiff's failure to prove any actual harm to her reputation. The lawsuit arises out of the HarperCollins' publication of Mr. Wilson's 1991 autobiography *Wouldn't It Be Nice -- My Own Story*. The Court also granted a substantial part of HarperCollins' motion for summary judgment on the libel claims of Brian Wilson's brother, Carl Wilson, brought on the same book. (*Wilson v. HarperCollins Publishers Inc.*, Civ. No. 94-892 JC/LFG (July 7, 1997)).

Plaintiff Must Prove Reputational Harm

Ms. Wilson had initially alleged that the book falsely portrayed her as an abuser of alcohol and as passively standing by while her husband abused their three children. In 1995, the Court dismissed the alcohol allegations on the ground that the challenged passages could not sustain the interpretation Ms. Wilson sought to ascribe to them. In its recent motion for summary judgment, HarperCollins argued that the remaining allegations should be dismissed in view of the New Mexico requirement that a plaintiff show actual injury to reputation as part of her *prima facie* case, and Ms. Wilson's unequivocal admission during her deposition that she had not sustained any such injury on account of the book. HarperCollins also argued that the challenged portrayal of her was substantially true.

The Court adopted HarperCollins' position (over Ms. Wilson's argument that her burden had been met by her assertion that she had suffered emotional distress), holding that her inability to identify a single person who thought less of her on account of the book precluded her from establishing a *prima facie* case of defamation under New Mexico law. The Court thus dismissed Ms. Wilson's remaining claim. (In view of this holding, the Court did not address the issue of substantial truth.)

Substantial Truth and an Admission Found Wins Dismissal

Carl Wilson claimed that the book, *inter alia*, falsely portrayed him as a purchaser of illegal narcotics and as an abuser of alcohol. HarperCollins asserted in its summary judgment motion that any such portrayals (and the passages on which they were based) were substantially true in view of Mr. Wilson's deposition testimony admitting to a history of severe alcohol abuse and to a history of abusing and purchasing cocaine. Moreover, HarperCollins adduced dramatic evidence showing the truth of the specific passage on which the narcotics claim was based, which describes Mr. Wilson's purchase of heroin while the Beach Boys were touring in Australia in 1978.

HarperCollins had uncovered an article published in an Australian music magazine in 1978 which quotes Carl Wilson as admitting to making two purchases of heroin during the tour discussed in the book. HarperCollins was able to locate the journalist who wrote the article and interviewed Carl Wilson for it. That journalist not only signed an affidavit stating that Carl Wilson had made such admissions during their 1978 interview, but turned over to HarperCollins an audiotape recording of the interview, on which Carl Wilson clearly describes his two purchases of heroin. Against this factual backdrop, the Court granted summary judgment as to the heroin allegation. (The Court, we believe by oversight, failed to address the alcohol abuse allegation. HarperCollins has moved for reconsideration on that ground.)

The Court also granted HarperCollins' motion for summary judgment on approximately half of the remaining challenged passages, concluding, among other things, that they were variously: substantially true, not of and concerning Carl (or the Beach Boys), not susceptible of the meaning Carl sought to ascribe to them, and/or not defamatory.

Opinion Not As Successful

The Court declined, however, to grant HarperCollins' motion for summary judgment on a number of passages, which HarperCollins asserted to be, among other things, not susceptible of defamatory meaning and protected opinion in any event. Mr. Wilson has alleged, for example, that certain passages in the book falsely portray him as callous, caring more about money than about his brother's health, and being indecisive. While the Court indicated that it would permit Mr. Wilson's

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claims relating to these passages to go to trial, it did advert to the possibility of those claims being dismissed on a directed verdict or judgment notwithstanding the verdict following trial.

R. Bruce Rich, a partner in the Trade Practices and Regulatory Law Department at Weil, Gotshal & Manges LLP in New York City, and Elizabeth Weiswasser, an associate at that Firm, are the attorneys for HarperCollins Publishers Inc. in the litigation, as is William S. Dixon, a partner at Rodey, Dickason, Sloan, Akin & Robb, P.A. in Albuquerque, New Mexico.

Motion to Dismiss: A Winning Tactic in New Mexico

By William S. Dixon

The dismissal of a multi-count complaint for failure to state a claim in *Schuler v. McGraw-Hill Companies*, No. Civ. 96-292 (D.N.M. June 11, 1997), should give defense practitioners both heart and comfort in deploying a motion for more definite statement in tandem with a motion to dismiss to win libel cases at an early stage. It also constitutes a stout affirmation that courts will not permit a plaintiff to circumvent the constitutional and common law limitations on libel by dressing their claims in an alternative garb, such as false light, intentional infliction of emotional distress, interference with contractual relations, or prima facie tort.

The *Schuler* case arose from a Business Week article entitled "Did the Amex Turn a Blind Eye to a 'Showcase' Stock?" which focused on American Stock Exchange's Emerging Company Marketplace (ECM) list. Its thrust was to question the appropriateness of Amex's investigation and selection of companies for the list. In particular, the article discussed the unhappy financial vicissitudes of Printron, an Albuquerque "high-tech" company whose stock price plummeted after being listed on ECM.

Business Week Article Discusses Sex-Change Exec

In the course of discussing Amex's investigation of Printron, Business Week recounted the colorful history of Printron's president, Eleanor Schuler. As it turns out, in a former life Eleanor had been a man. As John Huminick, she had worked as a welder and metallurgist, claimed to have operated as a double agent for the F.B.I. combatting Soviet espionage, and later served as an officer of more than one publicly-held company. In the early 1970's Huminick had a sex change operation and assumed the name and identity of Eleanor Schuler. Thereafter, she served on the board of directors and as president of Printron for several years.

The Business Week article disclosed that in 1975 the SEC had filed charges against Huminick and others, resulting in a consent decree against him. (Huminick signed this decree as Schuler, although the proceeding was styled as one against Huminick and others.) It described Huminick/Schuler's failure to disclose this prior consent decree in a sunshine filing in New York State or to mention it in subsequent SEC filings. The article speculated that one reason Amex may not have caught the earlier Huminick consent decree in investigating Printron for the ECM list was that it was brought against Huminick and Huminick was now using the name and persona of Schuler in her corporate activities. In this context the article discussed Schuler's sex change operation, her derring-do as a spy, her authorship of a book on anti-espionage activities, her interviews with People Magazine and the Washington Post regarding her sex change, and Huminick/Schuler's participation in the affairs of public companies.

Exec Sues for Libel and Privacy Torts

Initially, Schuler's complaint against Business Week merely attacked the articles and alleged, in the gross and without specificity, libelous statements. She also alleged false light, private facts and intrusion claims, intentional infliction of emotional distress, interference with contractual relations, and prima facie tort.

From the outset the defense strategy was to compel Schuler to identify *verbatim* each libelous statement and to challenge directly and early on the viability of any cause of action based on them. In their motion for more definite statement the defendants argued that unless plaintiff specifically identified the precise statements claimed to be libelous, neither defendants nor the court could determine whether they were susceptible to a defamatory meaning, whether they were of or concerning the plaintiff, and whether they were provably false or constituted nonactionable opinion under New Mexico law.

The Court granted the motion for more definite statement and required the plaintiff to allege with specificity each state-

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ment which she claimed was defamatory. In her amended complaint Schuler identified some 39 statements as defamatory. Defendants then filed their motion to dismiss on the grounds, *inter alia*, that the statements were not actionable as defamation and that Schuler could not circumvent the strictures of libel law by characterizing them as other torts. Defendants also moved to dismiss the private facts and intrusion claims on the ground that the reference to her sex change operation was an integral and newsworthy part of the article and not highly offensive.

Motion to Dismiss Demonstrates Failure to State Cause of Action

The Court's opinion methodically reviewed each statement to determine whether they were actionable as defamation. Although the opinion is fact-specific, it demonstrates the advantage of raising early and thoroughly the issue of whether allegedly libelous passages are actionable or not. The Court found that references to Schuler's "checkered record," the "stain on her record" and to the "bizarre Printron case" were statements of opinion and not actionable under New Mexico law. The Court also found that several statements were not of or concerning Schuler but rather about Amex. Moreover, the Court found that certain statements---for example, that the name Eleanor Schuler was made up "out of thin air"---were not even defamatory.

Finally, the Court declined Schuler's invitation to create a libel-by-implication case from the article's description of the omission of the SEC/Huminick proceeding in subsequent SEC and New York sunshine filings. Schuler argued that by stating that the prior proceeding was omitted, Business Week implied that Schuler was legally required to disclose it but had dishonestly failed to do so. The Court refused to engage in this inferential rewriting of the article, confirming that the disclosure had indeed been omitted and emphasizing that the article itself acknowledged that the reporting requirement was a matter of dispute.

The Court dismissed the other tort claims on the ground that they were based on the same statements it had found protected or nonactionable. It ruled that the false light claims were based on the identical statements as were the libel claims, that the improper means alleged regarding the claims for interference with contractual relations and prospective advantage were the defamatory statements which had already been held not actionable, and that prima facie tort could not be used to end-run the traditional state and constitutional limitations on libel actions. The Court dismissed the intrusion claim because it replicated the "private facts" claims and dismissed the "private facts" claim because the published information was newsworthy and central to the thesis of the article, adding that rather than shunning publicity, Schuler had courted it by giving interviews to the press regarding her gender change. Finally, the Court disposed of the intentional infliction claims by finding that Business Week's conduct in publishing information regarding the sex change was not outrageous.

Comprehensive Motion to Dismiss Can Be A Winning Strategy

Schuler thus stands for the continued vitality of using motions for more definite statement and motions to dismiss in tandem to force a plaintiff to identify the allegedly defamatory statement with precision and to obtain an early and conclusive court ruling on the viability of the causes of action prior to expensive discovery. Defendants must, however, give the motion extensive attention and briefing. In this case defendants filed a 26-page brief analyzing in detail and in context each statement claimed to be libelous and the reasons why it was not actionable. If defendants treat the motion to dismiss as a perfunctory obstacle certain to be denied or fail to demonstrate the nonactionable character of the specific statements at issue, the courts will most likely do so as well.

The problem is compounded in a case like *Schuler* by the number of statements alleged to be defamatory. Unless the defense attorney demonstrates with a clarity of analysis the absence of a cause of action as to each statement, the sheer number of statements claimed to be actionable may overwhelm judicial analysis and discrimination and cause the Court to throw up its hands and let the jury sort it out.

Schuler demonstrates that a conscientious court will take the time to review in detail the statements if the defense attorney gives it the materials with which to work.

Finally, it demonstrates the importance of challenging early and often the plaintiffs' attempts to avoid the strict rules pertaining to libel by cloaking defamation in alternative tort theories.

William S. Dixon is with the firm Rodey, Dickason, Sloan, Akin & Robb in Albuquerque, NM.

Florida Court: "Fair Report" Privilege Covers Humane Society Investigation of Vet

By Charles D. Tobin

Press reports on an investigation by a private, non-profit humane society that enforces animal control laws are subject to the "fair report" privilege, a Florida trial judge has ruled.

In his decision, Lee County Circuit Judge R. Wallace Pack held the humane society's veterinarian had no libel cause of action against the News-Press of Ft. Myers for reporting on the investigation that targeted him. *Fancher v. Lee County Humane Society, Inc., et al.*, No. 96-8498-CA-RW (Fla. Cir. Ct. July 14, 1997).

Last fall, employees at the society's animal shelter complained to the governing board about plaintiff, Dr. David Fancher, the society's staff veterinarian. The employees, according to the court's decision in the libel lawsuit, charged that Fancher had improperly euthanized animals and was responsible for unclean conditions at the shelter.

Fancher alleged that the employees, some of whom he named as defendants in the libel lawsuit, themselves were responsible for the shelter's conditions and only made their claims in retaliation for complaints he had about them to the board.

In September 1996, the News-Press reported on the investigation and the board's decision to remove Facher pending an investigation. Fancher filed a libel lawsuit against the newspaper. The lawsuit alleged the newspaper had falsely reported Fancher was "suspended," when, according to him, he actually had been "placed on administrative leave with pay." He also objected to the newspaper's recounting of the employees' allegedly false charges. In the same state-court complaint, Fancher also sued the humane society's board for an alleged deprivation of his civil rights under 42 U.S.C. 1983 and for an injunction to stop the investigation.

Judge Pack, in ruling on the newspaper's motion to dismiss, noted that Fancher's claims against the humane society alleged the private organization "is endowed with governmental powers" and "operates an animal shelter and performs animal control functions" for the county and two local cities. The complaint also alleged that the society engages "in the performance of governmental functions" and that its animal control officers "have the authority to issue citations and prosecute offenders." Finally, the court noted that in his civil rights claims, Fancher alleged the society and its directors at all times "were acting under 'color of law'."

The court reasoned that "Dr. Fancher's Complaint alleges the Humane Society operates as an arm of the government." Therefore, Judge Pack ruled, reports on the humane society's investigation were subject to the the fair report privilege, which protects substantially accurate press reports on government information, even if the information is false.

Judge Pack noted the News-Press specifically had reported Fancher was "suspended with pay" and not just "suspended." The court cited to Florida courts, in non-libel contexts, that have interchangeably used the terms "suspension" and "administrative leave". Finally, the court cited a New York libel decision that held the use in a newspaper article of "suspended" instead of "administrative leave" was not actionable. The court concluded that the News-Press's use of "suspended with pay" was substantially accurate and, thus, was privileged.

The court also held the complaint's "conclusory" allegations of actual malice "will not save this action from dismissal under the fair report privilege," since, under Florida precedent, "allegations of actual malice are irrelevant in actions concerning substantially accurate press reports on the government." The court granted the News-Press motion to dismiss the case with prejudice.

Plaintiff will have until mid-August to file an appeal.

Charles D. Tobin of Gannett Co., Inc., and Steven Carta of Simpson, Henderson & Carta, Ft. Myers, represent the News-Press.

Vulgarism Survives Motion In Illinois

Judge Gettleman, Northern District of Illinois, held that an employer's alleged reference to an ex-employee as "cunt" was sufficient to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim. After being discharged, Olivia Ann Cozzi, a credit supervisor with Pepsi-Cola General Bottlers, Inc., filed a five-part complaint against her former employer, claiming in part that Pepsi and its employees had spread rumors to Cozzi's friends, associates and/or prospective employers -- most notably that Cozzi was a "bitch" and a "cunt." *Cozzi v. Pepsi Cola*, 1997 WL 308841 (N.D.Ill.).

Cozzi argued that the epithets were false accusations of fornication or adultery, and thus constitute per se defamation under the Illinois Slander and Libel Act, 740 ILCS 145/1. Relying on 19th century precedence, Pepsi maintained that 'bitch' and 'cunt', if used in their common meaning, cannot amount to charges of unchaste character. The court, observing that the common meaning of these words has probably changed since the 19th century, concluded that 'cunt' may be used as a synonym for 'prostitute' and therefore represents a cognizable claim. 'Bitch,' however, is a less vulgar and more common vituperation that is insufficient to establish a per se defamation without the support of additional adjectives.

The court also denied Pepsi's motion to dismiss the complaint as "too vague for [Pepsi] to form a responsive pleading." Pepsi pointed out that Cozzi's complaint not only fails to indicate the dates or context in which any of the statements were made, but also does not identify the speakers or recipients of the allegedly defamatory statements. Noting the tension between federal pleading standards (which require that the plaintiff set forth the actual defamatory statement in their complaint) and the Northern District of Illinois' practice of not requiring verbatim renditions of the defamatory statement (due to the difficulty of knowing exact details of the claim prior to discovery), the court reached a compromise, directing Cozzi to amend her complaint to include factual information regarding the speaker, audience, timing, words, and context in which the alleged statements were made, but only "to the extent of her current knowledge." Cozzi's additional claim that Pepsi had "black-balled" her by defamation aimed at prospective employers was found to be similarly vague and subject to amendment, as it failed to identify the prospective employers involved, the date of the alleged references and the substance of the defamation.

Eighth Circuit: Corporations Are Public Figures Under Minnesota Law

By Thomas Tinkham

The Court of Appeals for the Eighth Circuit, applying Minnesota law in a non-media case, held that corporations, at least those in regulated industries, are public figures and must prove actual malice. *Northwest Airlines, Inc. v. Astraen Aviation Services, Inc.*, 111 F.3d 1386 (8th Cir. 1997). In this non-media case arising out of the United States District Court for the District of Minnesota, Astraea Aviation counterclaimed against Northwest Airlines for, among other things, defamation. The alleged defamatory comments were made by a representative of Northwest Airlines and reprinted in the *Minneapolis Star & Tribune*. The comments expressed Northwest's concern about the quality of Astraea's work including comments regarding defective parts, leaky fuel lines, and an undetected tail crack on one of the aircraft being refurbished for Norwest Airlines by Astraea.

After determining that it was appropriate to apply Minnesota law, the Court of Appeals affirmed the trial court's grant of summary judgment to Northwest Airlines.

Basing its decision on *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W. 2d 476, 487 (Minn. 1985) the Eighth Circuit concluded that in Minnesota a corporation claiming defamation, at least those in highly regulated industries, must prove actual malice in order to recover on a defamation claim. Minnesota does not recognize that corporations have as great a need to vindicate defamation comments as do individuals. The Court also concluded that Minnesota would not differentiate between media and non-media defendants in applying this rule; and concluded that Minnesota affords non-media defendants the same First Amendment protection as media defendants.

Applying the standard of actual malice the Court concluded that Astraea had failed to offer sufficient evidence to establish with "convincing clarity" that Northwest made its statements with actual malice. Specifically, Astraea failed to show that the defendant entertained serious doubts as to the truth of the matters published.

Thomas Tinkham is with the firm Dorsey & Whitney in Minneapolis, MN and represented Northwest Airlines, Inc. in this matter.

First Claim Under Ohio's Agricultural Disparagement Statute Filed

The LDRC has learned that Ohio's recently passed agricultural products disparagement act is currently being litigated. On April 30, the AgriGeneral Co., a large Ohio based egg-producer, filed a series of counterclaims in the federal district court in the Northern District of Ohio (Western Division) against Ohio's Public Interest Research Group ("PIRG"). AgriGeneral's claims, the first that we are aware of under Ohio's agricultural disparagement act adopted in 1996 (Ohio Revised Code Section 2307.81), accuse PIRG of intentionally disseminating false information to the public for the purpose of harming AgriGeneral.

The suit began as a five part complaint brought by Ohio PIRG against AgriGeneral. The first four causes of action sought unpaid overtime wages for employees and were filed under various federal and state labor acts, thus garnering federal jurisdiction. The fifth cause of action, a claim under the Ohio Consumer Practices Act, originally sought supplemental jurisdiction but was subsequently remanded to the Ohio state courts. In this claim PIRG alleged that AgriGeneral met variations in demand for eggs through stockpiling -- a practice that required routine inspections for spoilage and insect infestation. The unadulterated 'old' eggs were then re-washed, mixed with newer eggs, and sold during peak demand times such as Easter.

In response to PIRG's allegations, AgriGeneral counterclaimed under the agricultural product disparagement act. Significantly, the undercover reporter who broke the story, Irv Oslin of the now defunct *Columbus Guardian*, has not been charged by AgriGeneral. PIRG's counsel maintains that they were in compliance with the statute as they made no statement regarding the adulteration or safety of AgriGeneral's eggs -- merely that they were being deceptively labelled.

Ohio's statute, adopted in May of 1996, affords a cause of action to "any person who grows, raises, produces, markets or sells a perishable agricultural product" or any association representing such persons, against anyone who knowingly or negligently communicates false information regarding the plaintiff's product. Notably, the statute defines false information as "any information that is not based upon reasonable and reliable scientific inquiry, facts, or data, and that directly indicates that a perishable agricultural or aquacultural product is not safe for human consumption." Additionally, if the disparagement is found to be intentional, the defendant is "liable for damages in an amount up to three times the amount of compensatory damages...."

Procedurally, the future of these claims is uncertain. PIRG's original cause of action for fraud has been remanded to the state courts as a class action suit on behalf of all consumers of AgriGeneral's products. AgriGeneral's counterclaims will likely follow suit and be refiled in state court, leaving only the employment dispute in federal court.

Reporter Bites the Amendment that Feeds Him

Defense attorney Andrew Napolitano calls the complaint "deliciously ironic." On July 14th, Dan Garcia, a sports reporter for the *Newark Star-Ledger*, filed a four-count complaint against the New Jersey Nets, a professional basketball team, and their head coach John Calipari for allegedly derogatory comments made by Calipari in a parking lot confrontation with Garcia this March. Garcia, who has covered the Nets for nine seasons, was leaving the team's practice facility when Calipari loudly referred to him in front of other reporters as that "fucking Mexican idiot." Then, according to Garcia, Calipari threatened to punch the reporter in the face.

Garcia's complaint, filed in a New Jersey Superior Court in Passaic County by Slattery McElwee & Jespersen, maintains that Calipari's outburst is not protected by the First Amendment and constitutes negligent and intentional infliction of emotional distress. Moreover, the complaint contends that Calipari's behavior satisfies the elements of assault. Garcia is also suing the Nets for vicarious liability and negligence. The complaint seeks an unspecified amount of compensatory and punitive damages, but the *New York Post* quoted Garcia's lawyer as saying that other cases concerning "less emotional distress" have brought settlements of "at least $5 million." (*New York Post*, 7/15/97).

According to the Nets, Garcia had previously approached the team seeking $1 million in compensation for the remarks. When the Nets rebuffed the offer, Garcia filed his complaint. Commenting on behalf of Calipari and the Nets, Napolitano noted that it is ironic that "a professional reporter, who relies on First Amendment freedoms daily for his work, would attack the First Amendment rights of the coach." (*New York Post*, 7/15/97).

Eavesdropping Claims Survive Motion To Dismiss

Adding some murk to the issue of when media organizations may be sued in tort for gathering news with hidden cameras, a federal judge in Arizona last March refused to dismiss a claim brought against ABC under the Federal Eavesdropping Statute, 18 U.S.C. s. 2511(2)(d). *Medical Laboratory Management Consultants v. American Broadcasting Companies Inc.*, 25 Media L. Rep. 1724 (D. Ariz. 1997).

The suit stems from a 1994 *PrimeTime Live* segment about errors in pap smear testing at medical laboratories. In reporting the piece, ABC employees concealed their identities and claimed to be interested in setting up testing facilities. Under this guise, they entered the plaintiff's laboratory, talked with the operator of the lab about its pap smear testing practices, and secretly recorded the conversations. *Id.* at 1725.

In addition to a variety of state-law claims such as defamation, trespass and invasion of privacy, the plaintiff alleged that ABC violated the Eavesdropping Statute, which prohibits secretly taping a conversation "for the purpose of committing any criminal or tortious act" 18 U.S.C. s. 2511(2)(d). The lab said that ABC had "specifically intended" to commit torts such as defamation and theft of trade secrets when it made the tapes. *Medical Laboratory*, 25 Media L. Rep. at 1725. ABC brought a motion to dismiss the eavesdropping charge for failure to state a claim upon which relief could be granted, arguing that the lab had not alleged that ABC recorded the conversations "for the purpose" of committing a crime or tort, as the statute demands. *Id.* at 1725-26.

District Judge Roslyn Silver held that "specifically intended" could be construed to mean the same thing as "for the purpose," so the lab's allegation satisfied Section 2511's requirement. *Id.* at 1727.

ABC's Purpose Was An Issue of Fact

The court rejected ABC's argument that the lab had no cause of action because the network's sole purpose for taping the conversations was newsgathering. Judge Silver said that the purpose of the taping "remained an issue of fact." *Id.* at 1728. Also, the judge ruled that ABC would have violated the eavesdropping statute if it had a legitimate newsgathering purpose in making the tapes, but also had an illegitimate purpose such as theft of trade secrets. *Id.*

Judge Silver devoted much of her opinion to distinguishing this case from *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995). In *Desnick*, Chief Judge Richard Posner upheld the dismissal of a claim that use of a hidden camera by *PrimeTime Live* in an investigation of cataract physicians violated 18 U.S.C. 2511(d). Posner found that the plaintiffs had failed to allege that ABC had sent its hidden cameras into the plaintiffs' office for the purpose of committing a crime or tort. *Desnick*, 23 Media L. Rep. at 1167.

But in *Medical Labs*, Judge Silver found that by alleging that ABC specifically intended to commit torts when it used its hidden cameras, the plaintiff lab had pleaded a cause of action that could survive a motion to dismiss. *Medical Labs*, 25 Media L. Rep. at 1727.

Plaintiffs Not Allowed to Add New Claims or Defendants

In her latest order in *Medical Labs*, Judge Silver refused to allow the plaintiffs to amend their complaint to add claims of spoliation of evidence and violation of the Uniform Trade Secrets Act, A.R.S. s. 44-401. *Medical Laboratory Management Consultants v. American Broadcasting Companies Inc.*, No. Civ-95-2494-PHX-ROS (June 25, 1997), *slip op.* at 5-6 (order partially granting and partially denying plaintiffs' motion to file second amended complaint). (Hereinafter "*Order.*") The judge said that Arizona does not recognize the tort of spoliation of evidence, and that the plaintiffs unduly delayed in bringing the theft of trade secrets claim. *Order* at 6-7.

Judge Silver also refused to allow the plaintiffs to add as defendants two confidential sources of ABC. *Order* at 9. In two-and-a-half years of litigation, the judge noted, the plaintiffs had been unable to find out the sources' identities, and Judge Silver earlier had ruled that ABC did not have to disclose its sources under Arizona's shield law. She found that delaying the progress of the suit while the plaintiffs tried to find out the sources' names would be unduly prejudicial to ABC. *Order* at 8-9.

The judge also refused to allow the plaintiffs to add six other named defendants, including ABC in-house counsel John Zucker, on grounds of the statute of limitations, failure to plead a fraud claim against them with particularity (per Fed.R.Civ.P. 9(b)) and undue delay. *Order* at 9-15.

Oklahoma City Sued Over Confiscation of Oscar Winning Film

The Tin Drum Seized From Library, Blockbuster and Private Homes

By S. Douglas Dodd

The American Civil Liberties Union of Oklahoma ("ACLU-OK") and a trade association whose members include national video store chains and individual video stores, have filed separate federal lawsuits in the Western District of Oklahoma seeking declaratory and injunctive relief in connection with the recent Oklahoma City Police seizure of copies of a 1979 German-French anti-nazi film which won the 1979 Academy Award for Best Foreign Film. Videotape copies of director Volker Schlondorff's "The Tin Drum" were confiscated from Michael Camfield, the development director of the ACLU-OK and from several retail video stores on June 25th. Camfield is the Plaintiff in the first suit which was filed July 3rd.

The confiscation followed what the suit calls an *ex parte* proceeding before Oklahoma County District Judge Richard Freeman. According to the suit, Oklahoma City Police, acting on a complaint by the director of Oklahomans for Children and Families, obtained a copy of the film and asked Judge Freeman to determine if it violated Oklahoma obscenity or child pornography statutes. Police reportedly inquired about a specific portion of the film where a young boy is depicted engaging in oral sex with a teenage girl.

Seizure Based On Ex Parte "Advisory Opinion"

Police did not initiate a formal legal proceeding and Judge Freeman issued no written order. But on June 25th, Judge Freeman reportedly advised the police he had determined that a brief portion of "The Tin Drum" was obscene or contained child pornography. Judge Freeman later told reporters it was "an advisory opinion" and had no force of law. It was after the "advisory opinion" that police seized videotape copies of the film from six Oklahoma video stores and at least two of their customers.

The ACLU-OK's Michael Camfield rented the film "to inform himself about the substance of the movie out of an interest in the widely-publicized and ongoing public, political, artistic and legal controversy over the movie's availability at the Oklahoma County Metropolitan Library System" the suit says. The library system reportedly turned its only copy of the film over to the Oklahoma County DA's office.

Two copies of the film were reportedly confiscated from customers of Blockbuster video stores, including Camfield. The suit claims police demanded from Blockbuster employees, the identity and addresses of customers who had rented the film. The release of that information violated the provisions of 18 U.S.C. § 2710 (Federal Videotape Privacy Protection Act) which relates to the wrongful disclosure and use of video tape rental or sales records, the suit says.

The suit names the city of Oklahoma City, two Oklahoma City Police officers, Oklahoma County District Attorney Robert Macy and "other unknown persons." It seeks declaratory relief that the demand, receipt and use by police of video tape rental or sales information was a violation of 18 U.S.C. § 2710, that the seizure of the film was an unconstitutional prior restraint and illegal seizure and censorship, and that the film is neither obscene nor contains child pornography. It also seeks to enjoin the use of personally identifiable information obtained from Blockbuster about the Plaintiff, to enjoin the continued use by police of nonadversarial or *ex parte* court proceedings for the determination of obscenity or child pornography, and to enjoin threats by the police and the District Attorney of prosecution for possession of "The Tin Drum." In addition, the suit seeks money damages and attorney fees. While the suit seeks injunctive relief, there has been no request for preliminary injunction or temporary restraining order. Plaintiff's counsel believes there will be no action by the District Attorney's office to prosecute people in possession of the film while the federal action is pending.

Video Dealers and Oklahoma City DA File Separate Suits

The second suit was filed July 11th by the Video Software Dealers Association ("VSDA") as a class action on behalf of its member stores in Oklahoma and other non-member video stores. It names as defendants the city of

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Oklahoma City, its Police Chief, three police officers and Oklahoma County District Attorney Bob Macy. The VSDA suit does not seek money damages, but asks that Judge Richard Freeman's advisory ruling be reversed, that the tape seizures be declared unconstitutional and that further confiscations of videotapes be prohibited.

Defendants Oklahoma City, its police officers and District Attorney Robert Macy have not yet responded to either Complaint. But on July 18th, Macy filed a Declaratory Judgment action in Oklahoma County District Court seeking a ruling on whether "The Tin Drum" is obscene under Oklahoma law. District Judge James Blevins will be faced with the question posed informally to Judge Richard Freeman in late June. The court may be asked to stay proceedings pending a decision in one of the two federal court suits.

The VSDA suit alleges that actions similar to those in Oklahoma City are beginning to occur statewide. The suit cites Ponca City and Tulsa as two examples of police or District Attorney activity which indicate the possibility of additional seizures or confiscations. However, Tulsa County District Attorney William LaFortune has issued an opinion finding that while "The Tin Drum" may contain some offensive material, it does not violate Oklahoma's child pornography law. LaFortune says he does not intend to prosecute persons for possession of the film.

S. Douglas Dodd is a partner in LDRC member firm Doerner, Saunders, Daniel & Anderson in Tulsa, Oklahoma.

Los Angeles Judge Enjoins Distribution of *Playgirl*'s Brad Pitt Issue

In an unusual case of prior restraint, a Los Angeles Superior Court judge on July 14, 1997 temporarily enjoined further distribution of *Playgirl Magazine*'s August issue at the request of actor Brad Pitt, who is suing the magazine for invasion of privacy and infliction of emotional distress for publishing a series of nude photos of the star actor. Subscription and newsstand copies of the August issue had already been sent out and are unaffected by the order.

The order of Judge Robert O'Brien prohibits *Playgirl Magazine* from distributing any more copies of the August issue pending a hearing scheduled for July 29. The judge denied the even more drastic request by Pitt's lawyers that the already-distributed issues be recalled. The judge's order and the other papers in the case have been sealed and the parties' lawyers have refused to comment further on the case.

According to news reports, Pitt alleges that the photographs were taken in 1995 on the Caribbean island of Saint Barts by a photographer who trespassed onto the grounds of the hotel where the actor and his then-girlfriend, actress Gwenyth Paltrow, were vacationing. *Playgirl* denies that it solicited or took the photographs and claims that the pictures have already been published in European magazines and on the internet.

The August issue was apparently a quick sellout and newsstand copies are no longer available. As for the content of the allegedly offensive photos, the *New York Post* reported on July 15th that the spread reveals "a relaxed, naked Pitt, romping at times with equally buff then-love Gwenyth Paltrow. . . . Other candid shots show a nude Pitt dancing, reading and doing housework."

Anti-Censorship Groups Denounce On-Going Efforts in Oklahoma to Restrict Media

Tin Drum Only the Most Recent in Campaign by Oklahoma City Authorities

National anti-censorship organizations not only condemned the efforts by Oklahoma City authorities to prevent the city's citizens from seeing "The Tin Drum," but denounced what they see as an on-going effort by local authorities to restrict other media material as well. The National Coalition Against Censorship, the National Campaign for Free Expression, the Freedom to Read Foundation, and the American Booksellers Foundation for Free Expression, in a press release issued July 16, concluded that the seizure of "The Tin Drum" was not an isolated event in Oklahoma City. They cited the arrest of employees at several convenience stores in Oklahoma County on charges of selling allegedly obscene magazines. While those charges have now been dropped, there is a report, the censorship groups say, that at least 90 retailers in Oklahoma City have been told by police that it is illegal to distribute any magazine depicting nudity except Playboy and Penthouse. And prosecutors in the city are reported to be preparing to bring to trial in September a case against two retailers accused of selling allegedly obscene comic books.

Preliminary Hearings in the Military Are Open Too

By Stuart Pierson

On June 23, 1997, the United States Court of Appeals for the Armed Forces granted a petition for mandamus filed by ABC, CNN, CBS, FOX, NBC and *The Washington Post* to reverse a closure order issued by the Special Court Martial Convening Authority for its hearing under Article 32 of the Code of Military Justice concerning charges preferred against Sergeant Major of the Army Gene C. McKinney. The charges alleged 18 violations, including sexual harassment, assault and obstruction of justice.

The charges against McKinney, the Army's highest ranking enlisted officer, were issued in May 1997, amid a multitude of revelations and charges of sexual harassment and assaults in the American military. After responding by denying the charges and asserting that they were racially motivated, McKinney applied for an honorary discharge. Without officially denying McKinney'a application, the Army indicated that it would proceed with a hearing to determine whether to convene a court-martial, and then ordered the hearing closed. When McKinney protested the closure, the Army persisted, asserting as grounds that an open hearing would distract the investigating officer, that evidence admissible at the hearing but inadmissible at trial could taint a trial panel, and that complaining witnesses might have to reveal sexual histories at the Article 32 hearing that would not be admissible at trial.

The four broadcast news networks, CNN and *The Washington Post* prepared and filed their petition for mandamus in the Court of Appeals for the Armed Forces ("USCAAF"), the highest and only civilian court in the military system, bypassing the intermediate Army Court of Criminal Appeals. Their petition argued, first that the closure order violated the public's qualified First Amendment right of access, and, alternatively, that the order exceeded the respondents' discretion under the Code of Military Justice.

A Press-Enterprise Plaintiff Argument

On the constitutional issue, the petition reasoned that, as an Article 32 hearing following preference of charges is designed to determine whether a court martial will be convened, it is not materially different from a preliminary hearing in a civilian criminal proceeding; and, accordingly, under *Press-Enterprise II*, it could be closed to the public only upon specific findings of an overriding interest that is likely to be prejudiced by openness; any closure must be narrowly tailored to protect that interest; and less restrictive alternatives must not be available. Plainly, the respondent Army officials had failed to make the required findings.

The media's alternative argument cited to a 1996 decision of the Air Force Court of Criminal Appeals that had found on very similar facts that Article 32 hearing should not be closed under the applicable military court rule. Their petition also noted that court's assertion that the issue of openness in such hearings was an uncertain one within a developing area of law.

Access Ordered

The Court of Appeals responded to the petition by immediately issuing an order staying the Article 32 hearing, setting a hearing for June 23, requiring the respondents to show cause why a writ should not issue, and requiring the media petitioners to show cause why the proceeding should not have been initiated in the Army Court of Criminal Appeals as required by the USCAAF rules.

After responses were filed, the court heard argument from the media petitioners, McKinney (who also petitioned for an open hearing), amici, the Judge Advocates Association and the National Institute for Military Justice (who supported openness), and the respondents. Following a brief recess, the court ruled from the bench, granting the writ, reversing the closure, and issuing an order, to be followed later by an opinion. The order commanded, in terms indicating essential identity with the *Press-Enterprise II* standards, that:

> . . . appropriate provisions be made for access by spectators to the pretrial investigation hearing

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> under Article 32, . . . subject to reasonable and customary limitation on the number and conduct of spectators, and that further restrictions on public attendance during the hearing, if any, must be accompanied by specific, articulable and substantial reasons with respect to individual witnesses.

Although the court has not yet issued its opinion, the immediate and overall context of the petition proceeding, taken with the court's questions and comments at argument, indicate a probable rationale for its decision. Because all military courts, including the USCAAF, are established under Article I of the Constitution, not Article III, and because the military justice system has only slowly evolved from one predicated on absolute command authority to one recognizing a role for an independent judiciary, the Bill of Rights has been applied to military proceedings only on a case-by-case basis. While the First Amendment's proscription, "Congress shall make no law," surely applies at least with equal force to courts established under the legislative power provided in Article I, as to courts established under the judicial power in Article III, the military command tradition and its courts' deference to the need for discipline have naturally disinclined its authorities -- including its highest court -- to rely on constitutional authority.

It appears likely, therefore, that, while the court will adopt something close to the *Press-Enterprise II* standards, it will do so, not as a constitutional imperative, but as a rule predicated on its supervising judicial authority. Even if there is no reliance on the First Amendment, the decision will stand as a rule for all the services in all Article 32 proceedings where charges have been preferred.

Stuart Pierson is with the firm Levine Pierson Sullivan & Koch in Washington, DC which represented the Petitioners in this matter.

Access to Sealed Deposition Ordered

But the Rubber-Stamped Protective Order Supported

By Adam Liptak

The *Business Week* fiasco arose from an all-too-routine litigation shortcut: a confidentiality agreement, negotiated and administered by the parties and "so ordered" by a court on the basis of no evidence or reflection at all, which turns over the judicial reins to the parties in deciding what information deserves court-ordered secrecy. It's a kind of privatization of the judicial function.

The Sixth Circuit, in the final paragraphs of its second *Business Week* decision, was appalled by this practice. *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F. 3d 219, 227 (6th Cir. 1996). Noting that Rule 26(c) of the Federal Rules of Civil Procedure allows sealing of discovery materials only "'for good cause shown' to the court that the particular documents justify court-imposed secrecy," the appellate court told the district court that it may not "abdicate its responsibility to oversee the discovery process" and "certainly should not turn this function over to the parties."

These words have been almost entirely ignored by district court judges in the Sixth Circuit and elsewhere. The problem is that the trial courts think, with some justification, that upfront document-by-document adjudication of "good cause" would impose an intolerable burden on judicial resources.

Judge Lewis A. Kaplan of the Southern District of New York said as much in an otherwise helpful decision granting a motion by The New York Times for access to a deposition of Acting Baseball Commissioner Allan H. "Bud" Selig. *Greater Miami Baseball Club L.P. v. Selig*, 955 F. Supp. 37 (1997). In Judge Kaplan's view, the "good cause" determination need only be undertaken once someone objects to secrecy. Were courts required to make item-by-item determinations before they granted

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blanket protective orders, "there would be little time in which to do anything else." He continued: "The issue whether the material really should be kept from public view is left for another day, which fortunately seldom arrives -- a circumstance that spares the courts much time which may be devoted to other litigants and the parties many dollars that otherwise would be spent litigating academic questions."

By backloading the "good cause" determination, Judge Kaplan places an enormous burden on the press and other interested parties. The expense of filing a motion to intervene for access to sealed materials is not trivial. The time that passes while the issue is briefed and decided often turns the documents sought into old news. The documents may turn out to be boring. Or, by the time the court decides, your client or, worse, a competitor may have obtained them through "traditional newsgathering techniques" (that is, leaks). All of this is more than sufficient to discourage most people from contesting protective orders most of the time. As a practical matter, then, Judge Kaplan's approach, which is quite common, reads the "good cause" requirement right out of Rule 26(c).

That said, there is much that is useful in the *Selig* decision. It follows from Judge Kaplan's frank acknowledgment that there had been no "litigated determination of whether there was good cause for [sealing] Selig's testimony" that the parties to a protective order have no reliance interest in it and have the burden of showing good cause when challenged.

Judge Kaplan allocated the legal burden correctly. He failed to see, though, that by putting third parties to the practical burden of having to file a motion to challenge the sealing of documents on a piecemeal basis, his decision effectively ensures that much litigation is conducted in secret merely because the parties wish it to be secret. That's entirely at odds with Rule 26(c).

Adam Liptak, senior counsel at The New York Times Company, represented The Times in the Selig case.

Atlanta Federal Court Enjoins Georgia Statute Criminalizing False Identities and Unauthorized Use of Logos on the Internet

By Tom Clyde

The Georgia legislature's first foray into regulating the Internet -- an effort that drew apt comparisons to a bull entering a china shop -- has been enjoined by a federal judge in Atlanta. On June 20, 1997, Judge Marvin H. Shoob enjoined a 1996 Georgia law that criminalized the use of false identities and the unauthorized use of logos, official seals or trademarks on the Internet. *American Civil Liberties Union v. Miller*, No. 1:96-cv-2475-MHS (N.D. Ga. 1997).

Fourteen plaintiffs led by the ACLU of Georgia brought the action seeking declaratory and injunctive relief against O.C.G.A § 16-9-93.1, which made it a misdemeanor to "knowingly transmit any data through a computer network" if (1) "such data uses any individual name ... to falsely identify the person" or (2) "such data uses ... any trade name, registered trademark, logo, legal or official seal or copyrighted symbol ... which would falsely state or imply that such person ... has permission or is legally authorized to use [it]."

The plaintiffs challenged the law on the grounds that it constituted an impermissible content-based restriction on speech and was unconstitutionally vague. The Georgia Attorney General's office scrambled to defend the statute by contending that procedurally the plaintiffs had no standing because no credible threat of prosecution existed and substantively the law was constitutional because it incorporated an unstated "intent to defraud" element as part of the crime.

An In-Court Internet Demonstration

In a hearing in January, the plaintiffs made an in-court presentation regarding the Internet and electronic e-mail to Judge Shoob. Using a 10 by 12 foot screen, Georgia Institute of Technology Professor Hans Klein provided the court with a cybertour focusing on certain newsgroups in which participants commonly employ pseudonyms. Klein

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paused on a posting by a "DaveP" in an Alcoholics Anonymous newsgroup to demonstrate how anonymity is critical to an open discussion of certain topics. Klein similarly demonstrated how the unauthorized use of company logos as links to company Web sites facilitate navigation through the potentially overwhelming quantities of information available on the Internet.

Five months after the hearing, in an opinion issued just days before the United States Supreme Court's decision in *Reno v. American Civil Liberties Union*, Judge Shoob preliminarily enjoined the Georgia law, concluding that "the statute was not drafted with the precision necessary for laws regarding speech." In addressing the plaintiffs' likelihood of ultimately prevailing on the merits, the court first dismissed the procedural defenses asserted by the State, finding that the plaintiffs had standing to bring the claim because a credible threat of prosecution existed and that abstention pending interpretation of the statute by the Georgia courts was improper because the statute on its face abridged free expression.

Overbroad

In addressing the substance of the statute, the court held that it constituted a presumptively invalid content-based restriction subject to the strictest scrutiny. While the court agreed that "fraud prevention" on the Internet constituted a compelling state interest, it held the statute was not narrowly tailored and "instead [swept] innocent, protected speech within its scope." The court expressed frustration with the State's tortured attempts to "engraft" certain "intent to defraud" elements into the statute. Characterizing the State's position as being "that the act does not mean what it says," the Court dismissed the defendants' interpretation as internally inconsistent and grammatically incoherent.

In summing up its concerns regarding overbreadth, the Court stated that "[o]n its face, the act prohibits such protected speech as the use of false identification to avoid social ostracism, to prevent discrimination and harassment, and to protect privacy, as well as the use of trade names or logos in non-commercial educational speech, news, and commentary -- a prohibition with well-recognized first amendment problems."

And Vague

In addition to the First Amendment grounds, the court also held that plaintiffs were likely to prevail on the merits of their void-for-vagueness argument, holding that the statute failed to give fair notice of proscribed conduct. The court specifically noted ambiguity regarding what was meant by transmissions that "falsely identify" the sender and transmissions that "use" trade names or logos. Because of the virtually limitless definition of "data" covered under the statute, the court also observed that the statute could be interpreted to apply not only to computer transmissions per se, but also to transmissions via "telephone, fax machine, answering machine, voice mail, pager or any other electronic device that might be connected to computer network facilities."

Based on plaintiffs' likelihood of prevailing on the merits as well as favorable findings with respect to threat of irreparable injury, balance of hardships, and promotion of the public interest, the court preliminarily enjoined enforcement of the statute. Since the issuance of the injunction on June 20, 1997, no final judgment on the merits has been entered, and the State has reportedly failed to take any action, stating that the matter is "under review."

On the same day that Judge Shoob's opinion was issued, U.S. District Judge Loretta A. Preska enjoined a New York law criminalizing certain transmissions of obscene or indecent material on the Internet as an extraterritorial regulation of interstate commerce, an issue not reached in the Georgia decision. *American Library Association v. Pataki*, No. 97 Civ. 0222-LAP (S.D.N.Y. 1997). The U.S. Supreme Court's decision in *Reno* followed within the week. Apparently undeterred, the sponsor of the Georgia act, state representative Don Parsons, is reported to have said that he may introduce a "more precisely written law against identity fraud" on the Internet next legislative session.

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Second Circuit Upholds Injunction Preventing New York City From Transmitting Fox News on Time Warner's Cable System

Parties Settle, Giving Channel to Fox

The United States Court of Appeals for the Second Circuit this month upheld a federal district court's decision to grant Time Warner a preliminary injunction preventing the City of New York from carrying Fox News or Bloomberg Informational Television (BIT) on cable channels designated for educational or governmental purposes. *Time Warner Cable of New York City v. Bloomberg L.P.*, Nos. 96-9515, -9517, *slip. op.* at 1 (2d Cir. July 3, 1997).

This week, Time Warner and Fox News came to an agreement under which Time Warner will carry Fox News on its New York cable system. To effectuate the settlement, the City will give Time Warner control of a municipal channel. *The New York Times* reported on July 24 that Time Warner will reimburse the City with a channel when the cable company eventually expands its system.

A confidentiality agreement prevents Time Warner and Fox News from discussing other terms of the settlement. But *The New York Times* reported that Fox would gain access to 65 percent of Time Warner's cable systems in the United States. In addition, while it evidently is not part of this week's deal, Time Warner and Rupert Murdoch's News Corporation are expected to negotiate access for Time Warner to News Corporation's international satellite broadcasting system.

It was unclear what effect, if any, the agreement could have on carriage of BIT on Time Warner's New York system.

A number of advocacy groups had filed *amici* briefs in the Second Circuit supporting Time Warner's position that municipal channels may not be used to transmit commercial programming. It was unclear whether the settlement--specifically the City's turning over of a municipal channel-- would be challenged.

In the July 3 opinion by Circuit Judge Jon O. Newman, a three-judge panel held that Time Warner had shown that it probably would win its claim that the City's transmission of Fox News and BIT was a commercial use of municipal channels that is prohibited by Time Warner's cable franchise agreements with the City. *See id.* at 3. Last November, Judge Denise L. Cote granted Time Warner a preliminary injunction on the ground that Time Warner likely would be able to show that the City's action violated the company's First Amendment rights. But because the Second Circuit affirmed the injunction based on its interpretation of the franchise agreements, it did not rule on the First Amendment issue, although it did say that it was "less certain than the district court that the City's action . . . violates the First Amendment." *Id.* at 17.

At issue in *Time Warner* is the proper distribution of editorial control between a cable franchisee and its government franchisor. Like other cable television companies in municipalities across the nation, Time Warner owns and operates its cable systems in New York as a franchisee of the City. *See id.* at 4. Under a franchise agreement, a municipality may require a cable company to comply with national standards for the provision of cable television services set forth in the Cable Communications Policy Act of 1984, 47 U.S.C. s. 521 *et seq* (the "Cable Act"). *See Time Warner, slip op.* at 4-5. Under one such standard, the City requires Time Warner to set aside some channels for what the Cable Act labels "public, educational or governmental use" ("PEG" channels). *Id.* at 5, *citing* 47 U.S.C. s. 531(b).

Time Warner's dispute with the City over the use of PEG channels arose in the fall of 1996, after the cable company chose to carry MSNBC, the 24-hour news network owned jointly by Microsoft and NBC, on its system, and not to carry Fox News at that time. *See id.* at 8. Following Time Warner's decision not to carry Fox News, the City unsuccessfully asked for Time Warner's consent to cablecast Fox News and BIT on its "Crosswalks" channels. *See id.* at 8-9. The City itself operates the Crosswalks channels, which are designated for educational and governmental use (the "E" and "G" of PEG) under the franchise agreements. *See id.* at 5.

After Time Warner refused to give its consent, the City went ahead and cablecast BIT on one of its Crosswalks channels, with commercials. The next day--October 11, 1996--Time Warner obtained a temporary restraining order to prevent the City from transmitting BIT or Fox News. *See id.* at 10. District Judge Cote then granted a preliminary injunction, finding that Time Warner likely would be able to prove that the City's transmission violated both the First Amendment and the Cable Act's provision protecting cable operators' editorial discretion, and that Time Warner would suffer irreparable harm if the transmission continued. *See id.* at 11. Judge Cote also found that the City's actions were designed to coerce Time Warner

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into carrying Fox News on one of its channels, and to retaliate against Time Warner for deciding not to carry Fox News in the first place. *See id.*

The City and Bloomberg (which had intervened before Judge Cote's hearing on the preliminary injunction) appealed the injunction to the Second Circuit. *See id.* at 3. The appellate court considered two standards for granting a preliminary injunction. *See id.* at 12. The first, advocated by the City on the basis that it applies when a party tries to enjoin government action in the public interest, requires a threat of irreparable injury and likely success on the merits. *See id.* The second, lower standard, supported by Time Warner, requires a threat of irreparable injury, serious questions as to the merits, and "a balance of hardships tipping decidedly in favor of the moving party." *See id, citing Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). The court decided that the lower standard would be appropriate, but said that Time Warner had met the higher "likelihood of success" standard anyway. *See id.* at 14.

The court held that Time Warner would suffer irreparable harm if the City were allowed to place Fox News and BIT on the Crosswalks channels because that would deprive Time Warner of control over its programming mix, which it relies on to solicit customers. *See id.* at 15. Even though Time Warner does not control the programming on Crosswalks, the court said, using Time Warner's system to carry programs whose placement on Crosswalks might be unlawful could not be "satisfactorily remedied after the fact." *See id.* at 15-16.

Time Warner also had argued that it would suffer irreparable harm because an audience that grew accustomed to seeing Fox News or BIT on Crosswalks might later demand that Time Warner carry those networks on its own channels. The court dismissed this claim as too speculative, *See id.* at 16.

While District Judge Cote had indicated that it might be a close question whether a cable operator has standing to challenge the use of a PEG channel, the Second Circuit appeared to hold that the City's use of Time Warner's system to distribute programming gave the cable company standing to sue. *See id.* at 15-16.

The Second Circuit held that Time Warner probably could prove that Fox News and BIT were outside the scope of programming allowed on Crosswalks and that the City would breach its two franchise agreements with Time Warner by carrying the networks. *See id.* at 27. One franchise agreement, covering Brooklyn, Queens and Staten Island, says that "Municipal Channels" may be used to distribute "noncommercial Services by the City or for any other lawful, governmental purpose." *See id.* at 19. Another, covering Manhattan, provides for "Governmental Channels" to carry "Services by the City or educational institutions for functions or projects related to governmental or educational purposes, including the generation of revenues by activities reasonably related to such uses and purposes." *See id.* at 19-20.

After noting that neither agreement defines "commercial," the Second Circuit said that Judge Cote had been correct to hold that the agreements did not authorize the City to use Crosswalks for purposes that Congress did not intend when it passed the Cable Act provision governing PEG channels. *See id.* at 20-21. Looking at the legislative history of the Cable Act, as well as the City's own past statements about the goals of Crosswalks, the court found that Fox News and BIT did not fall within the categories of educational or governmental programming. *See id.* at 24-25. But the court avoided drawing a bright line between allowable and commercial programming, and declined to say that all commercial programming should be barred from PEG stations. *See id.* at 24-25. Under special circumstances such as a lack of local news on other channels, the court indicated in dictum, a municipality might be able to carry commercial news on a PEG channel. *See id.* at 25.

The court rejected the City's claim that Time Warner was trying to control the content of Crosswalks in violation of the Cable Act. *See id.* at 26. It found that Time Warner was simply enforcing the City's contractual obligations under the franchise agreements. *See id.*

The court noted that the public interest favored an injunction. Although more New Yorkers probably would want to see Fox News or BIT than the usual municipal fare on Crosswalks, "numbers cannot be decisive," the Second Circuit said. *See id.* at 29. "Because much of PEG programming has a limited, often specialized audience whose needs are not otherwise met," the court said, it is important not to use PEG channels for non-PEG purposes. *Id.* at 29.

Although it did not make its decision on First Amendment grounds, the court in dictum was skeptical of Time Warner's argument that the City's use of Crosswalks to carry Fox News and BIT constituted content-based government regulation of Time Warner's speech. *See id.* at 18. Rather, the court said, it seemed to be a case of government as speaker. *See id.* at 17-18.

49th State Leads The Country in Tort Reform

By Pamela M. Zauel

On May 9, 1997, Alaskan Governor Tony Knowles signed House Bill No. 58 into law. This sweeping tort reform legislation, which applies to civil actions accruing on or after August 7, 1997, places limits on damages awards. In most cases, noneconomic damages, including damages for pain and suffering, cannot exceed $400,000 or the injured person's life expectancy in years multiplied by $8,000, whichever is greater. AS 09.17.010(b). However, where noneconomic damages are awarded for severe permanent physical impairment or disfigurement, such damages cannot exceed $1,000,000 or the person's life expectancy in years multiplied by $25,000, whichever is greater. AS 09.17.010(c).

Under the new law, punitive damages typically may not exceed the greater of $500,000 or three times the amount of compensatory damages awarded. AS 09.17.020(f). In cases where the fact finder determines that the defendant's unlawful conduct was motivated by financial gain and that the defendant actually knew of the adverse consequences of such conduct, punitive damages are capped at $7,000,000. AS 09.17.020(g).

To be awarded *any* punitive damages under Alaska's new law, however, plaintiffs must prove by clear and convincing evidence that the defendant's conduct "was outrageous," was "done with malice or bad motives," or "evidenced reckless indifference to the interest of another person." AS 09.17.020. If such damages are allowed, a separate proceeding will be conducted before the same fact finder to determine their amount. Discovery of evidence relevant to an award of punitive damages on the basis of the defendant's amount of financial gain as a result of the defendant's conduct and the financial condition of the defendant cannot be conducted until *after* the fact finder determines that punitive damages should be awarded. AS 09.17.020(e).

Alaska's new law contains other, significant changes. Prejudgment interest may not be awarded for future economic, noneconomic or punitive damages. AS 09.30.070(c). Rule 58 of the Alaska Rules of Civil Procedure was amended to reflect that change.

In actions involving the fault of more than one person, including third-party defendants and persons who settle or are otherwise released from an action, the court, unless instructed otherwise by the parties, shall instruct the jury to find the percentage of total fault allocated to each person responsible for the damages. AS 09.17.080(a). Assessment of a percentage of fault against a person not a party does not subject that person to liability in the litigation and may not be used as evidence of liability in another action. As 09.17.080(c).

In an effort to provide financial incentives to settle disputes, Alaska's new law now allocates attorney fees and court costs under the offer of judgment rule. Depending on the timing of the offer and disclosures made by the parties under the State's rules of civil procedure, an offeree shall pay between 30% to 75% of the offeror's reasonable actual attorney fees if the judgment finally entered on the claim for which the offer was made is at least five percent less favorable to the offeree than the offer. AS 09.30.065. (If there are multiple defendants and if the judgment finally entered on the claim for which an offer was made is at least ten percent less favorable to the offeree than the offer, the offeree will pay between 30% and 75% of the offeror's reasonable actual attorney fees. AS 09.30.065.)

Despite Alaska's interest in encouraging settlement, another aspect of the new law may discourage it. Under newly-enacted AS 09.68.130, the Alaska Judicial Council will collect and evaluate information relating to compromise or other resolution of all civil litigation. Such information will be collected on a form developed by the Council, which must include the gross dollar amount of the settlement, to whom the settlement was paid, and any nonmonetary terms. AS 09.68.130(a). The information received by the Counsel is considered confidential. AS 09.68.130(b). Under amended Alaska Rule of Civil Procedure 41(a)(3), parties *shall* submit information required under AS 09.68.130 to the Council. A similar rule, newly enacted, compels the same information in the appellate arena. Rule 511(e), Alaska Rules of Appellate Procedure.

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LDRC Members Participate in the Moscow Media Law and Policy Center's First Russian-American Conference on Mass Media Law

By Sandra S. Baron

Five lawyers from LDRC members and I attended the First Russian-American Conference on Mass Media Law sponsored by the Moscow Media Law and Policy Center in cooperation with the American Bar Association (ABA-CEELI) and LDRC. It was a two-day conference, held at the Moscow State University School of Journalism, with the first day on *Defamation Law and the Mass Media* and the second day on *Issues in Copyright Law*. Over one-hundred individuals participated, virtually all of whom were from Russia. They included jurists, attorneys, journalists, academics, Glasnost Defense Foundation representatives, and public officials (including several prosecutors).

LDRC's active participation in the planning and the presentation of issues at the conference was primarily limited to the first day. David Bodney (Steptoe & Johnson LLP), Kevin Goering (Coudert Brothers), Margaret Blair Soyster (Rogers & Wells), Brady Williamson (LaFollette & Sinykin), John Zucker (ABC, Inc.) and I prepared papers and delivered comments on protection of speech regarding public figures and public officials, opinion and fair comment, and specific procedural issues in libel cases.

Judge Pierre Leval, Federal Court of Appeals judge from the Second Circuit, spoke on both days. Professor Monroe Price of Cardozo School of Law, Yeshiva University (New York), who is a founder of the Moscow Media Law and Policy Center and who was responsible for recruiting LDRC and its members for this conference, was a moderator. Also attending were lawyers from Akin Gump in Austin, Texas who spoke on copyright issues, Professor Peter Krug of the University of Oklahoma College of Law, who writes on Russian law, and several representatives from the ABA-CEELI program in Moscow and from U.S. A.I.D. Professor Krug has published two articles on Russian defamation law that all of us found very useful: *Russian Civil Defamation Law*, 13 Cardozo Arts & Entertainment L.J. 847 (1995) and *Civil Defamation Law and the Press in Russia: Private and Public Interests, The 1995 Civil Code and the Constitution*, 14 Cardozo Arts & Entertainment L.J. 297 (1995). He moderated the copyright sessions on day two of the Conference.

I think it fair to say that all of the LDRC participants had a memorable time in Moscow. To start, the School of Journalism is housed in an extremely old building located across from the Kremlin with its spires rising above the historic walls. And we learned a lot, not the least of which was that the Russian and American systems really are very different in their substantive law at this juncture.

Criminal libel law is seemingly a viable option under Russian media law. And while the burdens of proof make it more difficult to prove criminal libel, the penalties and stigmas for conviction can be substantial. Public officials are treated no differently from private figures -- although public officials sue the media far more than private figures do. Malice or evil intent is only relevant in criminal cases and a civil plaintiff apparently needs to prove little more than publication and damage. As one of the Russian speakers, a Justice of the Supreme Court, noted: "The libel defendant has to prove truth...Otherwise, the defendant has nothing to prove."

Insult law is the sister principle to libel. And calling someone a "damn fool" apparently can subject one to liability. Relatives can sue over statements about their deceased kin. On the other hand, there is apparently a privilege to report material from public documents and from officials that is akin to the fair report privilege.

The courts do not have specific limitations on what is known as "moral damages, " or at least no more so than our courts have for punitive damages under the Supreme Court's various decisions. It was suggested that, as a general matter, damage awards are modest in amount.

It is a Very Different System

It is a very different system, a civil law system in substance. To an extent, its laws look more to European example than any where else. But Yury Baturin, Doctor of Juridical Science, Secretary of the Russian Federation Defense Council, and drafter of the relatively new Russian Media Law, stated firmly that Russians did not believe it appropriate to import the law or practices of any other nation. That was the message as well of Viktor Knyshev, Justice of the Russian Federation Supreme Court, who spoke following Mr. Baturin. Indeed, after watching Mr. Baturin outline Russian

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libel and insult law on a matrix across a twenty foot blackboard and listening to his and Justice Knyshev's sound rejection of any influence on the law from outside of Russia, we probably all wondered why they had invited us to speak at this Conference.

I have been promised a copy of Mr. Baturin's grid, which sums up the elements of their law and the distinctions between the criminal and civil options. We were not surprised that these gentlemen, the first two speakers at the Conference, held the rapt attention of the Russian participants. Of all of the speakers, these two gentlemen received the most questions from the audience.

Judge Leval: Why We Protect Speech

Judge Leval addressed the issue of why protection of the press has been highly valued in the United States, noting right up front that it was certainly not because Americans loved or trusted the press. The protections afforded were to allow information to reach the public, because of our determination that democracy did not function unless the citizen-governors had the information they needed in order to make the choices that were theirs; that we believed in a marketplace of ideas and that we relied upon the press to present most of the various information options. Rumors and information from the government, two other means of obtaining information, were, we felt, inherently unreliable. Moreover, if protection of speech were left to the government officials, they would have little incentive to protect speech that was critical of their function. Thus, the United States Constitution removed the most fundamental issue of protection of speech from the political arena and ultimately placed its interpretation in the hands of the courts.

Americans, by protecting the speaker in such a substantial fashion, have concluded that potential injury to the individual, certainly possible under our system, was preferable to the potential injury to the entire body politic were we to jeopardize the press's ability to serve as a source of information. Judge Leval also reviewed a proposal that he has made previously in a 1988 Harvard Law Review article (*The No-Money, No-Fault Libel Suit: Keeping Sullivan in its Proper Place*, 101 Harv. L. Rev.1267) that there should be a procedure available to plaintiffs that allows them to challenge the truth of an allegedly libelous statement but without risk of damages to the defendant. (Indeed, Judge Leval in his article argues that under the current procedural rules in the U.S. such a remedy is available currently for plaintiffs should they chose to use it.)

Neither Judge Leval nor any of the LDRC speakers received many questions from the Russians. The LDRC's role -- extremely well executed by our member lawyers -- was to explain the basics of American law and the basics of why the law evolved in the manner that it did. I believe it fair to say that we were very effective in fulfilling our function and from comments that I received, the Russians (and, of course, specifically those who represented media) were both interested and impressed with American principles and practice. We offered up our law with some humility, and most certainly so after the lead speakers made it so clear that outside law would serve little purpose in Russia. We made it clear that we understood that our role was to familiarize them with the development of U.S. law, and that they were free to borrow from it if it proved useful.

A Media Defense Lawyer Speaks

One of the speakers, Aleksandr Ratimov, was head of the legal department of the Glasnost Defense Foundation, an organization that defends the press and journalists throughout Russia. He spoke about the extraordinary growth in the number of libel suits in Russia generally and their threat to the viability of the Russian press. But he focused on a deeply troublesome problem of suits involving opinion and the difficulty the courts are having determining what is to be protected and what is not. Mr. Ratimov noted that there is little guidance from the Russian Supreme Court in this area of the law.

Mr. Ratimov's concern seemed particularly acute to us after hearing the Russian Supreme Court Justice indicate that such epithets as "damned fool" and "fascist" might well be subject to liability. Indeed, the term "fascist" was the subject of at least two successful libel actions involving Vladimir Zhirinovsky and two other public officials who had characterized his views in that fashion. They, of course, had to prove that he was a fascist or had fascist tendencies.

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And a Defender of Protecting Honor and Dignity

A speaker that certainly caught our attention was Elena Kuznetsova, Dean at the Lvov State University, School of Journalism in the Ukraine. She argued in favor of expanding protections for individual honor and dignity, and that it was needed to develop democracy in the Independent States. She argued that the major journalism organizations and institutions should establish ethical norms for journalists, that journalists should voluntarily establish a tribunal made up of representatives of the various journalistic organizations, and they should appoint an Inspector for Journalistic Ethics. The Inspector should be authorized to examine instances of violation of rights brought to him by individuals or entities. Disagreement with his judgment could then be appealed to the courts.

Her fundamental position was that individuals needed to be protected not only from libel, but from insult. She noted that in the Ukraine insult is punishable by law and that a good number of publications have been subject to substantial damage awards, some severe enough to bankrupt the publications, arising out of what was deemed insulting speech. While she did not define the limits of what is unlawful insult, she suggested that it included simply coarse language.

NOTE: All of the speakers' statements were subject to translation. It is sometimes difficult to know how exact the translation met the original, and defining terms in the various laws and legal systems was possibly, on occasion, victim to the gulfs that translation creates.

Dean Kouznetzova concluded that there needed to be a specialized bar and information courts for these types of disputes.

And the Anecdotes...

After almost eight hours of Conference in a closed, hot and humid hall, I think it fair to say that the American participants felt satisfied when the last scheduled speaker concluded. But the Russians were eager to hear from each other, and voted overwhelmingly to stay longer to listen to each others' war stories. These tales came from plaintiffs' counsel -- one of the more emotive speakers -- as well as defense. They were tales of difficult courts, allegedly disreputable journalism, and even a threat to entrap a docudrama to Russian shores in order to litigate against its producers.

Undoubtedly the most memorable of comments, however, came from a lawyer who represents both plaintiffs and defendants. He scoffed at the notion that one could compare the Russian and American legal systems. He said it was akin to comparing a Rolls Royce with a horse and carriage. Russian judges work in courthouses without toilets, he roared. What kind of men do you think make up the Russian judiciary? Russian judges are either taking bribes or need protection from the litigants, he said. He is relieved, he said, when he finds a knowledgeable jurist who isn't on the take.

While, based upon our experience at this Conference, the gentleman's comments seemed harsh, the differences between the current Russian system and our own is, indeed, quite vast -- substantively, procedurally, and truly in the legitimacy of the system itself. Extra-judicial justice is said to be far more prevalent than that obtained within the system. Enforcement of a judgment is very difficult, even if one is obtained. I was told that the lack of enforceability is one factor in favor of the press; that is, they do not pay the damages ordered. Whether that is true or not, it is clear that the system is now filling with lawsuits by public figures and government officials placing the most fragile of the new and independent media, and particularly that outside of Moscow, at risk.

Moscow: Uninhibited, Robust and Wide-Open

By David J. Bodney

The view is never the same.

From every angle, post-Soviet Moscow reveals its dizzying rate of change. Evidence of a market economy is everywhere.

It is a summer's Friday afternoon, and we are driving past the kiosks and new construction, the billboards and bustle.

Not far from Sheremeteyevo airport, the long, tall image of the Marlboro man hangs down along the exterior of an office building more than 15 stories high. This outdoor marketing of the American West -- and its most alluringly lethal export -- provokes in me a comment from the back seat of our car.

"In America," I observe, "government is taking steps to ban the advertising of cigarettes. As our demand for cigarettes diminishes -- these days, we view them as dangerous substances -- tobacco companies are marketing them heavily overseas, especially in Russia and Eastern Europe."

After hearing this news, a security consultant -- we'll call him Viktor -- turns around from the front seat of our car and responds, matter-of-factly: "In Russia, cigarettes don't kill people. People kill people."

I wondered whether Viktor had ever heard of our National Rifle Association. Still, whether he borrowed the mantra of the American gun lobby for his pronouncement was far less important than what he'd witnessed first hand in Russia.

"In Moscow, there are two or three assassinations every week. Murders. Business people get killed, and the killers don't get caught. Happens all the time," Viktor explained, as a steady stream of roadside billboards whirled past our windows, tempting the modern Muscovite to buy alcohol, tobacco and other such passing pursuits of happiness.

Yes, the bandwidth between the haves and the have-nots in Russia is stretched to the ends of the dial. A very lucky few have, most have not, and what binds them together is our whetting of their collective appetite to have more than they've got.

It's a recipe for the sort of violence that stains the doorsteps and city streets of Moscow, and that's led to the town's recent reputation for being the new "Wild West." In his latest work, *Resurrection*, Pulitzer Prize winner David Remnick has noted that the fastest-growing service industry in Russia is "personal security," and that the mob has turned Moscow "into a kind of criminal bazaar."

Visiting Russia from Arizona, I marvel at the passing of the torch of outlaw antics from one band of vipers to another. Luckily, I travel in distinguished company on this trip to the Russian Federation, and we witness no violence, no proof that this Wild West image is deserved.

We are lawyers and judges from the United States, and we're here for the First Russian-American Conference on Mass Media Law. We congregate in a building that houses the journalism school at Moscow State University. Our conference is sponsored by the American Bar Association, the Libel Defense Resource Center and a new organization known as the Moscow Media Law and Policy Center.

It's not exactly the annual PLI conference on Broadway. For one thing, it's hot and muggy yet no one dares drink the water. But it isn't remotely the gunfight at the OK Corral either. We all wear headphones for simultaneous translation.

Judge Pierre Leval extols the benefits of New York Times v. Sullivan, the celebrated 1964 decision of the U. S. Supreme Court that recognized the media's qualified privilege from libel suits by public officials. He explains to this largely Russian audience of lawyers, judges, professors and students that the Sullivan decision -- and indeed most of the great advances in our First Amendment freedoms -- occurred during the 1960s, part and parcel of our struggle over civil rights and the war in Vietnam.

Rightly, Judge Leval applauds these landmarks in American jurisprudence, and our country's courage to err on the side of "uninhibited, robust, and wide-open" debate. He encourages our Russian counterparts to ponder the wisdom of our ways, and to contemplate care-

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fully the American experience as they develop the laws of libel in the former Soviet state. Echoing Justice Holmes, Judge Leval gently reminds our audience that "democracy is an experiment."

And then it suddenly occurs to me that the birth of our greatest press freedoms did not occur in the 1960s by accident.

"It is no coincidence," I say during my brief remarks on the procedures of libel law in America, "that the New York Times decision was handed down in the 1960s." For these were indeed explosive times in our country, at home and abroad, and it made me ponder the evolution of libel law in the context of a distinctly human experiment.

During an earlier break in the conference, Sandy Baron and I discussed the nasty, brutish and short life that existed before the law of libel found its way into our jurisprudence. We tried our best to imagine a world where dispute resolution was achieved by a duel, and violence was an appropriate means of redressing an insult. Surely, defamation law emerged as a better way of settling such grievances, and speech -- uninhibited, robust and wide-open -- could act as a salutary surrogate for more lethal means of expression. (After all, who was the true founder of civilization if not, as Freud once observed, the man who first hurled an epithet at his adversary instead of a spear?)

It therefore seemed quite natural that our counterparts in the Russian media bar should be wrestling over the adoption of appropriate legal safeguards for libel cases at this moment in their history. For never before in the inglorious Soviet past had change -- painful, violent, democratic change -- taken place within and around the Kremlin walls.

It was not surprising that Russian lawyers and journalists would be considering alternatives to their present libel laws -- where defendants bear the burden of proving the truth of all their statements, retractions can be compelled and the dead (or their heirs) can sue for injury to a decedent's "honor and dignity."

During America's turbulent decade of Kennedys and King, we could not afford to surrender our vigilance in protecting the rights of free expression -- indeed, we had to bring such rights into being. So, too, must our friends in Russia find ways to promote and protect speech today, when other, more violent means of expression are so menacingly convenient.

Another theme worth remembering emerged from our conference on libel law in Moscow last June: Every nation is a product of its history and culture. The lessons of another country's past cannot be imported transnationally into the laws of another land. And so, as the 1960s were a defining period in our country's struggle to improve its people's condition, the 1990s are unique in Russia's long and arduous road toward democratic self-discovery. Indeed, the creation of a durable legal order and court system is surely a precondition to the expansion of free speech rights in Russia -- and so, the adoption of an "actual malice" standard will doubtless wait its day.

As we returned by auto along the same stretch of highway from Moscow to the airport at the close of this conference on Sunday, the subject turned from tales of gunfire and the Wild West to talk of some of the things that unite us in the democratic experiment.

"Any plans to visit America?" I asked Viktor, as our car rumbled past the come-hither stares of Claudia Schiffer and Cindy Crawford abounding from the billboards.

"No," he replied, taking in Moscow's changing scenery. "One day . . . maybe."

"I'd like to give you something for all your help," I said, trying clumsily to drop some dollars into his hand.

"It is not necessary," Viktor insisted. "I get paid for what I do. Just say 'thanks' is enough," he kindly spoke.

And on that note our brief discourse ended, a peaceful bookend for the weekend conference, now a memory in between.

Evidence of a market economy is everywhere -- even a marketplace of ideas.

The view is never the same.

Mr. Bodney is a partner in the Phoenix office of Steptoe & Johnson LLP, and serves as Chairman of the LDRC's Trial Techniques Committee.

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Send in your registration materials immediately!

The conference will include both plenary and breakout sessions:

International Media Law Session: To open the conference, Robert J. Hawley will moderate a discussion about developments in international media law with a panel of experts including Jeremy Bartlett, Nick Braithwaite, Siobhain Butterworth, Michael Doody, Patrick Dunaud, David Hooper, Roger D. McConchie, Brian Macleod Rogers and Mark Stephens

Dinner Program: Join George Freeman and Laura Handman as they co-chair the opening dinner discussion with panelists Ann Lewis, Jane Mayer, Tony Blankley, Chris Wallace, James Fallows, Congressman Bob Barr and Jamie Gorelick.

On Thursday night, The Honorable Gilbert S. Merritt, Chief Justice of the U.S. Court of Appeals for the Sixth Circuit, is the speaker.

Breakout Sessions: Participants will rotate through four breakout sessions where facilitators, panelists and participants will discuss specific libel issues in depth. At the end of the four sessions, reports and findings for each breakout group will be discussed.

Pre-publication/Pre-broadcast Review
Newsgathering Issues
Pre-trial/Discovery/Motions
Trial (With Specific Focus on Damages)

Register before August 11th and save $50 on the registration fee.

For more information about the conference, see NAA website: http://www.naa.org/conference