



LIBELLETTER

Reporting Developments Through July 21, 2000

In This Issue . . .

LIBEL

SC Supreme Court Reverses Jury Award for Police Chief, p.3
Co-Producer of Tailwind Report Sues CNN for \$106 Million, p.4
CO Court of Appeals Recognizes Incremental Harm Doctrine, p.5
UT Teen Charged with Criminal Libel for Internet Activity, p.7
Jury Finds AL Lawyer Guilty of Criminal Defamation, p.8
Judgment for *Time* Affirmed in Simpson Related Case, p.9
Times Wins on Report of Lawyer Discipline Referral, p.10

INTERNET

NJ Supreme Court Widens Jurisdiction for Internet Torts, p.11
John Doe Suits Challenge Right to Anonymity on Internet, p.13
Taped Athletes Intrusion Claims Dismissed Versus ISPs, p.16
Columbia Journalism Review Sued for Web Publication, p.16
3rd Cir. Holds Child Online Protection Act Unconstitutional, p.17

ACCESS

7th Cir. Issues Decision on Access to Criminal Proceedings, p.19
AR Supreme Ct. Holds Gag Order Gross Abuse of Discretion, p.19

RIGHT OF PUBLICITY

Permanent Injunction of Phony Web Sites Stands, p.25
AT&T and Ad Agency Face Right of Publicity Suit, p.26
Hockey Player Wins \$24.5M for Use of Name in Comic Book, p.27

NEWS & UPDATES

CO Supreme Court Prohibits Prosecution of *Globe* Reporter, p.
D.C. Cir. Upholds Statute Restricting Cable Editorial Rights, p.21
NBA Sues *N.Y. Times* for Photo Sales, p.35
Surveys Reveal Ambivalent Support for First Amendment, p.37

Updates:

CBS and King Estate Agree to Cross-License Speech, p.36

INTERNATIONAL

Safe Harbor Privacy Principles, p.23

**SC HIGH COURT
REVERSES LIBEL
AWARD**

p. 3

**CRIMINAL LIBEL
IN UTAH &
ALABAMA**

pp. 7, 8

**HOCKEY PLAYER WINS \$24.5 MILLION
FOR USE OF NAME IN COMIC**

p. 27

Fourth Circuit Reverses Press Contempt Finding

Publication of Sealed Court Document at Issue

By George Freeman

On July 6, 2000, after a year and one-half wait, the U.S. Court of Appeals for the Fourth Circuit, in two separate opinions, reversed the contempt findings against the *Wilmington Star News*, a New York Times Company paper, and two of its reporters. The paper and one reporter, Kirsten Mitchell, had been fined \$600,000 for allegedly opening a court-ordered sealed document and reporting some of its contents. *Ashcraft v. Conoco, Inc.*, 2000 U.S. App. LEXIS 15620 (4th Cir. 2000). A second reporter, Cory Reiss, had been ordered to serve an indefinite term of imprisonment for refusing to reveal his confidential sources for some of the same information obtained from the sealed court document. *Ashcraft v. Conoco, Inc.*, 2000 U.S. App. LEXIS 15613 (4th Cir. 2000). See *LDRC Libel-Letter*, January 1998 at 20; February 1998 at 10; November 1998 at 30.

The panel for both appeals was the same, Judges

(Continued on page 2)

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4th Circuit Reverses Press Contempt Finding

(Continued from page 1)

Widener and Luttig from the Fourth Circuit, and Judge Catherine C. Blake, District Court Judge from the District of Maryland, sitting by designation.

Routine News-Gathering

The case arose from routine news reporting. Conoco had entered into a \$36 million settlement of an environmental leak litigation commenced by 178 trailer park residents. Federal District Judge Earl Britt, upon the request of the parties, sealed the settlement agreement, including the settlement amount. Reiss, who had been covering the case, learned the settlement amount from two confidential sources.

Mitchell, who had not previously reported on the matter, was assigned to go to the courthouse and review documents “since the settlement.” Mitchell asked for the court file. The court clerk gave her a stack of documents, while telling Mitchell that she was segregating some out, which the court noted were in a brown envelope, because they were sealed. (The panel seemed impressed by the fact that Mitchell was totally cooperative with the clerk and accepted without question the fact that some of the documents were off-limits.)

In the stack she was given, there was a previously opened white envelope that had a legend in boldface type stating that it was confidential, sealed and to be opened only by the court. (Mitchell testified she only saw this legend after she had reviewed the documents inside and put the documents back in the envelope.) Inside the envelope was a two-page confidentiality order and the settlement agreement itself, including the settlement amount. The paper subsequently ran an article including the settlement amount and attributing that information both to confidential sources and a court document.

After Attorney General Reno refused to prosecute the contempt cases, Judge Britt assigned a special prosecutor to do so. The judge was thus the victim (it was his settlement agreement which was violated), the

prosecutor (since he determined twice to appoint special prosecutors) and the judge. He found both reporters and the paper in contempt.

Judge Luttig: No Order Violated

With respect to Mitchell and the paper, the Fourth Circuit reversed 2-1. The majority, in an opinion by Judge J. Michael Luttig, held that the legend on the envelope was not an official court order, in that it was not signed by a judge and had none of the other indicia of a judicial decree. Judge Luttig noted that the special prosecutor had argued that it was this legend which was

the order which Mitchell violated, not the two-page confidentiality order inside the envelope.

In any event, the court also found that neither “order” was specific and direct enough to uphold a contempt conviction,

particularly in light of the fact that the reporter was not a party to the litigation and that the envelope had concededly already been opened. Further, the court held that Mitchell did not act “willfully, contumaciously and intentionally” given the circumstances of the case since she did not specifically ask for the settlement agreement, was given it by a court clerk who had segregated the other sealed documents and since the envelope had previously been opened.

The court concluded:

If anything, in our view, the above sequence of events all but confirms that Mitchell acted wholly innocently, and certainly innocently insofar as the law is concerned A citizen who requests public documents from an officer of the court, who herself evidences diligence in safeguarding the confidences of the court, and is given an envelope that once was sealed but has been previously opened and is at the same time open and denominated as such, is entitled to presume that the envelope and its contents are publicly available material, at least absent proof of knowledge otherwise.

(Continued on page 3)

“[T]he above sequence of events all but confirms that Mitchell acted wholly innocently, and certainly innocently insofar as the law is concerned . . .”

4th Circuit Reverses Press Contempt Finding

(Continued from page 2)

Sealing Order Invalid

The court also reversed the contempt finding on the grounds that the district court's sealing order was invalid. We had strenuously argued that the court had not followed proper procedures in sealing the settlement agreement. The Fourth Circuit has particularly good law requiring that no court papers be sealed without notice to the press and an opportunity for the press to be heard, less drastic alternatives to sealing the documents must be considered, and specific findings must be made by the court as to why the material should be sealed. None of these procedural requirements were followed in this case, and therefore the appellate court held that the underlying confidentiality order, which we had been held to violate, was not a valid order.

Cannot Compel Sources

This conclusion was critical to the unanimous reversal of Reiss's conviction, a decision written by Judge Blake, but joined in by both Judges Luttig and Widener. The court held that Judge Britt abused his discretion in compelling Reiss to divulge the identities of his confidential sources since the underlying sealing order itself (which his sources had violated) had been invalid. The court reasoned that enforcement of an invalid confidentiality order could not serve as a compelling interest justifying disclosure of a reporter's confidential sources.

In the *Mitchell* case, Judge H. Emory Widener, Jr. dissented in part. He held that whatever the technical errors made by the district court judge, Mitchell should have known that the documents were not to be opened and, therefore, he would have held her in criminal contempt.

The Wilmington Morning Star and its reporters were represented by George Freeman, assistant general counsel of The New York Times Company, by Floyd Abrams and Landis C. Best of Cahill Gordon & Reindel, by Mark J. Prak and Harold C. Chen of Brooks, Pierce, McLendon, Humphrey & Leonard and by Stephen T. Smith of McMillan, Smith & Plyler. Professor Rodney A. Smolla filed an amicus brief on behalf of a number of news organizations supporting the appellants.

South Carolina Supreme Court Reverses Jury Award for Police Chief

Failure to Investigate Anonymous Opinion Submission Not Actual Malice

A jury verdict awarding former police chief Wayne Elder \$310,000 for his libel claim against the *Gaffney Ledger* was reversed by the South Carolina Supreme Court in late June. *Elder v. Gaffney Ledger*, No. 25153 (S.C. Sup. Ct. June 19, 2000). The court held that Elder failed to show sufficient evidence of actual malice on the part of the newspaper's editor, Cody Sossamon, who decided to print an anonymously phoned-in item suggesting that Elder took payoffs from drug dealers. The award had previously been upheld by a South Carolina mid-level appellate court.

"What's Your Beef" Column

The piece appeared in the *Gaffney Ledger's* "What's Your Beef" column, in which readers could express opinions about matters of local concern. The newspaper operated an answering service which recorded readers' comments, and transcripts of such calls appeared in the column. The anonymous contributor in this case complained about the proliferation of drug dealing in the town of Blacksburg, where Elder was police chief, and mused, "Now I often wonder if the drug dealers are paying the Chief of Blacksburg." Sossamon published the piece with an accompanying caption which he wrote: "Are the drug dealers paying?"

Rather than accepting Sossamon's invitation to respond to the piece, Elder sued the newspaper for libel. A jury awarded him \$10,000 in actual damages and \$300,000 in punitive damages.

On appeal, the Court of Appeals of South Carolina held that the question "Are the drug dealers paying?" did not constitute protected opinion, and that it implied an affirmative answer. According to that court, actual malice was established through evidence of ill will which Sossamon may have harbored

(Continued on page 4)

SC Sup. Ct. Reverses Jury Award for Police Chief

(Continued from page 3)

against Elder, and through Sossamon's failure to verify the implication of the anonymous assertions. It therefore affirmed the verdict. *Elder v. Gaffney Ledger, Inc.*, 333 S.C. 651, 511 S.E. 2d 383 (Ct. App. S.C. 1999.) See *LDRC LibelLetter*, February 1999 at 7.

Reversed on Actual Malice

The South Carolina Supreme Court reversed, based solely on the actual malice issue. The court discredited each point of evidence relied upon by the court of appeals, namely: (1) Sossamon failed to investigate the anonymous caller's assertions; (2) the phone recording of the caller's statement was deleted from the newspaper's answering machine and therefore was not entered into evidence at trial; (3) Sossamon pled guilty to manufacturing marijuana some years before this; and (4) Sossamon was rude to Elder's wife once when she came to the newspaper's offices to place an advertisement.

As for the failure to investigate, the Supreme Court noted, the plaintiff had presented expert testimony that reporters typically verify the accuracy of news articles; however, no testimony established that the same standard procedures applied to editorials or opinion columns. Though Sossamon was unable to produce the actual tape at trial, there was no evidence that he had fabricated its contents. Thus, crediting the absence of the tape as evidence thereof effectively switched the burden on the actual malice question from the plaintiff to the defendant.

Although Sossamon had been arrested on a marijuana charge in the past, nothing showed that Elder had any involvement, so no motive of ill will could be inferred. The court found the incident between Mrs. Elder and Sossamon irrelevant to demonstrating ill will toward Chief Elder. And at any rate, ill will alone would not sufficiently establish constitutional malice.

The court also noted that Sossamon testified at trial as to his own suspicions regarding Elder,

though he lacked the factual basis to write an accusatory news article. This being the only evidence concerning Sossamon's belief in the accusation, the court could not rule that he had purposefully avoided the truth. Therefore, the verdict could not stand.

UPDATE

Co-Producer of Tailwind Report Sues CNN for \$106 Million

In late May, CNN settled a lawsuit brought by April Oliver, the producer of the Tailwind story, for an undisclosed amount. See *LDRC LibelLetter* May 1999 at 1. Now, a little more than a month after the settlement, her co-producer, Jack Smith, is suing CNN for fraud, wrongful termination and defamation in a U.S. Federal District Court in Atlanta.

When CNN broadcast the Operation Tailwind story in June 1998, allegations of U.S. forces using lethal nerve gas to kill Vietnam War defectors were met with much protest. Amidst the controversy, CNN backed off the Tailwind story and fired the story's producers, April Oliver and Jack Smith.

In his suit, Smith alleges that he was defamed by the internal report conducted by attorney Floyd Abrams and CNN's in-house counsel David Kohler who concluded that the Tailwind story was "insupportable." Smith believes that CNN actions have permanently hurt his reputation as a journalist.

Smith, who is seeking \$6 million in actual damages and \$100 million in punitive damages, claims that CNN fired him and retracted the Tailwind story in order to stave off protest from the military and the government and retain valuable relations with military officials and not because the network was unable to verify the story. Oliver, too, alleges CNN fired her for public relations and business reasons.

Colorado Court of Appeals Recognizes Incremental Harm Doctrine

By Marc D. Flink

In affirming dismissal of a defamation claim based, in part, on published allegations of spousal rape, the Colorado Court of Appeals recognized and applied the incremental harm doctrine. *Tonnessen v. The Denver Publishing Company dba Denver Rocky Mountain News*, 2000 Colo. App. LEXIS 1090 (Colo. Ct. App. 2000). The allegations of forced sex were initially made by the wife in a divorce/custody proceeding and were repeated to a reporter by the wife's sister during an out of court interview.

Twins of Different Fathers – Allegations of Forced Sex

On June 11, 1995, Denver Publishing printed an article concerning the dissolution of marriage action between plaintiff Peter Tonnessen and his wife. The article focused on the circumstances surrounding the impregnation of Mrs. Tonnessen. In late 1994, Mrs. Tonnessen had given birth to twin girls fathered by different men. The court of appeals summarized the circumstances relating to the conception as follows:

The twins were conceived in January 1994, after the wife had filed the dissolution action but before she finally left the marital home. After Tonnessen discovered that his wife was pregnant, he filed a paternity action, the test results showed that Tonnessen was the father of one of the twins, but the other had been fathered by the wife's boyfriend. The case attracted considerable media attention around the world.

During the dissolution proceedings, the wife explained the dual impregnation by testifying that she had had consensual sex with her boyfriend, who by the time of the dissolution was her fiancé and is now her husband, and that sometime afterwards she had been raped by Tonnessen in the marital home. Tonnessen denied raping his wife.

The article in the *Denver Rocky Mountain News* repeated the wife's allegations of rape made in the context of the judicial proceedings. The article also included a statement by the wife's sister that the wife said that Ton-

nessen had "forced [wife] to the floor and had sex with her." The article also contained other alleged defamatory statements attributed to the wife and the wife's sister unrelated to the circumstances of conception.

Tonnessen filed a complaint and an amended complaint seeking damages for defamation, invasion of privacy and outrageous conduct. Denver Publishing filed a motion to dismiss or in the alternative for summary judgment. The trial court granted the motion for summary judgment based on the pleadings and on certain articles that were attached. After examining the submissions, the court determined that as a matter of law: (1) the statements were not defamatory; (2) they were privileged; (3) the facts published were already in the public domain; and (4) Denver Publishing's conduct did not support a claim for relief for outrageous conduct.

The In Court Statements Were Privileged

The Court of Appeals easily disposed of the defamation claim based on the wife's statements of forced sex made in the context of the judicial proceedings. Although the court acknowledged that "the imputation of rape is defamatory *per se*," it further recognized that "under the common law doctrine of fair report, reports of in-court proceedings containing defamatory material are privileged if they are fair and substantially correct, or are substantially accurate accounts of what took place." The court went on to note that "[t]he privilege exists even if the reporter of the defamatory statements believes or knows them to be false." Because the court found that the article fairly and accurately summarized the positions of the parties in the court proceedings, the statements were privileged and not actionable.

The Court of Appeals also addressed the sister's out of court statements in the context of the fair report privilege. The court stated:

The fair report privilege is not limited to media defendants, but extends to protect reports of judicial proceedings made by all other persons as well. *See Rosenberg v. Helinski*, [328 Md. 664, 616 A.2d 866 (1992)]. Thus, to the extent the sister was simply repeating the wife's in-court

(Continued on page 6)

Colorado Court of Appeals Recognizes Incremental Harm Doctrine

(Continued from page 5)

accusation, the sister's statement also was privileged.

Tonnessen argued that the sister's comments were not privileged because the sister was not present in court when the accusations were made, and therefore the sister was not reporting an in-court statement. Even assuming that Tonnessen's interpretation of the privilege was correct, the Court of Appeals affirmed the trial court's determination that the sister's statements were not actionable under the incremental harm doctrine.

Colorado Recognizes Incremental Harm Doctrine

The incremental harm doctrine is a concept in libel law whereby the court "compares the harm caused by non-actionable elements of an article to the harm caused by actionable portions and dismisses the latter when the difference is incremental." *Jewell v. NYP Holdings, Inc.*, 23 F.Supp. 2d 348, 388 (S.D.N.Y. 1998). The incremental harm doctrine allows a court to dismiss a plaintiff's libel claims where the claims are based on statements that caused little or no harm to a plaintiff's reputation either because the harm was so trivial or because other non-actionable statements in the same publication were the genuine cause of the harm. *Herbert v. Lando*, 781 F.2d 298, 311 (2d Cir. 1986).

In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 523 (1991), the United States Supreme Court stated that the incremental harm doctrine is not constitutionally required under the First Amendment. In *Masson*, the Supreme Court, however, expressly recognized the rights of states to adopt the doctrine under state tort law.

In *Tonnessen*, the Colorado Court of Appeals recognized and adopted the incremental harm doctrine as supporting the dismissal of the plaintiff's claims in that case. The *Tonnessen* decision was issued six months after a Wisconsin Appellate Court stated, "Wisconsin has not recognized the doctrine of incremental harm." *Maquire v. Journal Sentinel, Inc.*, 232 Wis. 2d 236, 248, 605 N.W. 2d 881, 888 (Wis. App. 1999). The D. C. Circuit and the Ninth Circuit, applying California

law, also rejected the doctrine. See *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984); *Masson v. New Yorker Magazine, Inc.*, 960 F.2d 896 (9th Cir. 1992).

The Colorado Court of Appeals held as follows:

This statement by the sister is virtually the same as the wife's in-court accusation which was reported by Denver Publishing. Because we have held that the reporting of the wife's statement is protected by the fair report privilege, we conclude the sister's statement is not actionable under the "incremental harm doctrine."

Rather, the reporting by Denver Publishing was of two separate repetitions of an identical accusation: that Tonnessen forced his wife to have sex with him. Tonnessen was not being accused of one crime by the wife and another by the sister, or even of committing two separate sexual acts. In our view, the harm to Tonnessen's reputation, which he has alleged arose from the wife's rape allegation, flowed from and was caused by the reporting of her in-court testimony. There is no suggestion anywhere that the sister had any independent knowledge of what actually occurred between Tonnessen and the wife, and the newspaper's act of adding the sister's words about what the wife had told her did not do more than convey the same allegation contained in the privileged, non-actionable statement.

We consider the analysis in *Herbert v. Lando, supra*, to be applicable and conclude that the reporting of the sister's words is not actionable as a matter of law under this limited application of the incremental harm doctrine. The sister's words merely imply the same view and are simply an outgrowth and subsidiary to those claims upon which it had been held there can be no recovery, and any damage attributed to the repetition of the wife's rape allegation through the sister's statement would be nominal.

To hold otherwise would allow Tonnessen to do indirectly what he could not do directly; that

(Continued on page 7)

Colorado Court of Appeals Recognizes Incremental Harm Doctrine

(Continued from page 6)

is, to make Denver Publishing liable for accurately reporting the wife's in-court statement. See Daly, *The Incremental Harm Doctrine: Is There Life After Masson?*, 46 Ark. L. Rev. 371, 385-86 (1993).

Marc D. Flink is a partner in the Denver office of Baker & Hostetler, LLP and represented the Denver Publishing Company.

Utah Teen Charged with Criminal Libel for Website

ACLU Argues Statute Unconstitutional

In one of the most distressing examples of post-Columbine trampling on student civil liberties, a Utah prosecutor has charged a 16-year-old boy with criminal libel for the posting of insults on a Web site. Indeed, before a decision had been made as to whether or not to charge the boy with the class B misdemeanor, Beaver County sheriff's deputies arrested him and seized his computer. He then spent seven days in a juvenile detention facility in Cedar City, Utah, before being released and permitted to travel to California to stay with his grandparents.

Ian Lake, the Utah teen, has pleaded not guilty in a 5th District Juvenile Court to the charge of criminal libel after he posted a Web page in which he called his school principal "the town drunk," referred to several female classmates as "sluts," and questioned the work ethic and competency of other school faculty.

Lake, who had been treated as a "outsider" by other students, claimed that he created his Web site in retaliation to other student-created sites which carried similarly offensive messages. Parents, reminded by recent memories of Colorado's Columbine High School and the threatening Web sites posted by two students prior to their shooting spree, notified the principal of the Utah school of the offensive site. Lake defended his postings by stating that he threatened no one and he had no intentions of violence towards any of his classmates. Lake's

father defended his son in statements made to the press that his son had spent months researching what he could say without crossing the line into libel.

The most recent criminal libel case in Utah dates to 1987, when then-Salt Lake County Attorney Ted Cannon was convicted for slurs he made about a television reporter. He served 30 days in jail. However, Lake's case is the first Utah libel case involving the Internet. Prior to charges being formally made, Leo Kanell, the Beaver County Attorney who was reviewing the case stated to the press, "It comes down to whether posting on the Internet constitutes publishing. In my opinion, it is publishing, because you're reaching such a large audience." Because of that, he maintains, Web sites should be accountable to local libel statutes.

After the charges were officially made, Lake's attorney, Richard Van Wagoner, who took the case as a cooperating attorney for the American Civil Liberties Union of Utah, stated to the press that the charges should be dropped because the Utah law violates the First Amendment. Van Wagner will challenge the constitutionality of the statute on its face, arguing that the statute does not apply the correct actual malice standard as required by the U.S. Supreme Court. In support of that argument, Van Wagoner cited the U.S. Supreme Court's decision in *Garrison v. State of Louisiana*, 379 U.S. 64 (1964), in which the high court struck down Louisiana's criminal libel statute, which punished false statements about public officials by utilizing the standard of ill will. The U.S. Supreme Court, in dismissing the lower court's conviction, relied on the standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), writing, "[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." *Garrison*, 379 U.S. 64 at 74.

Van Wagoner asserted that if his proposed facial challenge failed he would argue that Lake's speech qualified as parody, a protected form of speech. He further stated that if the facial challenge and the parody defense failed, he would argue that the statements made by Lake were not false, therefore establishing a complete defense to any libel action.

A pretrial conference has been scheduled for August 1, 2000.

Jury Finds Alabama Lawyer Guilty of Criminal Defamation and Witness-Tampering

124-Year-Old Statute Holds Up for Defamed Alabama Lieutenant Governor

After two days of deliberation, Jasper, Alabama, lawyer Garve Ivey Jr. was recently found guilty by a Mobile County jury of witness-tampering and criminal defamation, but acquitted of a felony bribery charge, in a legal battle involving Alabama Lieutenant Governor Steve Windom. Co-defendant Wes Chappell, Ivey's private investigator, was found innocent of all three charges.

The proceedings stemmed from a 1998 lawsuit and its videotaped accusations by admitted ex-prostitute and drug addict Melissa Myers Bush, stating that the then-candidate for Lieutenant Governor had assaulted and raped her during a sexual relationship between 1987 and 1993 when she was working as an escort. After being jailed in an unrelated criminal case, Bush recanted her story and claimed that she had been paid to make her false statements about Windom by Birmingham businessman Scott Nordness.

Nordness originally heard Bush make a comment about how she used to be a hooker during a job interview. When Nordness asked if she had ever slept with anyone famous, she replied with Windom's name. According to testimony, Ivey, who was vice president of the Alabama Trial Lawyers Association, which opposed Windom's candidacy, reimbursed Nordness for \$2,700 of the total \$3,200 which Nordness had paid to Bush for her videotaped testimony. Ivey then produced 300 copies of the tape, which were distributed to news outlets across the state after Bush's lawsuit was filed.

Ivey's attorneys, in an attempt to get the criminal defamation charge dropped, claimed that the 124-year-old defamation law was unconstitutional because it did not utilize the "actual malice" or "reckless disregard for the truth" standard established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In finding Ivey guilty of criminal defamation, the jurors agreed, according to jury forewoman Laura Macon, that Ivey should have entertained serious doubts as to Bush's testimony and done more to try to verify her claims before making them public.

Although the jury acquitted Ivey of bribing Bush because Nordness gave Bush the money before he met

Ivey, they did believe that Ivey later persuaded Nordness to sign a statement that falsely suggested no money had changed hands, leading to Ivey's conviction for witness-tampering.

Ivey, 48, could face up to six months in jail on each misdemeanor count, total fines of up to \$2,500 and possible loss of his license to practice law. Ivey's attorneys stated that they plan to appeal the decision, arguing that "[t]he evidence cannot possibly support a guilty verdict."

Stemming from the same controversy, Ivey has filed a civil lawsuit in Walker County Circuit Court against Lt. Gov. Windom, alleging Windom defamed his character by claiming that Ivey was a "ringleader of a plot" to discredit his campaign and publicly called Ivey a "liar, and had falsely accused the plaintiff of bribery and other felonies." Ivey further alleged that Windom abused legal process when he lobbied for an old college friend to be appointed as a special prosecutor to convene a new grand jury investigation after the Mobile County District Attorney had concluded a grand jury investigation of the matter with no indictments.

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Judgment for *Time* Affirmed in Simpson-Related Case

By Robin Bierstedt

A California Court of Appeal has affirmed a judgment for *Time* magazine in a libel case brought by Rachel Ferrara, the former girlfriend of Kato Kaelin. On the night that Nicole Simpson and Ron Goldman were murdered, Ferrara was on the telephone with Kaelin when he heard three loud “thumps” on the wall of his room at O.J. Simpson’s estate.

Kaelin and Ferrara testified at the preliminary hearing in the O.J. Simpson murder case. *Time*’s August 1996 article — entitled “The Whole Truth?” — reported that prosecutors Marcia Clark and William Hodgman were investigating a claim by two friends of Ferrara that she and Kaelin had not told the whole truth in their testimony about when and where Kaelin saw Simpson when Kaelin left his guesthouse to investigate the “thumps.”

Ferrara’s suit alleged that *Time*’s article mischaracterized her testimony and falsely accused her of perjury. The libel case went to trial in March 1998 and featured the dueling testimony of the Simpson prosecutors: Marcia Clark for Ferrara (a surprise witness) and William Hodgman for *Time*. The jury found that three of the four statements sued on were not false, that the one false statement (concerning Ferrara’s preliminary hearing testimony) was not libelous, and that the article was a “fair and true report.”

Ferrara appealed the judgment on a number of grounds. She argued that the special jury verdicts on the four statements at issue were inconsistent with one another and with the general verdict in favor of *Time*. The appellate court, noting the principle that verdicts “must be harmonized if there is any possibility of reconciliation,” found the verdicts reconcilable even though “apparently inconsistent.”

On the fair report finding, Ferrara argued that the privilege should not apply to *Time*’s brief communication with a government official, consisting of the reporter asking Hodgman in a corridor conversation to confirm that there was an investigation

pending against Ferrara and Kaelin. The court said this contention was “unpersuasive” and that, in any event, the question of applicability of the privilege was “irrelevant” given the other jury findings.

The court similarly rejected plaintiff’s other grounds for appeal: error in ruling that her O.J. Simpson testimony was a matter of public concern; coercion of the jury verdict (based on the jury’s inability to render a verdict on the question of negligence); unavailability of punitive damages (the trial was bifurcated and the issue of damages never reached); and exclusion of testimony (the trial court found Eric Burns, who described himself as a media analyst for the Fox news channel in New York, not competent to testify as an expert on *Time*’s alleged negligence).

Robin Bierstedt is Vice President and Deputy General Counsel of Time Inc. and, along with Douglass Maynard and Paul Gardephe of Time Inc. and Bob Vanderet and Neil Jahss of O’Melveny & Myers, represented Time in this case.

UPDATE: Colorado Supreme Court Stays Prosecution of Reporter for Attempting to Obtain JonBenet Ramsey Ransom Note

The Colorado Supreme Court has agreed to hear a facial challenge to Colorado’s commercial bribery statute, and has issued an emergency writ prohibiting the prosecution of *Globe* reporter Craig Lewis until further order of the court. Lewis was indicted by a Jefferson County Colorado grand jury for violating Colorado’s commercial bribery statute when he allegedly offered to purchase a copy of the JonBenet Ramsey “ransom” note from a private handwriting analysis expert who had been retained by John and Patsy Ramsey.

In May, after the trial judge denied Lewis’ motion to dismiss the indictment on grounds that the statute was facially unconstitutional, Lewis pleaded

(Continued on page 10)

Colorado Supreme Court Stays Prosecution of Reporter

(Continued from page 9)

not guilty to the charges. He then filed an emergency petition with the Colorado Supreme Court arguing that the statute, which makes it a felony to offer or confer “any benefit” on a source under a duty not to disclose information as “consideration” for breaching that duty, applies to every whistleblower situation, and is therefore “substantially overbroad.” An amicus brief in support of Lewis’ petition was filed by the Reporters Committee for Freedom of the Press, The Society of Professional Journalists, and the California Newspaper Publishers Association.

In granting Lewis’ petition, the Colorado Supreme Court put the pending prosecution on hold, and ordered the District Attorney to file an Answer to the petition by July 31, explaining why the indictment should not be dismissed. Lewis will then have 30 days in which to file a reply brief in support of his petition. (Lewis’ petition also asserts that two other statutes — Colorado’s criminal extortion statute and its criminal libel statute — are facially unconstitutional; the Supreme Court’s Order to Show Cause indicates that these issues will also be addressed by the Court).

yers, including the plaintiff, of threatening her while she was prosecuting one of their clients on murder charges. Charges arising from the incident were referred to the court disciplinary committee.

The defamation complaint against *The Times* made two main points. The first was based on a sentence in *The Times*’s article which said that the prosecutor accused the lawyers of outrageous conduct “after they used motor vehicle records to obtain her home address and then mailed her an empty envelope just before their client’s trial began.” The plaintiff alleged that this was stated as fact rather than as an allegation by the prosecutor. On this point, Judge Wilk correctly concluded that, although there was some ambiguity, the formulation was insufficient to form the basis of a libel claim.

Plaintiff’s second claim was based on a sentence in the article which stated that the trial judge in the murder case to whom the prosecutor had complained about the threatening behavior “referred the matter to a court disciplinary committee that could disbar the three lawyers.” The bulk of the plaintiff’s claim was that he was never the subject of the judge’s investigation and his name was not referred to the disciplinary committee. He therefore said it was false and defamatory for *The Times* to imply that he was facing disbarment.

Judge Wilk concluded that although the judge’s letter concerned only one of the other attorneys, “it was sent after a hearing which referred to the actions, concerns and potential liability of all three attorneys, including the plaintiff. The disciplinary committee was free to take the investigation in any direction it deemed appropriate. The statement that it could disbar the three lawyers was substantially accurate and, therefore, not actionable.”

Although the facts were not altogether clear-cut, Judge Wilk’s holding is based on long-held precedent that the media are privileged when reporting on official and judicial proceedings, such as here, as long as the reporting is substantially accurate. This test was met in this case.

George Freeman, assistant general counsel of The New York Times Company, represented The New York Times and David Rhode in this matter.

N.Y. Times Wins on Report of Lawyer Discipline Referral

By George Freeman

On July 6, 2000, New York State Supreme Court Judge Elliott Wilk dismissed a libel suit against *The New York Times* and reporter David Rohde arising from a March 18, 1999 article in *The Times*. *Shipman v. New York Times Publishing Co.*, No. 114101/99 (N.Y. Sup. Ct. N.Y. County July 6, 2000).

The article reported on a lawsuit filed by an Assistant District Attorney who accused three defense law-

New Jersey Supreme Court Widens Jurisdiction for Internet-Based Torts

By Bruce S. Rosen

Ignoring the developing national body of law, the New Jersey Supreme Court has broadly interpreted the state's jurisdiction over tortious out-of-state cyberspace communications. In *Blakey v. Continental Airlines, Inc.*, 164 N.J. 38, 751 A.2d 538, (2000) the Supreme Court used a traditional jurisdictional analysis to rule that in certain instances the state courts have jurisdiction over people posting defamatory comments on a online bulletin board from Houston.

Multi-State Parties in First NJ Case

In *Blakey*, one of the airline's first female Airbus pilots filed a Title VII Civil Rights suit in federal district court in Seattle, near her home in 1993. Continental had the suit transferred to Newark, where the plaintiff was based. While the suit was pending, she transferred to Houston and then took a leave of absence. Shortly thereafter, she brought a state Law Against Discrimination (LAD) claim for defamatory retaliatory harassment in New Jersey state court against several Houston-based Continental pilots who were allegedly disparaging her personally and professionally on a CompuServe bulletin board used by Continental employees.

The Court said that if cyberspace is used for corporate purposes, then defamatory retaliatory harassment through that medium becomes part of the workplace for purposes of the LAD. Even if those alleged cyber-harassers were non-residents, if they knew that the plaintiff had already filed a separate action for harassment in New Jersey, then they must have intended that the harm be felt there, and the New Jersey Courts should retain jurisdiction over these defendants. (The Court sent the case back for more discovery on who knew what and when).

While *Blakey* is a "poor vehicle through which to explore the complexities of personal jurisdiction in an age of electronic commerce," as Justice O'Hern quite rightly notes for a unanimous Court, it is the Court's first pass on these thorny questions of

personal jurisdiction. It is uncertain whether the Court has simply gone the extra mile to protect a plaintiff in the context of the state's exceptionally broad LAD, or whether cyberspace commentators worldwide had better watch their language lest they will face the worldwide jurisdiction of the New Jersey Courts.

Appeals Court Rejected Jurisdiction

In 1999, the Appellate Division panel below (322 N.J. Super. 187, 730 A.2d 854) relying on a number of cyberjurisdiction decisions over the past five years, declined to grant jurisdiction. The appellate panel noted that courts around the country have been especially careful not to allow the immediacy of cyberspace contact to translate into sweeping jurisdiction for any seeming harm coming across a modem wire. After analyzing a series of older print media cases and a series of newer cyberlaw cases (such as *CompuServe v. Patterson*, 89 F.2d 1257 (6th Cir. 1996) and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998), the Appeals court concluded that there was no evidence the pilots' online remarks were directed at New Jersey:

[w]e . . . have located no case in which a court has found personal jurisdiction over a non-resident defendant for allegedly defamatory remarks communicated electronically when the plaintiff did not reside in the forum state, plaintiff's employment was not based on the forum state, and the defendant's electronically transmitted remarks were not specifically targeted at the forum state. Indeed to do so would go beyond the limits of due process.

322 N.J. Super 187, 206

The Supreme Court deflated that finding by determining there was a real potential that the defendants' electronically transmitted remarks were targeted at New Jersey (and giving the Court an oppor-

(Continued on page 12)

New Jersey Supreme Court Widens Jurisdiction for Internet-based Torts

(Continued from page 11)

tunity to expand the definition of a workplace for cyberspace-related LAD claims). They sent the case back for more fact-finding.

Consistent with '89 Decision

The appellate decision attempted to move state law to the evolving view that there is no nationwide jurisdiction for defamation actions “and the advent of the Internet and electronic bulletin boards does not change that fact.” 322 N.J. Super. at 211. If the panel was at all concerned about how Justice O’Hern and the rest of the high court might react to their decision, they merely needed to read Justice O’Hern’s 1989 opinion in *Lebel v. Everglades Marina*, 115 N.J. 317, 558 A.2d. 1252, more closely.

The Court in *Lebel* ruled a Florida boat seller who may have defrauded a New Jersey buyer had sufficient minimum contacts with New Jersey — telephone calls, and mail during acquisition by plaintiff of a boat, delivery of which was taken in Florida — and that subjecting him to suit here did not offend traditional notions of fair play and substantial justice. Writing for the court in *Lebel*, Justice O’Hern declined to rely on the then-“unsettled” “stream of commerce” theory (whereby the defendant did intentionally put his product in the stream of commerce in the state) and instead declared that the Court would “stay with the basics.”

Essentially, the court ruled, the pleadings set forth a case that defendant purposefully directed his activities at New Jersey; when a non-resident defendant purposefully directs its activities to the forum and the litigation results from alleged injuries that arise of or relate to those activities, the forum may assert personal jurisdiction over the defendants. Once the Court established this specific jurisdiction, it was not a huge leap for the Court to rationalize the state’s interest in protecting its residents and in determining that the marketer of a “big-ticket” item should have anticipated that a breach of contract suit would expose it to suit in the forum of the buyer.

Same Justice/Same Analysis

Fast forward to *Blakey*: same Justice, same “basic” analysis: There will be no jumping on the trend of the moment; if an intentional tort is alleged to have been directed at a person within the state, it creates specific jurisdiction. Even if, unlike New Jersey resident Richard Lebel, Seattle resident Tammy Blakey’s act of utilizing the forum allows her to rely on LAD redress. In *Blakey*, the state’s interest for general jurisdiction is required to protect the integrity of its LAD statute. “The effect of retaliatory falsehoods on [Blakey] could reasonably influence the anti-discrimination policies of the forum by deterring [Blakey’s] resolve.” 164 N.J. at 70.

May Not Be Defamatory

However, the Court reminded the parties that it had not ruled on whether the online comments were capable of defamatory meaning and in fact remarked that some of the comments were clearly outside of its rigorous standards set forth in *Ward v. Zelikovsky*, 136 N.J. 516, 643 A. 2d 972 (1994) (holding that “[u]nless a statement explicitly or implicitly rests on false facts that damage the reputation of another, the alleged defamatory statement will not be actionable”).

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LDRC would like to thank Summer interns — Brian Scott Levine, St. Johns Law School, Class of 2002 and Mark Mendoza, Columbia Law School Class of 2002 — for their contributions to this month’s *LDRC LibelLetter*.

John Doe Suits Challenge the Right to Anonymity on the Internet

By Megan E. Gray and Gregory L. Vinson

The number of lawsuits filed by individuals and corporations based on the publication of allegedly defamatory statements on Internet message boards and chat rooms has mushroomed. The plaintiffs are often frustrated by the fact that the speaker's identity is unknown; most message board participants use pseudonyms. Many plaintiffs have sought to overcome this obstacle by filing suit against one or more John Doe defendants and quickly serving subpoenas on the Internet Service Providers ("ISPs"), portals, and other parties that have access to the speakers' identity. Unfortunately, many of these lawsuits are meritless and some courts have failed to enforce procedural protections against premature discovery to preserve the defendant's right to remain unidentified.

Freewheeling Chat

Internet message boards and chat rooms are online forums where individuals can post messages on the electronic equivalent of a hallway corkboard. These forums are often organized by particular topics of interest. Yahoo!, in particular, maintains separate message boards for hundreds of publicly traded companies, on which participants can express their opinions on management, and the future prospects of the company and its stock price. The conversation in these forums can hardly be characterized as investment advice. Participants often exchange highly opinionated and hyperbolic statements, and the topics of conversation on the message boards frequently stray to topics having nothing to do with the companies that are the subjects of the forum.

The fact that almost all participants on Internet message boards and chat rooms use pseudonyms to identify themselves contributes to the free-wheeling nature of the discussion. As a result, statements published on message boards are generally understood to be unreliable. The inability of the audience to identify the speaker and therefore to evaluate the

speaker's trustworthiness, creates inherent skepticism about the truth of the statements. *See, New York v. Duryea*, 76 Misc. 2d 948, 966-967, 351 N.Y.S.2d 978, 996 (1974). ("Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is 'responsible,' what is valuable, and what is truth").

Despite their unreliability, these communications have expressive value protected by the First Amendment. The United States Supreme Court has recognized the important role of anonymous speech. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). The Court stated "anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority." *Id.* at 357.

Corporations Increasingly Sue

Concerned about their personal reputations, the reputations of their companies, and potentially adverse effects on their stock prices, the directors of corporations have increasingly resorted to filing defamation lawsuits as a means of silencing what they perceive to be threatening or offensive speech.

In many cases, however, the plaintiffs file suit merely as a pretext for discovering the identity of the pseudonymous speaker, without any expectation of actually prevailing on the merits of the action. Once a suit is filed, the plaintiff's attorney issues subpoenas on the ISPs and portals that are capable of identifying the John Doe defendants based upon billing and registration information.

Because many of these suits are based on statements that clearly cannot be considered defamatory, the plaintiffs frequently dismiss as soon as they learn that John Doe defendants have retained counsel. In

(Continued on page 14)

John Doe Suits Challenge the Right to Anonymity on the Internet

(Continued from page 13)

one case, the plaintiff company actually agreed to make a \$40,000 donation to the defendant's John Doe Anonymous Foundation after the defendant countersued alleging plaintiff's claim was frivolous. *See Itex, Inc. v. Does*, Circuit Court for the State of Oregon for the County of Multnomah Case No. 98-09-06393. The disturbing aspect of these cases is that the John Doe defendant often has no idea that a subpoena seeking disclosure of his personal information has been issued, or that a lawsuit has even been filed against him.

Procedural Protection Needed For "Does"

One of the fundamental principles of due process is that individuals should have notice and an opportunity to contest claims brought against them. Plaintiffs in John Doe suits often claim that they cannot give notice of the suit to the defendant until they learn the defendant's identity. Nonetheless, courts should examine the merits of the underlying action before allowing discovery into the defendant's identity to ensure that the right to anonymity is respected in the online environment.

At least one federal court has outlined procedural guidelines to ensure that John Doe defendants retain these rights. In *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), the court held, "Thus some limiting principles should apply to the determination of whether discovery to uncover the identity of a defendant is warranted." The court instituted safeguards to ensure that disclosure of the defendant's identity is allowed only in cases where the plaintiff has in good faith exhausted traditional avenues for identifying a civil defendant pre-service, and will not use discovery as a method to "harass or intimidate." *Id.* at 578.

First, the plaintiff should identify the defendant with sufficient specificity such that the court can de-

termine that the defendant is a real person or entity who could be sued in court, taking into account jurisdictional requirements.

Second, the plaintiff should identify all previous steps taken to locate the defendant. In most cases, the plaintiffs do not even bother to post notice on the message board where the allegedly defamatory statements were published.

Third, the plaintiff should establish that plaintiff's suit could withstand a motion to dismiss. This is to ensure that there is some merit to the underlying cause of action.

Finally, the plaintiff should file any requests it may have for discovery with the court, along with a statement of reasons justifying the specific discovery requested as well as identification of a limited number of persons or entities on whom discovery process might

be served. *Id.* at 578-80.

Procedures Vary: Hvide and Melvin

Other cases have demonstrated a significant variance in procedure with respect to permitting the plaintiff to discover the defendant John Doe's identity without evaluating the underlying merits of the action. For example, in *Eric Hvide v. John Does 1 through 8*, Circuit Court of the 11th Judicial Circuit in and for Miami, Dade County Florida, Case No. 99-22831 CA 01, the court essentially ruled that the right to remain anonymous evaporates the moment a person is sued.

In *Hvide*, the court rejected the John Doe defendant's claim that he had a constitutional right to remain anonymous under the circumstances of the case. Contrary to defense counsel's assertion that "anonymity encourages candor and frank discussion where it wouldn't normally occur," the court remarked "give them anonymity and nothing holds them back . . . That's why the Ku Klux Klan wears hoods."

The court stayed its ruling to allow the defen-

(Continued on page 15)

Nonetheless, courts should examine the merits of the underlying action before allowing discovery into the defendant's identity to ensure that the right to anonymity is respected in the online environment.

John Doe Suits Challenge the Right to Anonymity on the Internet

(Continued from page 14)

dant an opportunity to appeal. The court of appeals subsequently granted John Doe's petition to stay compliance with the subpoenas while it continues to consider the merits of the case.

Meanwhile, in *Melvin v. Doe*, PICS Case No. 00-1010, Pennsylvania Judge Joan Melvin sued the anonymous operator of a political watchdog Web site based upon allegedly defamatory statements posted on the site. The author of the Web site reported that Melvin inappropriately lobbied on behalf of another attorney seeking a judgeship, an allegation that Melvin has denied. After filing suit in Virginia, Judge Melvin issued a subpoena on AOL seeking disclosure of the Web site operator's identity.

The ACLU, representing Defendant John Doe, successfully moved to dismiss the Virginia suit for lack of personal jurisdiction over the defendant. In so doing, however, the defendant revealed that he was a resident of the state of Pennsylvania, prompting Melvin to re-file in that state.

The judge in the Pennsylvania case, taking a more moderate approach than the court in *Hvide*, granted the defendant's motion to stay discovery requests to reveal John Doe's identity until the defendant had the opportunity to establish through summary judgment proceedings whether Judge Melvin actually engaged in the activities alleged on the Web site. The court is currently considering defendant's motion for summary judgment and, should the motion be denied, defendant's request for certification of appeal.

Some jurisdictions require a stay on discovery, including third-party subpoenas, until after the defendant has been served with the complaint. Plaintiffs generally claim that such stays should not apply to John Doe defendants because the discovery is necessary in order to serve the defendants.

Nonetheless, the court in *Xircom, Inc. v. Doe*, Ventura County Superior Court Case No. Civ. 188724¹ ruled that plaintiff's prematurely issued subpoena violated California's statutory stay on discovery and ordered the subpoena quashed. While *Xir-*

com marked the first time a John Doe defendant successfully moved to quash a subpoena seeking his identifying information, the court did not address John Doe's claims that the subpoena violated his constitutional rights of privacy. The parties reached a settlement before this issue could be further litigated.

In a novel twist to John Doe defamation suits, one defendant, identified as Aquacool_2000, went on the offensive by suing Yahoo! for disclosing his personal information to the plaintiff without giving prior notice. See, *John Doe, aka Aquacool_2000 v. Yahoo!, Inc.*, C.D.Cal. Case No. CV 00-04993-NM.² Yahoo had previously disclosed John Doe's personal information to a plaintiff in an underlying defamation suit, without ever providing notice to John Doe. John Doe's suit alleges that in so doing, Yahoo! violated his constitutional rights to privacy and violated the terms of Yahoo!'s own privacy policy. Yahoo! has since modified its procedure for responding to subpoenas and now provides its users with notice and an opportunity to challenge the subpoenas prior to disclosure of the user's information.

If the right to speak anonymously online is to have any meaning, courts should not allow discovery into the identity of pseudonymous speakers at least until after the court has determined that the suit could survive on the merits. If the plaintiff is entitled to discovery regarding the identity of John Doe defendants without first demonstrating the merits of its action, these suits will continue to serve as an instrument for intimidating critical speech on the Internet. This, in turn, will result in a dangerous chilling effect on what the Supreme Court has recognized as "the most participatory form of mass speech yet developed." *Reno v. ACLU*, 521 U.S. 844, 863 (1997).

Megan E. Gray and Gregory L. Vinson are associates in the Los Angeles office of Baker & Hostetler LLP.

¹ Megan E. Gray represented John Doe in this action.

² The authors represent John Doe in this ongoing litigation.

Videotaped Athletes' Intrusion Claims Dismissed As Against ISPs

Section 230 Provides Immunity for All Non-Content Providers

U.S. District Judge Charles P. Kocoras in the Northern District of Illinois recently dismissed an amended complaint brought by college athletes, locker room photographs of whom were displayed on several Web sites without their consent, against two Internet service providers that hosted the sites. *John Does v. Franco Productions*, 2000 U.S. Dist. LEXIS 8645 (N.D. Ill. June 21, 2000) (No. 99 C 7885). The plaintiffs were unknowingly videotaped while undressed, and the resulting videotapes were sold by various means, including through Internet marketing. On Web sites hosted by the defendants, GTE Corporation and PSINet Inc., other parties posted still images taken from the videos for promotional purposes. The athletes filed suit against the videotape manufacturer and the ISPs for invasion of privacy by intrusion on seclusion.

Their first complaint against GTE and PSINet was dismissed based on the protection of Section 230 of the Communications Decency Act of 1996 (47 U.S.C. § 230), which immunizes Internet service providers from liability for content provided by third parties. The plaintiffs then amended their complaint to describe the ISPs as "Web hosts" instead. In dismissing the amended complaint, the judge held that regardless of terminology used, "[t]he CDA creates federal immunity against any state law cause of action that would hold computer service providers liable for information originating from third parties." According to Judge Kocoras, involvement in Web hosting activities could not "transform an entity into an information content provider." As the plaintiffs had not pled any facts to indicate that the service providers were involved in the creation or development of the offending images, their claim was again dismissed for failure to state a cause of action.

Columbia Journalism Review Sued for Web Publication

Former Associate Deputy Director at the Federal Bureau of Investigation, Oliver "Buck" Revell, filed suit against Columbia University School of Journalism, the Board of Trustees of Columbia University, and author Hait Lidov over the article "Pan Am 103—The American Issue," which was published on the Columbia Journalism Review (CJR) Internet Web site on December 21, 1999. The core of Revell's complaint alleges that the article has defamed him by suggesting that he was a knowing and willing participant in the fatal explosion of Pan Am flight 103, in which 270 people were killed. Revell alleges that the article imputes to him "a list of criminal and civil misdeeds," including "massive obstruction of justice, a knowing . . . [and] willful concealment and failure to warn the crew and passengers that Pan Am 103 would be bombed, . . . [and] conspiracy to commit . . . mass murder. . . ." Revell further alleges that the article falsely states that he conspired "with then Vice-President George Bush to conceal the foreknowledge of the Pan Am 103 bombing and sacrifice 'expendable' people. . . 'to smooth out relations with Iran.'"

The claims against Columbia University and its School of Journalism, focus on what Revell characterizes as the "knowing[], negligent[], and reckless[]" decision of *CJR* to publish "as true the totally false and irresponsible allegations" without any attempt to verify their veracity. The complaint attempts to amplify *CJR*'s wrongdoing by arguing that *CJR* had an "added obligation" to investigate the truthfulness of Revell's piece since he was neither a student nor faculty member of the School of Journalism, but was instead a practicing physician. The complaint characterizes as "inconceivable" any account of the school's action except that which defined it as "malic[ous] and wilful and wanton."

Revell has sued the defendants for libel, intentional infliction of emotional distress, conspiracy, negligence, and gross negligence. He seeks \$30,000,000 in actual damages and \$30,000,000 in punitive damages. The case has been assigned to Chief Judge Jerry Buchmeyer in the Dallas Division of the Northern District of Texas.

Third Circuit Holds Child Online Protection Act Unconstitutional

By Jodie L. Kelley

On June 22, 2000, the United States Court of Appeals for the Third Circuit issued a decision with sweeping implications for the government's ability to regulate speech on the Internet. *ACLU v. Reno*, No. 99-1324, 2000 WL 801186 (3rd Cir. June 22, 2000) (*COPA II*). At issue is the current Child Online Protection Act (COPA), the statute enacted to replace the one invalidated in *Reno v. ACLU*, 117 S. Ct. 2329 (1997), which prohibits any party from making available to minors, for commercial purposes, any material that is harmful to minors.

The Act sets forth several affirmative defenses, for example, to companies that restrict access of "harmful" material to only those with a

credit card, adult access code, or a digital certificate that verifies age. Violation of the Act subjects a party to civil penalties (fines up to \$50,000 per day) and criminal penalties (fines of up to \$50,000 and jail terms of six months).

District Court Grants Preliminary Injunction

The day after COPA was enacted, the American Civil Liberties Union and various content providers filed suit individually and/or on behalf of their members, asserting that the statute violated the First Amendment. After a five-day hearing, the district court granted a preliminary injunction. *ACLU v. Reno*, 31 F. Supp.2d 473 (E.D. Pa. 1999) (*COPA I*).

The court balanced the specific burdens imposed by the statute and the benefits the statute was designed to achieve. The court's primary focus was on the intangible burdens COPA's scheme imposes on both users and content-providers. A content-provider establishes an affirmative defense if it places potentially harmful material behind a shield, and allows access to such material when a user presents either a credit card or similar age verification code.

But the use of such age verification systems requires a user to reveal personal data, and a person may

be hesitant to do so, especially given the nature of the material at issue. *COPA I*, 31 F. Supp. 2d at 494-95. Accordingly, the court concluded, fewer users will access sites that have material contained behind a screen, and content-providers will suffer a loss of revenue. Moreover, in an attempt to avoid COPA's penalties, content providers would censor more material than might be necessary, leading to a further restriction on speech. *Id.*

These burdens, the district court concluded, were not outweighed by the benefits. Even if COPA were

In particular, the Third Circuit found fault with the Act's incorporation of "contemporary community standards" into the Act's definition of "harmful to minors."

enforced, children could access harmful material that was placed on the Internet by foreign content providers. *Id.* at 497. Moreover, the court concluded, parental blocking and filtering technologies were likely to be as effective as COPA while imposing fewer constitutional burdens. *Id.* Accordingly, the district court concluded, plaintiffs had shown a substantial likelihood that they would succeed in demonstrating COPA's unconstitutionality.

Third Circuit Affirms on New Basis

The Third Circuit has now affirmed, proclaiming itself "confident that the ACLU's attack on COPA's constitutionality is likely to succeed on the merits." *COPA II*, 2000 WL 801186 at 2. However, in doing so, the court relied on a rationale that had not been adopted by the court below, or briefed or argued by any of the parties to the appeal.

The court of appeals began by noting that, as a content-based restriction on speech, "COPA is 'both presumptively invalid and subject to strict scrutiny.'" *Id.* at 9 (internal citation omitted). Accordingly, to prevail the government would have to demonstrate the statute is narrowly tailored to meet a compelling governmental interest, and that it does so in the least restrictive manner possible. *Id.* Protecting children from harmful material is undoubtedly a compelling

(Continued on page 18)

Third Circuit Holds Child Online Protection Act Unconstitutional

(Continued from page 17)

governmental interest, the court concluded. The problem with the statute is the means by which the government attempts to do so. *Id.*

In particular, the Third Circuit found fault with the Act's incorporation of "contemporary community standards" into the Act's definition of "harmful to minors." COPA defines material that is harmful to minors as that which "the average person, applying contemporary community standards, would find, . . . with respect to minors, is designed to appeal to . . . the prurient interest;" depicts "in a manner patently offensive with respect to minors," sexual acts or the "lewd exhibition" of the genitals or breasts; and lacks serious literary, scientific or artistic value for minors. 47 U.S.C. § 231(e)(6). Although this standard has historically been used, and upheld, in other contexts, the court found it sweeps too broadly in the Internet context.

That is because "[u]nlike a 'brick and mortar outlet' with a specific geographic local, and unlike the voluntary physical mailing of material from one geographic location to another . . . the Web is not geographically constrained." *COPA II*, 2000 WL 801186 at 11. Thus, a content provider cannot shield itself from liability by refraining from sending material into the most conservative communities. Instead,

to avoid liability under COPA, affected Web publishers would either need to severely censor their publications or implement an age or credit card verification system where any material that might be deemed harmful by the most puritan of communities in any state is shielded by such a verification system.

Id.

The First Amendment, the Third Circuit concluded, does not allow the government to place such a burden on speech.

Because no technology currently exists by

which Web publishers may avoid liability, such publishers would necessarily be compelled to abide by the "standards of the community most likely to be offended by the message."

Id. at 14 (citation omitted). Thus, minors and adults in communities that would not deem material harmful to minors would nonetheless be deprived of the right to access such material. Such a result, the court concluded, "imposes an overreaching burden and restriction on constitutionally protected speech." *Id.* Accordingly, the court concluded that, although the

"Miller" obscenity test continues to be a useful tool outside the Internet context, "Miller . . . has no applicability to the Internet and the Web, where Web publishers

"Miller . . . has no applicability to the Internet and the Web . . ."

are currently without the ability to control the geographic scope of the recipients of their communications." *Id.* at 16.

The court expressed hope that technology may soon make such regulation "constitutionally practicable," *id.* at 17, but recognized that, as a result of its holding, the government may currently be unable to constitutionally restrict harmful material on the Web. *Id.* at 2, 16. The court concluded:

"[t]he State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations."

Id. at 16, quoting *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 555 (2d Cir. 1988).

The government has not yet announced whether it will seek review of the Third Circuit's decision. A petition for a writ of certiorari would ordinarily need to be filed with the Supreme Court by September 20, 2000.

Ms. Kelley is a partner in the Washington, D.C., office of Jenner & Block, which represented the Chamber of Commerce of the United States and the Internet Education Foundation as amicus curiae in this challenge.

Seventh Circuit Issues New Decision on Access to Criminal Proceedings

By David Sanders

In a recent decision reaffirming the media's right of access to trial court proceedings, the United States Court of Appeals for the Seventh Circuit has ruled that the press has a right of access in criminal cases to the identity of unindicted co-conspirators whose hearsay statements are admitted at trial. *United States v. Ladd*, No. 99-2301 (6/27/00).

This appeal had a complicated procedural history. The trial court initially sealed a variety of documents. While the criminal trial was in progress, various news organizations sought to intervene to obtain access to documents that had been placed under seal. The district court initially denied the motion to intervene. Thereafter, the Court of Appeals reversed and remanded with instructions to allow the media to intervene. The Seventh Circuit also instructed the district court to articulate its reasons for having denied access to documents under seal to permit the Seventh Circuit to undertake a meaningful appellate review of any denial of access. *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998).

On remand, the media sought access to the sealed

[T]here is a "strong presumption that all trial proceedings should be subject to scrutiny by the public . . ."

documents. The district court gave two reasons for initially having sealed the documents: (i) based on concerns over trial publicity, non-disclosure was necessary to protect the defendants' right to a fair trial; and (ii) non-disclosure was required to ensure that the government's ongoing investigation was not compromised. The district court recognized, however, that these initial concerns would be inapplicable after trial, and therefore unsealed most of the documents at issue following trial.

Nonetheless, the district court decided to keep under seal the identity of certain alleged co-conspirators whose statements were conditionally admitted in evidence at trial under the co-conspirator exception to the hearsay rule set forth in rule 801(d)(2)(E) of the Federal Rules of Civil Procedure. The district court reasoned that disclosing the names of the unindicted co-conspirators would not promote an understanding of or confidence in the

criminal justice system, and that the only purpose of disclosing their identities would be to stigmatize the individuals because the public would know they were named as co-conspirators in the indictment, but they would have no opportunity to clear their names through a trial.

The media organizations appealed again, and the Seventh Circuit reversed. The court first reaffirmed that there is a "strong presumption that all trial proceedings should be subject to scrutiny by the public," and that any "suppression" of access must be narrowly tailored to preserve higher values. (The opinion does not state whether the presumption is based on the First Amendment or the common law, although the court did acknowledge the constitutional underpinnings of the right of access in its prior opinion in the case.)

In dictum likely to be useful in other cases, the court stated that

(Continued on page 20)

UPDATE: Arkansas Supreme Court Upends Prior Restraint

By Philip S. Anderson

The Arkansas Supreme Court, held that a gag order issued by a juvenile court judge in Fayetteville, Arkansas, constituted a prior restraint on the press and was a "plain, manifest, clear and gross abuse of discretion." In an opinion that was issued on June 29, the judge was ordered to revise her order to conform to the opinion. (An article on the prior restraint was in *LDRC LibelLetter* June 2000, at 35)

The action in which the gag order was issued was a delinquency case brought by the State against a 12-year-old boy charged with shooting a policeman with a shotgun during an exchange of fire with the officer. The boy and the policeman were both wounded in the shoot-out. Charges of attempted capital murder were filed against the boy in *State of Arkansas v. Michael Nichols*.

At a public hearing, the judge issued an order prohibiting the dissemination by the media of names or pictures of the victim and the victim's family, the names or pictures of the juvenile charged with the crime or his family, and the names or pictures of juveniles entering

(Continued on page 20)

Seventh Circuit Issues New Decision on Access

(Continued from page 19)

the source of evidence admitted at trial and the circumstances surrounding its admittance are important components of the judicial proceedings and crucial to an assessment of the fairness and integrity of the judicial proceedings.”

In applying this principle, the court determined that there is an “important public interest in revealing” the names of unindicted co-conspirators whose hearsay statements were considered as evidence during trial.

Distinguishes *U.S. v. Smith*

The court devoted much of its opinion to distinguishing the Third Circuit’s decision in *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985). There, the court refused to allow the release of the names of individuals identified as potential co-conspirators on a bill of particulars in order to avoid irreparable harm to the individuals on the list, because some of them might be entirely innocent, but would have no opportunity to vindicate themselves publicly. The Seventh Circuit distinguished *Smith* on the ground that in admitting the co-conspirator statements into evidence at trial, the district court necessarily found that the government proved by a preponderance of the evidence that a conspiracy existed, that both the declarant and the defendant were members of the conspiracy, and that the statements were made in the course of and in furtherance of the conspiracy. The court concluded that the satisfaction of these evidentiary requirements for the admissions of the statements gave a far stronger evidentiary basis to conclude that the persons involved were, in fact, co-conspirators, than the prosecution simply naming them as co-conspirators, as in *Smith*.

Having determined that the case involved a reliable basis for finding that the individuals were indeed co-conspirators, the court concluded that potential injury to the conspirators’ reputation and their privacy interests resulting from the public disclosure of their identity must yield to the public’s right to know the sources of evidence considered by the jury at trial pursuant to the co-conspirator exception to the hearsay rule.

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AR Supreme Court Opens Prior Restraint

(Continued from page 19)

or leaving the court building. A photographer for the *Arkansas Democrat-Gazette* took a picture of the defendant with a coat over his head as he left the courthouse. The newspaper published the picture and identified the boy in the next morning’s edition of the paper. On the same day that the photograph was published, the *Arkansas Democrat-Gazette*, the *Morning News of Northwest Arkansas*, the *Northwest Arkansas Times*, the Arkansas Press Association, and the New York Times Company for its station KFSM-TV in Fort Smith Arkansas, filed a motion to intervene.

The following week, following a show-cause hearing, the juvenile judge held the *Democrat-Gazette* in contempt of court and fined it \$100. She also denied the motion to intervene by the news organizations, which filed a petition for a writ of *mandamus* in the Supreme Court and sought expedited relief.

In its opinion of June 29, the Arkansas Supreme court held that the order was unconstitutionally broad and pervasive in its scope and constituted an unconstitutional prior restraint of the press. The court found that whatever policies the state had for prohibiting public dissemination of the name and likeness of a juvenile offender were no longer of serious consequence once both had been revealed as a result of open hearings and photos lawfully shot outside the courthouse. The scope of individuals covered was vague and overly broad and the effort to ban photography outside the courthouse “too pervasive in its scope.” The juvenile court judge was directed to amend the gag order to restrict its scope. The court, in the circumstances of this case, found “no overriding state interest that would warrant an injunction against photographing Nichols and the others entering or leaving the courthouse.”

On the day the court delivered its opinion, the *Arkansas Democrat-Gazette* filed a motion for reconsideration of the contempt citation in juvenile court. On July 3, the newspaper filed a notice of appeal to the Arkansas Supreme Court of its conviction for contempt of court. As of July 13, the juvenile court had not addressed either the contempt citation or the scope of her gag order.

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Court Upholds Statute Restricting Cable Editorial Rights

By Marc Apfelbaum

A recent decision of the Court of Appeals for the District of Columbia Circuit addressed a critical First Amendment issue: What is the proper level of scrutiny of a statute that seeks to significantly restrict a speaker's editorial rights in the name of promoting diversity and remedying alleged media concentration? Although the case arose in the context of cable television, because the court purported to apply general First Amendment principles, and because the Supreme Court has held that cable op-

erators are generally entitled to the full protections of the First Amendment (*See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994)), the implications of the decision may affect all media. The case, *Time Warner Entertainment Co., v. FCC*, No. 96-5272 (D.C. Cir. May 19, 2000) involved a First Amendment challenge by Time Warner Entertainment Co. ("TWE") (the owner of Time Warner Cable, several cable programming services and other media entities), to two provisions of the Cable Television Consumer Protection and Competition Act of 1992. The first challenged provision, the subscriber limits provision, directed the Federal Communications Commission ("FCC") to enact rules to limit the number of subscribers any cable operator may reach. The second provision, the channel limits provision, directed the FCC to enact rules to limit the number of channels on a cable system that can be devoted to programming produced by corporate affiliates of the cable operator. (The FCC's implementing regulations are the subject of a separate challenge that is still pending in the D.C. Circuit.)

Congress enacted the two provisions because of concerns about increased media concentration. In particular, Congress indicated that the concern behind the subscriber limits provision was that "media gatekeepers will (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or un-

popular speech . . ."

Similarly, Congress justified the channel limits provision on the grounds that "[v]ertical integration in the cable industry . . . gives cable operators the incentive and ability to favor their affiliated programming services" and that "it would be unreasonable for them to occupy a large percentage of channels on a cable system." Congress further stated the provision "is designed to increase the diversity of voices available to the public." S. Rep. No. 92, 102d Cong., 1st Sess. 25, at 32, 80 (1991).

[T]he panel construed Turner as standing for the proposition that all laws that attempt to deal with purported bottleneck characteristics of a media entity are content neutral no matter what their purpose.

TWE argued that because the challenged measures seek to intervene directly in protected editorial processes in order to correct perceived imbalances, they were content-related rather than content-neutral and, therefore, triggered strict scrutiny. Relying

on *Turner, Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and other cases, TWE argued that the fundamental purpose of the First Amendment is precisely to allow speakers to express their own views — to "slant information according to their own biases" in the words of the Senate Report — free from government interference. (*See, e.g., Turner*, 512 U.S. at 641, ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression."))

The D.C. Circuit panel, purporting to rely on *Turner*, rejected this contention, and held that the challenged provisions were content neutral and, therefore, subject to only intermediate scrutiny. Apparently because the challenged provisions did not bar or mandate the carriage of particular speech or ideas, the panel viewed them as content neutral:

By placing a value upon diversity and competition in cable programming, the Congress did

(Continued on page 22)

Court Upholds Statute Restricting Editorial Rights

(Continued from page 21)

not necessarily also value one speaker, or one type of speech, over another; it merely expressed its intention that there continue to be multiple speakers.

In addition, the panel construed *Turner* as standing for the proposition that all laws that attempt to deal with purported bottleneck characteristics of a media entity are content neutral no matter what their purpose. In TWE's view, this represents a serious misreading of *Turner*, which involved a challenge to the "must carry" provisions of the 1992 Cable Act. The must-carry provisions require cable operators to carry a certain number of broadcast television stations on their systems. The Supreme Court did conclude that such requirements are content neutral, but the Court also clearly indicated that Congress' finding (in 1992) that cable had bottleneck characteristics was only one step in that determination.

In particular, the Supreme Court found that Congress' concern — based on its finding that most Americans watched broadcast television stations only on cable systems — was that the broadcast medium as a whole could be jeopardized if significant numbers of stations were not carried on cable. The Court therefore determined that Congress' purpose was not to change or improve the programming available to cable viewers, but to preserve the broadcast medium for those viewers who did not subscribe to cable. It was that purpose that the Supreme Court determined it to be content-neutral. Indeed, the Court also clearly recognized that the must carry provisions would have been content based and would have triggered strict scrutiny if Congress' purpose had been "to exercise content control over what subscribers view on cable television." *Turner*, at 652.

So *Turner*, like *Tornillo* (which struck down a right of reply statute that was enacted by a state legislature to address the purported bottleneck power of

newspapers) and many other cases before it, stands only for the proposition that Congress' purpose — and not the presence or absence of "bottleneck" characteristics — is the decisive factor in determining a statute's content-neutrality. As the legislative history makes clear, content control was Congress' explicit purpose in adopting the subscriber and channel limits provisions.

TWE also argued that even if only intermediate scrutiny were triggered, the challenged provisions would still fall because the government hadn't met its burden of proving that they addressed "real, not

"Congress took a structural approach to the regulation of cable operators" which "adds a prophylaxis to the law and avoids the burden of individual proceedings"

merely conjectural problems" (*Turner*, 512 U.S. at 664), and because there were several other general and cable-specific statutes that already addressed any problems that might result from over-concentration in

cable. These measures include the general antitrust laws and specific provisions that prohibit cable operators from discriminating against non-affiliated programmers and require cable operators to lease channel capacity to them.

The D.C. Circuit panel again rejected TWE's contentions. As to whether or not there was a real problem with cable operators favoring affiliated programming to an extent that posed genuine risks to unaffiliated programmers, the panel pointed to testimony in the congressional record that "the large [cable operators] have the market power to determine what programming services can 'make it' on cable" and that "[t]he potential effects of . . . concentration are barriers to entry for new programmers." The panel also concluded that it was a matter of "economic common sense" that when a cable operator's incentive to provide attractive programming to its customers conflicts with the incentive to favor affiliated programming, "the operator may, as a rational profit maximizer, compromise the consumers' interests." *Op.* at 15.

As to the need for additional measures to address this problem, the panel concluded that with the chal-

(Continued on page 23)

Court Upholds Statute Restricting Editorial Rights

(Continued from page 22)

lenged provisions, “Congress took a structural approach to the regulation of cable operators” which “adds a prophylaxis to the law and avoids the burden of individual proceedings to remedy particular instances of anticompetitive behavior.” Therefore, the panel concluded that TWE had not “demonstrated that the [challenged provisions are on their] face either unnecessary or unnecessarily broad.”

The panel’s opinion leaves government with very broad powers to strip speakers of editorial control in the name of correcting perceived editorial imbalances that flow from a purported over-concentration of media. Stripping speakers of editorial control is “content neutral,” and subject to intermediate — not strict — scrutiny so long as government “merely” limits the number of people they can speak to, or requires them to speak others’ ideas instead of their own. This is so even where the government’s very purpose is to override speakers’ editorial decisions, so long as it does not dictate or prohibit specific messages.

Problems can be shown to be real rather than conjectural, and intermediate scrutiny can be met, based on testimony regarding “potential” harms and the application of judges’ views of “economic common sense.” Broad prophylactic measures can be imposed because they “avoid the burdens of individual proceedings.”

Some may feel unthreatened by this outcome because the case deals with cable television operators, not more traditional media. But as stated above, the Supreme Court has made clear that cable is generally entitled to the full protections of the First Amendment and the D.C. Circuit panel purported to apply general First Amendment principles. That means statutes that would limit the number of copies a newspaper could print (the equivalent of subscriber limits) or the amount of columns it could fill with its own content (channel limits) could be evaluated according to these same lenient standards.

TWE is seeking rehearing and rehearing en banc of the panel’s decision.

Marc Apfelbaum is Senior Vice President and General Counsel of Time Warner Cable.

SAFE HARBOR PRIVACY PRINCIPLES

Protection for International Transfers of Personal Data Approved

Exceptions for Journalism Included

On May 31, 2000, the European Commission’s Internal Market Directorate voted unanimously to approve the U.S. proposed Safe Harbor Privacy Principles, including exceptions for journalistic activities. The proposal was then presented to the European Parliament, which narrowly approved the agreement by a 279-259 vote only after a number of conditions were established. The Parliament’s rejection of the agreement as negotiated is non-binding, although it will be considered by the European Commission. The proposal will now move on to the full EU executive Commission for a final decision.

The proposed Principles, an arrangement that would create an “adequate” level of privacy protection and allow U.S. organizations to receive personal data from the European Union, was developed in response to the European Union’s 1998 ratification of the European Commission Directive on data privacy. That Directive required that transfers of personal data could take place between non-EU countries only if those countries provided a similar level of privacy protection. By approving the Safe Harbor Privacy Principles and the accompanying Frequently Asked Questions, the Department of Commerce has, under its statutory authority to foster, promote, and develop international commerce, tried to create a predictable framework for such data transmissions.

The decision of Parliament, the European Union’s directly-elected assembly, could complicate efforts to enact the plan. The Parliament insisted that exchanges should not be permitted between European and U.S. factions until all Principles were fully operational and recommended that the proposal include conditions for compensation for failure to apply the Principles, as well as the right of individuals to appeal issues to an independent body.

The “Safe Harbor”

The Safe Harbor Privacy Principles were developed
(Continued on page 24)

SAFE HARBOR PRIVACY PRINCIPLES

(Continued from page 23)

oped as an attempt to avoid trade disputes concerning data between European and United States firms and create an environment for the transfer of information which parallels the strict EU data protection laws. The United States' proposal required that an organization must give appropriate notice to individuals as to the purposes for which it collects and uses information, how an individual could contact the organization, the types of third parties who would have access to the information, and the choices an individual had to limit the use and disclosure of the information.

Additionally, individuals must be given affirmative or explicit choices over whether sensitive information (i.e. personal information specifying medical or health conditions, racial or ethnic origin, etc.) could be disclosed to a third party or used for a purpose other than those for which it was originally collected or subsequently authorized.

Organizations which utilize the safe harbor must make sure that the transfers of information are to third parties who either subscribe to the Principles, are subject to the Directive or some other similarly adequate body, or have entered into a written agreement that requires the third party to provide at least the same level of privacy protection as the Principles. If that obligation is met, the organization can not be held responsible if a third party uses the transferred information in a way contrary to any restrictions or representations, unless the organization knew or should have known the third party would do so and the organization did not take reasonable steps to prevent or stop such use.

Exceptions

Limitations and exceptions to adherence to the Principles were also set forth in the approved proposal. Organizations which receive information from the European Union and would otherwise be required to protect the privacy of personal data under the safe harbor proposal, would be exempt from those requirements to the extent necessary to meet national security, public interest, or law enforcement requirements.

Another limitation would arise from statutes, governmental regulations, and case law that created con-

flicting obligations or explicit authorization, as long as an organization could demonstrate that its non-compliance with the Principles was limited to the extent necessary to meet an overriding legitimate interest behind the conflicting authority. Other exceptions included any created by the European Directive or Member State law.

Journalistic exceptions were also addressed, stating that where rights of a free press intersect with privacy protection interests, the First Amendment must govern the balancing of those interests with regard to the activities of U.S. persons or organizations. Any personal information that was gathered for publication, broadcast, or other forms of public communication of journalistic material, whether used or not, as well as information found in previously published material from media archives, was not subject to the requirements of the safe harbor principles.

Further exceptions were applied to telecommunication carriers, ISPs, and other similar organizations. Such organizations would not be held secondarily liable for any information transmitted by third parties that violated the Principles, as long as the organization was merely a conduit for the data transmitted and did not determine the purposes and means of processing the personal data.

Decisions by organizations to qualify for the safe harbor would be entirely voluntary. Those who publicly declared and decided to adhere to the plan could comply with the Principles in several possible ways; from developing their own self regulatory privacy policies that comply with the Principles, to joining a self regulatory privacy program that adheres to the Principles. In addition, organizations subject to a statutory, regulatory, administrative or other body of law that effectively protects personal privacy could also qualify for safe harbor benefits.

*Note: As of this publication, the Principles are not applicable in the financial services sector, due to the fact that more time was needed to examine recent developments in U.S. laws and regulations governing privacy in this area. The Department of Treasury in consultation with the Department of Commerce is currently working with the European Commission to achieve this goal of bringing the benefits of the safe harbor to the financial services sector.

Permanent Injunction of Phony Web Sites Stands

University Proper Plaintiff for Misappropriation Suit in Indiana

In May, an Indiana appellate court affirmed the issuance of a permanent injunction against a disgruntled former French professor who attributed e-mail messages and personal Web sites to his former colleagues at the University of Evansville. *Felsher v. University of Evansville*, 2000 Ind. App. LEXIS 638 (Ct. App. Ind. 4th Dist. May 3, 2000). The court held, in perhaps a unique ruling, that under Indiana common law a corporation could have a cause of action for misappropriation, and therefore refused to strike the University as a plaintiff. It also found that an injunction was the proper remedy, despite the fact that the original offending Web sites and misattributed e-mail addresses had been removed from the Internet, because the defendant might always reconstruct them.

Misleading Addresses

Dr. William Felsher lost his teaching position at the University of Evansville in 1991. Six years later he began publishing several articles on Web sites alleging wrongdoing by University president James Vinason, another plaintiff in the case, and other faculty. The URL addresses used for the Web sites on two different service providers gave the impression that the sites were created by plaintiffs Dr. Stephen Greiner and Dr. Larry Colter, faculty administrators at the University. Then, Felsher created e-mail addresses using the names of Vinson, Greiner, and Colter, from which he sent letters to various academic institutions nominating Greiner and Colter for job openings, and directing the addressee to the disparaging Web sites for a description of the nomi-

nee's "accomplishments."

According to the record, this went on at least until early 1999. In February of that year, the University, Vinson, Greiner and Colter filed suit for invasion of privacy and moved for a preliminary injunction. Before litigation began, Felsher removed the offending email addresses from the Internet. He also removed the two Web sites, but posted similar material on twelve new Web sites. He continued to send e-mails from his own address, directing academic institutions to the new Web sites.

The trial court issued a preliminary injunction forbidding Felsher from appropriating the names or likenesses of the plaintiffs (including the University) or "the name of any other person or individual associated with the University of Evansville;" from maintaining Web sites or e-mail addresses incorporating the names of any such individuals; and from nominating any person associated with the University for positions at other schools. The plaintiffs then moved for the court to grant a permanent injunction as a summary judgment order, which the trial court granted after first denying Felsher's motion to remove the University as a plaintiff.

Corporate Right of Privacy?

On appeal, Felsher (litigating pro se) continued to press the point regarding the University as plaintiff. He argued that only persons have private rights of action for invasion of privacy torts. The court of appeals agreed that he was correct concerning claims of invasion of privacy by intrusion upon seclusion, false light, and disclosure of private facts, but distinguished appropriation, under which doctrine the plaintiffs brought this suit. Before the present case, Indiana courts had not ruled on a claim for invasion of privacy by appropriation of name or likeness, so the court referred to the *Restatement (Second) of Torts* in deciding the issue, and construed it, without corroborating authority, to mean that "corporate entities are entitled to bring a claim

(Continued on page 26)

LDRC members should give serious consideration to filing amicus support in this action, if an opportunity arises. Allowing corporations to bring right of privacy/misappropriation claims is a dangerous precedent, indeed.

Permanent Injunction of Phony Web Sites Stands

(Continued from page 25)

under the appropriation strand because it is intended to protect a property interest in name and likeness.”

Felsher used the University’s name in the e-mail messages he sent as an imposter, a use the court found sufficient to support the University’s claim for misappropriation. It held that

A university or other corporate has an interest in the exclusive use of its own identity, as represented by its name or likeness, separate from any interest in protection of personal feelings.

In effect, the court attributed a property-like aspect to the right of action for misappropriation, which unlike the right of publicity, for which Indiana has a particularly broad statute, does not carry the requirement of a commercial use. That ruling seems to have added to the general confusion surrounding those two types of claims, while inviting a whole new brand of plaintiff to the privacy arena.

Prior Restraint Upheld

Felsher also argued that his voluntary removal of the offending material from the Internet should render the need for an injunction moot. The court disagreed, using a rather vague analysis, observing that, absent an injunction, Felsher might have subsequently continued with his activities, that money damages were inadequate to repair a damaged reputation, and that “the public interest is served well rather than disserved by a permanent injunction against persons known to misuse electronic communications in a manner which amounts to invasion of privacy.”

Furthermore, the court rejected Felsher’s assertions that the injunction was overbroad in preventing him from nominating for academic positions “any other person or individual associated with the University of Evansville.” The court found that the large scope of the injunction was necessary to protect the University’s interests, as Felsher’s motive was to harm the University itself, which he could

have accomplished through a similar use of the names of other faculty members. However, the court did take a narrow construction of the order, and read it to prevent Felsher only from nominating others through misuse of identity.

The University’s success in this case reflects the cliché “What goes around comes around,” an unfortunate basis for a novel legal holding. Clearly the court felt that Felsher’s actions were less than admirable, and wished to prevent further harm to the University. The same sentiment was evident in the Eastern District of Virginia’s opinion issuing an injunction against a disgruntled novelist’s use of author Patricia Cornwell’s name. *See LDRC LibelLetter*, June 2000 at 29. The Indiana court chose to do so here, however, by potentially presenting many corporations with an entrée into the courtroom on misappropriation claims, something unheard of until now.

Plaintiff is seeking review by the Indiana Supreme Court.

And another right of publicity suit . . .

Julia Hill, who lived in a redwood tree in California for over two years in order to publicize and prevent the logging of the ancient trees, has sued AT&T, OmniSky Corp. and advertising agency TBWA Chiat/Day over an ad she says falsely used her identity. The ad, for OmniSky wireless Internet service, showed a woman on a wooden platform in a tree surrounded by such possessions as a blanket, tarp, and outdoor equipment, holding a handheld OmniSky wireless Internet device. According to the Associated Press account, the picture (less the Internet wireless device) resembled ones that were widely disseminated to media of Hill. Also different, was the ad’s portrayal of a man at the base of the tree, with a logo on his jacket that read “sponge-bath.com,” holding two large buckets and looking up a rope ladder. Ms. Hill was not amused.

Her complaint was filed in Federal District Court in San Francisco.

A “Twisted” Verdict

\$24.5 Million for Use of A Hockey Player’s Name in a Comic Book

By Joseph Martineau

“Where have you gone Joe DiMaggio” may be one of recent history’s most recognizable lyrics.¹ Undoubtedly, Simon and Garfunkel reaped a fortune from writing and performing the song *Mrs. Robinson* in which DiMaggio’s name appeared. After the recent verdict and judgment in a St. Louis, Missouri Circuit Court in *Doe vs. TCI of Missouri, Inc. et al.*, No. 972-9415, Div. 3 (July 5, 2000), however, future composers and authors should consider the potential cost of such non-consensual use of a celebrity’s name.

On July 5, 2000, a St. Louis jury returned a verdict in favor of former hockey player, Tony Twist, for \$24.5 million, on a claim of misappropriation of his name in a comic book called *Spawn*. The verdict was joint and several against the comic book’s creator, his company, a related toy manufacturer, and the company that published his comic books. The \$24.5 million represented almost 20% of the revenues from the comic book and its derivative products, including an animated television program, a feature film and action figure toys. The damages awarded were strictly compensatory; none were punitive (at least not avowedly so).

Todd McFarlane’s *Spawn* and the two “Tony Twists”

In 1992, Todd McFarlane left a remarkably successful career illustrating *Spiderman* and other comic books for Marvel Comics and started his own comic book called *Spawn*. *Spawn* is about a covert government assassin, named Al Simmons, who was killed as part of a plot by his corrupt boss. Simmons went to hell, but made a deal with the devil (called “Malebolgia”) to return to earth so he could see his wife Wanda. Instead of returning to earth in human form, however, the devil resurrects Simmons as a Hellspawn, a ghastly being, unrecognizable from his former living self. As a Hellspawn, or *Spawn* for short, he has superhuman powers, but struggles with how to use them.

The first issue of *Spawn* was the largest selling comic book ever. Beginning with the sixth issue, a vicious, foul mouthed mafia don appeared. Though un-

named in that issue, in later issues the mob boss was referred to as “Antonio Twistelli” and eventually “Tony Twist.” Though a recurring character, Twist appeared only sporadically and was peripheral to the comic’s main characters.

Spawn’s extraordinary success spawned other *Spawn* related materials (excuse the pun). In 1997, Home Box Office (“HBO”) produced and telecast an adult animated series based on the comic’s story line and characters. It ran for three seasons, but only the first season included the Twist character. McFarlane also licensed the story to New Line Cinema, which produced a live actor, feature film, called *Spawn*. Further, McFarlane created a company to market toys and apparel based on *Spawn*. Neither the movie nor the toy/apparel line included the Twist character. Nonetheless, this did not stop the plaintiff from claiming successfully that he was entitled to a share of the money made from those as well.

The Hockey Twist

Around the time McFarlane was starting *Spawn*, a young hockey player named Tony Twist, whose main skill lay in his ability to pummel opposing players, entered the National Hockey League (“NHL”). He eventually came to play as an “enforcer”² for the St. Louis Blues. During the mid-90s, he acquired local prominence as a sports celebrity and promoter of charitable causes, as well as some national recognition as the best fighter on the ice. In 1999, he was profiled in a *Sports Illustrated* article “Fighting for a Living.” Ironically, during the pendency of his lawsuit, which included HBO as a defendant, he was featured on HBO’s *Real Sports with Bryant Gumbel* and touted as the most feared fighter in hockey. From all apparent indications, Twist’s hockey career ended in August 1999 when on the day the Blues released him, he sustained serious injuries in a motorcycle accident.

The comic character Twist and the hockey player lacked any resemblance beyond name. They did not look alike; their professions were not the same; and

(Continued on page 28)

A “Twisted” Verdict

(Continued from page 27)

they hailed from different parts of the world. In discovery, and to some extent at trial, the plaintiff tried to contend that both had similar personas as “enforcers” in their respective trades. That purported parallel between the hockey player and mobster was tenuous at best.

None of the defendants ever promoted, marketed or advertised *Spawn* by referencing any connection between the two Twists. In fact, no one even noted any association until two fans of *Spawn* wrote McFarlane in 1994. In their letters, the fans pointed out that many characters in *Spawn* had names similar to McFarlane’s family, friends and employees. In a column in the *Spawn* comic book, McFarlane responded to these letters, acknowledging that several of the main characters were indeed named after persons he knew.³ He further stated that he was an avid hockey fan and that some characters were named after hockey players, including Twist. Later, in an interview with *Wizard Magazine*, a periodical dedicated to comic fans, McFarlane again acknowledged the identity of names. *Wizard* published an article called “Spawning Ground” detailing that interview.

The Lawsuit

In August 1997, the hockey player learned of the existence of the namesake character and McFarlane’s statements that the character had been named after him. This happened when fans asked him to autograph some *Spawn* related materials. In October, he filed a suit in Missouri state court alleging misappropriation of name and likeness, defamation, unjust enrichment and civil conspiracy. Before filing suit, he provided no notice to any of the defendants of his objections to the Twist character.

In addition to McFarlane, his companies and the comic book publisher, the suit named HBO, which had produced the animated television series and resulting home recordings based on the comic, *Wizard Magazine* which had published the “Spawning Ground” interview with McFarlane, and a host of entities that distributed *Spawn* products (e.g., TCI which offered HBO on its cable system and Blockbuster Entertainment

which rented *Spawn* videotapes).

Claiming that he wanted to limit publicity, Twist filed the suit under the pseudonym John Doe, and he requested *ex parte* that the court file be sealed. The circuit court agreed to this request. During later proceedings, however, the court expressed bewilderment at why the case should be sealed. Shortly before trial, the circuit court advised all parties by letter that the seal would be rescinded when the trial started. It never entered any formal order to that effect, but the seal was effectively lifted with the start of the trial.

HBO removed the case to the United States District Court for the Eastern District of Missouri. Because the hockey player and McFarlane were both Canadian, however, the district court ruled that diversity was lacking and remanded. See, e.g., *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997). The district court also rejected arguments that Twist’s claims were preempted under copyright law, and that federal question jurisdiction lay on that basis.

The Motions to Dismiss

Upon remand to the Missouri state court, virtually all defendants moved to dismiss on a variety of grounds. These included: (i) the lack of any “commercial” appropriation; (ii) a First Amendment privilege for literary works of entertainment; (iii) the lack of similarity beyond name; (iv) the inability to maintain a claim for defamation when no reasonable person would assume that the feats of the fictional Twist were ascribed to the real Twist; (v) the First Amendment “book seller” defense available to distributors of literary works; and (vi) failure to plead sufficient facts to support a conspiracy.

In ruling on these motions, the circuit court dismissed all claims against those defendants who merely distributed *Spawn* in some fashion. The court said:

“To require quiescent distributors to critically review all materials for potential misappropriation before distribution would place a serious burden on constitutionally protected speech, and also elides the implicit requirement of the common law action that the action will lie only

(Continued on page 29)

A “Twisted” Verdict

(Continued from page 28)

against the person who actually appropriates the plaintiff’s name or likeness, i.e. the first publisher.” 3/4/99 Order at 5.

The court also dismissed the defamation claim in its entirety as to all defendants, holding:

This Court agrees with Defendants’ argument that, “[n]o sensible person would ascribe to plaintiff, a hockey player, the unlawful and deviant activities of the fictional mobster, Tony Twist, who is absorbed with battling and ultimately destroying the comic’s hero, Spawn, a resurrected CIA operative possessing superhuman powers and haunted by the devil.” Because Defendants’ alleged statements are not defamatory on their face, no reasonable person could find Defendants’ statements to be factual allegations about Plaintiff.

Id. at 7-8. Finally, the court dismissed the civil conspiracy claim, holding: “An agreement to distribute a publication cannot be construed to be a conspiracy unless Plaintiff alleges Defendants mutually agreed to work in concert to harm Plaintiff.” *Id.* at 9 (citations omitted).

Misappropriation/Unjust Enrichment Remain

The court denied the motions as to the misappropriation and unjust enrichment claims against McFarlane and his companies, the comic publisher and HBO, because all were active participants in the creation of *Spawn* works which used the plaintiff’s name or likeness. *Id.* at 4. In its written order, the court did not address the constitutional defenses, nor did it address the issue that the works involved were not “commercial” in the sense required to state a claim for appropriation.

Finally, while the motions to dismiss were under submission, *Wizard Magazine* settled with the plaintiff on terms under which it agreed to produce the writer and editor of the “Spawning Ground” article for deposition in St. Louis.

The plaintiff’s discovery over the next two years,

though involving considerable expense, revealed little that was not already known, and largely conceded by the defendants. However, troubling, at least from the standpoint of jury appeal, was McFarlane’s deposition testimony, which he later repeated at trial. McFarlane insisted that he had not consciously named the fictional character after the hockey player, and that he became aware of the hockey player only after giving the comic character its name.

This testimony was seemingly inconsistent with his own written responses to fan mail and the interview that he gave to *Wizard Magazine*. It was also incongruous with his avowed “hockey-geek” status, and the fact that other characters in *Spawn* had names similar to other NHL players. And, it gave rise to the argument that if there was nothing wrong with naming a fictional character after a real life person, why not just admit that this is what he had done! Given the instructions ultimately provided to the jury, this contradictory testimony played right into the plaintiff’s hands.

The Motion for Summary Judgment

In January 2000, the remaining defendants moved collectively for summary judgment, asserting three grounds.

First, the defendants argued that because *Spawn* was literary expression and not commercial speech, the plaintiff’s appropriation and unjust enrichment claims, all of which were based on some alleged infringement of his right of publicity or invasion of privacy, failed as a matter of First Amendment law. The defendants cited a legion of cases holding that tort law regarding infringement of publicity and privacy rights does not prohibit use of a person’s identity in expressive works related to news, parody, art, literature, music or entertainment. *See, e.g., Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr.2d 305, 309 (Cal.App. 1997)(Hollywood movie); *Rosa Parks v. Laface Records*, 76 F.Supp.2d 775 (E.D.Mich. 1999)(rap music); RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46, comment c (1995).

The defendants argued that comic books and television cartoons, such as *Spawn*, are likewise constitutionally protected. *See, e.g., Cardtoons v. Major League*
(Continued on page 30)

A “Twisted” Verdict

(Continued from page 29)

Players Association, 95 F.3d 959, 969 (10th Cir. 1996) (recognizing that cartoons are a constitutionally protected form of entertainment).

Second, the defendants argued that the common law rights of publicity and privacy are infringed only when identity is used commercially, *i.e.* for trade purposes. While the law may not limit publicity claims strictly to advertisements, use of identity in works of literature or entertainment should not cross the “commercial” use threshold. RESTATEMENT (THIRD) OF UNFAIR COMPETITION §46, comment c (1995); *see also Costanza v. Seinfeld*, 693 N.Y.S. 2d 897 (N.Y.

Sup.Ct. 1999)(rejecting claim under New York privacy statute by person named Costanza alleging popular sit-com Seinfeld appropriated his name and likeness).

Third, defendants argued that mere use of a name was insufficient to support a claim for infringement of the rights of publicity or privacy. Because no person can monopolize a name, the defendants argued that use of a name constitutes an infringement only when it is used for its recognitional value, *i.e.* as a symbol of identity and for the purpose of pirating the reputation or good will that goes along with that identity. *See, e.g., Haith v. Model Cities Health Corp.*, 704 S.W.2d 684, 687 (Mo.App.W.D. 1986); *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994). Although there was contradictory evidence whereby McFarlane acknowledged his awareness of the real-life hockey player and that this inspired his use of the “Tony Twist” name, there was no evidence that any defendant sought to trade off on some association between the *Spawn* character and the hockey player. Nor was there any evidence that the commercial success of *Spawn* derived from any perceptible or perceived correlation between fictional and factual Tony Twist.

The Plaintiff Argues Zacchini

The plaintiff’s response did not try to distinguish any of the cases cited. He simply argued that they were incongruous with Missouri common law surrounding ap-

propriation, which he said, required only that the defendant use the plaintiff’s name or persona without consent and that it gain a resulting advantage.

He argued that the Supreme Court holding in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), eliminated any constitutional defense because his claim was one simply seeking vindication of his property rights. According to him, *Zacchini* meant that “property claims,” unlike claims for reputational harm or emotional distress, posed no First Amendment problems.⁴ Thus, as predicted by the *Zacchini* dissent, the plaintiff sought to apply the *Zacchini* holding to a situation considerably beyond the narrow facts pre-

... *the defendants argued that the common law rights of publicity and privacy are infringed only when identity is used commercially, i.e. for trade purposes.*

presented, *i.e.* the telecast of Zacchini’s entire professional performance as a human cannonball. *Id.* at 579. Oddly enough, in denying summary judgment, the trial court relied on this prediction by the dissent.

Although the majority in *Zacchini* was at pains to emphasize that the case involved the appropriation of the performer’s entire act, Justice Powell’s dissent recognizes that the *ratio decidendi* of the majority could not be limited to the facts of the case.” 4/10/00 Order at 3.

In denying summary judgment, the circuit court, like the plaintiff, cavalierly disregarded seemingly indistinguishable case law from across the country, saying in a footnote that it did not find any of these cases “especially persuasive.” *Id.* at 6, n. 3. It said further that:

Here, the parties are in the shadows cast by *Zacchini* on the one hand and [*Hustler v. Falwell*] [485 U.S. 46 (1988)] on the other. Defendants have not used Plaintiff’s name or likeness in a news broadcast, nor have they used Plaintiff’s property in a strictly commercial way, as by using the name to promote a line of hockey paraphernalia, for example. On the other hand, *Defendants are not publishing and broadcasting Spawn for art’s sake alone. The record is clear*

(Continued on page 31)

A “Twisted” Verdict

(Continued from page 30)

that Defendants have a strong economic incentive to promote their comic books and television programs.

Id. at 4 (emphasis added). Accordingly, to the court, the fact that the defendants created *Spawn* to make money, and did so, meant that they could be liable for knowingly using plaintiff’s name without consent. In later proceedings during a casual discussion about the case among the court and counsel, the court was asked to clarify how it could distinguish holdings such as *Parks v. LaFace Records* and *Poly-*

dorous. In response, the court stated that it had not sought to distinguish these cases; it simply believed these cases to be wrongly decided and too broad in their application of the First

Amendment. The court acknowledged that First Amendment immunities existed for non-consensual use of name or identity in news reports, commentary or parody, but said it did not believe the Constitution should be applied more broadly than that.

In denying the summary judgment motion, however, the trial court did leave one escape hatch for the defendants. The plaintiff would be required to demonstrate “both that Defendants knowingly utilized his name and likeness for the purpose of advancing their economic interests, and also that in fact Defendants derived economic benefit (in the form of increased sales of their products) from that use, or in fact, caused Plaintiff direct pecuniary loss (by damaging his ability to market his name or image). . . .” *Id.* at 5.

This was a significant concession by the court. The plaintiff had come forward with some questionable evidence of harm -- a friend testified that he had thought of employing the plaintiff at \$100,000 per year to endorse his company’s product, but pulled the offer after the plaintiff told him about *Spawn*. However, the plaintiff had no evidence that any of the defendants had derived any economic benefit in the form of increased sales of *Spawn* from using the name “Tony Twist.”

More importantly, there was no evidence whatsoever

(and never would be) that any of the defendants used the name “for the purpose of advancing their economic interests.” At worst, the evidence showed that McFarlane had a proclivity of using real persons’ names, including hockey figures, *but not that he was economically driven to do so*. In fact, the plaintiff’s own expert witness, a marketing professor, acknowledged that if defendants had intended to profit from the use of an athlete’s name, one would anticipate that they would have promoted the connection between *Spawn* and the athlete, and that he found no evidence of this having occurred. If McFarlane used the name knowing about the hockey player, it was because he liked the name as a name for the character, not because of any profit motive.

In denying summary judgment, the circuit court, like the plaintiff, cavalierly disregarded seemingly indistinguishable case law from across the country. . .

The Trial: Judge/Jury Overcomes Lack of Evidence

At the trial, the court struck the plaintiff’s claim for punitive damages. It also struck the plaintiff’s claims for personal reputational and emotion distress damages, limiting the plaintiff to his claim for actual economic damages to his professional reputation and ability to market himself. In other words, the court restricted the plaintiff’s recovery to the harm suffered with respect to his ability to obtain endorsement deals and recovery of the fair market value for the use of his name.

It is with respect to this latter type of damage that the testimony of two (purported) expert witnesses came to play. Over objection, the court permitted a sport’s agent and a marketing professor to testify, without any empirical or quantitative analysis whatsoever, that in their opinion the fair market value of plaintiff’s name in *Spawn* ranged from 15% to 20% of the gross revenues earned from *Spawn*. These witnesses were unflappable in their testimony, even though plaintiff had never been engaged in any large scale endorsement deals, even though the character looked or acted nothing like the plaintiff, even though the defendants did not market *Spawn* based on a connection between the real life hockey player and the fictional character, and even though the plaintiff had never earned more than \$16,000 for endorsements for any year during his career.

(Continued on page 32)

A “Twisted” Verdict

(Continued from page 31)

When it came time to rule on motions for directed verdict and for instructing the jury, the court abruptly shut and then locked the “pecuniary intent” escape hatch it had offered in the summary judgment ruling. In considering a directed verdict claim that plaintiff had failed to prove that defendants used the name for the specific purpose of gaining a pecuniary advantage, the court agreed it found such evidence lacking, but allowed the case to proceed anyway.

Later, at the jury instruction conference, the court rejected the defendants’ request to include this element of pecuniary intent, namely that defendants “intentionally used Plaintiff’s name and likeness in the comic books and animated television show *Spawn* for the purpose of advancing [their] economic benefit.” Instead, it gave an instruction that for all practical purposes amounted to a directed verdict against the defendants, as follows:

The court acknowledged that First Amendment immunities existed for non-consensual use of name or identity in news reports, commentary or parody, but said it did not believe the Constitution should be applied more broadly than that.

Your verdict must be for plaintiff and against defendant [name inserted] if you believe:

First, defendant [name inserted] intentionally used or published plaintiff’s name, and

Second, defendant [name inserted] derived advantage from the use or publication of plaintiff’s name, or plaintiff suffered harm as a result of defendant [name inserted] use or publication of plaintiff’s name, and

Third, plaintiff did not consent to the use or publication, and

Fourth, as a direct result thereof, plaintiff sustained damage.

Not surprisingly, given the instructions, the jury found for the plaintiff. Before closing arguments, knowing how the jury was to be instructed, even McFarlane acknowledged the likelihood of a jury verdict against him.⁵

The extent of the verdict was perceived as a remote possibility, given that the court had permitted the plaintiff’s two expert witnesses to testify that the plaintiff was entitled to 20% of *Spawn*’s revenues.⁶ However, none of the observers of the trial really anticipated such generosity by jury. After all, plaintiff had never made more than \$16,000 for endorsements in any given year during his career. He had never been involved in any national endorsement campaign. His career was effectively over. His marginal fame was limited primarily to the St. Louis area. Finally, the only evidence of harm plaintiff had ever been able to muster came from a friend who learned about *Spawn* only as a result of the plaintiff’s having told him at a time when the plaintiff was frantically looking for witnesses to support his damage claims. None of the plaintiff’s own marketing and sport’s experts had ever heard of *Spawn* before being engaged to testify. This certainly belied the notion that people were drawing a correlation between the plaintiff and *Spawn* or that it had hurt his professional reputation.

The Aftermath of the Verdict

It remains to be seen just what will ultimately happen in this case. Post-trial motions do not need to be filed until August 5, 2000. Thereafter, the court has 90 days to rule. The judgment does not become final until the trial court rules or until that 90 day period expires. There will undoubtedly be appeals. There is insurance covering only part of the verdict, and McFarlane has vowed repeatedly that he will never settle. It seems unlikely, however, that without some relief, McFarlane could ever afford the bond necessary to stave off execution on the judgment, and the extent to which insurers would have any obligation to post bond amounts above the limits of their coverage is unclear.

There are numerous errors to be addressed in any post trial proceedings or any appeal. First, and foremost, are the constitutional issues repeatedly and vociferously asserted by the defendants from day one.

(Continued on page 33)

A “Twisted” Verdict

(Continued from page 32)

Courts long ago recognized that a celebrity’s right of publicity does not preclude others from incorporating a person’s name, features or biography in a literary work, motion picture, news or entertainment story.

Matthews v. Wozencraft, 15 F.3d 432, 439 (5th Cir. 1994)(citation omitted); *Parks v. Laface Records*, 76 F. Supp. 2d 775 (E.D. Mich. 1999)(“The right of publicity ... does not authorize a celebrity to prevent the use of her name in an expressive work protected by the First Amendment.”).

Such protections exist, not merely in connection with “news,” but also where the expressive work is published primarily for entertainment, rather than informing. See, e.g., *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr. 2d 305, 307-08 (Cal.App. 1997)(“Popular entertainment is entitled to the same constitutional protection as the exposition of political ideas.”). It should make no difference that the entertainment involved is fiction rather than fact. *Id.*; *Guglielmi v. Spelling-Goldberg Productions*, 160 Cal. Rptr. 352, 357 (Cal. 1979)(Bird, C.J. concurring)(“It is clear that works of fiction are constitutionally protected in the same manner as political treatises and topical news stories.”); 2 J. T. McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY*, §8.9[A] (1996)(“The vast majority of relevant cases ... reach the conclusion that the fictional use of human identity is not actionable as either invasion of privacy by ‘appropriation’ or infringement of the Right of Publicity.”).

The only exception to this rule is where a fictional use is libelous because it leads the audience to mistakenly, but reasonably, infer that the publication is intended to convey factual information about the plaintiff which is false, defamatory and harmful to his reputation. *Id.* But the trial court already appropriately rejected plaintiff’s defamation claims.

The trial court’s reliance on *Zacchini* to overcome this constitutional bar on misappropriation claims

where a person’s name is used in literary expression was a gross overstatement of the holding. The *Zacchini* opinion made it clear that the holding was to be narrowly applied to the limited circumstances at hand — the broadcast of *Zacchini*’s entire performance as a human cannonball. 433 U.S. at 573, n. 10; *Id.* at 575, 576. Indeed, the only proper *Zacchini* analogy is not to the fictional depiction of a fat mob boss named after a celebrity, but to the unauthorized filming and subsequent broadcast of a David Copperfield magic show or a Barbara Streisand concert.

The trial court’s reliance on Zacchini to overcome this constitutional bar on misappropriation claims where a person’s name is used in literary expression was a gross overstatement of the holding.

A second issue, which avoids the need to decide the constitutional question altogether, is whether the tort of appropriation was ever intended to cover literary works of entertainment. The Restatement of Unfair Competition certainly states that it was not;

that unless the work involved crosses the commercial speech threshold, it is not properly the subject of an appropriation claim. RESTATEMENT (THIRD) OF UNFAIR COMPETITION, §46(1995)(person’s identity must be “used for purposes of trade”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION, §47 (1995)(“use ‘for purposes of trade’ does not ordinarily include the use of a person’s identity in ... entertainment, works of fiction ... or in advertising that is incidental to such uses.”) (emphasis added). See also *People ex rel. Maggio v. Charles Scribner & Sons*, 130 N.Y.S.2d 514 (1954); *Newton v. Thomason*, 22 F.3d 1455, 1461 (9th Cir. 1994); *Rogers v. Grimaldi, MGM/UA*, 875 F.2d 994, 1004-05 (2d Cir. 1989).

A third issue is the propriety of holding the defendants liable for damages based on the percentage of revenues derived from products that did not even include the offending *Twist* character, such as revenue of the toy company and movie. Related to this is a fourth issue, of holding the defendants jointly and severally liable for damages based on revenues earned by publications in which they were not even involved. In essence, the joint and several nature of the verdict means that the liability of the comic book publisher included damages for not only the revenues of the comic books,

(Continued on page 34)

A “Twisted” Verdict

(Continued from page 33)

but also the television show, the movie and the toys in which it had no involvement, over which it had no control, and from which it derived no revenues. Indeed, the publisher’s potential liability under this joint and several verdict exceeds its net worth and is far in excess of the total revenues it ever derived from publishing the *Spawn* comic book.

A fifth issue is the propriety of letting the two purported expert witnesses testify that based on their judgment and experience alone, they believed that the hockey player was entitled to 15% to 20% of the total revenues attributable to all *Spawn* related products. Such testimony seems wholly lacking in foundation given these witnesses’ failure to empirically or objectively test their opinions by comparing them with amounts received by other celebrities whose name is used, and their failure to consider what the plaintiff, himself, had historically received for use of his name for endorsement purposes.

A final issue obviously relates to the size of the verdict in light of any reasonable expectation that plaintiff was seriously harmed in his professional endeavors by any of the defendants’ actions or that the defendants gained any pecuniary value because of the use of the name. The evidence showed that plaintiff had never made more than \$16,000 in any year, and his only evidence of loss was that his friend decided not to do a \$100,000 endorsement deal with him after the plaintiff told him about *Spawn*. While that loss of anticipated income seems large in comparison to what the plaintiff had earned previously, it is minute in relation to the verdict. Likewise, because *Spawn* was remarkably successful even before the appearance of the Twist character, and because there was no evidence that anyone was attracted to *Spawn* because the plaintiff’s name was used in it, the pecuniary gain to the defendants, if any, in no way comes remotely close to the astounding amount awarded. On this basis, it is conceivable that the trial court could remit or reduce the verdict accordingly.

Conclusion

In speaking about claims for infringement of pub-

licity rights, the Supreme Court has said that “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. at 576. This was the policy underlying the rule that the First Amendment would not bar a claim against a defendant’s pirating of a professional performance.

In the context of the facts of *Zacchini*, that policy was entirely justifiable. But it does not countenance the astounding verdict in *Doe v. TCI*. Nothing was taken from the hockey player Tony Twist. Because no one would realistically construe the non-look-alike *Spawn* character as a real life depiction of him or his activities, his good name and reputation were not tarnished. Because the defendants did not attempt to parlay the hockey player’s modest success and limited recognition into success for *Spawn*, there was no commercial use of his identity.

Indeed, the only theft that is threatened here is the court-sanctioned theft of defendants’ creative efforts and energies by giving the hockey player 20% of the total revenues of the entire *Spawn* empire. This gives the hockey player, who never contributed anything to *Spawn*, more than seems to have been made by *Spawn*’s creator.

“As one commentator recently observed, ‘it is difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation, for the use made of [an individual’s identity in a work of fiction].’”

Guglielmi v. Spelling-Goldberg Productions, 160 Cal. Rptr. 352 (Cal. 1979)(Bird, C.J., concurring) (quoting Hill, “Defamation and Privacy Under the First Amendment,” 76 COLUM. L. REV. 1205, 1305 (1976)). Allowing this verdict to stand “would actually sanction the theft of [the defendants’] creative enterprise.” *Cardtoons v. Major League Baseball Players Association*, 95 F.3d 959, 976 (10th Cir. 1996).

If it stands, it will be a dark force to be reckoned with by all those who create or produce expressive works that are designed primarily to entertain, rather than inform or comment.

A "Twisted" Verdict

(Continued from page 34)

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¹The analogy to the Simon and Garfunkel hit is not original, but was first coined by St. Louis freelance writer, Staci Kramer, in her July 7, 2000 article, "Spawn Ruling Puts a Chill on Writers," for the online publication *Inside.com*. There are, of course, other examples that come to mind, e.g. the movie titled *In Search of Bobby Fisher* about young chess prodigies; and the Garrison Keilor novel *Me, by Jimmy 'Big Boy' Valente*, which is transparently inspired by the exploits of Minnesota governor Jesse "the Body" Ventura.

²At trial, the plaintiff described the role of enforcer as a "policeman" on the ice. Another witness characterized the role as that of a "goon." In any event, the role is a long standing one in professional hockey, accepted and expected by many fans of the sport, even if not an entirely accepted by the NHL.

³For example, the lead character, Al Simmons, had the same name as McFarlane's best friend in college. Simmons wife, Wanda, had the same name as McFarlane's wife. Another lead character, Terry Fitzgerald, the comic Simmons' best friend in life, who the comic Wanda married after Simmons' death, had the same name as another real life friend of McFarlane. In the comic, Wanda and Fitzgerald had a daughter Cyan, the same name as McFarlane's daughter. Though never noted at trial, two characters, having only brief appearances, had the same name as executives at HBO.

⁴Of course, such an interpretation of Zacchini does grave disservice to the First Amendment because it diminishes constitutional protections depending on the nomenclature a plaintiff uses to describe his claim. Cases such as *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), make it clear that the First Amendment is not so facilely set asunder.

⁵According to a quote in a column by *St. Louis Post-Dispatch* columnist Bill McClellan, said in the presence of the author, "My stomach is right about 98% of the time, and I've got a bad feeling. I don't think I'm going to walk out of here clean." *St. Louis Post-Dispatch*, p. B-1, Friday July 7, 2000.

⁶This was one of many factors prompting HBO to settle with the plaintiff after the first week of the trial.

that contract, the NBA further argues, are recited on the back of the media credential.

It is the NBA's position that the press credentials given to the *Times* restrict the organization's use of the game photographs "for the sole purpose of news coverage of a particular NBA game," and that the sale of the photographs in the manner pursued by the *Times* violates its contractual obligations to the NBA. The league reports that the press credentials contain the following language:

The use of any photograph, film, tape or drawing of the game, player interviews or other arena activities taken or made by the accredited organization or the individual for whom this credential has been issued shall be limited to news coverage of the game by the organization to which this credential is issued, unless expressly authorized in writing by the NBA.

The NBA complaint specifically alleges that the *Times* is violating the terms of the press credentials by offering for sale, through its Online Store and newspaper advertisements, its collection of "Basketball" photographs. The "Basketball" collection features five photographs of players from the New York Knicks and other NBA team players participating in the 1999 playoffs. The photographs were taken by *Times*' agents, who gained access to the game by possessing NBA press credentials issued to the *Times*. The *Times* is offering this group of five photographs (each 11" x 14") for \$900, or \$195 apiece.

The action seeks to enjoin the *Times* from selling photographs it has taken at NBA games, claiming such sales cause irreparable injury to the NBA. The complaint also seeks compensatory damages, including all profits earned by the *Times* from its sale of NBA photographs. The NBA points out that through its division, NBA Photos, its own sales of photos is a significant source of league revenue. The NBA is being represented by Skadden, Arps, Slate, Meagher, and Flom LLP.

NBA Sues *The New York Times* for Photo Sales

In a breach of contract complaint filed in New York Supreme Court, the National Basketball Association ("NBA") has alleged that *The New York Times*' sale of NBA game action photographs violates the terms governing the *Times*' access to NBA games. The NBA claims the *Times*' acceptance and use of the NBA credentials, required for access to NBA games, forms a binding contract. The terms of

 U P D A T E

CBS and King Estate Agree to Cross-License “I Have a Dream” Speech

CBS and the family of Dr. Martin Luther King Jr. have reached a settlement in their dispute over the rights of King’s “I Have a Dream” speech. Under what has been characterized as a “cross-licensing” agreement, CBS News will retain the right to use its footage of Dr. King’s speeches, including the “I Have a Dream Speech,” in addition to having the right to license its footage to others while providing contact information, as appropriate, regarding the Estate’s claimed intellectual property rights. In return, CBS will provide the King family with CBS footage of the speeches for their use in the production of certain works on Dr. King. CBS has also agreed to make a contribution to The Martin Luther King Jr. Center for Nonviolent Social Change.

The case arose when the King family filed suit against CBS in 1996 for a documentary the network produced on the civil rights movement. The documentary showed nine minutes—62%—of the King speech without the permission of the King Estate. The suit was originally dismissed in 1998 by U.S. District Judge William C. O’Kelley on the rationale that King had lost the rights to the speech, which is governed by the 1909 Copyright Act, because he had failed to comply with the statutory requirements for securing federal copy-

right protection prior to delivering the speech in a manner that was judged to amount to “general publication.” The Eleventh Circuit, however, revived the case. That court ruled that a performance, regardless of the size of its audience, is not a publication, and that CBS had yet to prove that King had relinquished his rights in the speech in other ways.

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Surveys Reveal Ambivalent Support for First Amendment

Further Decline in News Appetite Despite Growing Role of Internet

Americans support the First Amendment's guarantee of free speech – except when the speech in question is offensive, a recent survey sponsored by the Freedom Forum suggests. Another survey sponsored by the Pew Research Center reveals continuing declines in the number of Americans who follow the news, despite a growing audience for its online offerings.

Though generally supportive of First Amendment ideals, Americans are less willing to support speech that offends identified groups, according to the Freedom Forum survey. The survey, which probed the public's knowledge of and support for First Amendment rights, revealed a citizenry willing to censor unpopular views, unable to identify First Amendment guarantees beyond the freedom of speech, and more likely than not to think that the press has too much freedom to do what it wants.

Americans Like Freedom — In the Abstract

When questions were phrased abstractly, support for the First Amendment was highest. Thus, when asked to characterize the degree of speech freedom Americans have, 87% thought we have either too little or just the right amount of freedom. This liberal sentiment was echoed when 95% expressed the view that people should be allowed to voice unpopular views.

But when presented with examples of unpopular speech, support fell off sharply. For instance, 53% thought that people should not be allowed to say things offensive to religious groups, while 40% thought that musicians shouldn't be allowed to sing songs with offensive lyrics.

Sixty-seven percent thought people shouldn't be allowed to say offensive remarks to racial groups, but only 36% favored laws to that effect. That suggests, perhaps, that Americans make a distinction between what they think is right and should be the norm—e.g., no public hate speech—and their willingness to use the legal system to punish it.

Artwork fared little better. Fifty-one percent oppose allowing people to display offensive artwork in public places.

Spotty Knowledge of First Amendment Rights

The survey also revealed that while most respondents (60%) could name freedom of speech as a right guaranteed by the First Amendment, 37% failed to identify any First Amendment rights. The second most frequently identified First Amendment right was freedom of religion (16%). Most respondents (61%) also mistakenly believed that under current law it is illegal to burn the American flag as a means of political protest. Asked whether they would support amending the Constitution to ban flag burning, 46% said they would.

... one in five expressed disapproval of allowing newspapers to publish freely without government approval of a story.

Support for Regulation of News Media

Respondents also expressed willingness to support government control of the news media. The survey employed split-sample questioning to reveal that 53% of Americans believe that “the *press* in America has too much freedom to do what it wants,” while 40% believe that “*Americans* have too much press freedom” (emphasis added). For some, perhaps, the press is an institution distinguishable from the general collective of “Americans.”

When asked what restrictions on press freedoms were appropriate, one in five expressed disapproval of allowing newspapers to publish freely without government approval of a story. Greater objection to press freedom was expressed in other areas.

23%, for instance, believed newspapers shouldn't be allowed to criticize public officials.

43% believed newspapers shouldn't be allowed to endorse candidates for public office.

60% were against allowing television cameras into any and all courtrooms.

(Continued on page 38)

Surveys Reveal Ambivalent Support for First Amendment

(Continued from page 37)

On the other hand, 77% believed journalists should be allowed to keep news sources confidential. Seventy-three percent agreed that broadcasters should be allowed to televise Supreme Court proceedings. And an interesting view, one that is rather heartening in its observance of core democratic First Amendment tenets, 70% or more believed that tabloid press (e.g., *The Star*) and free-wheeling television talk-shows (e.g., Jerry Springer) should have the same freedom as their staid counterparts (e.g., *The New York Times*, *ABC News with Peter Jennings*).

Not surprisingly, 55% disagreed with the proposition that high school journalists should be allowed to report on controversial issues in their schools with approval of school authorities.

First Amendment and the Internet

Most people (74%) say they are prepared to extend broad First Amendment protections to material on the Internet, but once again when specific examples are tested, support drops. For instance, 58% agreed with the statement that the government should be able to “restrict the posting of sexually explicit materials on the Internet, even though those same materials can be legally published in books and magazines.” The survey also revealed wide support (42%) for restriction on Internet speech offensive to racial groups otherwise legally publishable in books and newspapers.

Religious Freedom

In the area of religious freedoms, 64% supported student-led prayer at school-sponsored events such as football games. Similarly, 61% thought school officials should be allowed to post the Ten Commandments in public school classrooms. Public school use of the Bible as a factual text in history or social studies classes was supported by 56%.

Pew Survey Finds Loss of News Interest

A separate survey by The Pew Research Center investigated public attitudes toward and uses of the news, finding an increasing reliance on the Internet for news delivery amid an overall decline in news interest. The primary findings of the survey describe a changing media landscape in which the traditional broadcast news outlets are losing audience shares to apathy, the emergence of Internet news sites, and the continuing diffusion of Internet technology (54% of Americans now report going online).

The number of Americans who say they enjoy following the news has fallen steadily since the mid-1990s: now only 45% describe themselves this way.

Although magazine and newspaper readership has fallen off moderately in the recent past, sharp declines have been recorded among broadcast news viewers. Since 1998, regular viewership of network news has declined from 38% to 30%, while regular viewership of local news has dropped from 64% to 56%.

Meanwhile, the number of those who regularly go online for news is up for the same period from 20% to one-in-three.

A closer examination of the data reveals the Internet is most favored by the young and better-educated, with many more college graduates under 50 years of age going online everyday than tuning into network news. The survey also found that those who go online and are interested in the news are less likely to watch network news.

The survey found no evidence, however, that the Internet is reducing the audience for cable news, newspapers or radio news, though these outlets suffer from the general decline in news interest. The number of Americans who say they enjoy following the news has fallen steadily since the mid-1990s: now only 45% describe themselves this way. Age is strongly related to news interest: 57% of those over 50 enjoy following the news, while just 31% of young adults expressed this opinion.

Internet News Gains An Audience

The Internet is drawing both the serious news con-

(Continued on page 39)

Surveys Reveal Ambivalent Support for First Amendment

(Continued from page 38)

sumer and readers whose interest in the news is merely marginal. The less interested are turning to the Internet for its headline news format and quick updates, while the more serious news readers, such as well-to-do college graduates, find attractive the depth of news coverage available online.

The Internet is strikingly popular for those in search of financial news. For active investors (defined as those who have traded stocks in the last six months) looking for stock quotes and investment advice, the Internet has largely supplanted traditional media. In fact, in the event of a stock market crash 16% of all Americans would turn first to the Internet, the most frequently cited medium, followed by cable news at 14%.

Internet News More Credible

America's growing reliance on the Internet for news has been matched by increasing confidence in the medium's ability to deliver credible news. Perhaps not surprising, traditional news sources with an online presence, such as ABC News, received higher marks for Internet news credibility than Internet-only news sources such as Netscape, Yahoo and America Online. Nonetheless, the believability of these Internet-only news sources is comparable to the ratings received by television network news. What may be surprising is that the traditional news outlets are perceived as more reliable by Internet users when they deliver news over the Internet than when they deliver it over the airwaves.

The Pew study was based on telephone interviews with 3,142 adults conducted from April 20 to May 13 and has a margin of error of plus or minus 2.5 percentage points at the 95% confidence level. Complete results and discussion of the Pew survey may be found online at www.people-press.org.

The results of the Freedom Forum survey are derived from telephone interviews with 1,015 adults and are available at www.freedomforum.org by following the link to the "State of the First Amendment." The Freedom Forum survey, conducted in mid-April, has a margin of error of plus or minus three percentage points at the 95% confidence level.

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