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LIBELLETTER

Reporting Developments Through July 20, 2001

In This Issue . . .

SUPREME COURT

PAGE

S.Ct.	Supreme Court Rejects Publishers' Arguments in <i>New York Times v. Tasini</i>, 7-2 <i>NEXIS and CD-ROM not "revisions," therefore not privileged under Copyright Act</i>	7
11 th Cir.	National Geographic Will Appeal <i>Greenberg</i> Decision to Supreme Court <i>In light of Tasini, will argue that CD-ROM should be treated like microfilm</i>	9
S.Ct.	Supreme Court Holds Unconstitutional Mass. Tobacco Advertising Regulations <i>5-4 majority applies First Amendment protection for commercial speech in controversial context</i>	11
S.Ct.	Mandatory Assessments on Mushroom Growers Held to Violate First Amendment in <i>US v. United Foods</i> <i>Assessments unconstitutional if primarily funneled into forced commercial speech</i>	14

LIBEL

Va./N.Y./ W.Dist. Ok./Fla.	Four Recent Libel Cases Result in One Win, Three Losses for Media Defendants <i>Jury finds no negligence in Va. TV case; newspaper in N.Y., TV in Okla. and Fla. lose jury verdicts</i>	15
Fla.	Publisher of Key West Weekly Arrested for Report on Police Cover-Up <i>Subject of story arrests publisher under statute barring disclosure of complaints</i>	19
Ala.	Alabama Supreme Court Voids Criminal Libel Conviction in <i>Alabama v. Ivey</i> <i>Strikes down 125-year-old criminal statute because it fails to require actual malice</i>	20
8 th Cir.	Eighth Circuit Reverses Libel Judgment Over "Clinton Conspiracy Theory" Video <i>Plaintiff sheriff's deputies accused of covering-up murder did not show actual malice</i>	21
S.D.N.Y.	John and Patsy Ramsey Agree to Third Libel Settlement, This Time with Time.com <i>Online article said brother was suspect in JonBenet murder</i>	24
N.Y.	Merck & Co. Brochure for AIDS Drug Libeled "Jane Doe" Pictured Within <i>Court granted summary judgment to plaintiff, ordered trial to determine damages</i>	25
N.Y.	Appellate Court Dismisses Libel Lawsuit Against "Geraldo Rivera Show" <i>Failure to investigate a guest's remark between taping and airing not proof of actual malice</i>	29
Cal.	<i>Colecchio v. Random House</i> Plaintiff Will Appeal Loss <i>Author of Geffen book qualified allegedly defamatory statement as mere "legend"</i>	30
Tex.	"Slum Lord" Not Defamed by Article Concerning Building Code Enforcement <i>Despite recent unfavorable case law, summary judgment affirmed on substantial truth doctrine</i>	31
N.J.	Appeals Court Says "Lesbian Cowgirl" Statement is Capable of Defamatory Meaning <i>A radio host's false accusation of homosexuality leaves triable question of recklessness</i>	33
N.Y.	New York Court Grants Summary Judgment to "60 Minutes" in Defamation Suit <i>Report that sensational documents purportedly authored by JFK and Marilyn not actionable</i>	35
Canada	Appellate Court Affirms Large Libel Verdicts Against Canadian Broadcasting Corp. <i>Court of Appeal practically imposes an editorial "duty of fairness" on the CBC</i>	44

PRIVACY AND NEWSGATHERING

9 th Cir.	<i>Hoffman v. Capital Cities/ABC</i> Misappropriation Win Reversed by Ninth Circuit <i>Magazine article held "noncommercial speech" entitled to First Amendment Protection</i>	3
Idaho	Idaho Supreme Court Questions Privilege in Reporting on Public Documents <i>Plaintiff wins on intrusion and private facts in controversy over 40-year-old court file</i>	27

(Continued on page 2)

(Continued from page 1)

U.K.	Publish and Be... Imprisoned: Lifetime Injunction Bans Identification of Bulger Killers <i>Fear of vigilante justice results in permanent prior restraint on young killers of toddler</i>	51
Tex.	Sex Offender's Claim Against Media for Newsgathering Fails <i>Defense of truth can't be defeated even the techniques used are allegedly misleading</i>	55
4 th Cir.	Trial Court Rejects Broad Rule 26(c) Protective Order, Formulates Own <i>"Confidential" material must constitute trade secret or confidential R&D in baby formula case</i>	57

CYBER — LIBEL AND LIABILITY

Cal.	CA Court Says Holland-Based Newsletter Can Be Sued in California Federal Court <i>E-mailing CA residents newsletters and invites to view site "akin to sending newspapers" to CA</i>	39
U.K.	UK Court of Appeal Agrees to Hear <i>The Times's</i> Appeal On Internet Archives <i>To be decided: whether single publication rule, qualified privilege apply to Internet publications</i>	40
Australia	Australian Court to Decide Where Internet Article Is Published <i>Is WSJ.com published on Dow Jones's web servers in NJ or on viewers' computer screens?</i>	41
Hague	Hague Convention on Jurisdiction and Judgments May Endanger Free Speech on Web <i>Some proposed changes could require media defendants to be globally liable</i>	47

NEWS & UPDATES

NY, Tex., Cal.	States Expand "Son of Sam" Laws <i>Crime memorabilia money now claimable in CA, TX; NY victims have expanded ability to claim</i>	54
	Survey of Teachers Shows Support for First Amendment in Principle But Not Practice <i>Majority think students should be censored, yet think schools teach First Amendment well</i>	58
	Annual "State of the First Amendment Survey" Released by First Amendment Center <i>Networks' Mistaken 2000 Election Projection Left a Lasting Impression on Public Opinion</i>	58
	George Washington University Releases "State of Freedom of Information" Report <i>Federal agencies still resist FOIA requests even as public use of FOIA rises</i>	59
	Former <i>Washington Post</i> Publisher Katharine Graham Dies at 84	60

SAVE THE DATES!**2001 NAA/NAB/LDRC
LIBEL CONFERENCE**

*Information and Registration forms for the
2001 NAA/NAB/LDRC LIBEL CONFERENCE have been sent out.
If you have not received registration materials, visit
www.ldrc.com to download the forms.*

**September 12-14, 2001
Alexandria, Virginia**

Dustin Hoffman Misappropriation Win Reversed by Ninth Circuit

By Anne Egerton

The United States Court of Appeals for the Ninth Circuit has reversed the three-million-dollar verdict in favor of Dustin Hoffman in the *Tootsie* "altered photograph" misappropriation case. In a unanimous decision issued July 6, the court held that the *Los Angeles* magazine article at issue was "noncommercial speech" and, as such, was entitled to "full First Amendment protection."

Hoffman, the court ruled, therefore was required to prove by clear and convincing evidence that the magazine had acted with actual malice in publishing the altered photograph. Because he had not done so, the appeals court threw out the district court's award of compensatory and punitive damages to Hoffman, as well as the award of attorneys' fees to his lawyers. *Hoffman v. Capital Cities/ABC, Inc.*, Nos. 99-55563, 99-55686 (9th Cir. July 6, 2001).

Hoffman marks the Ninth's Circuit's first departure from its lengthy record of rulings in favor of celebrities in misappropriation cases, a string of decisions that has earned it the moniker "the Court of Appeals for the Hollywood Circuit."

A Digital Fashion Spread

The case arose from a 1997 article in *Los Angeles* magazine ("LAM") (published by ABC) entitled "Grand Illusions." Part of the magazine's "Fabulous Hollywood Issue," the article featured sixteen famous scenes from movies such as *North by Northwest*, *Gone with the Wind*, and *Thelma and Louise*. As the magazine told its readers, it digitally altered still photos from the scenes so that the actors who had starred in the films appeared to be wearing 1997 fashions. A photograph of Dustin Hoffman as "Tootsie" — in wig and makeup, standing before an American flag — was "merged" with a photograph of a male model's body, attired in evening gown and heels. The photograph bore the caption, "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels."

District Court Rules for Hoffman

Hoffman sued, claiming misappropriation under California common law as well as violations of California's statutory right of publicity (Cal. Civil Code section 3344) and unfair competition law (Cal. Bus. & Prof. Code section 17200) and of the federal Lanham Act. At the conclusion of the bench trial, the district judge ruled in Hoffman's favor, praising him as "truly one of our country's living treasures." *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 867 (C.D. Cal. 1999). The district court first rejected LAM's copyright preemption argument on the ground that Hoffman's "own likeness and name cannot seriously be argued to constitute a 'work of authorship' within the meaning of [the Copyright Act]." The court did not address the fact that the photograph showed Hoffman not as himself but as the character "Tootsie" — a character owned by the film's copyright holder, Columbia Pictures.

(Continued on page 4)

Hoffman marks the Ninth's Circuit's first departure from its lengthy record of rulings in favor of celebrities in misappropriation cases.

LDRC'S 21ST ANNUAL DINNER

with

Ben Bradlee

Diane Sawyer

Mike Wallace

Walter Isaacson,
as moderator

Wednesday,
November 7th, 2001

Sheraton New York Hotel & Towers

Dustin Hoffman Misappropriation Win Reversed by Ninth Circuit

(Continued from page 3)

(In calculating damages, however, the court did refer to “the role and character [Hoffman] had created in the motion picture *Tootsie*” as something of value for which *Hoffman* was entitled to recover).

The district court went on to hold that LAM had misappropriated Hoffman’s name and likeness “to sell magazines, [and to] advertise and promote designer clothing.” Likewise, the court said, LAM had violated Hoffman’s right of publicity by using his name and likeness “on or in products, merchandise or goods, namely, *Los Angeles Magazine*” and to advertise and sell the magazine as well as Richard Tyler gowns and Ralph Lauren shoes.

Finally, the district judge ruled that LAM had violated the Lanham Act because consumers were likely to be confused “as to whether Mr. Hoffman was associated with, sponsored, approved, or endorsed *Los Angeles Magazine* or the depiction of his image in *Los Angeles Magazine*.”

The trial court rejected LAM’s First Amendment defense, stating summarily, “The First Amendment does not protect the exploitative commercial use of Mr. Hoffman’s name and likeness.” The article at issue, the court stated, “provided no commentary on fashion trends and no coordinated or unified view of current fashions.” The district court — citing *New York Times v. Sullivan* — also held that the article constituted “knowingly false speech” because LAM “intended to create the false impression in the minds of the public ‘that they were seeing Mr. Hoffman’s body.’”

The district court awarded Hoffman \$1.5 million in compensatory damages: according to its calculation, the “fair market value” of the use. The court also assessed LAM \$1.5 million in punitive damages, stating that Hoffman and the other celebrities depicted in the article “were commercially exploited and were

robbed of their dignity, professionalism and talent.” Finally, the court awarded Hoffman nearly \$270,000 in attorneys’ fees under the right of publicity statute and the Lanham Act.

Ninth Circuit: Not Commercial Speech

The Ninth Circuit reversed. The opinion by Judge Robert Boochever — sitting with Judges A. Wallace Tashima and Richard C. Tallman — first examined whether the article and photograph in question were commercial speech, noting that the actual malice re-

quirement does not apply to cases involving “false commercial speech.” Distinguishing the Ninth Circuit’s *Midler/White/Waits* line of advertising cases, the court concluded that, “[v]iewed in context, the article as

Distinguishing the Ninth Circuit’s Midler/White/Waits line of advertising cases, the court concluded that, “[v]iewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors.”

a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors.” The appeals court disagreed with the district court’s view that a “shopping guide” in the back of the magazine, which listed prices and stores for the gown and shoes, rendered the feature article a “commercial exploitation.”

In a footnote, the Ninth Circuit also distinguished the California Supreme Court’s recent decision in the Three Stooges case, *Comedy III Productions, Inc. v. Saderup, Inc.*, 21 P.3d 797 (Cal. 2001). The Ninth Circuit suggested that first amendment vs. right of publicity balancing test established in *Saderup* — “whether the work in question adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation” — was less than clear. In any event, the court concluded, the digitally-altered photograph that LAM published unquestionably contained “significant transformative elements.”

(Continued on page 5)

Dustin Hoffman Misappropriation Win Reversed by Ninth Circuit

(Continued from page 4)

No Actual Malice

The Ninth Circuit panel then turned to the district court's finding of actual malice. Hoffman had claimed that the photograph and accompanying caption were false "because they created the impression that Hoffman himself posed for the altered photograph. After discussing the "totality of [LAM's] presentation" of the photo at length, Judge Boochever concluded that the article and accompanying photo, in context, did not by themselves provide clear and convincing evidence that LAM intended to suggest to readers that they were seeing Hoffman in the altered photograph. The court noted that the magazine explicitly stated that digital technology had been used to transform the famous still photos. The court added

Although nowhere does the magazine state that models' bodies were digitally substituted for the actors' bodies, this would be abundantly clear given that the vast majority of the featured actors [including Cary Grant, Marilyn Monroe, and Judy Garland] were deceased.

Last, the appeals court examined the testimony of LAM's style editor, which the trial court had relied on in concluding that LAM intended to create the false impression that readers were seeing Hoffman's body in the Tyler gown and Lauren shoes. The district court had characterized the testimony as an admission "that [LAM] intended to create the false impression in the minds of the public 'that they were seeing Mr. Hoffman's body.'" The appeals court noted, however, that the style editor further testified that she meant only that she wanted the male model to have Hoffman's body type, and that she never intended to convey to readers that Hoffman had participated in the article's preparation.

Because Hoffman's failure to prove actual malice defeated all four of his claims, the appeals court stated that it did not need to reach LAM's copyright preemption argument. The Ninth Circuit's reversal of the judgment against LAM — in addition to dispensing with the three-million-dollar damage award — means

that Hoffman will be required to pay LAM's attorneys' fees. Hoffman has petitioned for rehearing *en banc*.

But Why Reach Actual Malice?

Hoffman plainly comes as welcome relief to publishers and broadcasters who wondered whether any distinction remained — at least in the Ninth Circuit — between true advertisements and editorial uses of names and photographs of famous people. First Amendment advocates also can celebrate the court's rigorous application of the actual malice standard — *de novo* review, the subjective/actual test for intent, the inadequacy of mere negligence — to this misappropriation case. What is less than clear is why the court reached the actual malice issue at all. The court could simply have held that the magazine article in question was an expressive work and the photograph an editorial use of Hoffman's name and likeness, and that Hoffman therefore had no misappropriation or right of publicity claim. (The Lanham Act claim also would drop out in the absence of commercial speech.) Had the Ninth Circuit decided the case on this statutory ground, the court would not have had to reach the constitutional issue of actual malice.

The likely explanation is that the court was dealing

(Continued on page 6)

SAVE THE DATES!

**LDRC'S
ANNUAL DCS BREAKFAST**

**Friday,
November 9th, 2001**

Sheraton New York Hotel & Towers

Dustin Hoffman Misappropriation Win Reversed by Ninth Circuit

(Continued from page 5)

with the “falsity loophole” in publicity rights cases created in California by *Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (1983), and followed by the Ninth Circuit in *Eastwood v. National Enquirer*, 123 F.3d 1249 (9th Cir. 1997). (See J.M. Rubins, *The ‘Falsity’ Loophole in Publicity Rights Cases: Are New York and California Moving in Opposite Directions?*, April 2001 LDRC Bulletin.) The *Eastwood* cases held that the exemptions in California’s right of publicity statute for news and public affairs did not protect the *National Enquirer* from claims arising from articles that Clint Eastwood alleged to be knowingly false. The Ninth Circuit panel in *Hoffman* also may have reached the actual malice issue because Hoffman’s focus on the alteration of the original photograph amounted to a disguised defamation or false light claim.

Hoffman’s lawsuit illustrates the continuing problem presented not only by the *Eastwood* cases but also by the very broad language of the common law misappropriation tort as defined by Prosser and the *Restatement*, and by the absence in California’s right of publicity statute for living celebrities of the exception for expressive works — books, plays, films, and magazines — contained in its statute governing the right of publicity held by the estates of deceased celebrities. Compare Cal. Civ. Code section 3344.1(a)(2)(fictional and nonfictional entertainment and dramatic, literary, and musical works, as well as advertisements for these works, are not products, merchandise, goods, or services) with Civ. Code section 3344(c) (exempting only news, public affairs, sports broadcasts, and political campaign uses).

Until the United States Supreme Court rules on the application of misappropriation and the right of publicity to expressive works protected by the first amendment, defendants should continue to argue (1) that editorial uses cannot give rise to misappropriation and right of publicity claims, and (2) that any defamation claim disguised as misappropriation must be subject to the constitutional protections and defenses that govern defamation claims, including the actual malice requirement for public figures.

Stephen M. Perry of Munger Tolles & Olson in Los Angeles represented Capital Cities. Charles N. Shepard

of Greenberg Glusker Fields Claman & Machtinger in Los Angeles represented Dustin Hoffman.

Floyd Abrams and Landis C. Best, Cahill Gordon & Reindel, New York, New York, for amici curiae of Various Magazine and Newspaper Publishers, Broadcasters, Television Syndicators, and Media Associations.

Anne Egerton practices media law in Los Angeles, California.

Procter & Gamble Co. v. Amway Corp. Infects Hoffman

The Fifth Circuit decision earlier this year in which the court stated that defamation plaintiffs in commercial speech cases were not obligated to meet the First Amendment obligations of *New York Times v. Sullivan* and its progeny, was cited as well for this point in the Ninth Circuit decision in *Hoffman v. Capital Cities/ABC*. In dicta, the Ninth Circuit panel states that in commercial speech cases, “the public figure plaintiff does not have to show that the speaker acted with actual malice.”

The adoption of *Procter & Gamble*, 242 F.3d 539 (5th Cir. 2001) is distressing. The defendants in that case filed a petition for writ of certiorari in the Supreme Court of the United States on July 5th arguing, among other things, that the fact that speech is “commercial” should not deprive it of all constitutional protections under libel law. The Petitioners also ask the Court to clarify its definition of commercial speech, stating — as LDRC did in its recent **LDRC BULLETIN 2001-2** — that there is unsettling confusion surrounding the definition of commercial speech, a fuzziness and lack of precision that results in lower courts applying the concept, and the decidedly lower standards of protection that goes with it, to a wide array of speech that, we argue, in fact deserves full First Amendment protection.

The U.S. Supreme Court, 7 to 2, Rejects Publishers' Arguments in *New York Times Co. v. Tasini*

**By Bruce P. Keller, Jeffrey P. Cunard and
Peter Johnson**

Disclaimer: The authors represent the publishers in the case described below and freely admit a bias in their view of the merits.

In *New York Times Company, Inc. v. Tasini*, No. 00-201, 121 S. Ct. 2381, 2001 WL 703909 (U.S. June 25, 2001), the U.S. Supreme Court held, 7 to 2, that absent express consent, the republication of print periodicals in electronic formats infringes the copyrights in contributions submitted by freelance authors. The Court rejected the argument that electronic copies stored in the NEXIS electronic library or on CD-ROMs, even some that photographically reproduce, page by page, the entirety of the printed edition, were privileged under Section 201(c) of the 1976 Copyright Act.

Under Section 201(c), when a writer — such as a freelance contributor — submits articles, opinion pieces or even a report on the local college football game, the writer retains the copyright to the work and can sell it again and again to anyone who will buy it. The newspaper or magazine (a “collective work” under copyright law) has the “privilege” to publish and republish the story “as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.” 17 U.S.C. 201(c). It cannot, however, “include it in a new anthology or an entirely different magazine or other collective work.” H.R. Rep. No. 94-1476, at 122-23 (1976).

The question throughout the *Tasini* litigation has been whether copies of a periodical, either revised to fit the ASCII, text-based format familiar to NEXIS users, or reproduced exactly as it appeared in its original printed form but digitized to fit alongside countless other periodicals burned onto a single CD-ROM, are formats that remain within the phrases “that particular collective work” or “any revision of that work.”

District Court/2nd Circuit Disagree

The October 1999 *LibelLetter* reported that the District Court, which had held that such electronic republication was privileged under the publisher’s right to include a freelance contribution in “any revision” of its publication, *Tasini v. New York Times Co.*, 972 F. Supp. 804, 823-25 (S.D.N.Y.

1997), had been reversed by the Second Circuit. 206 F.3d 161 (2d Cir. 2000). The District Court had concluded that because the NEXIS and the CD-ROM formats “carry recognizable versions of the publisher defendants’ newspapers and magazines . . . defendants have succeeded at creating ‘any revision[s]’ of those collective works.”

The Second Circuit, however, found three reasons why those formats fall outside the revision privilege:

- They fail to preserve both the “selection and arrangement” of the print edition;
- The inclusion of multiple issues in a database or on a disc creates a “new anthology” of articles rather than a collection of periodicals;
- Users can retrieve individual articles without retrieving the complete periodical.

Supreme Court: Focus on User

The Supreme Court did not adopt either of the first two prongs of the Second Circuit’s rationale. It intentionally avoided the holding that “selection *and* arrangement” are necessary in order to maintain the copyright status of a collective work, 2001 WL 703909, at *9 n.9, and did not decide whether databases containing periodicals themselves constitute “new anthologies” (either of periodicals or of individual articles). *Id.* at *9.

Instead, it focused exclusively “on the Articles as presented to, and perceptible by, the user of the Databases.” *Id.* It concluded that, notwithstanding the presence on the electronic copies of (a) in the case of ASCII text copies, the entire editorial contents of the rest of the newspaper and (b) in the case of image-based CD-ROMs, every page of a periodical issue, reproduced photographically, the ability of a reader to retrieve a freelance contribution directly, without having to “flip” through any pages, placed the copies outside of Section 201(c). It was on this basis that the Court managed to distinguish reproduction in microform. According to the Court:

In the Databases, by contrast [with microform], the Articles appear disconnected from their original context. In NEXIS and NYTO, the user sees the . . . Article apart even from the remainder of page 26 [where

(Continued on page 8)

New York Times Co. v. Tasini

(Continued from page 7)

the Article begins]. In GPO, the user sees the Article within the context of page 26, but clear of the context of page 25 or page 27, the rest of the Magazine, or the remainder of the day's newspaper. In short, unlike microforms, the Databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any "revision" thereof.

Id. at *10.

Because it was true of GPO that the "Article" appeared just as it did on the paper copy, surrounded by articles, advertisements and other material – in short, just as it does on microfilm – the Court worked hard to come up with a rationale for condemning GPO copies. It finally concluded that

the GPO user ... will see the entirety of Magazine page 26, where the article begins, and Magazine page 78, where the article continues and ends. [T]he GPO retrieval [does not produce] any text on page 27, page 79 or any other page. The user who wishes to see other pages may not simply 'flip' to them. She must conduct a new search.

Id. at *5 n.2.

In fact, the Court made a clear error here. The undisputed evidence before it was that a GPO user could both "flip" to pages adjacent to the retrieved article and "jump" to the continuation page.

The Court's decision leaves open to debate the status of image-based copies that not only present a freelance contribution as it originally appeared on the printed page but also require users to navigate on a page-by-page basis, such as by repeatedly pressing page up/page down on a keyboard. If such copies only permit articles to be located by literally paging through the periodical, they should be deemed within the scope of Section 201(c), regardless of whether an accompanying search engine permits the subject of the reader's search to be accessed directly. That format is at issue in a case involving a CD-ROM set containing photographic digital reproductions of every page of every issue of the National Geographic magazine. *Greenberg v. National Geographic*

Soc., 244 F.3d 1267 (11th Cir. 2001) (see box, page 9).

The Immediate Consequences of Tasini

The Court's ruling in *Tasini* upsets the widely-held publishing industry understanding that the Copyright Act treats all publishing formats in a "media neutral" manner. It ignores all of the language and legislative history of the Copyright Act that, taken together, demonstrate an unmistakable intent by Congress that new technological retrieval systems should not change the underlying nature of the copies from which works are reproduced.

As a result, publishers of any publication that includes freelance contributions, whether consisting of articles, illustrations or photographs, now must "enter into an agreement allowing continued electronic publication" of works already published, 2001 WL 703909, at *11, and acquire future electronic rights by contract, with the possible exception of republication in formats, like those at issue in *Greenberg*, that require continual page-by-page scrolling of the digitally-reproduced pages.

The opinion also creates a fundamental practical problem. Although in recent years many publishers have insisted on acquiring "electronic rights" by contract, not all have done so. Moreover, acquiring such rights on a going-forward basis, while eliminating risk in the future, does not reduce the risk with respect to publications that were archived electronically before such contracts became prevalent. For those earlier works, publishers must either track down the writers and acquire the rights, or — the far more likely solution — simply delete freelance contributions that were not expressly contracted for, leaving irreparable gaps in the electronic historical record.

Focus On End-User

Despite acknowledging that electronic copies contain the entire editorial contents of the print editions, the Court found infringement by focusing exclusively on the ability of end users to download articles "clear of the context provided either by the original periodical editions or by any revision of

(Continued on page 9)

[T]he ability of a reader to retrieve a freelance contribution directly, without having to "flip" through any pages, placed the copies outside of Section 201(c).

New York Times Co. v. Tasini

(Continued from page 8)

those editions.” *Id.* at *9. This makes the Court’s decision the first case to impose direct liability based on how users may read or perceive a copy, rather than on the contents of the copy.

Thus, although a user command prompts a search of “the universe of [the database] contents,” which necessarily involves a search of the complete periodicals the databases contain, the only salient fact to the Court is that what ultimately “appears to a user” is an article “as a separate item,” something that simply was not true as to GPO. It further characterizes the database contents as “thousands or millions of files containing *articles* from thousands of collective works,” rather than of the collective works themselves. *Id.* at *9 (emphasis added). Although the Court acknowledged that NEXIS and the CD-ROMs also were designed to, and do, permit easy retrieval of the entirety of any given issue of a periodical, it determined that “the fact that a third party can manipulate a database to produce a noninfringing document does not mean the database is not infringing.” *Id.* at *11.

This analysis reflects two related problems. *First*, the freelancers repeatedly asserted that their claims of copyright infringement have nothing to do with end users’ ability to retrieve their articles, but rest entirely on how their articles are stored in the databases themselves. At oral argument on the summary judgment motion, they insisted: “We have not claimed that . . . defendants are guilty of contributory or vicarious liability with respect to direct infringement committed by end users.”

Not only did they present no evidence of any infringing retrieval, the undisputed record below showed that at no point prior to any user accessing the electronic copies were the publishers’ collective works copied or reproduced on

anything other than an entire issue-by-issue basis. Thus, as a factual matter, nothing in the record supports any claim of infringement based on retrieval.

Second, prior to this case, potential third-party article retrievals never have determined whether there has been direct infringement by a defendant. The Supreme Court had previously made it clear that: “[t]hird party conduct would be wholly irrelevant in an action for direct infringement.” *Sony Corp. of America v. Universal City Studios*, 464 U.S. 417, 446 (1984). Because the infringement claims in this case are based entirely on the acts of reproducing copies of the particular collective works on CD-ROMs and in the NEXIS library, under fundamental copyright law, it was the

(Continued on page 10)

National Geographic Wants Supreme Court Review for its Freelance Suit

Contends Tasini Provides Support For Reversal

The National Geographic Society has decided to seek U.S. Supreme Court review of an 11th Circuit Court of Appeals decision in favor of a freelance photographer suing over CD-Rom reproduction of back issues that included his work.

In *Greenberg v. National Geographic Society*, the Court of Appeals ruled in March that Section 201(c) of the Copyright Act of 1976 did not allow the National Geographic Society to publish an electronic archive on CD-ROM that reproduced every issue of *National Geographic* magazine exactly as it appeared in print. 244 F.3d 1267 (11th Cir., March 22, 2001). See *LDRC LibelLetter*, April 2001 at 43.

According to a report in *Adlaw*, National Geographic’s attorneys believe that *Tasini* provides support for a reversal of their case by the Supreme Court, since the Court found in *Tasini* that publishers need not pay a new licensing fee for image based reproductions such as microfilm or microfiche if they appear in the exact same position as they did in the original publication. National Geographic argues that their CD-ROM should be treated in the same manner as microfilm or microfiche.

The district court granted summary judgment to National Geographic, ruling that there was no infringement, but the Court of Appeals reversed.

Pennsylvania Newspaper Association's Freelancer Agreement Available on Web

In just one of many reactions from writers and publishers to the Supreme Court’s *New York Times Co. v. Tasini* decision last month, the Pennsylvania Newspaper Association has begun putting its freelancer agreement on their web site. To view it, go to <http://www.pap-newspaper.org/legal/workforhire.htm>.

New York Times Co. v. Tasini

(Continued from page 9)

content of those allegedly directly infringing copies that the Court should have examined. It pretended to do so, but did not, repeatedly drawing a distinction between what the Databases do and what users do. According to the Court, “the Databases” “offer users individual articles, not intact periodicals,” 2001 WL 703909, at *10, even though it also concluded that only “users” can “manipulate the Databases” to retrieve a complete periodical. *Id.* at *11.

In fact, the nature of the electronic copies and prior copyright law doctrine is such that it is senseless to inject user manipulation into an analysis of direct infringement for which the publishers were held liable. That direct liability should have been imposed as a result of what was placed on the allegedly infringing copies – copies that the majority opinion identifies as the NEXIS and CD-ROM copies.

Similarly, the Court focused exclusively on what is “perceptible by” the user. *Id.* at *9. It emphasized that each article “appears” as a separate item, that an article “appears” to a user without graphics, that even in the image-based GPO the article “appears” without other pages of the print periodical, and that the databases do not “perceptibly” present a revised edition of the periodical. *Id.* at *9, *11.

This approach, that only the individual article is “perceptible,” ignores that it is “perceptible” only because the complete collective work is in the database. It is a throw-back to before the 1909 Copyright Act, when works expressed in new media like piano rolls and phonograph records were not copyrightable because the end user could not “see and read” the contents. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 17 (1908). The 1976 Copyright Act was supposed to change all that by finally removing visual perceptibility as the criterion for copyrightability, and making it clear that a copyrighted work is a copyrighted work, fixed on a copy, with regard to whether the work can be “perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 102. Thus, copyrighted works can be fixed on computer discs, phonograph records, music CDs, and any number of “graphic or symbolic” media that do not allow direct visual “perception.” H.R. Rep. No. 94-1476, at 52. In this sense,

Congress declared that the nature of the medium of the copy, or of the tools used to make the work perceptible, are irrelevant in determining the copyrightability or essential nature of the work.

Taken literally, the Court’s analysis would also conclude that a reproduction of a novel in Braille or on audiotape is a different work than the hard copy version, and would treat a computer program in source code (which is perceptible by human beings) as a different work from executable code fixed on a disk.

Dissent (Stevens & Breyer)

The dissenting opinion, authored by Justice Stevens and joined by Justice Breyer, endorsed the arguments advanced by the publishers, including that: (1) the media neutral provisions of the 1976 Copyright Act were designed to ensure that

[P]rior to this case, potential third-party article retrievals never have determined whether there has been direct infringement by a defendant.

all authors, including publishers of collective works, could exploit their works in any medium, now known or later developed; (2) potential third-party uses, such as the ability to retrieve an individual article, should not result

in liability, under the principle established by *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984); (3) the electronic availability of freelancers’ works does not deprive freelancers of the ability to exploit their individual works commercially, as by self-syndicating, and in fact benefits them by making their works, and the fact of their publication in the publishers’ periodicals, more widely known; and (4) imposing liability on publishers will result in the mass deletion of freelance works from electronic libraries.

What’s Next?

Tasini now returns to the district court, where the damages issues will be litigated. Although the *Tasini* case itself involves only 21 articles written by six freelance authors, several purported nationwide class actions brought by freelancers were filed against publishers in the wake of the Court of Appeals’ decision in *Tasini*. The determination of damages in *Tasini*, therefore, could have an effect on those class

(Continued on page 11)

Supreme Court Snuffs out Tobacco Advertising Regulations

By Bruce E.H. Johnson, Eric M. Stahl and
Eric B. Martin

In a decision that did not fundamentally alter the First Amendment protection for commercial speech — but that applied it in perhaps the most controversial of contexts — the United States Supreme Court held unconstitutional much of Massachusetts' attempt to heavily regulate tobacco advertisements. *Lorillard Tobacco Co. v. Reilly*, 121 S. Ct. 2404 (June 28, 2001). The decision clarifies some aspects of the Court's prior commercial speech decisions and signals the Court's continued commitment to an enhanced version of the *Central Hudson* test, particularly the requirement that advertising restrictions be narrowly tailored and carefully calculated to serve the government's asserted interest.

New York Times Co. v. Tasini

(Continued from page 10)
actions.

In response to the Court's decision in *Tasini*, the defendants, as well as other publishers, have begun deleting free-lance contributions from, or destroying, electronic copies. All print publishers who republish electronically may wish to do the same in order to minimize the risk of future damages. The *Tasini* decision exposes the countless publishers and libraries that have been preserving decomposing paper collections on CD-ROM and in electronic libraries such as NEXIS to infringement liability with respect to innumerable individual articles. This, in turn, will have a devastating impact on research and study in the United States. The public no longer will have electronic access to the complete contents of newspapers, magazines, other periodicals and anthologies. Instead, they will have to revert to the research methods of a prior generation: the *Reader's Guide to Periodicals* and bound paper copies — to the extent such copies even exist.

Bruce P. Keller, Jeffrey P. Cunard and Peter Johnson are with Debevoise & Plimpton, New York. Laurence Henry Tribe of Harvard Law School in Cambridge, Mass., also represented defendant New York Times Co. Laurence Gold of Washington, D.C., argued for plaintiff Tasini.

Creating A Buffer Zone

Lorillard, which was issued on the final day of the October 2000 term, involved a challenge by manufacturers of tobacco products to advertising regulations imposed by the State of Massachusetts. The regulations established a buffer zone of 1000 feet around any school or playground, within which all outdoor advertising of tobacco products was prohibited and all in-store tobacco advertising was to be at least five feet off the floor. The tobacco manufacturers contended that this zone encompassed 90 percent of the land area in the state's three largest cities. The regulations also required retailers to place tobacco products behind counters so as to require a customer to contact a salesperson before making a purchase.

On summary judgment, the District Court upheld the restrictions, with the exception of the in-store advertising ban. The First Circuit affirmed in part and reversed in part, upholding all of the regulations.

Preemption for Cigarette Ads

The Supreme Court, in a lengthy opinion authored by Justice O'Connor and joined by a shifting majority, struck the bulk of the Massachusetts regulations. First, five of the justices agreed that state's restrictions on indoor and outdoor advertising of cigarettes was preempted by Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334. That act applies only to cigarettes, prompting the Court to reach the First Amendment challenge raised by cigars and smokeless tobacco manufacturers (as well as to the "point of sale" regulations for all tobacco products).

First Amendment Concerns: Applying Central Hudson

At the outset of its constitutional analysis, the Court addressed petitioners' argument that First Amendment challenges to commercial speech regulations should be reviewed under strict scrutiny, and not under the intermediate protection provided by the test set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Justice O'Connor noted that "several Members of the Court have expressed doubts about the Central Hudson analysis." She sup-

(Continued on page 12)

Supreme Court On Tobacco Ad. Regs.

(Continued from page 11)

ports this point with a citation to prior concurring opinions joined by a majority of the Court (Justices Thomas, Stevens, Kennedy, Ginsburg and Scalia). The citation is remarkable; it is the Court's first recognition that a majority of its members have questioned *Central Hudson*, and suggests that a call for strict scrutiny might be well taken in some future case involving an advertising restriction that passed muster under intermediate scrutiny. Here, however, just as in its last commercial speech decision (*Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173 (1999)), the Court held that there was "no need to break new ground" in this case because "*Central Hudson*, as applied in our more recent commercial speech cases, provides an adequate basis for decision."

This case involved only two of the four prongs of the *Central Hudson* test: whether the speech regulation directly and materially advances the asserted governmental interest, and whether the regulation is not more extensive than necessary to serve that interest. Six members of the Court held that the Massachusetts Attorney General met its burden under the first of these requirements as to the outdoor, but not the indoor, advertising restrictions. By a 5-4 majority, however, the Court found that all the advertising regulations were overbroad and thus failed under the final *Central Hudson* requirement. (These majorities barely overlapped, with only Justices O'Connor and Rehnquist joining in both holdings).

Evidentiary Burden on Harm

To meet its burden under the "direct advancement" prong, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans*, 527 U.S. at 188 (quoting *Edenfield v. Fane*, 507 U.S. 761, 770771 (1993)). The Court has never established the government's evidentiary burden.

The *Lorillard* petitioners and several *amici* urged the Court to hold that advertising restrictions cannot stand

unless they are supported by concrete evidence that withstands judicial review. For example, a brief submitted on behalf of the Newspaper Association of America, other media *amici* and the ACLU called on the Court to make clear that lower courts reviewing First Amendment challenges to commercial speech restrictions must independently evaluate conflicting evidence; must require the government regulator to meet its *Central Hudson* burden by at least a preponderance of the evidence; and must require that the admissibility of that evidence be established, particularly with regard to purported scientific evidence.

The Court declined to adopt such a standard:

We do not ... require that empirical data come accompanied by a surfeit of background information.

We have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions

based solely on history, consensus, and simple common sense.

The actual holding of *Lorillard* may not be as permissive as the above language suggests. The voluminous record before the Court consisted of numerous studies, by the FDA, Surgeon General, Institute of Medicines and others, that the Court read as establishing a causal link between tobacco advertising and demand for tobacco products. The Court concluded that

[o]n this record and in the posture of summary judgment, we are unable to conclude that the Attorney General's decision to regulate advertising of smokeless tobacco and cigars in an effort to combat the use of tobacco products by minors was based on mere 'speculation [and] conjecture.'

Lorillard cannot be read as treating the government's evidentiary burden as light, although the Court does appear

(Continued on page 13)

Supreme Court On Tobacco Ad. Regs.

(Continued from page 12)

unwilling to require much in the way of independent judicial scrutiny of the weight and admissibility of evidence submitted to show “direct advancement.”

The majority reached a different conclusion with regard to the indoor “five-foot” restriction. The Court here found that the regulation did not meet the “direct advancement” prong of *Central Hudson* because it provided only “ineffective or remote” support for the government’s purpose. The Court noted that not all minors were under five feet tall, and even those who were had the ability to look up. Thus, the Court concluded, the restriction did not advance the state’s goal of curbing youth smoking.

Not a “Reasonable Fit”

A majority of the Court also concluded that neither the outdoor nor the indoor advertising restrictions satisfied the final *Central Hudson* requirement of a reasonable fit between the means and the ends of the regulatory scheme. The Court held that the breadth and scope of the regulations did not demonstrate a careful calculation of the speech interests involved.

The Court noted that in some areas of the state, the regulations represented a nearly complete ban on the communication of truthful information about tobacco. The Court noted that the state failed to make a “case specific analysis” of the effect of the 1000-foot buffer zone around schools and playgrounds, but simply chose that zone because it was the figure proposed by a prior FDA rule.

The Court also found the range of communications restricted was overbroad: a ban on all oral communications did not further the state’s interest, and the ban on signs of any size did not narrowly address the stated problem of billboard advertising. The Court also noted that the state could have, but did not, address the specific types of advertisements that appealed to underage tobacco users.

Perhaps the most significant aspect of the Court’s narrow-tailoring analysis is its confirmation that there is no “child-protection exception” to First Amendment protection for advertising. The Court stated that the govern-

ment’s interest in protecting youth from the dangers of tobacco was “substantial, and even compelling,” yet it concluded that the lower courts erred by failing to weigh this interest against the interests of the advertisers in presenting truthful information about a legal product to potential adult consumers, and of adult consumers in receiving such information.

[T]he governmental interest in protecting children from harmful materials does not justify an unnecessarily broad suppression of speech addressed to adults...As the State protects children from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.

Perhaps the most significant aspect of the Court’s narrow-tailoring analysis is its confirmation that there is no “child-protection exception” to First Amendment protection for advertising.

Finally, the Court used a different analysis, and reached a different result, with regard to Massachusetts’ “behind the counter” regulations. Here the court held that the regulations were content-neutral regulations of

conduct. Thus, the Court applied the *O’Brien* test for communicative-related conduct restrictions, and held that the state had demonstrated a substantial interest in preventing access to tobacco products by minors and that the regulations at issue were an appropriately narrow means of advancing that interest.

In sum, *Lorillard* confirmed that the Court is committed to an enhanced *Central Hudson* test. Any notion of a “vice exception” to First Amendment protection for commercial speech clearly is dead and gone. The Court once again deflected calls to craft a rule of strict scrutiny review of advertising restrictions, but it did not foreclose the possibility of applying such a rule in a later case.

Bruce E.H. Johnson is a partner, Eric M. Stahl is an associate, and Eric B. Martin is a summer associate with Davis Wright Tremaine LLP in Seattle, which submitted an amicus curiae brief in support of the Reilly petitioners on behalf of the Newspaper Association of America, the ACLU, Dow Jones & Co., Magazine Publishers of America, and The Reporters Committee for Freedom of the Press.

Got Mushrooms?

Supreme Court Finds First Amendment Violation in United Foods

A recent decision from the Supreme Court will give agricultural cooperatives and their members some food for thought. The First Amendment, ruled the Court on June 25, 2001, may preclude mandatory assessments on members of an association that fund generic advertising with which a given member disagrees. In *United States, et al. v. United Foods, Inc.*, 121 S. Ct. 2334 (2001), a 6-3 majority held that obligatory support of an association's commercial speech under a federal statute is a form of unconstitutional compelled speech if the money in question is spent primarily on generic advertising and does not further a more comprehensive marketing program. Justice Kennedy wrote the majority opinion, joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, and Thomas.

The case concerns the Mushroom Promotion, Research, and Consumer Information Act (7 U.S.C. § 6101 *et seq.*). The Act authorized a mandatory assessment on all handlers of fresh mushrooms (producers and importers), to be used for "projects of mushroom promotion, research, consumer information and industry information." However, most of the monies collected from the mushroom industry were spent on generic advertisements promoting mushroom use. United Foods, Inc., a mushroom producer based in Tennessee, runs national advertisements that tout the company's particular label and disagreed with having to divert funds from its own campaign in order to support generic advertising that did not distinguish between branded and unbranded fungi.

It had been argued, and the United States District Court for the Western District of Tennessee agreed, that the Supreme Court's 5-4 decision in *Glickman v. Wileman Brothers*, 521 U.S. 457 (1997) (holding that similar assessments levied on the California tree fruit producers are not in violation of the First Amendment) should govern the outcome. After *Glickman* was decided, the District Court, in keeping with the tree fruit opinion (or so it thought), found for the United States.

United Foods appealed to the Sixth Circuit, where the lower court's decision was reversed. Writing for the appellate court, Judge Gilbert S. Merritt found numerous distinctions between *Glickman* and the case at bar, specifically pointing out that the mushroom industry, unlike the tree fruit industry, "has not been collectivized, exempted from anti-trust laws, subjected to a uniform price, or otherwise subsidi-

dized... except for the compelled advertising." Therefore, he concluded, "the First Amendment invalidates the compelled speech." *United Food v. U.S.*, 197 F. 3d 221.

The United States appealed to the Supreme Court, but the Sixth Circuit's ruling was affirmed. Justice Kennedy, in delivering last month's opinion, concluded that *Glickman* did not control. "Here the statute does not require group action, save to generate the very speech to which some handlers object," he wrote. "...[T]he compelled contributions for advertising are not part of some broader regulatory scheme... [T]he expression respondent is required to support is not germane to a purpose related to an association independent from the speech itself." Therefore, he concluded, the First Amendment cannot allow the imposition of such assessments.

Justice Stevens, while joining the majority opinion, also penned a separate concurrence, as did Justice Thomas. Justice Stevens noted that "the naked imposition of such compulsion, like a naked restraint on speech itself," impacts liberty and raises questions of constitutionality in ways that were absent in *Glickman*. Justice Thomas, in his concurrence, simply reiterated the need for First Amendment scrutiny in cases of compelled funding for advertising.

In dissent, Justice Breyer (joined by Justices Ginsburg and, in part, O'Connor) wrote that in distinguishing the case at bar from *Glickman*, the Court disregarded controlling precedent for the slight differences between the marketing schemes in *Glickman* and in the present case do not create enough of a distinction to justify a different outcome. Additionally, according to Breyer, the Court mistook for commercial speech what is actually economic regulation, and, in using strict First Amendment standards to analyze governmental intervention in wholly economic matters, set "an unfortunate precedent."

One interesting aspect of this case is to note the run-down of Justices between the decision in the 1997 tree fruits case and last month's mushroom opinion. All members of the majority in *United Foods* had dissented in *Glickman*, with the exception of Justices Kennedy and Stevens, who found no violation of the First Amendment in the 1997 case but saw a clear infringement on freedom of expression here.

(Continued on page 15)

One Win, Three Losses in Libel Trials

In four recent libel cases, juries returned verdicts for plaintiffs, all of them private figures, against television stations in Florida and Oklahoma, against a newspaper published by the Nation of Islam in New York, while a Virginia TV station won a suit against it. After verdict, the Florida case was settled; defendants in the NY and Oklahoma cases are expected to appeal. The Virginia plaintiff who lost is not expected to appeal.

Got Mushrooms?

(Continued from page 14)

Justice Stevens, despite having joined the majority in *Glickman*, wrote separately in *United Foods* to emphasize that payments of money, when not germane to a greater regulatory scheme, should be as closely guarded by the Constitution as speech itself. The three dissenters in *United Foods* had all signed the majority in *Glickman*, thereby standing their ground on agricultural assessments in these two cases as “purely economic conduct” rather than an independent form of expression or speech.

Finally, as predicted by the dissenters, another agricultural group has now come forward to challenge mandatory support of industry advertising. Groups opposed to the beef-promotion program, most widely known for the “Beef: It’s What’s for Dinner” campaign, announced on July 19 that they would amend a lawsuit filed in federal court in South Dakota and ask the judge to rule that the program, which some claim favors large meat packers over independent cattle ranchers, is unconstitutional. The case originally arose when thousands of cattle producers, after signing a petition to the government demanding a vote on whether to continue the advertising program, accused the USDA of preventing their desired referendum. After the *United Foods* decision was handed down, U.S. District Judge Charles Kornmann, the judge in South Dakota, wrote a letter to the parties in the beef suit stating that “neither this court nor USDA are going to ignore an opinion by the Supreme Court.”

United Foods, Inc. was represented by Bradley A. MacLean of Farris, Warfield & Kanady in Nashville, TN, Thomas C. Goldstein in Washington, DC, and Laurence H. Tribe of the Harvard Law School in Cambridge, MA. Seth P. Waxman, Solicitor General of the U.S. Department of Justice in Washington, DC, argued for the United States.

No Libel in Toy Store Story

First, the victory. It was from a jury in Virginia State court in Lynchburg.

In 1999, WSET-TV in Lynchburg, Va. broadcast a story which stated that Charlene Rappleyea had been suspended from her job at Toys’ R Us after she confronted a 7-year-old girl in the store’s restroom who she suspected of shoplifting. Rappleyea was charged with assault, but the charge was later dismissed.

The story stated that “[t]he parents of Amanda Artutis say she was strip-searched ... and the sales associate made her lift her shirt and unbutton her pants.”

The station argued that its broadcast was accurate, and that it acted responsibly by holding the story until it was confirmed by Toys’ R Us.

In her suit against the station, Rappleyea alleged that reporter Hobie Lehman and other station employees had failed to adequately investigate, and had failed to get Rappleyea’s side of the story. Rappleyea admitted that she had been charged and suspended from her job, but denied “strip searching” the child or making her unbutton her pants.

A former assignment editor at the station testified that when she spoke to the police to verify the parents’ story, she was told that “no assault occurred.” She recorded the police comment in the station’s computer logbook, which was produced during discovery, and said that she advocated that the station not run the story at an editorial meeting.

There were no expert witnesses at trial, since the Virginia Supreme Court has rejected the use of experts to establish journalistic standards in libel cases. See *Richmond Newspapers v. Lipscomb*, 362 S.E.2d 32, 14 Media L. Rep. 1953 (1987).

At the conclusion of the two-day trial, Circuit Court Judge M. Parrow III instructed the eight-member jury that Rappleyea, as a private figure, had to show that the station was negligent in its reporting.

After an hour and a half of deliberation, the jury found for the television station on June 29.

No appeal is expected in the case, although Rappleyea intends to go forward with a separate suit against WDBJ-TV in Roanoke, which is scheduled to go to trial in August. WDBJ also ran stories on the incident.

(Continued on page 16)

One Win, Three Losses in Libel Trials

(Continued from page 15)

The case was *Rappleyea v. WSET, Inc.*, No. 22536 (Va. Cir. Ct. Lynchburg jury verdict June 29, 2001). David Branson of Wallace King Marraro & Branson in Washington, D.C. represented the station and reporter; Rappleyea was represented by D. Hayden Fisher of Schaffer & Cabell in Richmond, Virginia.

Jury Verdict Isn't The Final Call

A suit against the Nation of Islam, tried in State court in New York City, stemmed from photographs of plaintiff Tatia Morsette that were used to illustrate an article in the June 3, 1997 edition of *The Final Call*, titled "Mothers in Prison, Children in Crisis."

A photo on the front page, under the headline, showed Morsette and her infant child. Another photograph appeared twice inside the newspaper and showed the plaintiff in prison garb with an identification number, under the headline "Mommy is in jail." The prison clothing and ID number were added to the original photographs by the newspaper; the original, unaltered photos of the plaintiff were taken from the newspaper's archive.

Shortly after the photos appeared, the weekly published a clarification stating that the photographs were for illustration only and were not meant to imply that the woman pictured was either a mother or a prisoner. The item added that the newspaper regretted any confusion caused by the photos.

Morsette, who has never been to prison, sued for libel in New York State Supreme Court in 1998, alleging that the photos falsely implied that she was a criminal, and caused her humiliation and emotional distress.

The trial court granted a defense motion for summary judgment in April 2000, but this was reversed in December. In its decision reversing, the Appellate Division ruled that Morsette need not show special damages in order to recover, since a finding that the photos implied criminality would constitute libel *per se*. See *Morsette v. The Final Call*, 278 A.D.2d 81, 718 N.Y.S.2d 29, 29 Media L. Rptr. 1191 (N.Y. App. Div., 1st Dept. 2000).

After a trial on remand, the jury awarded Morsette

\$640,000 in compensatory damages, for loss of reputation and emotional pain and suffering, and \$700,000 in punitive damages. *Morsette v. The Final Call*, No. 102141-98 (N.Y. Sup. Ct., N.Y. County jury verdict June 7, 2001). An appeal is expected.

The Final Call was represented by Joseph Flemming, who recently retired from Flemming Zulack & Williamson in Manhattan; the plaintiff's attorney was Alan J. Rich of Manhattan.

Lame Horse Report Leads To Libel Verdict

An Oklahoma Jury in Creek County District Court in Sapulpa found for defendant, a veterinarian to high profile race horses, in a lawsuit based upon a series of news reports by Oklahoma City television station KWTV. The reports aired in 1997 and 1998, with an initial two part series, leading to follow-up tips, events and stories about plaintiff.

In late January 1998, KWTV in Oklahoma City ran a two-part news story by its investigative reporter, Chris Halsne (now with KIRO-TV, Seattle). The report said that This Lady Sings, a horse that was recognized as the top amateur in her class at the 1997 World Quarter Horse Championships and was then sold for more than \$100,000, may actually have been lame, and that an investigation by the American Quarter Horse Association was underway to determine whether a drug administered by veterinarian Howard Mitchell could have affected the horse's performance in the competition.

Mitchell verified in an on-air interview that he gave the horse an injection of the painkiller Sarapin a few days before the competition, but he contended that the effects of the drug had worn off, adding that "[i]t lasts about 24 hours." When Halsne asked, "So that's a legal substance to be in the horse?," Mitchell replied, "It's non-testable." According to the report, other veterinarians believed that the effects of the drug, which is not detectable in routine drug tests, could last for several days.

A few days before KWTV's reports, the purchaser of This Lady Sings sued the former owner in federal court,

(Continued on page 17)

One Win, Three Losses in Libel Trials

(Continued from page 16)

alleging fraud, and contending that Mitchell had administered the drug to hide the horse's lame condition. Mitchell was not named in that case, although he was identified as a potential witness. The second part of KWTV's report, which detailed the allegations of the suit, stated that Mitchell examined the horse for the buyer prior to the sale, and did not disclose the horse's previous injury or that he had administered Sarapin at the request of the former owner. The parties settled the case several months after KWTV's reports were broadcast. (*Skoda v. Offutt*, No. CIV-98-104 [W.D.Ok. dismissed May 1, 1998]).

TIP ON PRIOR PROBLEM

The reports about the Mitchell's role in the dispute over *This Lady Sings* resulted in a tip to Halsne that Mitchell had been in trouble for his veterinary practices in New Mexico. Further investigation by KWTV revealed that in 1995, Mitchell had been banned for life from New Mexico racing after he was discovered to have been practicing veterinary medicine illegally at the Ruidoso Downs racetrack.

One of the horses he had been treating, *Doo Dominate*, broke down in the 1994 All American Futurity and had to be euthanized. The investigation by New Mexico authorities determined that *Doo Dominate* had begun the race with a broken knee and had been given an illegal painkiller called Mepivacaine. In February 1998, KWTV did a follow-up report about Mitchell's disciplinary proceedings in New Mexico in which it said that Mitchell was "suspected of helping kill one of the country's top race horses."

NEWS INVESTIGATIONS AND PENALTIES

In March 1998, Mitchell pleaded "no contest" to a complaint by the Oklahoma Horse Racing Commission that he had falsified his owner's license application by failing to disclose his being banned from New Mexico racing. The Commission fined him \$300 and rescinded his racing license.

In April 1998, the Oklahoma Board of Veterinary Medical Examiners began an investigation of Dr. Mitchell's involvement in the sale of *This Lady Sings*, with a complaint stating that "acceptance of a fee from both the buyer and seller is prima facie evidence of fraud."

The complaint also alleged that Mitchell had improperly failed to disclose that his occupational license in New Mexico had been revoked.

The probe ended five months later with Dr. Mitchell being placed on two years probation for his failure to disclose the New Mexico incident on his veterinary license application. He was also ordered to reimburse the board \$9,307.48 to cover the cost of its investigation and to retake part of the veterinarian's license exam.

KWTV also broadcast reports about the Oklahoma racing commission and veterinary board proceedings against Mitchell.

SUIT AGAINST KWTV

Mitchell's suit against KWTV alleged both libel and false light invasion of privacy. Ultimately, fifteen of the thirty-three statements from the various broadcasts that the plaintiff contended were false were submitted to the jury. According to Mitchell's attorney, the way the reports discussed the events in New Mexico "labeled him as a horse killer." Prior to the report, the attorney said, "[Mitchell] had a nationwide reputation for treating high-profile racehorses."

Dr. Mitchell was conceded to be a private figure.

During the eight-day trial, starting on June 18, 2001, Dr. Mitchell argued that Halsne, and therefore KWTV, acted negligently and recklessly disregarded the truth by not examining the entire case file in the New Mexico proceeding, although in his testimony Halsne disputed this claim. The plaintiff contended that witness statements and deposition testimony in that file did not support the conclusions expressed by New Mexico officials.

The defendants argued that they had accurately reported the result of the New Mexico proceeding, based on the statements of the investigator which the New Mexico Racing Commission designated as its spokesman and supported by documents from the New Mexico file, and that they had accurately reported the dispute over *This Lady Sings* based on the allegations of the federal suit.

The New Mexico Racing Commission investigator testified at trial that the reports were accurate.

(Continued on page 18)

One Win, Three Losses in Libel Trials

(Continued from page 17)

The plaintiff admitted that the loss of his racing licenses in New Mexico and Oklahoma and the disciplinary proceedings against him by the veterinary board harmed his reputation. The court excluded the plaintiff's evidence of alleged economic harm, and the plaintiff presented no direct evidence of general harm to reputation caused by false statements in the broadcasts. Instead, he relied primarily on a jury instruction, challenged by the defendants, that the jury could presume damage to reputation if it found the defendants recklessly disregarded the truth.

In an 11-1 verdict on June 27 after two and a half hours of deliberations, the jury determined that the defendants had recklessly disregarded the truth and acted with common law malice, and awarded the veterinarian \$6 million in actual damages. After additional arguments and 45 more minutes of deliberation, the jury also awarded \$500,000 in punitive damages. The punitive damages amount was split evenly between the reporter and the television station.

The station plans to appeal.

Robert D. Nelson and Jon Epstein of DCS member firm Hall, Estill, Hardwick, Gable, Golden & Nelson of Oklahoma City represented KWTW and Halsne. Douglas E. Stall of Latham, Stall, Wagner, Steele & Lehman in Tulsa represented the plaintiff.

The case is *Mitchell v. Griffin Television*, No. CJ-99-16-B (Ok. Dist. Ct., Creek County jury verdict June 27, 2001).

Florida TV Loss on School Report

The final case, against WFTS-TV in Tampa, Fla., arose from a 1996 investigative report on public school administrative employees who appeared to be absent from duty during normal work hours. The case was tried in Florida State court in Tampa before Judge Vivian Maye.

The story showed Margaret Woodie, a 30-year veteran of the Hillsborough County public schools, and three other school employees shopping and running personal errands during the school day. The broadcast described two instances in which Woodie was not at work at a time when official time records indicated that she was supposed to be on the job. Prior to the airing of the report, the school district conducted an internal investigation and excused

Woodie's absences by allowing her to account for her time off by applying previously accrued compensatory time. The story included Woodie's explanation that she had requested and received approval to take the comp time by phone, and comments from senior school officials excusing her absences after the fact.

Her lawsuit against the station, filed in 1997, argued that the report libeled her and placed her in a false light by juxtaposing her with three other school employees who were reprimanded for improperly taking time off. She named as defendants the owner of the television station, two corporate parents, and the reporter.

Curiously, the first judge assigned to the case allowed Woodie to add a claim for punitive damages on her count for false light, but not on her count for libel. Just prior to commencement of the trial, which occurred in April 2001, Woodie voluntarily dismissed the two corporate parents in the face of a motion seeking dismissal because they had no oversight or control over the broadcast. During trial, on defendants' motion for directed verdict, Judge Vivian Maye (to whom the case had previously been transferred) dismissed the case against the station's reporter because a pre-suit retraction demand required under Florida law was sent only to the station, and not separately to the reporter.

The judge also dismissed the claim for false light invasion of privacy as duplicative of the libel claim because both claims were based on the same set of facts. This decision removed the threat of punitive damages being awarded.

As to the sole remaining claim for libel against the station, the jury decided in Woodie's favor and awarded her \$228,000 in compensatory damages.

After the verdict, the parties settled for a lesser sum.

The case was *Woodie v. Tampa Bay Television*, Case No. 97-04273, (Fla. Ct. Hillsborough County, jury verdict April 25, 2001). WFTS was represented by Denis Durkin and Bob Lystad of DCS member firm Baker & Hostetler LLP. Mark S. Herdman of Herdman & Sakellarides in Palm Harbor, Fla. represented the plaintiff.

Key West Newspaper Publisher Arrested For Article Alleging Police Cover-up

In a highly unusual case, the publisher of a small weekly newspaper in Key West, Fla., was arrested last month for publishing an article that alleged a cover-up by a Key West police internal affairs investigator. The Key West Police Chief ordered the arrest of Dennis Cooper, publisher of the weekly *The Newspaper*, for revealing details of a confidential internal police investigation. See J. Babson, "Key West police chief has journalist critic arrested," *The Miami Herald* June 26, 2001 (available online at www.miamiherald.com).

The police chief relied on a patently unconstitutional statute that barred the writer from reporting his own complaint about the chief.

Article Alleged Internal Affairs Coverup

Based on his own investigations, Dennis Cooper had written and published a number of articles in *The Newspaper* alleging that in 1997 an internal affairs officer provided false information to the Florida Department of Law Enforcement during his investigation into alleged perjury by a Key West police officer. In May 2001, Cooper also filed a formal complaint with the Florida Department of Law Enforcement based on the identical information. Under Florida law, the complaint was to be investigated by the Key West police department.

In June, Cooper wrote and published an article that recounted his past articles on the subject and the additional information that he had recently filed a formal complaint. It was Cooper's disclosure of the fact of his own complaint that, according to the Key West Police Chief, broke the law by revealing details of the new Key West Police Department investigation.

Police Chief Claims Journalist's Complaint is Confidential

The basis for Cooper's arrest was Florida Statute § 112.533, which provides for the receipt and processing of complaints against state law enforcement agen-

cies. It also provides that such complaints are exempt from Florida's Sunshine Law § 119. In addition, the final provision of § 112.533, subsection 4, provides that:

Any person who is a participant in an internal investigation, including the complainant . . . who willfully discloses any information obtained pursuant to the agency's investigation, including, but not limited to, the identity of the officer under investigation, the nature of the questions asked, information revealed, or documents furnished in connection with a confidential internal investigation of an agency, before such complaint, document, action, or proceeding becomes a public

record as provided in this section commits a misdemeanor of the first degree

According to *The Miami Herald*, the Key West Police Chief who authorized the arrest said the statute "puts restrictions on journalists . . . [T]his law is referred

to as 'the Gag Law.' That's what this law is intended to do so we can have a fair and impartial investigation."

Statute Found Unconstitutional

In fact, 11 years ago one Florida federal court found this section of the statute unconstitutional. *Rantel v. City of Fort Lauderdale*, No. 88-6676-Civ. (S.D. Fla. 1990). A similar provision in another statute had also been declared unconstitutional. *Doe v. Gonzalez*, 723 F. Supp. 690 (S.D. Fla. 1988), *aff'd*, 886 F.2d 1323 (11th Cir. 1989) (holding unconstitutional a provision providing that disclosure of contents of complaint to Ethics Commission is a misdemeanor).

All Charges Dropped

At the beginning of July all charges against Cooper were dropped.

The Key West police chief ordered the arrest of Dennis Cooper, publisher of the weekly The Newspaper, for revealing details of a confidential internal police investigation.

Alabama Supreme Court Strikes Down Criminal Libel Statute

voids Conviction in Alabama v. Ivey

The Alabama Supreme Court ruled this month that the state's 125 year old criminal libel statute § 13A-11-163 is unconstitutional because it fails to require actual malice when the alleged victim is a public figure. *Ivey v. Alabama*, (Alabama S. Ct. July 6, 2000) (available at: www.findlaw.com/11stategov/al/alca.html). The decision reversed the conviction of lawyer Garve Ivey, former vice president of the Alabama Trial Lawyers Association, who was found guilty last year under the statute for distributing to the media a videotape that accused an electoral candidate of rape and other crimes. See *LibelLetter* July 2000 at 8. The Alabama Supreme Court also reversed Ivey's related conviction for witness tampering, finding that the prosecution was brought in the wrong county. Ivey had been sentenced to 30 days in jail.

Sex, Lies & Videotape

The videotape distributed by Ivey was made in September 1998 and featured Melissa Myers Bush, an admitted heroin addict and ex-prostitute, recounting accusations she made in a civil suit she filed that same month. Her civil suit claimed that Steve Windom, then running for Lieutenant Governor (and subsequently elected), had been a client of hers and that he raped and beat her. Portions of the tape were broadcast on a local television news program. Windom held a press conference to deny the charges and accused Ivey and the Alabama Trial Lawyers' Association of fabricating the charges because they opposed his candidacy.

A special prosecutor was appointed to investigate the circumstances surrounding the lawsuit, and by November 1998 Myers recanted her charges and admitted she was paid to make the charges by a businessman who allegedly was later reimbursed by Ivey. The witness tampering charge was based on allegations that Ivey later paid the businessman to sign a false statement denying the reimbursement. Apparently still outstanding are civil defamation lawsuits filed by Windom and Ivey against each other.

Alabama's Criminal Libel Statute

The Alabama statute provides that:

Any person who writes, prints or speaks or concern-

ing any woman, falsely imputing to her a want of chastity; and any person who speaks, writes or prints or and concerning another any accusation falsely and maliciously importing the commission by such person of a felony or any other indictable offense involving moral turpitude shall, on conviction, be punished by fine not exceeding \$500 and imprisonment in the county jail, or sentenced to hard labor for the county, not exceeding six months, one or both, at the discretion of the jury.

The Alabama Supreme Court found that on its face the statute failed to incorporate the actual malice standard as required by *Garrison v. Louisiana*, 379 U.S. 64 (1964). In *Garrison*, the U.S. Supreme Court reversed a criminal libel conviction under Louisiana law, holding that the actual malice standard adopted that same year in *New York Times v. Sullivan* applied with equal force in criminal libel actions.

Moreover, the Alabama statute could not be saved by reading into it the actual malice requirement. The Alabama Supreme Court rejected the state's argument that post-*Sullivan* reenactments of the criminal defamation statute as part of a revised criminal code implied a legislative intent to incorporate the required constitutional standard. In fact, the court found that the gender based provision in the first part of the statute regarding a false statements about a women's chastity was obviously unconstitutional and rebutted any presumption that the legislature intended the statute to comply with Supreme Court precedents.

Interestingly, the trial court gave an actual malice instruction to the jury, requiring that the state prove that Ivey had "actual knowledge that the accusation was false or [had] a reckless disregard of whether or not the accusation was false or not." *Ivey v. Alabama*, Slip op. at 8. The state argued that this instruction cured any facial deficiency of the statute. Reviewing other state court decisions striking down criminal defamation laws, the court found, however, that saving the statute through a jury instruction would essentially amount to legislation revision rather than a judicial interpretation of the statute. Citing *Gottschalk v. State*, 575 P.2d 289 (Alaska 1978); *Fitts v. Kolb*, 779 F. Supp. 1502 (D.S.C. 1991); *State v. Powell*, 839 P.2d 139 (N.M. Ct. App. 1992).

8th Circuit Reverses Libel Judgment Over Conspiracy Video

Court Holds That Defendants Failed to Show Actual malice

The unsolved 1987 murders of two teenage boys in Saline County, Arkansas, which have become part of the conspiracy theories surrounding former president Bill Clinton, have found their way to federal court. The U.S. Court of Appeals for the 8th Circuit this month reversed a \$598,000 libel verdict against the producer of a videotape espousing these theories. See *Campbell v. Citizens for an Honest Government*, No. 00-1411, 2001 U.S. App. LEXIS 15433 (8th Cir. July 10, 2001).

The state medical examiner initially ruled that the deaths of 17-year-old Kevin Ives and 16-year-old Don Henry, who were run over by a train while lying motionless on railroad tracks in Alexander, Ark. on Aug. 23, 1987, were the result of a marijuana-induced sleep. But a grand jury ordered a second autopsy by out-of-state pathologists, who determined that the teens had been murdered and that they were probably dead before their bodies were placed on the tracks. Eventually, the state medical examiner resigned over the incident.

The murders of Ives and Henry were eventually included in a widely-circulated list of “suspicious” deaths surrounding Bill and Hillary Clinton. A widely-distributed 1994 documentary, “The Clinton Chronicles,” detailed many of the alleged connections between various deaths and the Clintons.

Creating “Obstruction of Justice”

In 1996, “Clinton Chronicles” producer Patrick Matrisciana released a video about the deaths of Ives and Henry. “Obstruction of Justice: The Mena Connection,” alleges that the boys were killed after they witnessed an aerial drug delivery at an airport in Mena, Ark., and that their bodies were placed on the tracks so that evidence of their murders would be destroyed. The film also charges that the drug deal was part of a narcotics ring tolerated, if not sanctioned, by state and federal officials, including Governor Clinton.

More than 40,000 copies of the video have been distributed since its release.

In a textual graphic toward the end of the one-hour film, sheriff’s deputies Jay Campbell and Kirk Lane

were included in a list of six “Suspects Implicated in Ives/Henry Murders and Cover-up.” At the same time, the narrator states, “Eyewitnesses have implicated¹ several people in the murders and subsequent cover-up...,” before reciting the names.

The first name on the list and in the narration was Dan Harmon, who led the grand jury investigation in the deaths as a special prosecutor and was later elected to serve as a state prosecutor. Harmon is now in prison after being convicted on state and federal racketeering and drug charges.

The Video On Trial

In April 1997, Campbell and Lane filed suit in the federal district court in Little Rock against producer Matrisciana, his company Jeremiah Films Inc., and the film’s distributor, Citizens for Honest Government, Inc.²

During the five-day trial before Judge Warren K. Urbom — who usually sits in federal court in Lincoln, Neb. — Campbell and Lane alleged that Harmon had circulated rumors about their involvement in the death of the teens when he was subject to an investigation they were conducting as narcotics officers. That investigation was eventually dropped, although Harmon was convicted as the result of a new investigation which began several years later.

Former homicide detective John Brown was called by the plaintiffs and testified that he had taken a statement from Harmon’s girlfriend in 1993 in which she said that she was present when Harmon and two other men — not Campbell and Lane — killed the boys. One of these men was later himself killed. The girlfriend is now serving a 30-year sentence for a drug conviction and had recanted her statement to Brown.

But Brown also testified that

there had been supposedly in the state police case file information provided I think at a grand jury testimony or somewhere that there were two people that fit Mr. Lane and Mr. Campbell’s description that [sic] were the two people [who attacked

(Continued on page 22)

8th Circuit Reverses Libel Judgment Over Conspiracy Video

(Continued from page 21)

the boys].

Film editor David Minasian, however, testified as a defense witness that Brown had identified Campbell and Lane as the killers in two telephone conversations that Minasian had with Brown.

The plaintiffs also presented expert witnesses who testified that producer Matrisciana had departed from professional standards in relying on investigations of others as support for the allegations in his video.

The Defense Case

In his defense, Matrisciana testified that he was hospitalized during the making of the video and had ceded editorial control of the film to Kevin Ives's mother, Linda Ives, and Jean Duffey, a former prosecutor who says that she left Arkansas after she heard that Harmon planned to arrest her to prevent her from investigating him. Matrisciana also said that he was unaware of the charges made against Campbell and Lane in the film until it was completed.

Linda Ives said that an eyewitness saw Campbell and Lane beat up her son and his friend that night, and then put them in an unmarked police car. She also testified that Harmon told her that the officers had killed her son and added her belief that the crime was covered up because it was involved drug smuggling and CIA arms shipments to the Contras in Nicaragua.

The eyewitness, Ronnie Godwin, was heading home from a bar when he allegedly saw the incident. He was subpoenaed by the plaintiffs, but they released him when he appeared the morning of trial. Instead, the plaintiffs presented statements from his mother, sister and girlfriend that he is not a credible witness after he has been drinking. Defense efforts to find Godwin after he was released were fruitless.

The defendants also called two expert witnesses — Robert R. Douglas, a journalism professor and former managing editor of the *Arkansas Gazette*, and Joseph Farah, founder of the Western Journalism Center and publisher of the internet newspaper *WorldNetDaily* — who testified that Matrisciana's journalistic methods

were legitimate.

The jury was instructed that the plaintiffs were public figures and that they must show actual malice in order to win their case.

Jury Finds Libel

After ten hours of deliberation over two days, the 12-member jury found that the film had libeled the deputies and awarded damages, which it apportioned 75 percent against Citizens for Honest Government and 25 percent against Matrisciana.

The result was that Campbell won \$82,312.50 in compensatory damages and \$150,000.00 in punitive damages from Citizens for Honest Government, plus \$27,437.50 compensatory and \$50,000.00 punitive damages from Matrisciana. The verdict for Lane was \$66,750.00 in compensatory damages and \$150,000.00 in punitive damages from Citizens for Honest Government, as well as \$22,250.00 compensatory, \$50,000.00 punitive from Matrisciana.

Appellate Reversal

In their appellate brief, Matrisciana, Jeremiah Films and Citizens for Honest Government argued that the plaintiffs had not shown actual malice and that the district court improperly excluded evidence and limited cross-examination of witnesses.

The appeals court, in an opinion by U.S. Circuit Judge C. Arlen Beam, agreed with the first of these arguments and reversed. Circuit Judge Morris S. Arnold and District Judge Donald Alsop of Minnesota, sitting by designation, joined the opinion.

The use of the word "implicated" in the film "is somewhat vague," the court said, and it is unclear from the text and narration whether Campbell and Lane were being implicated in the murder, the alleged cover-up, or both. And the video's claim that any implications were supported by "eyewitnesses" was true to the extent that the public police records did mention a number of witnesses who claimed to have seen two men generally

(Continued on page 23)

8th Circuit Reverses Libel Judgment Over Conspiracy Video

(Continued from page 22)

meeting the plaintiffs' descriptions attacking Kevin Ives and Don Henry.

We find that, although Campbell and Lane attacked the credibility of the purported eyewitnesses, which would go to ascertaining whether they had in fact caused their deaths, their attack does not address whether purported eyewitnesses implicated them. ... Therefore they did not satisfy their burden of proving falsity by at least a preponderance of the evidence.

2001 U.S. App. LEXIS at 20.

The court also found that the plaintiffs had not shown that the defendants had acted with actual malice. "Campbell and Lane fail to show any [recklessness] with respect to Matrisciana's reliance on the investigations of Ives, Duffey and/or Brown," the court wrote. Slip op. at 16.

[A]lthough it may have been prudent of Matrisciana to insert the term "alleged" before, or "of dubious character" after the word "eyewitnesses," ... we do not find that the omission amounted to actual malice....

Id. at 40.

The court's opinion suggests that the result may have been different had Ives, Duffey or Brown been named as defendants in the case, or if evidence had been presented or jury instructions given that these players were employees of Matrisciana, in which case he may have been found liable under a respondeat superior theory.

Campbell and Lane failed their burden of proving by clear and convincing evidence that Matrisciana, either himself or through Ives, Duffey and/or Brown, had a high degree of awareness of probable falsity or entertained serious doubts as to the truth of the assertion. We, therefore, reverse.

Id. at 41.

As to the evidentiary issues, the appeals court said that its ruling on actual malice meant that it did not need

to reach the question of whether the district court erred by limiting cross-examination. And while the court "tend[ed] to agree" with Matrisciana's argument that he should have been permitted to present the hearsay evidence upon which Ives and Duffey relied to make their conclusions, it held that it need not decide that issue as well.

The court concluded by noting that

to say that Matrisciana did not cross the line into public-figure libel is not to say he stayed within the bounds of ethics and fairness. ... That Lieutenants Campbell and Lane have failed to disprove the disputed statements at the requisite levels should not undermine their accomplishments nor diminish their stature.

Id. at 45.

In addition to reversing, the appeals court remanded the case to the district court with instructions to dismiss.

The defendants were represented by John W. Hall, Jr. of Little Rock. Campbell and Lane were represented by James R. Rhodes III and M. Darren O'Quinn of Dover & Dixon in Little Rock.

¹ The parties differed on what this word was. The defendants said that it was "have," the plaintiffs claimed that it was "had."

² The case style refers to this group as "Citizens for an Honest Government," but the true name is "Citizens for Honest Government," without the "an." This article uses the group's true name.

LDRC would like to thank Summer interns — Nicholas Hatzis, Columbia Law School, JSD, Class of 2001; Nancy Clare Morgan, Columbia Law School, Class of 2003; and Katherine Vogege, Georgetown Law School, Class of 2003 — for their contributions to this month's *LDRC LibelLetter*.

Ramseys Settle Yet Another Suit

Another in the parade of libel cases filed by John and Patsy Ramsey has been settled.

The latest settlement, confidential, came in a lawsuit against AOL Time Warner over allegations published on *Time* magazine's web site, Time.com, that Burke was a suspect in the killing of his sister. The terms of the settlement were approved by a federal judge in New York City following a hearing on July 2. *Ramsey v. AOL Time Warner*, No. 00-CV-3477 (S.D.N.Y. dismissed July 2, 2001).

This is the third settlement of a case brought by the Ramseys in the aftermath of the intense media coverage of the apparent murder of their daughter, Jon Benet Ramsey, in 1996. In late January the Ramseys reached a confidential settlement of a suit brought on behalf of their 14-year-old son Burke against *The Globe* newspaper over headlines and stories which suggested that Burke had molested and killed his sister. See *LDRC LibelLetter*, March 2001, at 4. Last year, the Ramseys settled a similar case on their son's behalf against *Star* magazine for an undisclosed amount. See *LDRC LibelLetter*, April 2000, at 8.

Similar statements regarding Burke are also at issue in a pending case against the *New York Post*. And, on June 15, the Ramseys filed a second lawsuit against AOL Time Warner over a November 1999 Court TV program that, the complaint alleges, named them and Burke as suspects in Jon Benet's killing. The lawsuit was filed on behalf of Burke, and seeks recovery only for the statements regarding him. *Ramsey v. AOL Time Warner*, No. 01-CV-1561 (N.D. Ga. filed June 15, 2001).

L. Lin Wood of Wood & Grant in Atlanta has served as the Ramsey's attorney in this litany of litigation; in the settled case, he was assisted by Mark Goidell of Galasso, Langione & Goidell of Melville, New York. AOL Time Warner's outside counsel in the case was Robert P. LoBue of DCS member firm Patterson, Belknap, Webb & Tyler, New York.

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Drug Brochure Libeled Woman, Court Rules

Jury Trial Ordered to Determine Damages

Ruling on summary judgment motions from both sides, a New York State Supreme Court Justice held on June 13 that the pharmaceutical company Merck & Co. and its advertising agency libeled a woman whose picture was used in materials on AIDS drug Crixivan and ordered that a trial be held to determine damages. *Doe v. Merck & Co.*, No. 10786-98 (N.Y. Sup. Ct., Suffolk County June 13, 2001), available at <http://www.courts.state.ny.us/FCAS_docs/2001JUN/510010786199811SCIV.PDF>.

The plaintiff, who used the pseudonym Jane Doe in court papers, is a 30-year-old suburban mother who contracted HIV, the virus that causes AIDS, from her husband. In 1996 and 1997, she agreed to be photographed for what she was told would be educational material about the virus.

The Story of "Maria"

The photographs eventually appeared in a flip-chart titled "Getting the Facts" and a brochure titled "Sharing Stories." Next to her picture, the text of the brochure identified the plaintiff as 19-year-old "Maria," who "has two young children" and has been taking Crixivan and two other AIDS drugs not manufactured by Merck & Co. ever since she "was enrolled in a clinical trial 2 years ago." Maria was also said to take another drug daily "[t]o protect her from a recurring case of herpes." Elsewhere, the brochure noted that "[m]ore than 50 HIV-positive individuals taking Crixivan contributed ideas to this brochure, even though only four of them are highlighted here. Their names have been changed to protect their privacy. We thank them for sharing their stories and their time."

The plaintiff sued Merck, advertising agency Harrison & Star, modeling agency The Morgan Agency, which arranged the shoot, and photographer Skip Hine in 1998 for libel, intentional and negligent infliction of emotional distress, and violation of New York's "right of publicity" laws (N.Y. Civil Rts. Law §§ 50, 51). In January, she moved for summary judgment on her claims, while the defendants also moved for summary judgment in their favor.

Plaintiff Wins Summary Judgment

Ruling on these motions, Supreme Court Justice Mary Werner granted summary judgment to the plaintiff against Merck and Harrison & Star, the advertising agency that created the materials. She dismissed claims against the modeling agency and the photographer, and ordered the case to proceed to trial on the issue of damages.

Werner began with the libel claim. She rejected defense claims that the because the "Sharing Stories" material was "arguably within the sphere of legitimate public concern," the applicable fault standard was gross irresponsibility rather than negligence. "This [gross irresponsibility] standard," she wrote, "applies to private plaintiffs suing 'media defendants.' Defendants are not media defendants and do not claim to be." Slip op. at 3 (citation omitted).

The court distinguished *New York Times v. Sullivan*, 376 U.S. 254 (1964), on the basis that in that case the plaintiff was a public official and the defendant was a newspaper (ignoring the individual named defendants in that case).

The court also rejected as "absurd" defendants' argument that the "gross irresponsibility standard in this case should be characterized as 'whether the 'Maria' biography would be understood by its readers to convey actual facts about plaintiff.'" The correct standard, Werner wrote, is whether defendant acted in a "grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Id.* Since the "Maria" story was essentially fictional, plaintiffs met this standard, the court said.

She added that since plaintiff had produced evidence that readers did believe the "Maria" biography, defendants would fail to meet their own standard.

Statements Held to Be Libel Per Se

The court then reviewed the standards for libel per se in New York, as stated in a 1996 case:

(Continued on page 26)

This [gross irresponsibility] standard," she wrote, "applies to private plaintiffs suing 'media defendants.'

Drug Brochure Libeled Woman, Court Rules

(Continued from page 25)

The four classic exceptions to the requirement that a plaintiff prove actual damages consist of (1) statements charging plaintiff with a serious crime; (2) statements that tend to injure plaintiff in her trade, business or profession; (3) statements that plaintiff has a loathsome disease; or (4) imputing unchastity to a woman.

Slip op. at 4, citing *Harris v. Hirsch*, 228 A.D. 206, 643 N.Y.S.2d 556 (1st Dept. 1996).

Werner concluded that the statements regarding the plaintiff fell under the third and fourth definitions. By stating that the plaintiff has herpes, the brochure labeled the plaintiff as having a loathsome disease, Werner wrote. And by stating that she had a second child after she learned that she was HIV positive, the court wrote, the brochure imputes unchastity. (How the court arrives at this definition of unchastity is not explained.)

The court thus granted the plaintiff summary judgment on her claim for compensatory damages, but reserved for trial the issue of actual amount of the damages. But Justice Werner rejected both parties' motions for summary judgment on punitive damages, holding that the record established actual malice, but there were factual issues remaining on the question of common law malice required by New York law in order to award punitive damages.

Commercial or Trade

The court also granted the plaintiff's motion for summary judgment on the statutory claim, finding that her claim met the statutory requirements of "'(1) use of his or her name, portrait or picture, 2) for commercial or trade purposes, 3) without written permission.'" Slip op. at 5, citing *Allen v. Nat'l Video*, 610 F.Supp. 612, 621 (S.D.N.Y. 1985). The court held that while the "Getting the Facts" flipchart contained educational information, the "Sharing Stories" brochure "cannot be said to be anything other than a solicitation of Crixivan." Slip op. at 6.

She also ruled that an agreement between the ad agency and the photographer, which included the state-

ment that the photographs would be used "for an upcoming poster and education brochure. The usage is for two years and no advertising," did not constitute plaintiff's consent to use of her photo in the brochure.

Court Record Sealed

Finally, the court granted plaintiff's motion to seal the case record, after a motion filed on behalf of photographer Hine contained the plaintiff's actual name. Earlier in the case, the parties had stipulated to refer to the plaintiff by the pseudonym. "The court has considered the interest of the public in access to the court records and finds that plaintiff's interest in sealing the records outweighs any public interest at this time," Werner wrote. "Should any member of the public have an interest in opening these records, the court will entertain any such application on notice." Motion No. 014, Slip op. at 1.

The damages trial is scheduled to begin in August.

Defendants Merck and advertising agency Harrison & Star are represented by Sara Edelman of Davis & Gilbert in New York City; Curtis, Vasile, Devine & McElhenny in Merrick, N.Y., represented photographer Skip Hine. The plaintiff is represented by Meredith Braxton of Tranfo & Tranfo in Jericho, N.Y. and Greenwich, Conn.

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Idaho Supreme Court Questions Newspaper's Privilege in Reporting on Public Documents

A unanimous opinion by the Idaho Supreme Court last month declined to recognize an absolute constitutional protection for *The Idaho Statesman* after the paper published a 40-year-old court document. In *Uranga v. Federated Publications, Inc.*, No. 2001-52 (Idaho June 21, 2001), the Court ruled that a statement found in a dated court file was only "tangentially related" to the newspaper's responsibility to subject trials to public scrutiny. It then vacated a summary judgment ruling in favor of the media defendant.

In remanding the case to the district court, the Supreme Court offered plaintiff Fred Uranga an opportunity to prove that information contained in the document does not constitute a matter of legitimate public concern — a decision that seemingly challenges the U. S. Supreme Court's position on the First Amendment freedom to access public records and publish information contained therein.

The "Boys of Boise" Scandal

The file in question contains the handwritten statement of Melvin Dir dated January 7, 1956, stating that Dir had a homosexual affair with Frank Jones, son of a then-Boise City Councilman. The statement also mentions that Jones told Dir about "gay affairs he had had with... his cousin Fred Uranga." Dir's statement was taken as part of a 1955-1956 widespread "morals" investigation into allegations of pedophilia and homosexual activity. The scandal, which was dubbed the "Boys of Boise," resulted in approximately 1,500 witness interrogations and 16 arrests. Dir was one subject of the criminal investigation and was eventually convicted, but his statement was never used in an official judicial proceeding, accepted into evidence, or embodied in a court pleading.

Two score later, a photograph of Dir's unedited statement accompanied an article published by *The Statesman* as a part of the public debate over a proposed ballot initiative in Idaho that would ban state or

local anti-discrimination laws designed to protect homosexuals. The article, a "cautionary tale" that appeared on October 15, 1995, focused on the impact of the "infamous homosexual witch hunts" of the 1950s, in particular the post-investigation saga of Frank Jones, who was soon after expelled from West Point and eventually committed suicide. Although the article itself included a reference to Jones's "cousin," Frank Uranga was not mentioned by name in the text.

Procedural History

Uranga, who maintains that the allegations in Dir's statement are false, filed suit against Federated Publications for invasion of privacy by intrusion, invasion of privacy by publication of private facts, and intentional and/or reckless infliction of emotional distress. The district judge granted the newspaper's motion for summary judgment, noting the paper's constitutional privilege under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and the common law fair report privilege. The Court of Appeals unanimously affirmed.

The Idaho Supreme Court, however, vacated the district court's ruling and remanded the case. The five-member panel concluded that constitutional and fair report privileges did not serve as affirmative defenses here, that reasonable people could reach different conclusions based on the evidence, and therefore that summary judgment was inappropriate.

Absolute Privilege Questioned

Chief Justice Trout, writing for the state Supreme Court, cited lines from both *Cox Broadcasting* and *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), in which the Supreme Court pointed out that their decisions regarding the constitutional privilege of the press were to be narrowly construed: "We do not hold that truthful publication is automatically constitution-

(Continued on page 28)

A decision that seemingly challenges the U.S. Supreme Court's position on the First Amendment to access and publish public records

Idaho Supreme Court Questions Newspaper's Privilege in Reporting on Public Documents

(Continued from page 27)

ally protected, or that there is no zone of personal privacy within which the State may protect the individual from intrusion by the press..." *Florida Star*, 491 U.S. at 541, quoted in *Uranga v. Federated Publications, Inc.*, No. 2001-52, slip op. at 5.

Although the defense urged the Court to recognize that *Cox Broadcasting* created an unqualified privilege to report on the Dir statement, Chief Justice Trout found too many dissimilarities between *Cox* and the case at bar to grant that the constitutional privilege should be absolute. She noted that the U.S. Supreme Court has not answered the particular question on which the *Uranga* case hinged: "whether the First Amendment shield extends absolute protection to publish information contained in a

forty-year-old public file not directly concerning a judicial proceeding." Slip op. at 7.

The opinion offered a number of reasons why this case was one of those to which the constitutional privilege would not extend:

- 1) despite the dicta in *Cox Broadcasting*, court clerks cannot be presumed to scrutinize every document they file for public importance;
- 2) rejecting the newspaper's right to publish the Dir statement would not hamper the press's responsibility to apprise the public of criminal activity or governmental affairs; and
- 3) if the statement were to be proved false by the plaintiff, it would no longer fall under the constitutional protection of publication of "truthful" or "accurate" information.

The Court also addressed *The Statesman's* affirmative defense of fair report, but again determined that an absolute privilege does not exist. Because this document was never used in any official or judicial proceeding and because the "official action" involving Dir did not involve *Uranga*, summary judgment for the defense was inappropriate on fair report grounds, the Court concluded.

"Reasonable Minds Could Differ..."

After rejecting the absolute privileges asserted by *The Statesman*, Chief Justice Trout assessed the claims for intrusion, invasion of privacy/private facts, and intentional infliction of emotional distress and concluded that they must be allowed to proceed. The balance of the interests of the press and those of private individuals, although not explicitly called for in Idaho tort law, must be a consideration of the Court in privacy claims, she wrote. And in this case, whether or not that balance exists is a question for the jury. Trout also asserted, without much exposition, that allowing the trial to go forward on a question as unique

and specific as this would not have any "chilling effect" on the media.

Additionally, the Court's willingness to allow *Uranga's* intrusion claim (which does not require publication) to proceed confuses

the question of access in the state for more than just media organizations. The ruling seemingly says that a person can be liable for intrusion by merely retrieving an older court record whether or not the contents are published.

Federated Publications filed a Petition for Rehearing with the Idaho Supreme Court on July 12. In the meantime, the Court's determination of the public document as "tangential" to the story poses a quandary for news editors. "Who decides what is tangential information and what is not?" puzzled *Statesman* Executive Editor Carolyn Washburn in the paper's coverage of the decision. "That becomes a judgment call, and that can have a real implication on what the public gets to see out of a public record."

Debora K. Kristensen of Givens, Pursley, LLC, in Boise, Idaho, argued for the defendant. The plaintiff was represented by John L. Runft, also of Boise.

[The Court] found too many dissimilarities between COX and the case at bar to grant that the constitutional privilege should be absolute.

Failure to Investigate a Guest's Comments Was Not Actual Malice

N.Y. Appellate Court Dismisses Lawsuit Against Talk Show

By Charles J. Sennet

The “Geraldo Rivera Show’s” failure to investigate a remark made during the talk show, claiming improper conduct by a Buffalo police officer, cannot establish actual malice, the Appellate Division, Fourth Department, of New York’s Supreme Court ruled on June 8 in *McDonald v. Renford*, CA 01-00201, 2001 N.Y. App. Div. Lexis 5974. The appellate court ruled that the trial court should have granted summary judgment for the talk show and ordered the case dismissed.

Talk Guest Names Names

The libel suit arose from a December 1996 program concerning police brutality, titled “Black Men, White Cops, Recipe for Disaster?” Loretta Renford, the founder of an organization called Concerned Citizens Against Police Abuse, based in Buffalo, was one of several guests on the program.

Asked about an incident of alleged police brutality that had sparked her interest in the subject, Ms. Renford said when her son was being arrested on drug charges in 1994, Buffalo Police Detective Timothy McDonald handcuffed her son and poured the contents of a whiskey sour bottle over his head and threatened him verbally.

Nothing further concerning the incident was discussed in the program. A producer for the show testified that Ms. Renford had mentioned the incident when being interviewed before her appearance on the program but had not identified the detective. He testified that he did not contact the detective or otherwise try to verify the truth of the remark in the 13 days between the taping of the program and its broadcast.

Motion Initially Denied

After discovery closed, The Investigative News Group, Inc. and Tribune Entertainment Company, which produced and distributed the show, moved for summary judgment. They argued that as a police officer, plaintiff McDonald was a public official, and that he had not

shown evidence of actual malice, required under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

In a decision issued August 1, 2000, the New York Supreme Court, Erie County, denied summary judgment. Justice Christopher J. Burns’ ruling said the case raised issues “not so much about traditional journalism, but about provocative entertainment in a forum intended to raise a public furor.” He noted that as a police officer, the plaintiff had a heavy burden of proving actual malice, “particularly when Defendant attempts to shield itself behind its Guest Release and its claim of promoting public debate through journalism. The Guest Release, signed by every guest on the show, states that the information they present will be the ‘truth, honest and correct in every respect.’”

While acknowledging that “mere failure to investigate is not sufficient to demonstrate actual malice,” the trial court noted that “purposeful avoidance of discovering the truth or falsity of a statement through a deliberate decision-making process” could show actual malice. Here, the court said,

not only is there a question of whether there was a reckless disregard for the truth by the Geraldo Defendants, there may have been no regard. The attitude of the show and its personnel appears to be one of ‘don’t tell us what you are going to say then we can claim ignorance later.’ Whether it be called journalistic integrity or common decency a program broadcast on television which has the ability to instantly reach millions of individuals cannot disregard its obligation to be accurate simply by saying they didn’t know.

Ms. Renford originally was to appear on the program to discuss her organization, but the production staff decided she also would be asked about her son’s confrontation with Buffalo police, the court observed. “At no time did any personnel from the show ask specifics about her son’s arrest or attempt to verify her story. They simply had her sign the release and put her on the air. To act in such a manner in this instantaneous, wide-

(Continued on page 30)

N.Y. Appellate Court Dismisses Lawsuit Against Talk Show

(Continued from page 29)

reaching medium raises serious questions about whether or not the Geraldo Defendants acted with a reckless disregard for the truth or falsity of the event through a deliberate decision not to make further inquiry, particularly in light of a 13-day delay between the taping and airing of the comments," the court concluded.

Appeals Court Revises

On an interlocutory appeal by the producers, the Appellate Division reversed. The unanimous panel rejected the argument that failure to investigate Renford's claims before airing them on the program amounted to "purposefully avoiding" the truth, since there was no proof the producers of the show believed the claims were untrue. Under New York law, actual malice can be inferred from evidence of such "purposeful avoidance." (See *Sweeney v. Prisoners' Legal Services*, 84 N.Y.2d 786 (1995)).

In the absence of evidence that the Geraldo defendants were aware that Renford's claims were probably false, the Geraldo defendants 'cannot be found to have harbored an intent to avoid the truth'

Justices Green, Hayes, Wisner, Kehoe and Lawton decided the case.

Renford, who was also sued, did not move for summary judgment, and remains in the case. Plaintiff has applied for leave to appeal to the New York Court of Appeals.

The Investigative News Group, Inc. and Tribune Entertainment Company are represented by Paul Perlman and Kevin Kearney of Hodgson Russ LLP in Buffalo, N.Y. Charles J. Sennet is senior counsel for Tribune Company, Chicago, Ill. McDonald is represented by Richard Sullivan and Kevin Carter of Sullivan Oliverio & Gioia, in Buffalo, N.Y.

Plaintiff Will Appeal "Legendary" Libel Ruling in Favor of Random House

The manager of 60's soft rock band The Association announced in late May that he would appeal a judge's ruling that he was not libeled by a Random House book about David Geffen.

Patrick Colecchio, manager of the band whose hits include "Never, My Love" and "Cherish," said that he will appeal a February decision by Judge Malcolm Mackey of Los Angeles Superior Court. The decision found that under California's "totality of the circumstances" test for libel per se, the writer qualified the allegedly defamatory story as a mere "legend" such that the average reader of the paragraph would have understood that the tale was based on a myth. *Colecchio v. Random House, Inc., et al.*, BC 234449 (February 14, 2001).

The legend that author Tom King described in his book *The Operator* involved how Geffen persuaded the band's manager to sign his group with Geffen. Using the introduction "[t]he legend went that..." and peppering the tale with "the story went..." the author described how Geffen, after hearing that "the band's manager" was drunk at a party the night before, called him the next morning and said that the contract to represent the band was being penned, in accordance with their conversation the night before. (Colecchio was never mentioned by name in the book.)

Judge Mackey dismissed Random House and King from the lawsuit. A case against a William Morris agent said to be the source of the story, Owen Laster, will proceed and is anticipated to reach trial in September.

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“Slumlord” Not Defamed By Article Concerning Building Code Enforcement

Substantial Truth Doctrine Survives Turner and Gaylord Decisions

By Debra Thomas

The Dallas Court of Appeals affirmed summary judgment for media defendants, finding that an article, critical of the City of Dallas for its uneven code enforcement, was not reasonably capable of conveying a defamatory meaning to a particular landlord mentioned in the article as an example of one of the problems discussed. *Wheeler v. New Times, Inc.*, 2001 Tex. App. LEXIS 3272; 2001 WL 534156 (Tex. App.—Dallas May 21, 2001, n.p.h.). Justice Carolyn Wright wrote the unanimous opinion for Justices Lagarde, Kinkeade, and Wright.

Essentially, the plaintiffs’ appeal argument combined a discussion of the trial court’s ruling concerning the lack of a defamatory meaning with arguments concerning substantial truth. Relying on recent decisions in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000) and *Gaylord Broadcasting Co., L.P. v. Francis*, 7 S.W.3d 279 (Tex. App.—Dallas 1999, pet. denied), the plaintiffs asserted that “[t]he article was a libel if it was not ‘substantially true.’” The appellate court concluded that these cases were not controlling.

The “Razing Hopes” Article

In November 1995, the *Dallas Observer* published an article entitled “Razing Hopes.” The article focused on the belief that the City of Dallas employed inept, arbitrary, and unimaginative urban rehabilitation and that its building code enforcement policies and practices were often not even-handed. It also peripherally discussed Thomas L. Wheeler, Jr., and the City’s treatment of the more than 400 rental homes he owned or managed in poor neighborhoods in West Dallas.

The article noted that code enforcement officials have been “uncommonly gentle to the Wheelers in West Dallas,” stating that [i]nspectors have issued only 55 violation notices on the entire stock of 400 houses in the past three years, and fined Wheeler only twice.” The article explained that those figures are surprising because about

two-thirds of the homes are located in the Walker Target Area, a problem area that has been designated for “proactive housing code enforcement.”

By way of contrast, the article discussed another set of landlords, the Jacksons, who received 80 notices of violations on just six properties in a six-month time period. The article quoted a Dallas housing attorney who said the inequities in code enforcement are “astounding” and that “[t]he differences are inexplicable unless you take into account the differences of race and wealth between the Wheelers and the Jacksons.”

The article also detailed Wheeler’s extensive community activities in revitalizing West Dallas and his activity in programs designed to improve the community, including his membership on a city task force on housing.

Wheeler based his defamation claims on charges that the article implies various defamatory matters about him, not that the words themselves are defamatory.

The Lawsuit and Summary Judgments

Wheeler and several entities owned or operated by him sued *New Times, Inc.*, publisher of the *Dallas Observer* and Denise McVea, the author of the article. Wheeler did not dispute the truth of many of the factual assertions that go to the heart of the article. Wheeler, who owns or controls 400 low-rent homes in the poor neighborhoods of West Dallas, complained that the article referred to him as a “slumlord” but admitted that he has publicly referred to himself by that name. Wheeler conceded that “[a] lot” of the houses owned by the Wheelers had visible code violations at the time the article was printed and that the Jacksons received harsher treatment from the City than did the Wheelers. Wheeler also admitted that quotes from the article attributed to him, regarding the City’s treatment of the Wheelers and his efforts to upgrade the Wheeler property by upgrading the families who live in the properties, accurately reflect what he told McVea and what he believes.

Wheeler based his defamation claims on charges that the article *implies* various defamatory matters about him, not that the words themselves are defamatory. The initial

(Continued on page 32)

“Slumlord” Not Defamed

(Continued from page 31)

complaint contended that the article was defamatory because it understated the number of notices of code violations issued to the Wheeler properties and, therefore, implied that Wheeler had committed bribery and used improper influence to avoid the issuance of notices of violations and demolition orders.

The trial court granted summary judgment in favor of the media defendants on the allegations that the article implied bribery and improper influence. However, in the meantime, Wheeler amended the petition, adding allegations that the article also defamed him by implying that he does not keep his word, is a “scofflaw,” fraudulently misrepresented himself and his intentions to gain special privileges, is racially bigoted, and exploits minority tenants.

The media defendants again moved for summary judgment arguing, among other defenses, that the complained-of statements were not defamatory and that the alleged implications were not reasonable or defamatory. The trial court issued a take nothing judgment, concluding that none of the statements and/or implications contained in the article were defamatory or reasonably capable of a defamatory meaning as a matter of law. Wheeler appealed.

The Media Defendants’ Arguments

The media defendants argued, first, that the alleged incorrect factual statements about Wheeler or the Wheeler properties were not defamatory because it did not defame Wheeler to say he was accused of violating the law fewer times than the actual violations that were charged.

Second, the gist of the *Observer* article was not about Wheeler; rather it concerned an inept, unimaginative and sometimes racist City of Dallas code enforcement. Third, they argued that the article does not support the implications Wheeler tried to draw in his suit: it does not say that Wheeler bribed city officials; that he caused or manipulated the City into taking the actions which the article criticized; that Wheeler is a racist; nor that he caused the unequal treatment which he acknowledged the City gave to the Jacksons’ properties, as compared to his properties.

The media defendants pointed to, among other facts, a Fifth Circuit opinion affirming a federal court decision that found that white property owners like the Wheelers received markedly better treatment from the City of Dallas as

to Code enforcement than the Jacksons (who are black). *Jackson v. Wheeler*, 192 F.3d 127 (5th Cir. 1999).

Interpreting the Turner Decision

Wheeler argued that summary judgment was precluded under the ruling in *Turner* which provides that “a plaintiff can bring a claim for defamation when discrete facts, literally or substantially true, are published in such a way that they create a substantially false and defamatory impression by omitting material facts or juxtaposing facts in a misleading way.”

The *Turner* case involved a broadcast report about a faked “death” and related insurance fraud. The broadcast focused on the role of a former State Representative and then mayoral candidate, Turner, in drafting a will for Foster, who later faked his death, and in the subsequent attempted insurance fraud. The Texas Supreme Court determined that the broadcast in *Turner* gave a false impression of Turner’s role by omitting why he took certain actions as the attorney for Foster’s estate.

The *Wheeler* court stated that under *Turner*, Texas law precludes liability when a publication correctly conveys a story’s “gist” or “sting” although erring in the details, and provides for liability when a publication gets the details right, but fails to put them in the proper context, thereby making the story’s “gist” wrong.” The court distinguished *Turner* because any errors in “Razing Hopes” did not create a defamatory “gist.”

The court found that the “gist” or “sting” of the article is criticism of Dallas’s urban rehabilitation efforts and that gist is not lost in any inaccurate fact about Wheeler. Further, though the article suggests Wheeler benefitted from the City’s unequal treatment of landowners and suggests that the City takes a more lenient approach to people based on race and economic status, the article does not expressly allege nor imply that Wheeler caused these things to occur.

The Gaylord Decision Does Not Apply

On appeal, Wheeler also relied heavily on the decision in *Gaylord*, as support for the argument that the dispute as to the number of notices of violation he received creates a

(Continued on page 33)

“Slumlord” Not Defamed

(Continued from page 32)

fact issue for the jury.

In *Gaylord*, a television station aired an investigative report criticizing the work habits of certain Dallas judges. The central fact issue in *Gaylord* revolved around a database of courthouse parking records that a television station constructed and used as support for its story that accused a criminal district court judge of “hardly working.” *Id.* at 282-83. The judge, however, challenged six factual statements as *expressly* defaming him and produced summary judgment evidence purporting to show that the data used in the report was partially fabricated and that the hours he worked were roughly equivalent to another judge the report praised as “hard working.” *Id.* at 285-86. The dispute regarding the hours actually worked led to diametrically opposite conclusions: “hard working” versus “hardly working.” *See id.* at 283. Thus, in *Gaylord* the court found that there were fact issues that precluded summary judgment.

In *Wheeler*, the appellate court, which had also decided *Gaylord*, determined that *Gaylord* was not controlling. The court noted that, unlike the article at issue in *Gaylord*, the “Razing Hopes” article does not expressly criticize Wheeler. Rather, the article is critical of Dallas’s code enforcement and urban rehabilitation efforts and Wheeler is mentioned as an individual who has not been closely scrutinized because of the willful neglect of oversight agencies. The court concluded that, even if the complained-of statements were shown to be inaccurate, the article suggests that it is the City of Dallas, *not Wheeler*, which is responsible for the alleged improprieties that are the focus of the article. Because the article criticizes the City and not Wheeler, the court found that *Gaylord* was not controlling with regard to Wheeler’s claims.

Debra Thomas is an associate at Haynes and Boone, L.P., in Dallas, Texas. Don Templin, David Harper, Debra Thomas, and Heather Bailey represented defendant New Times in the Wheeler case.

Ms. McVea appeared pro se and adopted the New Times’s arguments on appeal.

Plaintiffs Thomas Wheeler and the Wheeler Entities were represented by James Branton, Thomas Crosley and Clayton Trotter of Branton & Hall, P.C. in San Antonio, Texas, and by Russell Post and Kevin Dubose of Hogan Dubose & Townsend in Houston, Texas.

“Lesbian Cowgirl” Statement Can Be Defamatory in NJ

A false accusation of homosexuality is reasonably capable of a defamatory meaning, the Superior Court of New Jersey, Appellate Division, ruled on July 2, 2001, reversing a grant of summary judgment for a radio talk show host and holding that a reasonable jury could find that the host acted with reckless disregard for the truth. *Gray v. Press Communications, LLC*, 2001 N.J. Super. LEXIS 280 (N.J. Super. Ct. App. Div. 2001).

“The Fact Remains That a Number of Citizens Still Look Upon Homosexuality With Disfavor”

The court weighed the gravity of calling a former children’s television show host a “lesbian cowgirl,” deciding that the threshold issue was whether the language used was reasonably capable of a defamatory meaning. There was no New Jersey precedent, but the court noted that a majority of other state courts had concluded that a “false accusation of homosexuality is actionable.” The court cited cases from Minnesota, Missouri, Maryland, Illinois, Colorado, and Texas ranging from 1970 to 1999. In line with the other states, the New Jersey court held that a false accusation was reasonably capable of a defamatory meaning, noting that “although society has come a long way in recognizing a persons’ right to freely exercise his or her sexual preferences, unfortunately, the fact remains that a number of citizens still look upon homosexuality with disfavor.”

Home on the Range (The Facts)

The case began in July 1998 when a listener called in to the afternoon radio show co-hosted by defendant Jeff Diminski to take part in the discussion of the day and identify her favorite childhood show. She named the “Sally Starr Show,” to which Diminski said, “That was the lesbian cowgirl, I think.” The caller branded Diminski as “sick,” said she wouldn’t call in anymore, and hung up.

Plaintiff Sally Starr Gray heard the program and called in to complain, prompting an immediate apology from Diminski. Later during the show, Diminski again retracted his remarks, saying, “It has been very informative today. We have learned about sex offenders’ rights. We learned about diamonds. We learned Sally Starr is not a lesbian.”

(Continued on page 34)

“Lesbian Cowgirl”

(Continued from page 33)

Gray filed suit in late October 1998, naming the company that owns the radio station, Diminski, and his producer as defendants and asking for \$5M in damages. The Associated Press reported that Gray was frightened and unable to sleep because of the remarks, particularly following the October 12 death of gay Wyoming college student Matthew Shepard. “You never know what kind of unstable character is out there,” her attorney told the AP.

Gray, who hosted the Philadelphia-area children’s television show in the 1950s, ’60s and early ’70s, was known for her fringed, spangled cowgirl costume. At the time of Diminski’s remarks, the septuagenarian was making personal appearances in her costume at venues including the Philadelphia Gay Pride Parade. Gray filed for bankruptcy in December 1999, stating that her personal appearances bookings declined after Diminski’s comments.

At Diminski’s deposition, he attempted to explain the reasoning behind his remarks. He had never heard of Gray until sometime in the 1980s when friends native to Philadelphia were reminiscing, Diminski said. He remembered hearing of Gray three times since — once during a conversation with “the next door neighbor or friends or something,” once during a backstage conversation among other performers at a stand-up comedy show, and once when he was working on his car and “heard this conversation” — and said each time Gray was referred to as a lesbian in a matter-of-fact way. Diminski said he thought Gray’s sexuality was common knowledge to people in the area.

The defendants moved for summary judgment. At the motion hearing the judge preliminarily stated that Gray was a public figure, which was not disputed by her attorney. The trial judge dismissed the case, concluding that the evidence did not establish “anything close to clear and convincing evidence” that Diminski acted with actual malice.

Wrangling With Actual Malice

The appellate court also analyzed actual malice, which the court noted was appropriate at the summary judgment stage. “Negligent publication does not satisfy the actual-malice test,” the court stated, but a “finding of reckless publication may result if the publisher either fabricates a story, or publishes a story or accusation that is wholly unbelievable, or relies on an informant of dubious veracity, or purposely

avoids the truth.” The appellate court also acknowledged its responsibility to “heed the admonition of the Supreme Court not to be reluctant to grant summary judgment in this type of case” and discussed the high cost of defamation litigation and the chilling effect such litigation has on the exercise of free speech.

Despite this, the court held that the trial judge erred in granting summary judgment. Diminski’s state of mind regarding the statements was a critical facet of the case, the court noted, and summary judgment should be denied since “the issue of state of mind does not readily lend itself to summary disposition.” The court noted that a jury could conclude that Diminski’s explanation for the statement, based on the three fuzzy conversations with unnamed people, was not credible. “To say the least, his sources were of dubious veracity,” the court said. “Indeed, they are so vague that a jury could find that they were contrived after the fact.”

The public policy director for the New Jersey Gay and Lesbian Coalition, Wendy Berger, told the *Newark Star-Ledger* on July 3 that the group welcomed the ruling that being called a homosexual was capable of being defamatory. “I think it’s an honest ruling,” the *Star-Ledger* reported her saying. “This confirms what we have said all along. What the judge did was reflect the reality of what’s there.”

A different appellate division panel had given radio personalities a far greater berth in *Wilson v. Grant*, 297 N.J. Super. 128 (N.J. Super. Ct. App. Div. 1996). In that case, the court dismissed the suit against talk show host Bob Grant, holding that his comments about the plaintiff, a self-appointed radio monitor who was waging a public war to have Grant removed from radio, consisted of vulgar name-calling and that the comments were not defamatory in the context of the show. Grant had called plaintiff George Wilson a “sick, no good, pot-smoking wife-beating skunk” and had said he had been in a mental institution. That case was decided by Judges Shebell, Baime and Braithwaite.

In the *Gray* case, the radio station was defended by Richard M. Eittrheim, Katie A. Gummer and Eric D. Sherman of McCarter & English in Newark, NJ. The plaintiff was represented by B. Adam Sagan and Jeffrey Zajac of Sagan & Greenberg in Bensalem, Penn. The case was before judges Keefe, Eichen and Steinberg, and the opinion written by J.A. D. Steinberg.

New York Court Grants Summary Judgment to “60 Minutes”

Defamation Suit Arising out of Report on Forged JFK Documents

By Jay Ward Brown

A “60 Minutes” report that sensational documents purportedly authored by President Kennedy and Marilyn Monroe were likely forged is not actionable, a New York trial court has ruled. *Cusack v. 60 Minutes*, No. 600060/98 (N.Y. Sup. Ct. N.Y. County, June 20, 2001) (Kapnick, Barbara R., J.). The order dismissing the complaint disposes of thirteen causes of action brought by more than 100 plaintiffs including Lawrence “Lex” Cusack, the man later convicted of mail and wire fraud in connection with the sale of the documents; his wife, his company and business associates who had acted as their agents in connection with the sale of the documents; and those who purchased the documents. In addition to laying bare the meritless nature of these plaintiffs’ claims, the trial court’s opinion touches on several points of law likely to be helpful in future cases.

Background

At the heart of the case are some 700 pages of documents that Cusack claimed were authored by President Kennedy, Marilyn Monroe, Robert F. Kennedy, and Joseph P. Kennedy, Sr., and which include papers purportedly creating trusts for Marilyn Monroe in return for her silence about President Kennedy’s alleged connections to the Mafia, receipts for payments made to or on behalf of Monroe, and other papers supposedly written by the President.

Shortly after he began experiencing financial problems in the early 1990s, Cusack told a dealer that he had recently found in his late father’s files various documents that contained the writing and signatures of President Kennedy, Marilyn Monroe and others. He claimed that his father, a well-known New York attorney, had secretly been an adviser to Kennedy on such matters as the President’s purported first marriage and divorce, alleged interactions with organized crime, and similar matters.

Cusack began to market the documents to collectors in 1991, selling individual documents for substantial sums, ranging from \$2,000 to \$760,000. In total, the

documents fetched some \$7 million. As events would later reveal, however, Cusack stole original documents from his father’s firm, the Surrogate’s Court, and the Archdiocese of New York and altered and embellished these documents with the forged handwriting of President Kennedy and others.

The 60 Minutes report on Cusack and his “historic” find, “The JFK Papers,” was broadcast on November 23, 1997. Although other media outlets noted the documents’ questionable provenance, the plaintiffs were especially peeved at CBS. They alleged that the broadcast did not include all of the “highly favorable” statements made by them during interviews and, although the plaintiffs purportedly had “fully expected the Segment to be favorable to them,” they found the broadcast to be “most unfavorable.” This, perhaps alone among plaintiffs’ allegations, undoubtedly was true: Not only did the broadcast include a statement by Dr. Duayne Dillon, a handwriting expert, that in his opinion the documents were forged, it reviewed the other evidence and news reports challenging their authenticity. The broadcast also included the less than compelling response of Cusack and other plaintiffs to the charges.

The Lawsuit Against CBS

In January 1998, plaintiffs instituted their suit against CBS, Ed Bradley, Don Hewitt, the segment producers, Dr. Dillon, Seymour M. Hersh (who did not appear on the CBS program but who had been critical of the documents in other contexts) and Robert L. White, a Kennedy memorabilia collector who had “authenticated” certain of the documents, but who backed off his earlier “certifications” in an interview included in the broadcast. The complaint, filed on behalf of 112 named plaintiffs, spanned some 150 pages and alleged thirteen causes of action, including defamation, trade libel, fraud, interference with economic relations, infliction of emotional distress, breach of contract, false advertising and breach of fiduciary duty.

The plaintiffs alleged that literally scores of state-

(Continued on page 36)

New York Court Grants Summary Judgment to “60 Minutes” in Defamation Suit

(Continued from page 35)

ments in the broadcast were false, but in effect alleged two overarching defamatory implications attributable to the broadcast. Specifically, plaintiffs alleged that the broadcast (1) defamed Lex Cusack and his business associates by falsely implying that he “was the forger,” and (2) constituted trade libel because it falsely “accused all the Documents of being forged,” thereby rendering the remaining plaintiffs’ investments worthless.

On March 13, 1998, however, the United States charged Cusack with mail and wire fraud as a result of his “scheme to market and sell forged documents on the false and fraudulent representation that the documents contain the actual handwriting of President John F. Kennedy, Robert Kennedy, Marilyn Monroe and/or others.” After the jury convicted Lex Cusack on all counts on April 30, 1999, the trial judge sentenced Cusack to almost ten years in prison and ordered him to pay full restitution to his victims in the approximate amount of \$7 million. Cusack’s various post-conviction gambits have been entirely unsuccessful thus far and the conviction has been upheld on appeal.

In the course of rendering sentence, the trial judge expressly noted that the complaint in the civil action against CBS was “facially outrageous” in light of the overwhelming evidence at trial that “Cusack was the author of the documents at issue and that he had invented out of whole cloth a relationship between his father and President Kennedy.” Notwithstanding Cusack’s conviction and the trial judge’s characterization of the civil action as all but frivolous, the plaintiffs — including Cusack — refused to voluntarily dismiss their action against CBS and the other defendants.

As a consequence, the defendants moved for summary judgment on all counts, placing the entire record from the criminal trial into the summary judgment record in the civil action. After plaintiffs cross-moved for summary judgment on various counts of their complaint, Justice Barbara Kapnick took the matter under submission. On June 20th, without oral argument, Justice Kapnick granted the defendants’ motion and dismissed the complaint in its entirety with prejudice.

Issue Reclusion and Privity

The CBS defendants’ principal argument was that Cusack’s criminal conviction collaterally estopped him from contesting the truth of the implications allegedly arising from the broadcast that the documents were forged and that Cusack had forged them. What is more, the defendants argued, all of Cusack’s co-plaintiffs were his privies for purposes of their action against CBS because they either (1) were in agency, contractual or similar business relationships with him, or (2) asserted claims that were entirely derivative of his own.

Justice Kapnick accepted this argument with respect to several groups of plaintiffs. After first agreeing that Cusack himself was barred by his conviction from relitigating in the civil action the question of whether he had forged the documents, Justice Kapnick ruled that Cusack’s wife, their company, and those of their business associates who had been acting as their agents in connection with the sale of the documents were all collaterally estopped by Cusack’s criminal conviction from contesting the truth of the broadcast’s purported implications, requiring dismissal of their defamation claims.

The remaining plaintiffs, however, as mere purchasers of the documents, were not in privity with Cusack and could not, the court concluded, properly be bound by the facts determined in his criminal prosecution. Justice Kapnick nevertheless easily dismissed the purchasers’ defamation claims because none of the allegedly false and defamatory statements in the broadcast were of or concerning any of them.

Overarching Defamatory Meaning

As for the remaining trade libel claims, defendants had pointed out to the court that all of the plaintiffs were required, under New York law, to prove by clear and convincing evidence that the challenged statements were false. See, e.g., *Al Raschid v. News Syndicate Co.*, 265 N.Y. 1, 3-4, 191 N.E. 713, 713-14 (1934); *Abernathy & Clothier v. Buffalo Broadcasting Co.*, 176 A.D.2d 300,

(Continued on page 37)

New York Court Grants Summary Judgment to “60 Minutes” in Defamation Suit

(Continued from page 36)

303, 574 N.Y.S.2d 568, 571 (2d Dep’t 1991). After comparing the evidence from the record of the criminal trial to the admissible portions of the various affidavits submitted by plaintiffs in support of their contention that the documents were authentic (or that, at the least, it was not Cusack who forged them), Justice Kapnick concluded that plaintiffs had failed to raise a genuine dispute as to the truth of the defendants’ statements, *i.e.*, that the documents were forged and forged by Cusack.

Significantly, in this regard, it appears that Justice Kapnick accepted the defendants’ argument — based on *Herbert v. Lando*, 781 F.2d 298, 311 (2d Cir. 1986), *Tavoulaareas v. Piro*, 817 F.2d 762, 788 (D.C. Cir. 1987), and their progeny — that, in light of the subsidiary meaning doctrine, it was unnecessary for her to parse separately each of the scores of allegedly false statements. Rather the court was entitled to and did focus exclusively on the two overarching defamatory meanings allegedly conveyed by the broadcast — meanings framed by defendants in their motion for summary judgment and unchallenged by the plaintiffs in their opposition.

Fault Standard

Given her ruling on the issue of falsity, it was perhaps unnecessary for Justice Kapnick to proceed to rule that certain of the purchaser plaintiffs who had participated in media interviews about the documents were limited purpose public figures required to demonstrate actual malice (citing *Daniel Goldreyer, Ltd. v. Dow Jones & Co.*, 259 A.D.2d 353 (N.Y.A.D. 1st Dep’t 1999)). She further found that the remaining purchaser plaintiffs, since the subject of the broadcast was a matter of public concern, were required under New York law to demonstrate that defendants had “acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties” (citing *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975)). Justice

Kapnick noted the absence of any evidence that the CBS defendants believed that the broadcast was false or were reckless with respect to it, and concluded that plaintiffs had likewise failed to proffer any evidence that the manner in which CBS produced and broadcast the report was irresponsible.

Tag-Along Claims Fail

As for the eleven tag-along claims, Justice Kapnick agreed with defendants that “all of these causes of action fail because the damages that plaintiffs claim to have suffered were not proximately, or even indirectly, caused by the actions that the CBS defendants are alleged to have taken.” Rather, as Justice Kapnick concluded, the plaintiffs’ alleged damages were caused by Cusack’s fabrication of the documents. Even assuming that CBS had promised to broadcast a favorable report on the documents and kept such a promise, Justice Kapnick pointed out, Cusack’s subsequent criminal conviction “would have brought about exactly the harm that plaintiffs claim to have suffered” at the hands of CBS.

In addition, Justice Kapnick noted that various of the tag-along claims failed for a variety of common-law reasons.

Fraud

The plaintiffs could not maintain their fraud claim, for example, because it was based on the premise that the CBS defendants intended to breach their promise to broadcast a favorable report and the mere intent to breach a promise does not give rise to fraud under New York law (citing *Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 234, 612 N.Y.S.2d 146, 148 (1st Dep’t 1994)). As the defendants had pointed out to the court, this rule applies specifically to fraud claims arising from journalists’ alleged breaches of promises.

(Continued on page 38)

[I]n light of the subsidiary meaning doctrine, it was unnecessary for her to parse separately each of the scores of allegedly false statements.

New York Court Grants Summary Judgment to "60 Minutes" in Defamation Suit

(Continued from page 37)

See, e.g., *Morgan v. Celender*, 780 F. Supp. 307, 311 (W.D. Pa. 1992); *Desnick v. American Broadcasting Co.*, 44 F.3d 1345, 1354 (7th Cir. 1995).

Interference With Economic Relations

The cause of action for interference with economic relations was defective, the court concluded, because such a cause of action arises only where the defendant was motivated solely by malice or effected the interference by unlawful means (citing *Matter of Pamilla v. Hospital for Special Surgery*, 223 A.D.2d 508, 509 (1st Dep't 1996)). The plaintiffs, however, had conceded that the CBS defendants "were at least partially motivated by their own self-interest" in preparing the broadcast and they had not otherwise acted unlawfully. Although not cited by Justice Kapnick in her opinion, this conclusion is in accord with prior New York decisions upon which the defendants had relied. See, e.g., *Huggins v. Povitch*, 24 Media L. Rep. (BNA) 2040, 2047 (Sup. Ct. N.Y. Co. Apr. 19, 1996).

Fiduciary Duty

Not surprisingly, Justice Kapnick also rejected plaintiffs' cause of action for breach of fiduciary duty: "The mere fact that those plaintiffs who co-operated with CBS expected the Program to be favorable to Cusack does not create a fiduciary relationship between those plaintiffs and CBS."

False Advertising

Citing the authorities relied upon by defendants, including *New York Public Interest Research Group, Inc. v. Insurance Info. Inst.*, 161 A.D.2d 204, 205, 554 N.Y. S.2d 590, 592 (1st Dep't 1990), and *Groden v. Random House, Inc.*, 61 F.3d 1045, 1052 (2d Cir. 1995), Justice Kapnick rejected plaintiffs' federal and state causes of action for false advertising and unfair business practices out of hand on the ground that such statutes apply only

to commercial activity and "were never intended to encompass the type of editorial comment at issue herein and, indeed, could not constitutionally do so."

Finally, the court rejected plaintiffs' causes of action for intentional and negligent infliction of emotional distress on the grounds that, with respect to the former, the defendants' conduct was not outrageous as a matter of law (citing *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993)), and, with respect to the latter, that even assuming CBS might be said to have had a duty to protect the plaintiffs from emotional harm, such a cause of action exists only when the harm arises directly from the breach of such a duty, (citing *Kenney v. McKesson Co.*, 58 N.Y.2d 500, 506 (1983)), something the plaintiffs had failed even to allege in this case.

Given the plaintiffs' demonstrated unwillingness to acknowledge that their claims are baseless,

it seems likely that the First Department will have the opportunity to speak to these matters on appeal. And, depending on precisely how far the plaintiffs are willing to press their arguments, it is entirely possible that the end of the litigation will arrive at just about the same time Cusack finishes serving his prison sentence.

The CBS defendants were represented by in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and Lee Levine, Jay Ward Brown and Thomas Curley of Levine Sullivan & Koch, L.L.P. of Washington, D.C. Seymour Hersh was represented by Michael Nussbaum of Ropes & Gray in Washington, D.C., and Robert L. White was represented by Robert M. Adler of O'Connor & Hannan in Washington, D.C. Solo practitioner Carl E. Person of New York City represented the plaintiffs.

[T]he plaintiffs' alleged damages were caused by Cusack's fabrication of the documents.

CA Court Says Holland-based Newsletter Can Be Sued In California Federal Court

On June 5, the United States District Court for the Central District of California ruled that it had personal jurisdiction over a Holland-based e-newsletter and its creator/operator. *Batzel v. Smith*, 2001 U.S. Dist. LEXIS 8929 (C.D. Cal. 2001). North Carolina-based lawyer Ellen Batzel sued the Dutch creator/operator, Tom Cremers, for defamation after Cremers republished e-mails he had received alleging she owned stolen Nazi art.

Reprints False E-Mails

Defendant Robert Smith e-mailed Cremers, alleging that Batzel had boasted of owning artworks stolen from Jewish families by the Nazis and that she claimed to be the granddaughter of Heinrich Himmler. Cremers published the e-mail and five separate updates in MSN's newsletter and on the site itself in September 1999.

Batzel, an entertainment lawyer with art business clients and Jewish clients in California, found out about the publication in January 2000 and requested a retraction from both Cremers and his sponsor, museum security company Mosler, Inc. None was published. Cremers also failed to inform inquirers that the Batzel information was false.

In addition to losing several California clients, Batzel claims she became a subject of investigation under the North Carolina bar. According to Batzel's complaint, her house-painter, Smith, was angry with her because she had refused his request to give her clients a script for review.

California Contacts

The court held that Cremers had minimum contacts in California. He had purposefully availed himself to California, the court found, by e-mailing his English-language newsletter to numerous subscribers in California several times a week, by entering a corporate sponsorship agreement with a California-based company, and by traveling to a California conference to promote the e-newsletter. He had also occasionally republished the content of several California newspapers, the court noted, and assuming that he complied with

copyright laws he would have had to enter licensing agreements with the California papers, as well.

The court held that the act of sending California residents e-newsletters and e-mailed invitations to view Cremers' website was "akin to sending newspapers" to California, and cited two recent cases as precedent, *Nicosia v. DeRooy*, 72 F. Supp. 2d 1093 (N.D. Cal. 1999) (8/99 LibelLetter p. 9) and *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (3/01 LibelLetter p. 13).

The court also held that it was not unreasonable to require Cremers to litigate in California, remarking that he had secured "excellent" representation with a "prestigious" California law firm, Latham & Watkins. There was no affront to Dutch sovereignty, the court held, for numerous reasons, noting that Cremers allegedly defamed an American in an English-language publication sent to other Americans. The court also stated that delays would result if litigation had to be initiated in Holland, and pointed out that it had ruled on several motions already and was familiar with the facts of the case.

Reserved on Anti-SLAPP

Attorneys for Cremers had also filed motions to dismiss based on the California anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16 (2001), and forum non-conveniens. The court reserved ruling on the anti-SLAPP motion and denied the forum non-conveniens motion.

To rule on an anti-SLAPP motion, the deciding court must analyze first whether the lawsuit arises out of the defendant's constitutionally protected actions, and if so then whether the plaintiff has a reasonable possibility of success. The *Batzel* court held that Cremers had met his burden as to the first prong, ruling that his publication was constitutionally protected because it qualified as a "written statement . . . made in a public forum in connection with an issue of public interest." The plaintiff had conceded that the published information, relating to stolen Nazi art, touched both interna-

(Continued on page 40)

CA Court Says Holland-based Newsletter Can Be Sued In California Federal Court

(Continued from page 39)

tional and national areas of public concern.

The court reserved ruling on the second prong of the anti-SLAPP analysis, noting that it was plaintiff's burden to prove that she had a reasonable possibility of success. The defendants argued that Batzel did not have a chance of success because she did not have a prima facie defamation case and because the suit was pre-empted by the Telecommunications Act, 47 U.S.C. § 230 (c)(1) (2001). The court ruled that to prove she had a reasonable possibility of success as a defamation case, Batzel had to prove falsity, and cited *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) after ruling that although Batzel qualified as a private figure, the issue was a matter of public concern. The court declined to rule whether Cremers was a media defendant, noting that in California, "a private plaintiff must prove falsity with respect to even non-media defendants when the suit involves a matter of public concern." *Melaleuca, Inc. v. Clark*, 66 Cal. App. 4th 1344 (Cal. Ct. App. 1998). (10/98 LibelLetter p. 21.)

The court ruled that the Telecommunications Act did not pre-empt the suit against Cremers and his website, "Museum Security Network" (MSN), which focused on art and museum security issues, holding that MSN/Cremers was not an internet service provider within the meaning of the Act. Instead, the court ruled, it was "plainly an 'information content provider.'"

The court denied the defendant's motion to dismiss on forum non-conveniens grounds because the court found he failed to meet his burden in proving the existence of an adequate alternative forum. The court noted that Cremers had already agreed that California law applies to the case and had in fact invoked California law in his anti-SLAPP motion.

Cremers was defended by Stephen J. Newman and Steven T. Chinowsky at Latham & Watkins. Mosler, Inc. was defended by Robert P. Long of Kinkle Rodiger & Spriggs. Smith was defended *pro se*. Plaintiff Batzel was represented by Howard S. Fredman of Howard S. Fredman Law Offices and M. Joey Lynch of M. Joey Lynch Law Offices.

The district judge who ruled on the motions was United States District Judge Stephen V. Wilson.

UPDATE: UK on Internet Archives

Last month's *LibelLetter* reported on a series of restrictive decisions in the UK libel case of *Grigori Loutchansky v. The Times*, a case involving claims over a newspaper article and the archived Internet version of the same article. *LibelLetter* June 2001 at 45. Since last month's report, the Court of Appeal has agreed to hear *The Times'* appeal on a number of additional issues, including whether the single publication rule and qualified privilege defense apply to the Internet publication.

In addition, the Court of Appeal will review whether Loutchansky is entitled to summary disposition on damages under Section 8 of the Defamation Act 1996, where damages are assessed by a judge alone and are limited to £10,000. The appeals will be heard the week of November 12th. In the event the trial court rulings are affirmed, a damages assessment is scheduled to begin on January 9th, 2002. Still pending is a petition for leave to appeal to the House of Lords on whether post-publication information can be considered in the qualified privilege analysis.

A compendium of articles on the case is available through The Times' web site www.thetimes.co.uk.

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Where is Internet Article Published?

An Australian Court to Decide

By Stuart Karle

An article posted on a website can be read on a computer screen anywhere in the world, but the issue of where it is actually “published” for purposes of determining where a libel tort may have occurred is now before a trial court judge in Melbourne, Australia. From June 4 through 7, Justice Hedigan of the Supreme Court of Victoria (the trial court of that Australian state) heard arguments on an application by Dow Jones & Company to dismiss Melbourne-based businessman Joseph Gutnick’s libel action based on an article available on *BarronsOnline*, a feature of *WSJ.com*. *Joseph Gutnick v. Dow Jones & Company* (Supreme Court of Victoria at Melbourne, 2000 No. 7763).

Dow Jones’s application was based largely on the argument that it did not publish this article in Victoria, but only in South Brunswick, New Jersey, where Dow Jones’s web servers are located, even though it was stipulated that *WSJ.com* subscribers in Victoria almost certainly read the article on their computer screens. A decision is expected by the end of August.

“Unholy Gains”

On Saturday, October 28, 2000, Dow Jones loaded onto its website *BarronsOnline* an article headlined “Unholy Gains,” which reported on the possible role played by religious charities in manipulations of publicly-traded securities. (The article also appeared in that week’s print edition of *Barron’s*, which had a circulation of approximately 300,000 copies, three of which were supposed to be sent to subscribers in the Australian state of Victoria.) *BarronsOnline* is a feature of *WSJ.com*, the principal news website published by Dow Jones, which is available only to paying subscribers or trial subscribers; at the time “Unholy Gains” was placed on the website, *WSJ.com* had more than 500,000 paying subscribers.

Immediately after publication, *Barron’s* exchanged

correspondence with a New York lawyer representing Mr. Gutnick who complained about the article, but ultimately Mr. Gutnick’s Melbourne-based solicitors commenced a libel action in the Victoria Supreme Court that complains only about the internet version of “Unholy Gain” published on *BarronsOnline*. The plaintiff later amended his claim to include a complaint about the publication of “Unholy Gains” in the print edition of *Barron’s*. Dow Jones’s position is that Mr. Gutnick’s effort to amend the Statement of Claim to include the (extremely limited) print distribution in Victoria is unavailing and the only article before the Court is the internet version. In any event, Mr. Gutnick actually has

never complained about the entire article, or even all portions of the lengthy piece that concern him, but only about chosen excerpts that he alleges relate only to activities that would have occurred exclusively in Victoria.

[A]llowing a website publisher . . . to be sued wherever someone might view its material would expose all publishers to the libel laws of every country in the world.

Where Was It Published

At the hearing, Dow Jones argued that it never published the internet article in Victoria, but only in New Jersey. Because the article was not published in Victoria, the Supreme Court of Victoria did not, under its own rules, have jurisdiction over any libel claim Mr. Gutnick might wish to file. Alternatively, if the Court found it had jurisdiction over a tort committed in Victoria — because of either the internet version or the handful of print copies of *Barron’s* destined for Victorian subscribers — Dow Jones argued that the Court should decline to hear the case as a matter of *forum non conveniens*. Virtually none of the relevant evidence is to be found in Victoria, and Mr. Gutnick has engaged in extensive activities in the United States while *Barron’s* has virtually no presence in Australia.

Dow Jones introduced lengthy affidavit evidence, unrebutted by Mr. Gutnick’s counsel, that articles on

(Continued on page 42)

Where is Internet Article Published?

(Continued from page 41)

BarronsOnline (a) are placed by Dow Jones only on computer web servers located on its corporate campus in South Brunswick, New Jersey, (b) are available only to registered and trial subscribers to *WSJ.com*, and (c) must be retrieved by subscribers by means of “get messages” sent by the subscriber, typically as a result of clicking on a link on *BarronsOnline*, to the webserver in New Jersey because Dow Jones does not “push” material from its webserver to the subscriber. As a result, Dow Jones argued that publication occurred in New Jersey when the webserver supplied a copy of the article to the subscriber’s “get message,” and not wherever in the world the article ultimately might ultimately be read by a subscriber.

Policy Issues

Dow Jones’ lead counsel, Geoffrey Robertson, Q. C., also stressed the policy arguments underlying Dow Jones’s position. Based on expert evidence, Dow Jones argued that anyone with a computer, a modem and a telephone line can access any website made available to the public, and therefore it is in practice impossible to bar access to someone based upon where they might be sitting when they seek access to a website. Therefore, allowing a website publisher, whether a corporation or an individual, to be sued wherever someone might view its material would expose all publishers to the libel laws of every country in the world. Even if it were possible to eliminate access to a site from certain countries, such a result shouldn’t appeal to Australia, Dow Jones argued, which is so geographically remote and therefore potentially such a great beneficiary of the world wide web’s capacity to mitigate the limitations imposed by distances between countries, businesses and people.

Mr. Gutnick’s counsel argued that “400 years of uninterrupted law” stood for the proposition that a defamatory statement is published when it is read and comprehended by someone, not simply when it is delivered to another person. When Dow Jones’s webserver in New Jersey provided a copy of the article to the subscriber’s “get message,” he argued, it was in the form of electronic bytes that could not be read and

in any event was transferred to an electronic program, the only function of which was to transport the article back to the subscriber so it could be read on a computer screen. Mr. Gutnick’s counsel advised the Court that Dow Jones was exaggerating the importance of the case for the internet and its users because one trial court opinion from Australia would not have great significance elsewhere. Ultimately, he argued that Dow Jones had made the article available to Victoria subscribers who had read it in Victoria and Mr. Gutnick, a prominent Victorian, should be allowed to seek redress for the alleged libel in the Victorian court.

A 19th-Century Duke Weighs In

Virtually all of the cases upon which Mr. Gutnick relied to argue that publication requires comprehension by a reader were slander and not libel cases. The distinction, Dow Jones argued, was crucial because critical element in slander is evidence that the ephemeral, oral communication had in fact been heard and compre-

(Continued on page 43)

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Where is Internet Article Published?

(Continued from page 42)

hended. No such requirement exists in proving a libel.

On the case law, Robertson for Dow Jones relied heavily on one of the most notorious examples, from an American perspective, in the history of English libel law, *The Duke of Brunswick v. Harmer*. In that 1849 case, the Duke in 1848 had sent his servant to a newspaper's office to retrieve a copy of an issue published in 1830 that included a supposedly defamatory article about the Duke. The only evidence discussed in the opinion was that the servant had merely obtained the copy of the paper and delivered it to the Duke, not that he, the servant, had read it. The court held that the delivery of this copy to the Duke's agent amounted to a new publication in 1848 that allowed the Duke then to commence a libel action within the six-year statute of limitation. This decision has been the basis, in lawsuits against American based publishers by plaintiffs in venues such as England and Australia, for claiming separate publication and separate reputations to vindicate for distribution, however nominal, in those jurisdictions.

Finally, Dow Jones relied on a criminal libel case from 1820 decided by the English Court of Appeal, *The King v. Burdett*, which turned up quite late in the research (*i.e.*, on the final morning of the hearing during the rebuttal by Dow Jones), in which three judges unambiguously held that publication occurs upon delivery of the allegedly libelous matter, not upon its reading or comprehension. As one Judge put it, "Actual communication of the contents, as by singing or reading, is indeed one mode of publication; but it is not the only mode, nor the usual mode; the usual mode is by delivery of the paper, either by way of sale or otherwise; and upon proof of the purchase of a newspaper or pamphlet in Fleet-Street, no one ever thought of asking whether the purchaser or other person read the paper or pamphlet in London or elsewhere."

Whatever the decision, an appeal by the losing party is likely. Ultimately, a holding that an internet article is published where the publisher's web servers are located, and not everywhere the article is read,

could prove to be an important step in furthering freedom of expression by assuring all new media publishers, whether major media companies or private individuals with their own websites, that they need not answer to the divergent libel laws and unpredictable legal standards of every country on earth.

Dow Jones is represented by barristers Geoffrey Robertson, QC, of Doughty Street Chambers in London and Tim Robertson of Frederick Jordan Chambers in Sydney, solicitors Paul Reidy and Kate Fitzgerald of Gilbert & Tobin in Sydney, and Stuart Karle of Dow Jones. Joseph Gutnick is represented by barristers Jeffrey L. Sher, QC, and Michael Wheelahan, and solicitors Clayton Utz of Melbourne.

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Canadian Appellate Court Affirms Large Libel Verdicts Against Canadian Broadcasting Corp.

By Brian MacLeod Rogers

On June 12, 2001, the Ontario Court of Appeal upheld two trial judgments against the Canadian Broadcasting Corporation over the same documentary program totaling \$1.3 million (Canadian), plus costs of the plaintiffs at trial and appeal in excess of \$1 million (Canadian). *Leenen v. Canadian Broadcasting Corporation* ([2001] O.J. No. 2229); *Myers v. Canadian Broadcasting Corporation* ([2001] O.J. No. 2228) (McMurtry C.J.O., Catzman and Austin JJ.A.) (decisions available through www.ontariocourts.on.ca). This continues the trend toward higher damage awards since the Supreme Court of Canada's decision in *Hill v. Scientology*, [1995] 2 S.C.R. 1130. The CBC is considering whether to seek leave to appeal to the Supreme Court.

More disturbing than the size of the awards, however, are statements by the Court on the defense of "fair comment," which directly oppose pronouncements in the House of Lords decision in *Reynolds v. Times Newspaper Ltd.*, [1999] H.L.J. No. 45. The Court of Appeal not only continues to apply an objective standard of "fairness" on any comment under this defense but also, through the issue of malice, imposes what amounts to an editorial "duty of fairness" on the CBC (and presumably other media) because of its enormous power.

Documentary Probed Safety of Heart Medication

The two cases arose out of a CBC public affairs program, *the fifth estate*, broadcast to some 1.4 million viewers in February 1996. The hour-long investigative documentary, entitled *The Heart of the Matter*, focused on the role of Canada's Health Protection Branch ("HPB") in a controversy over the safety of widely prescribed heart medications known as calcium channel blockers ("CCB's"), particularly nifedipine, manufac-

tured by major drug companies such as Pfizer and Bayer. A March 1995 study suggested that short-acting CCB's might pose a danger to heart patients, and the issue was whether more recently introduced longer-acting CCB's might lead to similar problems. The HPB, which had approved both forms of the drug, sought to provide advice to Canadian physicians on the issue and ultimately released a letter to doctors in January 1996, taking a cautious approach based on advice of an ad hoc advisory committee ("Committee"). The two plaintiffs were well known medical experts appointed by the HPB to the Committee. The CBC documentary was proposed and led by a freelance producer who had written two books critical of the HPB and its relationships with the drug industry. Central to the production was a classic whistle-blower, a senior HPB physician who resigned in January 1996 over the agency's

handling of this issue and other matters.

The Court of Appeal . . . imposes what amounts to an editorial "duty of fairness" on the CBC (and presumably other media) because of its enormous power.

Two Doctors Sued CBC

The first plaintiff, Dr. Martin Myers, was an academic cardiologist at a Toronto teaching hospital and an expert on hypertension. On behalf of Bayer, he had conducted a study to advise physicians how to switch patients from short-acting to long-acting nifedipine and met with the HPB in December 1994 concerning this study, at the invitation of Bayer's Canadian subsidiary. When invited to join the Committee, he pointed out his previous activities for drug companies but was asked to join in any event.

The other plaintiff, Dr. Frans Leenen, was also a medical researcher and cardiologist with the Ottawa Heart Institute. He was a world-recognized expert on hypertension and was on the advisory board of Pfizer Canada. His position on nifedipine was much the same as Dr. Myers': while the short-acting version was detrimental to patients with coronary artery disease, there was limited evidence with respect to the longer-acting formulation and existing guidelines should continue to be followed at this time.

He was appointed as chair of the Committee and prepared the first draft of the letter that was eventually sent

(Continued on page 45)

Canadian Appellate Court Affirms Large Libel Verdicts Against Canadian Broadcasting Corp.

(Continued from page 44)

out, with changes, by the HPB to Canadian physicians. However, with four others, he had earlier signed a letter concerning nifedipine sent by Pfizer Canada to physicians following the March 1995 study. Subsequent to the release of the HPB letter, he took up an invitation to attend a Pfizer advisory board meeting in Egypt to discuss future drug development, which was referred in the broadcast as a “cruise on the Nile”.

Claimed Broadcast Implied Dishonesty

Both these cases were based on libel by implication. The two trial judges found innuendo meanings that each doctor was dishonest, advocating continued use of the drugs despite knowing they were dangerous and, accordingly, benefiting the drug companies with which each was associated. The judges held that the program misled viewers on the dangers of longer-acting CCB’s and misrepresented the plaintiffs’ views and activities on the Committee. Both judges found that in order to support an erroneous thesis concerning the HPB and the role of the plaintiffs, the CBC deliberately simplified their views and presented them as “bad guys” in a “good guy/bad guy” scenario. The Court of Appeal concurred in this based on its own viewing of the videotape. The Court put it as follows:

What is complained of is that by a sophisticated “cut and paste” process Myers [and also Lennen] was portrayed as one of the bad guys, largely by the use of his own statements. The complaint is not that his words or that any of the statements made are false or defamatory in their true and natural meanings, but rather that “the overall impression created by the words and the images is alleged to be defamatory.

Qualified Privilege Defense Rejected

In both cases, the CBC raised qualified privilege on the basis of the common law approach favored by the House of Lords in *Reynolds*. Despite the fact that *Reynolds* was referred to in both trial judgments, the Court of Appeal made no attempt whatsoever to consider or apply the *Reynolds* analysis. In essence, both trial judges found there

was no “duty” to communicate the information involved. This was based on their view that the broadcast was wrong in its allegations. Therefore, while the broadcast might be *of* public interest, it was not *in* the public interest, and further, there was no urgency involved. The *Leenen* trial judge found that the CBC was merely trying to sensationalize an issue and incited panic among users of CCB’s, which was antithetical to the public interest. No attempt was made by the CBC to revisit *The New York Times v. Sullivan* defense, which had been firmly rejected by the Supreme Court of Canada in *Hill v. Scientology*.

Comment Not “Fair”

The CBC’s main defense was fair comment. In view of the draconian nature of the defense of justification, requiring the defendant to prove the implied meanings complained of are true, and the limited availability of qualified privilege in Canada, the defense of fair comment is extremely important and is generally given a generous approach when public affairs are at issue. As long as the statements or imputations can be reasonably viewed as opinions on matters of public interest, they are protected provided the underlying facts can be proven true. The defense is defeated if the plaintiff can establish malice, but the standard of such proof has been set quite high historically.

In *Reynolds*, one of the Law Lords suggested that the epithet “fair” is now “meaningless and misleading.” As long as the opinion is relevant to the facts addressed, then, “however exaggerated, obstinate or prejudiced,” it can be protected as long as it was honestly held, whether by a “crank, enthusiast... [or] reasonable person.” An objective standard of fairness, as traditionally required, was specifically rejected, and the suggestion was made that “fair” be dropped from the defense’s name altogether.

Not so in Ontario, apparently. In the most disturbing part of its ruling, the Court quotes extensively from the *Leenen* trial judgment on this issue:

(Continued on page 46)

Canadian Appellate Court Affirms Large Libel Verdicts Against Canadian Broadcasting Corp.

(Continued from page 45)

One of the elements of fair comment, of course, is fairness. If it is found that the comment is unfair, the defense fails. In the present case, the defendants argue that they did provide the viewer with a balanced debate. I disagree. This program, from its inception, was slanted in one direction. Throughout, the critics of CCB's were treated in a positive light, while the so-called defenders were treated in a negative way. Fairness would require that the viewers be presented with both sides of the argument in a balanced way. . . . Applying the objective test, which I must, I cannot conclude that the views presented were honestly held. And looking at the matter subjectively, I cannot conclude, despite their assertions to the contrary, that the defendants honestly believed what they were saying.

Leenan v. CBC, Supra, at [15]

Appears to Require "Editorial Balance"

There were other means by which the Court of Appeal could have disallowed the defenses of fair comment. In *Leenen*, the trial judge ruled that the facts involved were not proven true, and in both cases, the trial judges made strong findings of malice against the CBC. By specifically referring to "fairness," the Court appears to be setting a standard that obliges media to travel the middle of the road and to balance viewpoints whenever they may not be able to prove the truth of any possible defamatory implication. Obviously, this has important implications for investigative journalism and represents yet another strike against the media dealing with what is already a disadvantageous law of libel. No reference whatsoever was made to potential implications for freedom of expression or the *Canadian Charter of Rights and Freedoms*.

In essence, the Court found that in both cases the CBC omitted facts or presented them in a misleading way so that the resulting imputations were incapable of

being true. As a result, the broadcast was unfair to the plaintiffs, and this led directly to findings of malice. These focused on the CBC's tactics and alleged bias in preparing the program, which meant the plaintiffs did not have a fair opportunity to defend themselves. However, the defendants' conduct of the litigation and continuing support for their beliefs about the plaintiffs were also penalized by the high damage awards.

Decision Will Chill Investigative Journalism

The implications for investigative journalism are most disconcerting. In particular, the already difficult and unwieldy process of preparing television documentaries has been thrown yet another roadblock. Any attempt to pursue a particular thesis on a matter of public affairs can draw into the mix individuals whose reputations may be harmed. Knowing that a judge (and jury) may pour over anything used or not used in the broadcast to see whether the account is both fair and complete inevitably invites self-censorship. The result may well be middle-of-the-road or complex reports more likely to produce somnolence than concern or excitement. The challenges of tackling a technically difficult area, such as drug approval and use, may mean that critical commentaries on these subjects are never aired. Once again, protection for individual reputations trumps free speech concerns in Canada.

The Canadian Broadcasting Corp. was represented by M. Philip Tunley, David Leonard, Christine Lonsdale and Stanley Fisher Q.C; Dr. Leenen, by Richard Dearden and Alan Gardner; and Dr. Myers, by Christopher Ashby.

Brian MacLeod Rogers is a barrister and solicitor practicing media law in Toronto, Ontario and past president of Ad IDEM (Advocates In Defence of Expression in the Media) in Canada (www.adidem.org).

Hague Convention on Jurisdiction and Judgments May Endanger Free Speech on the Internet

By Kurt Wimmer

Central to any libel dispute are the practical questions of how the First Amendment applies and where a publication can be sued. Imagine the impact of a change in law that would allow a U.S. media outlet to be sued under the law of a country with scant protections for free speech — and have a judgment of the courts of that country enforced against the publisher, regardless of whether it has any contact with the country.

U.S. Began But Now Opposes Treaty

This chilling scenario was addressed from June 6 through June 20 by representatives from 52 countries who convened in the Hague for the first part of the nineteenth Diplomatic Session of the Hague Conference on Private International Law. The subject, of course, was the proposed Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The United States initiated these treaty talks in 1992, hoping to obtain more equitable treatment of U.S. civil and commercial judgments abroad. Now, in part because of the subsequent growth of international e-commerce, the U.S. has opposed certain aspects of the treaty more strongly than any other Hague member. To date, negotiators have been unable to agree on the final form of any major treaty provisions.

The U.S. currently is not a party to any treaty governing the recognition and enforcement of civil and commercial judgments in other countries, so European courts rarely recognize or enforce U.S. judgments. The Convention would benefit some U.S. litigants by affording U.S. judgments more international respect. However, the Convention could require U.S. publishers and Internet providers to be globally liable for information-related torts that might be enforced in jurisdictions outside the U.S. U.S. citizens could be held liable for posting on-line information that is protected by the First Amendment in America but is regarded as defamatory or a copyright infringement

in another Hague member country. Arguably, if the Hague Convention were ratified, it could limit freedom of expression to speech that is permissible in every Hague member country -- a lowest common denominator approach for speech on a global medium.

The Hague Convention on Jurisdiction

The proposed Hague Convention strives to globalize civil and commercial judgments without outlining specific substantive laws that signatories must follow. The treaty would (1) create jurisdictional rules governing international lawsuits and (2) provide for the recognition and enforcement of judgments by courts of member States. Under the proposed Hague Convention, if a speech offense is

[T]he Convention could require U.S. publishers and Internet providers to be globally liable for information-related torts . . .

committed online, the complainant can file suit basically anywhere. This is a mixed convention, meaning that a white list enumerates the grounds upon which the court of origin must assume jurisdiction, a black list

enumerates grounds upon which it must not assume jurisdiction, and a gray list enumerates grounds for jurisdiction that have neither been approved or disapproved. Article 10 of the draft Convention articulates the white list for tort actions:

1. The plaintiff may bring an action in tort or delict in the courts of the Contracting State
 - a. in which the act or omission that caused injury occurred; or
 - b. in which the injury arose, unless the defendant establishes that the [defendant] could not reasonably have foreseen that the act or omission would result in an injury of the same nature to the State.
2. The plaintiff may also bring on action in accordance with paragraph 1 when the act or omission, or the injury is threatened.
3. If an action is brought in the courts of a Contracting State only on the basis that the injury arose or is

(Continued on page 48)

Hague Convention on Jurisdiction and Judgments May Endanger Free Speech on the Internet

(Continued from page 47)

threatened there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the [plaintiff] has its habitual residence or seat in that State.

In short, a plaintiff can bring an action in tort in the State where the act or omission that caused the injury occurred or in the State where the resulting injury occurred. The court's jurisdiction would be limited to the injury, unless the injured party also resides in that State, in which case the court may have general jurisdiction.

An example can illustrate the potential difficulty of allowing tort actions against Internet publishers in the State where the injury occurred. When an individual in Germany finds content online that a news site placed online in Canada, the news site's speech injures the individual in Germany. Under the provisions of the Hague Convention, the individual could bring suit against the news site in either country, Germany or Canada.

This would not seem particularly problematic but for the fact that even when the news site's speech is legal in Canada and every other country where it intends to direct its speech, that speech may be considered defamatory or otherwise illegal in Germany. Thus, one Hague member country's restrictions on speech may effectively limit speech in every Hague member country because where one country would have jurisdiction to enter judgment under the terms of the Convention, the Convention would require every signatory country to recognize and enforce the original judgment absent specific exceptions.

Recognizing and Enforcing Judgments

Article 23(a) of the Convention defines "judgment" as "any decision given by a court... including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognized or enforced under the convention." The key principle of the proposed treaty is that all judgments issued in any signatory State shall be recognized in all other signatory States. Judgments would be enforced even in

countries that have no link to a particular dispute, as long as the court issuing the judgment had jurisdiction under the terms of the Convention.

Article 25 establishes three conditions for the recognition or enforcement of a signatory country's judgment. First, the judgment must be based on a ground of jurisdiction provided for in Articles 3-13 or be consistent with such a ground. Second, the judgment must have *res judicata* effect in the State where it originates. Third, the [judgment must be enforceable in the State initially rendering the judgment.

The proposed convention also identifies exceptions to the general rule of honoring judgments. Article 28 articulates six grounds on which a State may refuse to recognize or enforce judgments:

- a. proceedings between the same parties and having the same subject matter are pending before a court of the State addressed and those proceedings were the first to be instituted in accordance with Article 23;
- b. the judgment is irreconcilable with a judgment rendered [between the same parties], either in the State addressed, or in another State, provided that in the latter case the judgment is [capable of being] recognised or enforced in the State addressed;
- c. the judgment results from proceedings incompatible with fundamental principles of procedure of the State addressed, including the right of each party to be heard by an impartial and independent court;
- d. the document which instituted the proceedings or an equivalent document... was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence;
- e. the judgment was obtained by fraud in connection with a matter of procedure;
- f. recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

Judging from debates about the Convention, the public

(Continued on page 49)

*[O]ne Hague member country's
restrictions on speech may
effectively limit speech in every
Hague member country.*

Hague Convention on Jurisdiction and Judgments May Endanger Free Speech on the Internet

(Continued from page 48)

policy exception to recognizing and enforcing the judgments of other States, section (f), is probably the most important provision of Article 28. Because the U.S. is not currently bound by any treaty requiring the reciprocal recognition of judgments, it already relies on national policy to defend against the enforcement of international judgments that would violate the U.S. Constitution. See *Matusevich v. Telnikoff*, 877 F.Supp. 1 (D.D.C. 1995). In theory, the Article 28 public policy exception would allow the U.S. to continue refusing to enforce judgments that contravene U.S. policy as embodied in the Constitution, but it is not clear how broad the exception would be in practice. And U.S. public policy would not protect a U.S. media company with assets in one or more Hague signatory countries from having judgment rendered in one and enforced against assets in another, all without a stop in U.S. courts.

Debates over the Hague Convention

Although the proposed Convention's terms for jurisdiction over tort claims and provisions for the recognition and enforcement of judgments are the most contentious with respect to speech issues, other jurisdictional provisions have proved controversial as well. The proposed articles have very different ramifications for different countries and for different economic interests within a given country as well. As a general matter, U.S. delegates oppose the draft Convention. Within the U.S., however, copyright holders and consumer groups have expressed support for the proposed language.

There are two main reasons for U.S. objections to the Convention. First, delegates worry that leaving companies open to suits from all over the world will stifle incentives to expand e-commerce and hinder long-term economic development. Second, delegates fear that foreign legal judgments will undermine free expression on the Internet.

Although the U.S. has powerful market influence and is still the dominant force guiding the development of the Internet, it has had little success in modifying the treaty. However, as Representative Billy Tauzin (R-La.) recently stated, "[t]he U.S. Congress will not sit back and watch e-

commerce become hostage to old modes of thinking." *Impediments to Digital Trade: Hearings Before the House Subcomm. on Commerce, Trade and Consumer Protection*, May 22, 2001. Negotiations already have been extended several times beyond the original anticipated date of completion, and it seems likely that the U.S. will continue to delay final agreement on the provisions of the Convention.

U.S. Constituents Divided

Diverse American business interests, however, have yet to resolve their disagreement over the appropriateness of exposure to liability for tort actions across the globe. Owners of intellectual property generally favor the treaty as presently drafted. The treaty would effectively protect their interests by applying the copyright law of whichever signatory country provides the strongest protection for these interests.

Copyright holders are hopeful that the agreement will enable them to crack down on ever-more-complex infringements in new, more stringent ways. This group opposes proposals to exclude intellectual property from the scope of the Convention.

Consumer groups also favor the proposal, arguing that consumers should always be able to seek justice in the courts of their home jurisdiction in the electronic marketplace. Consumers arguably have a considerable disadvantage when they are subject to the jurisdiction of distant courts. Consumer advocates ultimately seek the application of local laws for on-line customers and further argue that it should be easy to have local judgments against foreign businesses easily recognized and enforced in foreign jurisdictions.

Businesses tend to object to the Convention because of the cost and difficulty of complying with consumer protection and privacy laws in different countries. Business interest groups thus prefer to adjudicate claims through alternative dispute resolution. The proposed treaty would allow choice of forum clauses in business-to-business agreements, but it would not recognize such clauses in business-

*[The U.S.] has had little success
in modifying the treaty.*

(Continued on page 50)

Hague Convention on Jurisdiction and Judgments May Endanger Free Speech on the Internet

(Continued from page 49)

to-consumer transactions.

Finally, and most significantly, other groups oppose the proposed treaty on grounds that it would infringe on American civil liberties. In light of the strong protection for speech afforded under the First Amendment, U.S. Internet service providers have not been responsible for monitoring the content of material placed on the internet through their servers. Under the Hague Convention, not only could a plaintiff potentially sue a publisher for placing on-line material considered illegal in the plaintiff's country in that country and have the judgment enforced in the U.S., but the plaintiff could also sue an ISP. ISPs that do global business fear that, under the proposed Convention, they would be forced to monitor every transmission moving over their network, constantly scanning for copyright violations, libel, defamation, and other speech infractions.

Thus, although U.S. delegates to the Conference oppose the language of the proposed treaty, the conflicting views of interest groups within the U.S. demonstrate the breadth of implications that would follow from the proposed Convention. That being said, these concerns reflect only a small fraction of the debates occurring among delegates to the Hague Diplomatic Conference.

The Convention's Impact on Speech

Opponents of the treaty argue that, if widely adopted, it will "lead to a great reduction in freedom, shrink the public domain, and diminish national sovereignty." James Love, *Hague Diplomatic Conference ends, Badly for now*, NOTES ON INFORMATION POLICY ISSUES FROM CPT, June 20, 2001, <http://legalminds.lp.findlaw.com/list/info-policy-notes/msg00124.html>. If ratified, the draft Convention would cripple the protection of speech in countries that value the exchange of information. Virtually any website can be accessed virtually anywhere in the world, and nations offended by certain types of speech could subject distant Internet speakers to legal actions. The Convention is bound to have an impact on free speech in the U.S., even

if the U.S. relies on the treaty's exceptions.

Supporters of the Hague Convention argue that the Internet will not be reduced to the lowest common denominator and that speech will remain protected in the U.S. because the public policy exception will mean the U.S. does not have to recognize and enforce judgments in conflict with the First Amendment. Even so, American delegates to the convention and free speech advocates fear that U.S. citizens could lose their constitutional right to freedom of expression if every website has to ensure that it is following the narrowest laws throughout the signatory countries.

More importantly, critics of the public policy exception note that these exemptions do not go far enough to prevent forum shopping or protect U.S. law. A primary reason the

[T]he conflicting views of interest groups within the U.S. demonstrate the breadth of implications that would follow from the proposed Convention.

public policy exception may not be very strong in practice is that a country may have difficulty refusing to enforce a judgment on public policy grounds if it wants its own judgments enforced. The U.S. initiated Hague

treaty negotiations in 1992 precisely because it wanted other countries to more consistently enforce its judgments. Thus, it would be somewhat ironic for the U.S. to now sign a treaty originally intended to increase recognition of U.S. judgments when it has evolved into a treaty that requires the U.S. to risk further non-recognition of its judgments simply to protect liberties that were guaranteed in America before treaty negotiations began.

Furthermore, U.S. companies will not be able to rely on the public policy exception in many Internet cases. A judgment, for example, can be enforced against an ISP or a publisher in any country where that provider has assets. Third party countries where defendants have assets but with no policy interests will be required to cooperate with the judgment.

Next Steps: On to 2002?

In light of the concerns discussed above, it is unclear how the U.S. will resolve its concerns about the proposed

(Continued on page 51)

Hague Convention on Jurisdiction and Judgments May Endanger Free Speech on the Internet

(Continued from page 50)

Convention. During the two years prior to the June conference, the U.S. and many other countries consulted with the public and with private industry to develop a better understanding of the nuances of the debate. Because many countries sought input, many opinions have been articulated, meaning that Hague negotiators have to face the extremely difficult task of reconciling the different views.

According to Rep. Tauzin, the U.S. State Department and other interest groups have demonstrated a willingness to either address the existing flaws in the proposed articles or to walk away from the Hague Convention altogether. The U.S. could always simply refuse to sign the treaty produced by the negotiations it initiated almost a decade ago, and because the U.S. is home to so many Internet companies, its refusal to participate would weaken the treaty substantially.

The document that will result from the first part of the June 2001 Diplomatic Conference will be significantly more complex than the 1999 draft. It will offer alternative texts for nearly every provision of the proposed Convention. In fact, at present there are 111 documents proposing alternatives for the treaty's 40 articles. Negotiations have revealed that it will be extremely difficult to draft specific provisions addressing jurisdiction about which the member countries will be able to agree.

The second part of the nineteenth Diplomatic Session will likely occur late in 2002. This will theoretically be the final meeting of the Convention. Opinions differ about how close the treaty is to ratification at this point. The chief U.S. negotiator, Jeffrey Kovar of the U.S. State Department, has said publicly that he does not think the treaty is close to being ratifiable. Others believe approval is likely. How the U.S. resolves the conflicts between the various interest groups — owners of intellectual property, the media and consumers' groups — will largely determine whether the Hague Convention will go forward and have a broad impact in the global marketplace for information.

Kurt Wimmer is a member of Covington & Burling, and is now located in the firm's London office. He is also Chair of the LDRC Cyberspace Committee.

Publish And Be... Imprisoned

UK Court's Lifetime Injunction Bans Identification of Released Bulger Killers

By Amber Melville Brown and Mark Stephens

In January of this year, English legal history was made when Dame Elizabeth Butler-Sloss, President of the Family Division of the High Court, accepted the proposition that the media should be permanently enjoined from publishing any material which might identify two convicted killers and their whereabouts upon their release. *Venables & Thompson v. News Group Newspapers Ltd, Associated Newspapers Ltd & MGN Ltd.*, Case Nos: HQ 0004986 & HQ 0004737 (High Court Jan. 8, 2001) (available through www.courtservice.gov.uk). In short, the court found that vague and unspecified threats of vigilante violence justified a permanent prior restraint on the publication of true and newsworthy information.

An Infamous Crime

The backdrop to this severe measure was the abduction, torturing and horrific killing, eight years ago, of the toddler James Bulger, by then 12- and 13-year-old John Venables and Robert Thompson. The murder had a devastating effect on the families of all concerned. It also impacted deeply on the public consciousness, not least because moments from the final hours of the tragic toddler's life, as he was led through the shopping centre with his killers, were captured on closed circuit television.

Killers' Rights to Privacy

This case has also led to uniquely rather robust steps being taken by the court to protect the killers' right to privacy, an emerging area of law in the UK because of the recent incorporation of the European Convention on Human Rights into domestic law. Venables and Thompson have been given new identities and have been moved to new locations. It will be a breach of the judge's order, and thereby a contempt of court, punishable by an unlimited fine, and in severe circumstances a

(Continued on page 52)

Publish And Be... Imprisoned

(Continued from page 51)

term of imprisonment, to publish information or clues that might lead to the jigsaw identification of the now 18-year-old men.

Contempt Powers

The power to punish for contempt of court, based in common law and enshrined in the Contempt of Court Act 1981, is the means by which the legal system of England and Wales protects itself from publications which might unduly influence the result of litigation and is a defense to the UK's abiding fear of trial by media. It is the responsibility of the Attorney General (A.G.), the government-appointed and highest ranking lawyer, to decide to charge a publication with contempt. In cases where the contempt was deliberate, the editor of the publication himself may be prosecuted and could find himself behind bars. Where this is not the case, the A.G. can ask the court to impose an unlimited fine on the publication in question.

Risk of Vigilante Justice

In this case, the injunction was granted because of "the almost unique circumstances which put Thompson and Venables at risk as there was a real and strong possibility that their lives would be in danger if their identities became known," according to Dame Butler-Sloss. Such has been the public outcry at what happened that there is a perceived threat that, once released, they would be tracked down and killed by those seeking to take the law into their own hands.

The vilification of the killers has been exacerbated by a number of factors. No doubt the tender age of the little victim played a large part, as did the horrific way in which he was tortured and killed; indeed, the police have deliberately not released full details of the manner of his torture and killing. The age of the killers themselves may also, bizarrely, have played a considerable part, serving to inflame hatred of them. But perhaps the most important fac-

tor is that they will have served only eight years in secure accommodation for their horrific crime, the maximum allowed for incarceration for juvenile offenses.

Risk to Killers Outweighs Freedom of the Press

In coming to her decision, Dame Butler-Sloss balanced the right to life guaranteed under Article 2 of European Convention of Human Rights, incorporated into UK law by the Human Rights Act 1998, with the right to freedom of expression — in this case the right to receive and impart information on behalf of the media, guaranteed by Article 10.

The court order was widely disseminated to and reported by news organizations but to date remains unchallenged. The Attorney General reminded news organizations at periodic intervals of the order by news wire releases. The decision was at least in part reached because of the threats made by some tabloid publications to expose the whereabouts and identities of the boys, thus exposing them to risk of vigilante attack.

Contempt Proceedings Against the Manchester Evening News

On the eve of their release, Venables and Thompson were held in two particular institutions which were described in the *Manchester Evening News*. On the day of publication, the *Manchester Evening News* was contacted mid-afternoon by the A.G.'s Office about the paper's apparent breach of the Court Order and threatened with contempt proceedings. The newspaper changed its final print edition but failed to change its Internet edition, which we were able to read online at 10 p.m. that same evening. The alleged breach described (without naming) the locations of Thompson and Venables in sufficient detail to allow anyone of reasonable aptitude to find out the locations in which they were being held.

(Continued on page 53)

It will be a breach of the judge's order . . . to publish information or clues that might lead to the jigsaw identification of the now 18-year-old men.

Publish And Be... Imprisoned

(Continued from page 52)

As is the usual practice, the A.G. then formally communicated his provisional view that the *Manchester Evening News* was in contempt of court and asked for their representations. The purpose in these representations is to ascertain whether or not proceedings for contempt should be launched against the newspaper-owning company, or that company and the editor. Traditionally, proceedings have been brought against the editor — who would face an unlimited fine and a period of unlimited imprisonment as a potential sanction — only where there is a cynical and calculated attempt to breach the court order. In this case, following representations, the A.G. clearly accepted that there was no such cynical and calculated motive, merely that the order had apparently been breached, and therefore he has launched contempt proceedings against the newspaper's owners without joining the editor. In the event of a successful prosecution, legal commentators expect a fine on the order of £40,000.

[T]he High Court gave no priority to freedom of the press and the public interest this freedom serves.

Curtailing Free Press Rights

The threats made to the released killers are no doubt a matter of concern but, as the newspapers argued to the court, “if there were truly threats it was the responsibility of the authorities to deal with the threat and not by way of injunction against the Press.” This would be the approach in the U.S. given the protections of the First Amendment. Here, however, the High Court gave no priority to freedom of the press and the public interest this freedom serves. Instead, applying the balancing approach, it subordinated freedom of the press to Venables's and Thompson's personal interest in establishing their post-prison lives free of publicity.

The ability of the media to cover freely court proceedings and matters of great public interest in the United Kingdom is becoming ever more severely curtailed. Most troubling is that the curtailment, at least in this case, was helped rather than hindered by the European Convention on Human Rights.

Injunction Applies Abroad

Most comment about the wide-ranging injunction against the media has focused on the ability of the injunction itself to protect anonymity in the face of news organizations outside the jurisdiction and publication on the Internet. This has pitched, on the one hand, the ingenuity of the English judiciary against, on the other, the legal brains of international media organizations and the rather anarchic Internet community.

A Spanish news organization, in breach of the court's order, put up a bounty of £50,000 for information leading to the identification of John Venables and Robert Thompson but quickly backed off the idea when their London lawyers explained that the English courts could enforce the order against their London bureau or fine them a money judgment and then register it for enforcement under the Treaties between European Union States.

Perhaps most interesting is how the Internet community will respond. Clearly, Internet service providers will not know what is on their servers, but when publications are drawn to their attention, what will non-UK ISPs do? Will they remove or block access to information from their servers, as they have done previously at the request of the British security services when a dissident English spy is said to have endangered lives by revealing their details over the Internet? Or, will ISPs stand by their rights under the First Amendment to continue to publish and be damned?

Injunction Modified for ISPs

On July 10, 2001, Dame Butler-Sloss agreed that the original version of the injunction was “inappropriate” for the Internet. This decision was taken after a petition to the court by Internet service provider (ISP) Demon Internet, who argued that it would be unfair for ISPs to be automatically found in contempt, even if they were unable to prevent their customers from reading the material which was

(Continued on page 54)

States Expand “Son of Sam” Laws

Both New York and Texas have amended their “Son of Sam” laws to expand the scope of income that crime victims may claim from convicted criminals. California amended its statute last year, although the Supreme Court in that state is considering a case challenging the constitutionality of the entire statute.

California expanded its law to cover convict’s income from the sale of crime memorabilia. 2001 Cal. Stat. chap. 261. The California bill was the result of efforts by Marc Klaas, who discovered that Richard Allen Davis — the man convicted of the 1993 murder of his 12-year-old daughter Polly — was offering autographed photos for sale on the Internet.

Texas Gov. Rick Perry signed a similar bill on May 15, 2001. Signature Message, SB 795 (May 16, 2001). “No victim should be subjected to reliving the horrors of crime,” Texas Governor Rick Perry wrote in his signature message, “least of all because of the sale of items by criminals who attempt to capitalize on the heinousness of their actions.”

And on June 25, New York Gov. George Pataki signed a bill to expand the state’s law to expand the ability of crime victims to receive compensation from convicted criminals, whatever the source of the criminal’s income. Previously, New York’s law limited crime victims to recovering money which represented “profits from the crime.” The new law also imposes penalties for failure by either the criminal *or those paying the funds* to report such income to the state, and extends the statute of limitations during which a victim may sue the perpetrator from seven years after conviction to ten years. 2001 N.Y. Laws Chap. 62.

Forty states have passed “Son of Sam” laws, starting with New York in 1977. These statutes generally provide that money received by a convicted criminal from selling rights to information regarding the crime must be given to the victims of the crime.

The constitutionality of these laws is in doubt, however, after the U.S. Supreme Court struck down New York’s original law on First Amendment grounds in *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991). After this ruling New York and California amended their laws to cover all income, not just from depictions of the crime. Other states have been less ardent about amending their laws to comply with the ruling.

California’s Second Court of Appeal upheld that state’s amended law in a 1999 decision, *Keenan v. Superior Court*, 72 Cal. App. 4th 681, 85 Cal. Rptr. 2d 417, 27 Media L. Rep. 2012 (Cal. Ct. App., 2d App. Dist., Div. 1 1999). See *LibelLetter*, July 1999, at 33. The California Supreme Court accepted review, 983 P.2d 727, 88 Cal. Rptr. 2d 775 (1999), see *LibelLetter*, Sept. 1999, at 7, and has been fully briefed, but has not yet heard oral argument in the case.

Publish And Be... Imprisoned

(Continued from page 53)

banned from publication.

After hearing all the parties, the judge agreed to make changes to the order which will mean that ISPs will not be in breach of the order, provided that they “take all reasonable steps” to prevent publication of the banned material. In other words, they will only be liable if they have actual knowledge of the publication and fail to take reasonable steps to prevent it.

This is a significant step for ISPs, and a sensible one, given that the Defamation Act 1996 provides a similar defense for ISPs for the publication of defamatory material (section 1(3)(e)). What “reasonable steps” will be held to be, and how this will work in practice, remains to be seen, but this is certainly a move which no doubt IPS will warmly welcome.

Amber Melville-Brown is head of defamation, and Mark Stephens is head of media and international, at Finers Stephens Innocent solicitors, London.

TV News Exposes Sex Offender in Newsgathering

Texas Claim Against Media for Mailing Postcard Fails

By Laura Lee Stapleton

A Texas appellate court affirmed the grant of summary judgment for a media defendant in a case involving the relatively rare circumstance of libel and other claims based upon the newsgathering by the defendant and not the publication. The case was filed by a registered sex offender over a postcard confirming the sex offender's address that was sent by the news organization to the plaintiff at a community mailbox. The ruling is published at *Provencio v. Paradigm Media, et. al.*, 44 S.W.3d 677 (Tex. App.—El Paso 2001, no writ).

The Court held that even if the return address on the postcard could be construed as misleading in that it suggested a public agency as the sender, it did not defeat the defense of truth, and the non-libel claims failed because the statements concerning the offender were substantially true.

Mailing of Postcard to Sex Offender by Media

In Texas, like several other states, sex offenders are required by state law to register as such. The offender's vital information, including the offender's current address, is kept in the Texas Department of Public Safety (DPS) Registered Sex Offender Database. The registration information is deemed public and is made available to the community through the internet. In the course of investigating whether registered sex offenders were moving without updating their address with the DPS, a Paradigm reporter sent a postcard via U.S. mail to convicted sex offender Armando Provencio at the address listed in the database. The return address listed on the card read:

Texas Department of Public Safety
Registered Sex Offender Address Verification
P.O. Box 13012
Austin, Texas 78711-3012

The postcard read:

DO NOT FORWARD

ATTENTION: REGISTERED SEX OFFENDER

THE PURPOSE OF THIS STATEWIDE DPS REGISTERED SEX OFFENDER SURVEY IS TO VERIFY THE REQUIRED ADDRESS INFORMATION YOU SUBMITTED AT THE TIME OF YOUR REGISTRATION.

THE CONDITIONS OF REGISTRATION REQUIRE ALL REGISTERED SEX OFFENDERS TO HAVE THEIR CURRENT ADDRESS ON FILE WITH THE TEXAS DEPARTMENT OF PUBLIC SAFETY.

IF THIS IS STILL YOUR CURRENT FULL-TIME RESIDENCE, CHECK BOX AND RETURN IN A STAMPED ENVELOPE. YES THIS IS STILL MY RESIDENCE

ATTENTION: CURRENT RESIDENT

IF THE ADDRESSEE NO LONGER LIVES AT THIS RESIDENCE, PLEASE RETURN TO POSTAL DROP (NO POSTAGE REQUIRED)

At the time, the Provencio lived in a trailer park with a community mailbox. His neighbors recovered the card before he did, learned of his sex offender status and threatened him with bodily harm. He moved.

Provencio sued Paradigm for libel, intentional infliction of emotional distress, fraud, negligence per se, negligence, and false impersonation of a public servant. He claimed that by mailing the postcard survey, Paradigm had falsely impersonated the Department of Public Safety and tampered with a government record.

Quick Resolution at Trial Court Level

Paradigm filed its summary judgment along with its answer in the case. The primary basis for summary judgment was the statements made in the postcard were true or substantially true. And, Paradigm argued, since all of the other claims were based upon the same statements, they too should fail. The trial court agreed and granted summary judgment.

(Continued on page 56)

Sex Offender's Claim Against Media for Mailing Postcard Fails

(Continued from page 55)

Appellate Court Relies Upon Truth

Provencio contended that Paradigm had impersonated the DPS through the return address on the postcard and this should preclude any protection from a truth defense. He contended the "gist" of the postcard was that the DPS was conducting a survey to verify sex offenders' addresses and because it was actually Paradigm conducting the survey, the statements in the postcard as a whole were false. He also claimed whether Paradigm violated criminal laws should be a question for the jury.

The summary judgment evidence established that the return address listed was not intended to appear as though the survey came from DPS, but rather to indicate the purpose of the mailing, which was to verify addresses contained in the DPS database. In ruling that substantial truth had been established, the Court cautioned that it was not "implying that we approve of investigative reporting methods that included deceptively suggesting the postcard came from a law enforcement agency."

It found, however, that the possible misleading nature of the return address was of secondary importance and did not defeat the truth defense. The decision centered around the fact that it was true Provencio was a sex offender, and it was true he was required to register as such. The Court also focused on the fact that Paradigm relied on public information in conducting the survey. The Court could not see how the content of the postcard would have been less damaging had the return address been different.

The Court then decided that Provencio could not circumvent the constitutional protections provided speech by pleading other torts based upon the same statements. The same protections that the First Amendment affords defendants from libel claims also protect them from non-libel claims based upon the same publication. Thus, because Provencio's libel claims failed so too did his non-libel claims.

Laura Lee Stapleton is a partner in the Austin office of Jackson Walker, L.L.P. She represented Paradigm Media in this case. The plaintiff was represented by Colbert N. Coldwell of Guevara, Rebe, Baumann, Coldwell & Reedman, L.L.P. of El Paso.

SAVE THE DATES . . .

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with

**Ben Bradlee
Diane Sawyer
Mike Wallace**

**Walter Isaacson,
as moderator**

**Wednesday,
November 7th, 2001**

Sheraton New York Hotel & Towers

**ANNUAL
DCS BREAKFAST**

**Friday,
November 9th, 2001**

Sheraton New York Hotel & Towers

Court Rejects Broad Rule 26(c) Protective Order

By Jay Ward Brown

A federal trial judge in Virginia has refused to enter a “standard” protective order requested by the defendant in a civil action. Instead, the court formulated its own order, adopting in large measure procedures proposed by The New York Times Company to protect the public’s access rights.

The case, *PBM Products, Inc. v. Mead Johnson & Co.*, No. 3:01CV199 (E.D. Va.), is a dispute between two manufacturers of infant formula over alleged false advertising that implicates the safety, efficacy and pricing of infant formula nationwide. Because of the significant public interest in the subject, The New York Times and other organizations had been covering the dispute long before the litigation commenced.

Shortly after PBM Products, Inc. filed suit, defendant Mead Johnson & Company moved for a protective order pursuant to Fed. R. Civ. P. 26(c)(7). The proposed order, like many entered by trial judges as a matter of course, would have vested in the parties discretion to designate discovery materials as “confidential” and prohibited their dissemination. In addition, the parties would have been authorized to file pleadings and other “confidential” documents under seal.

The New York Times Company moved to intervene. No matter how commonplace prophylactic protective orders have become, The Times pointed out, Rule 26(c) simply does not authorize a court to empower the parties to determine for themselves what materials are entitled to protection.

The Times also argued that the proposed order’s procedures for filing self-designated documents under seal would violate the public’s First Amendment and common law access rights. At least in the Fourth Circuit, courts generally are required to provide public notice, a public hearing and detailed findings before ordering closure or sealing.

In response, Mead Johnson’s principal argument was that because the court ultimately could reverse a decision by the parties to designate material as confidential or to file it under seal, the proposed order was appropriate. In addition, Mead Johnson contended that, especially given the Eastern District of Virginia’s “rocket docket,” requiring a document-by-document review of materials that a party believed constituted trade secrets simply would be impractical.

On June 8, Senior Judge Richard L. Williams ruled from the bench. Describing The Times as “just an overnight guest,” Judge Williams denied its motion to intervene on the ground that the relief he was fashioning would adequately protect the public’s access rights. At the same time, Judge Williams entered a protective order that adopted virtually verbatim The Times’s proposed procedures for filing material under seal and for dealing with deposition testimony.

With respect to the parties’ exchange of raw discovery materials, Judge Williams authorized the parties to determine for themselves in the first instance what qualifies for protection under Rule 26(c)(7). Judge Williams, however, also ordered that a party designating any material as confidential must be prepared to show both that it constituted a “legitimate trade secret” or “confidential research or development of commercial information,” and also that disclosure of the material “would cause irreparable harm” to the party. The order also authorizes challenges to such designations, and Judge Williams emphasized that a party found to have improperly designated materials as confidential should expect to pay the successful challenging party’s attorney’s fees and costs.

In short, having “lost” its motion to intervene, The Times nevertheless largely succeeded in ensuring that its reporters and others covering this case likely will have access to most of the materials exchanged by the parties in discovery. And Judge Williams’ order makes it unlikely that pleadings in the case will be filed under seal.

Particularly where the parties are able to present an agreed form of protective order to a willing judge, news organizations do not always have an opportunity to intervene before such an order is entered. But this case demonstrates that where the press has advance notice, a prompt motion to intervene can sensitize a judge to the public’s access rights and result in entry of a more reasonable protective order than would otherwise be the case.

The New York Times Company was represented by Jay Ward Brown of Levine Sullivan & Koch, L.L.P., in Washington, D.C. Mead Johnson & Co. was represented by Robert S. Bennett of Skadden, Arps, Slate, Meagher & Flom in Washington, D.C.

Survey of Teachers Shows Support For First Amendment In Principle But Not In Practice

The First Amendment Center and the Association for Supervision and Curriculum Development (ASCD) conducted a recent survey designed to reveal what public-school teachers and administrators think about the role of the First Amendment in schools.

The findings suggest educators support the First Amendment in principle but are wary about implementing it in the schools. Most educators think students have enough, if not too much, freedom and that restrictions are necessary. Sixty-six percent of teachers polled think students should not be allowed to report on controversial issues in their student newspapers without approval from school authorities; 92% support censoring t-shirts and 90% believe in filtering the Internet on school computers. But at the same time 77% of teachers polled think their school currently does a good job teaching students about the First Amendment and promoting First Amendment principles through school activities and policies.

Furthermore, although teachers show a greater knowledge of First Amendment principles than the general public (according to the 2001 State of the First Amendment Survey released by the First Amendment Center), they are surprisingly unaware of the rights guaranteed. While 73% were able to cite freedom of speech, only 22% could recall freedom of the press and 25% freedom of religion when asked to name specific rights guaranteed by the First Amendment. A meager 18% could recall the right of assembly/association and 6% the right to petition.

The study coincides with the launch of the First Amendment Schools Project, an initiative designed to transform how schools model and teach the principles of the First Amendment. The national project, a collaborative effort between the Freedom Forum's First Amendment Center and the ASCD will focus on creating consensus guidelines for addressing the First Amendment in schools; developing model schools where First Amendment principles are understood and applied; encouraging curriculum reforms that will enhance teaching about the First Amendment and increasing awareness among teachers and administrators about the meaning and significance of First Amend-

ment principles and ideals.

The survey, and additional information on the First Amendment Schools Project, is available at <http://www.freedomforum.org/templates/document.asp?documentID=13391>.

Annual "State of the First Amendment Survey" Shows Networks' Mistaken 2000 Election Projection Left a Lasting Impression on Public Opinion

The First Amendment Center's annual State of the First Amendment Survey, released last month, reveals that the 2000 presidential election may have had an impact on the public's perception of the press and the Supreme Court. The erroneous prediction that Al Gore had won the election compounded by the closed Supreme Court hearing, seems to have left a lasting impression on public opinion as reflected by the 2001 Survey.

Mistaken Election Predictions Have "Devastating Consequences"

According to the 2001 Survey, 64% of respondents believe people would be less likely to vote after hearing a news report projecting the winner of an election. The vast majority, 80% of those polled, believe television networks should not be allowed to project winners of an election while people are still voting — a big increase from the 70% who felt that way last year. Roughly half said they would favor an actual law barring news organizations from projecting a winner of a presidential election while people are still voting.

Since the 2000 election and subsequent Supreme Court hearing, there has also been a jump in the number who believe broadcasters should be able to televise Supreme Court proceedings from 73% of survey respondents agreeing last year to 77% agreeing this year.

(Continued on page 59)

Networks' Mistaken 2000 Election Projection Left Lasting Impression on Public Opinion

(Continued from page 58)

"If there is indeed that kind of cause and effect, there's a clear message for the news media here. A highly visible and reckless error — such as predicting the wrong winner in a presidential election — can have devastating consequences for the First Amendment," says Ken Paulson, executive director of the First Amendment Center. And the numbers produced by the 2001 Survey seem to show that there is a direct correlation between the networks' mistaken projections and the public's ease with limiting access to constitutionally protected information if it will increase the sense of comfort about the election process.

Mixed Support For Freedom of the Press

On the other hand, the Survey shows that the public agrees it is important for the media to hold the government in check. Eighty-two percent of respondents think the media's traditional watchdog role "very important" or "somewhat important" when it comes to monitoring government. But at the same time, 71% of respondents believe it is important for the government to hold the media in check. Specifically, 46% say the press has too much freedom to do what it wants (down from 51% in the 2000 Survey).

When asked whether they are more concerned about the media having too much freedom versus the government imposing too much censorship, 41% say there is "too much media freedom" while 36% say there is "too much government censorship."

Furthermore, a surprisingly large 39% "strongly agree" or "mildly agree" that "the First Amendment goes too far in the rights it guarantees," a statement the Survey interviewers asks respondents to agree or disagree with every year. That means nearly 4 in 10 of those polled believe the First Amendment provides too much freedom, up from 22% in 2000 (approximately 2 in 10).

The State of the First Amendment Survey 2001 is available at www.freedomforum.org.

George Washington University Releases "State of Freedom of Information" Report

On July 4, the 35th birthday of the Freedom of Information Act, George Washington University's National Security Archive released its first annual "State of Freedom of Information" report. This new report card, announced thirty-five years to the day after President Johnson signed the Act into law, stated the following:

- "Federal agencies still resist obeying the letter of the law, especially the required response time of 20 working days (on one Archive request filed in 1990, the CIA took 9 years to deny 22 documents in full, and another 7 months to deny the appeal);
- "Public use of FOIA continues to rise, with 1,965,919 FOIA requests filed with federal agencies in fiscal year 1999;
- "Direct cost to the taxpayers for administering the FOIA amounted to \$286,546,488 in fiscal year 1999, or about one dollar per citizen;
- "Documents released under federal, state and local freedom of information acts sparked more than 3,000 news stories in 2000 and 2001, exposing data of major public interest such as excessive mercury levels in canned tuna, enormous geographic variations in the prescription rates for Ritalin, a projected \$4 billion cost overrun on NASA's space station, and the internal policy debate over intelligence sharing with Peru prior to the shutdown of an American missionary plane."

Statistics and dollar amounts were taken from Justice Department data. See www.nsarchive.org/NSAEBB/NSAEBB51 for the report, sample FOIA request and appeal letters, and other documents pertaining to FOIA's history.

Former *Washington Post* Publisher Katharine Graham Dies at 84

Former *Washington Post* publisher Katharine Graham, 84, died on July 17 in Boise, Idaho, where she had been attending an annual media executives' conference.

In various positions with *The Post* and its parent company, from 1963, Mrs. Graham led *The Post* to national and international prominence by fostering hard-hitting, comprehensive coverage of our nation's capitol. LDRC honored Mrs. Graham in 1996 with its *William J. Brennan Jr. Defense of Freedom Award*, along with Arthur Ochs Sulzberger, celebrating the 25th anniversary of the publication of the Pentagon Papers. It was Mrs. Graham who gave the go-ahead in 1971 to publish the documents in *The Washington Post*, despite the surrounding controversy and a court's enjoinder of *The New York Times* from publishing the Papers.

It was only a year later that *The Post* broke the Watergate story. As Bob Woodward and Carl Bernstein dug deeper, Mrs. Graham weathered death threats and plunging stock prices resulting from challenges filed against the company's Florida TV license renewals.

In addition to these journalistic coups, under Mrs. Graham's guidance the newspaper's revenues grew to \$1.4 billion from the \$84 million they had been when she assumed the helm in 1963.

Mrs. Graham had many personal triumphs as well. In 1997 she won the Pulitzer Prize for biography for her book, "Personal History." She was the first woman to head a Fortune 500 company and the first to serve as a director of the Associated Press and of the American Newspaper Publishers Association.

Mrs. Graham dismissed the idea that any single person could shape the persona of a newspaper. "You inherit something and you do what you can," *The Washington Post* reported her saying. "And so the person who succeeds you inherits something different, and you add to it or you subtract from it or you do whatever you do. But you never totally control it."

Born in New York City in 1917, Mrs. Graham at-

tended Vassar for two years and graduated from the University of Chicago in 1938. In 1939, after working briefly as a reporter for the *San Francisco News*, she joined the editorial staff of *The Washington Post*, which had been purchased at a bankruptcy sale in 1933 by her father, Eugene Meyer. Her husband, Philip L. Graham, served as *The Post's* publisher from 1946 until his death in 1963.

Mrs. Graham became the paper's publisher in 1969, a position she held until 1979. She was also president of the company (1963-1973), chief executive officer (1973-1991), and chairman of the board (1973-1993).

At the time of her death she was chairman of the executive committee of the board of The Washington Post Company.

*LDRC honored Mrs. Graham in
1996 with the William J. Brennan
Jr. Defense of Freedom Award.*

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