

MULRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through July 25, 2003

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**HOUSE COMPENDIUM OF
INTELLIGENCE LAWS**

The House Intelligence Committee has updated its periodic "Compilation of Intelligence Laws and Related Laws and Executive Orders of Interest to the National Intelligence Community."

It's a very handy compendium of major and minor intelligence-related statutes, current as of March 25, 2003 and published for the first time in electronic form. A copy is posted here (2.6 MB PDF file):

http://www.fas.org/irp/congress/2003_rpt/laws2003.pdf

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New "Law of the Web" Treatise

Jonathan D. Hart of Dow, Lohnes & Albertson, PLLC of Washington, D.C., has authored a new guide to Internet law. *Law of the Web: A Field Guide to Internet Publishing, 2003 Edition*, published by Bradford Publishing Co. of Denver, addresses case law, legislation and proposed legislation in several areas of law that apply to the Internet, including the First Amendment, defamation, trademark, copyright, privacy, contracts, spam and jurisdiction. It is a compact 300 pages and well indexed.

Trial Records Set in 2002: Highest Media Victory Rate, Lowest Number of Trials

Media defendants won four of the five verdicts in trials of libel, privacy and related claims against media defendants in 2002. This is the lowest number of trials, and the highest media victory rate in any year since MLRC began tracking trials in 1980.

2002 is also the only year since 1980 without at least one award above \$1 million.

These are among the findings from the MLRC 2003 REPORT ON TRIALS AND DAMAGES, our annual examination of trials against the media and compilation of statistics on all such trials since 1980.

- Of the 452 cases that went to trial from 1980-1999, plaintiffs won and actually got to keep 91 awards, or 20 percent of the cases.
- Including these 2002 cases, plaintiffs have won 296 trials, or about 63 percent of the 477 cases against the media on libel, privacy and related claims that have resulted in trial verdicts since 1980. Plaintiff wins were modified by post-trial motions in 66 of these, or 24 percent. And of the 269 awards that survived post-trial motions, 125 (46.5 percent) were modified on appeal.
- Of the 269 awards won by plaintiffs at trial since 1980 that survived post-trial motions, plaintiffs appear to have held on to 93 (34.5 percent). This number is made up of awards not appealed in 34 cases (12.6 percent), and awards actually affirmed in 59 cases (21.9 percent).

There were post-trials settlements in 35 of the cases (13 percent) in which plaintiffs had won awards at trial.

Trials Declining Over Long Term

The small number of cases in 2002 follows a general trend over the past 22 years of a declining number of trials resulting in verdicts. During the 1980s, the average number of trials reaching verdict each year was 26.3; during the 1990s, there were an average of 21.4 trials reaching

verdict each year. So far in the 2000s, there have been an average of 11.3 trials with verdicts annually: 13 trials with verdicts in 2000, 16 in 2001, and the 5 in 2002.

Besides the five cases with verdicts after trial in 2002, there was also one case that ended with a mistrial (*Downing v. Aberchrombie & Fitch*, see *LDRC Media-LawLetter*, May 2002, at 8), and two cases in which defendants were held to be in default and verdicts were rendered against them without a trial.

One of the defaults involved the *Boston Globe*, which was held in default after refusing to reveal a confidential source and had a default verdict of almost \$2.1 million entered against it; the newspaper has asked the court to reconsider the default verdict. *Ayash v. Dana-Farber Cancer Inst.*, Civ. No. 96-565-E (Mass. Super. Ct., Suffolk County damages verdict Feb. 12, 2002); see *LDRC LibelLetter*, Feb. 2002, at 7.

The other was a \$2.1 million default verdict against non-appearing defendants in *Doe v. Franco Productions*, Civil No. 99-7885 (N.D. Ill. default verdict for plaintiffs Nov. 25, 2002).

Media Victory Rate at Trial Increasing

The 80 percent victory rate in 2002 trial verdicts beats the previous annual high, 70.6 percent in 1987. As the number of trial verdicts each year has gradually declined, the media victory rate has trended upward. In the 1980s, media defendants won 34.8 percent of verdicts; in the 1990s, they won 41.4 percent, and so far in the 2000s media defendants have won 52.9 percent of verdicts.

The one trial that ended in a damage award in 2002 was a Georgia case in which a sheriff's deputy was awarded \$225,000 for articles in a local newspaper calling him a "murderer" after a man stopped for a routine traffic violation died in police custody. The newspaper is appealing. *Farmer v. Lake Park Post*, No. 2000-CV-308 (Ga. Super. Ct., Lowndes County jury verdict June

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Trial Records Set in 2002

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21, 2002), *appeal pending*, No. _____ (Ga. Ct. App. filed March 2003); see *LDRC MediaLawLetter*, July 2002, at 3.

The four 2002 cases in which media defendants were victorious were:

- *Armour v. Federated Publications, Inc.*, No. 01-93328-NZ (Mich. Cir. Ct., Ingham County directed verdict Nov. 20, 2002), *appeal pending*, No. 245361 (Mich. Ct. App., 4th Dist. filed _____);
- *Burger v. Priority Records*, No. KC027869 (Cal. Super. Ct., L.A. County jury verdict April 12, 2002), see *MLRC MediaLawLetter*, Feb. 2003, at 12;
- *Carpenter v. Alaska Broadcast Communications, Inc.*, No. 00-1153 CI (Alaska Super. Ct. verdict Feb. 7, 2002), *appeal pending sub. nom. State of Alaska v. Carpenter*, No. S10700 (Alaska appeal filed July 26, 2002), see *LDRC LibelLetter*, Feb. 2002, at 17;
- *Ferrara v. Farrel*, No. CL-007753-AJ (Fla. Cir. Ct., 15th Cir. jury verdict May 30, 2002), *post trial motions pending* (Fla. Cir. Ct. 2002), see *LDRC MediaLawLetter*, June 2002, at 19.

Results on Appeal

A slightly higher share of plaintiffs' awards in the 1990s survived post-trial motions and appeals than awards from the 1980s.

Of the 106 awards from the 1990s that survived post-trial motions, 42 (39.7 percent) remained intact: 20 (18.9 percent) were not appealed, and 22 (20.8 percent) were affirmed on appeal. These 42 awards that plaintiffs apparently got to keep in the 1990s represent 22.7 percent of the 185 cases that went to trial during that decade.

In the 1980s, 49 (32.9 percent) of the 149 awards remained intact: 13 (8.7 percent) were not appealed, and 36 (24.2 percent) of the awards were affirmed. Thus, plaintiffs apparently kept a somewhat lower percentage of their awards in the 1980s, as the 49 intact awards are 18.4 percent of the 267 trials during the 1980s.

A large percentage of awards from the 2000s are still on appeal at this time, making calculation of these figures from the current decade premature.

A higher share of awards were not appealed in the 1990s versus the 1980s (18.9 percent in the 1990s, com-

pared with 8.7 percent in the 1980s). And a higher share of awards were settled prior to appeal in the 1990s than in the 1980s (18.9 percent in the 1990s versus 8.7 percent in the 1980s). (The repetition of the percentages in each category is a coincidence.)

Other findings of the study include:

- **The media win rate at trial** in 2000-2002, at just under 53 percent, is substantially higher than the media win rate at trial in the 1990s, 41.1 percent, or the 1980s, 34.8 percent.
- **The average award at trial** in 2000-2002 is \$2.9 million, less than the average of almost \$5 million in the 1990s. But at \$600,000 the median of trial awards is substantially higher than the \$372,500 median of the 1990s.

As was true in the 1990s, the number of cases against newspapers that have gone to trial in the 2000s continues to decline from the 1980s, while the number of cases against television defendants that go to trial has remained relatively flat. Television defendants, moreover, do better at trial than newspapers on a percentage basis, winning 49 percent of their trials since 1980 versus only 33.2 percent for newspaper defendants.

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High Court Decides Nike Not Ready for Review after All

By Steven G. Brody

The most closely watched First Amendment case before the Supreme Court of the United States this past term was resolved without a decision on the merits. The Court, in a 5-4 *per curiam* order, dismissed the writ of certiorari as improvidently granted in *Nike, Inc. v. Kasky*, No. 02-575, 2003 U.S. LEXIS 5015 (June 26, 2003). The Court's dismissal leaves standing a highly criticized decision of the Supreme Court of California.

Suit Over Corporate Speech

On May 2, 2002, the Supreme Court of California decided 4-3 that plaintiff Marc Kasky ("Kasky") could proceed with his lawsuit against Nike, Inc. ("Nike"). *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

Kasky alleges that Nike made false statements in defending itself from attacks on its labor practices. The allegedly false statements appeared in press releases, in letters to newspapers, in a letter to university presidents and athletic directors, and in other documents distributed for public relations purposes. Kasky is suing Nike under California's Unfair Competition Law ("UCL") and false advertising law.

The key issue addressed in the California Supreme Court's decision is whether Nike's allegedly false statements should be categorized as commercial speech or noncommercial speech. Only commercial speech can give rise to claims under the UCL and false advertising law. The intermediate appellate court had dismissed Kasky's complaint because it had concluded that Nike's statements were noncommercial speech and, consequently, fully protected by the state and federal constitutions. The California Supreme Court reversed, introducing a new and extraordinarily broad definition of commercial speech.

California's Test for "Commercial Speech"

The court formulated a three-part test for determining whether statements constitute commercial speech. Under the test, the California courts must consider three elements: the speaker, the intended audience and the content of the message. Practically speaking, the California court's three-part

test for defining commercial speech could include virtually any statement made by a commercial enterprise poll concerning itself, or its products or services, that likely will be heard by, or repeated to, potential customers.

The California Supreme Court's decision attracted a great deal of criticism from scholars, commercial speakers, the media and civil libertarians. These critics expressed concern that the decision will chill the speech of commercial enterprises, thereby impoverishing debate and media coverage of important public issues. When Nike petitioned the United States Supreme Court, it was supported by a broad group of *amici curiae*.

Serious Dissent at High Court

The Court granted the writ, but took an unusually long

time to do so. That was the first sign that certain Justices might have been troubled by Kasky's argument that the case was not ripe for review. At oral argument, concerns about the procedural posture of the case were explicitly raised by members of the Court, particularly Justice Ginsburg.

Although the Court's decision to dismiss the writ was not a complete surprise, there was a surprising public display of the Justices' disagreement on the dismissal. Three justices took the unusual step of writing separate opinions.

Justice Stevens wrote a concurring opinion (joined by Justice Ginsburg and, in part, Justice Souter), in which he identified three reasons why the Court's decision to dismiss the writ of certiorari was correct:

- (1) the judgment entered by the California Supreme Court was not final;
- (2) neither party has standing to invoke the jurisdiction of a federal court; and
- (3) the reasons for avoiding the premature adjudication of novel constitutional questions apply with special force to this case.

There were two dissenting opinions. Justice Kennedy wrote a one-line dissent that lacks any detail. Justice Breyer, joined by Justice O'Connor, wrote a 21-page dissent. Justice

Practically speaking, [the California Court's] three-part test for defining commercial speech could include virtually any statement made by a commercial enterprise poll concerning itself, or its products or services, that likely will be heard by, or repeated to, potential customers.

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High Court Decides Nike Not Ready for Review after All

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Breyer made clear that he not only would have reviewed the case on the merits, but likely would have found that the speech regulations in question must be reviewed under a form of heightened scrutiny, and that they could not survive that scrutiny. Justice Breyer's opinion relied largely upon principles of public speech — the importance of protecting the various voices in a debate concerning matters of public concern — rather than principles of commercial speech.

Nike Redux?

The Justices may not have seen the last of the *Nike* case. If a final judgment is issued by the California courts, it seems likely that this case again will be accepted for review by the United States Supreme Court (unless some other case presents similar issues to the Court in the interim). The case may not return to the high court until a few years from now, however, because of the time that will be spent during discovery, motion practice, a possible trial and state court appeals.

In the meantime, the California Supreme Court's broad definition of commercial speech is the controlling law in that state, and likely will give rise to additional lawsuits under the UCL. For example, on July 7, 2003, a lawsuit was filed under

the UCL by People for the Ethical Treatment of Animals, Inc. ("PETA") against KFC Corporation (a/k/a Kentucky Fried Chicken). PETA alleges that KFC made false statements in press releases that responded to PETA's media attacks against KFC and its treatment of chickens.

Is the sky falling for commercial speakers in California? Perhaps, but free speech advocates remain optimistic that, eventually, the United States Supreme Court will reject the California court's decision and prohibit lawsuits of the sort brought against Nike.

Walter Dellinger of O'Melveny & Myers LLP; David J. Brown, James N. Penrod of Morgan, Lewis & Bockius, LLP; Laurence H. Tribe of Cambridge, Mass.; and Thomas C. Goldstein, Amy Howe of Goldstein & Howe, P.C., represented Nike. Patrick J. Coughlin of Randi, Dawn, Bandman; Albert H. Meyerhoff, Frank J. Janecek, Jr., and Sylvia Sum, Milberg of Weiss, Bershad, Hynes & Lerach; Paul R. Hoerber of San Francisco, Calif., and Alan M. Caplan, Philip Neumark, Roderick P. Bushnell, April M. Strauss of Bushnell, Caplan & Fielding, LLP, represented Kasky.

Steven G. Brody is a partner in King & Spalding, and co-chair of MLRC's Advertising & Commercial Speech Committee.

Pennsylvania Judge, Newspaper Settle Case During Trial

Insurer to Pay Legal Fees; No Damages

Philadelphia Municipal Court Judge Alan K. Silberstein and the *Philadelphia Daily News* in mid-June settled a defamation lawsuit stemming from two items published on Aug. 6, 1997. *Silberstein v. Philadelphia Newspapers, Inc.*, No. 98-602632 (Phil. C.P. settled June 19, 2003). The settlement was reached as the defense presented its case.

According to a statement published by the *Daily News*, the settlement required the newspaper's insurer to pay the judge's legal fees directly to his counsel, and other expenses, but did not include damages.

The lawsuit stemmed from a *Daily News* article and column about Judge Silberstein's investigation of a woman's allegations that a court administrator had forced her to perform oral sex. The paper ran the stories, along with a picture of the judge, under the front-page headline, 'Chamber of Horrors?'

Silberstein, president judge of the Philadelphia Municipal Courts at the time, conducted the investigation after the administrator committed suicide. The investigation, which

included questions about the woman's sexual history, came to light after she sued Silberstein and the city of Philadelphia for alleged civil-rights violations.

The newspaper's reports were based on transcripts of interviews Silberstein conducted during the investigation, which were submitted as part of the civil-rights suit.

Silberstein argued that the articles implied that questions about the woman's sexual history had been asked out of a prurient interest in her sexual experience. The newspaper countered that the articles were truthful and fair reports.

The settlement in the libel suit between Silberstein and the *Daily News* came after 10 days of trial before Bucks County Common Pleas Judge Edward G. Biester, Jr., who was brought in to hear the case, and a Philadelphia jury.

The *Daily News*, reporter Mark McDonald and columnist Jill Porter were represented by Amy B. Ginsky and Robert C. Heim of Dechert in Philadelphia. Silberstein was represented by William P. Murphy of Murphy & Goldstein in Philadelphia.

Tiger Woods Transformed?

By Louis Petrich

In a long-awaited decision, on June 30 a divided panel of the U.S. Court of Appeals for the Sixth Circuit held that the First Amendment exempted from liability limited-edition prints containing the images of famous golfer Tiger Woods and commemorating Woods' victory at the 1997 Masters Tournament. *ETW Corp. v. Jireh Publishing, Inc.*, ___ F. 3d ___, 2003 WL 21414521 (6th Cir. 2003) A petition for rehearing is pending.

Wood's company, ETW Corporation, owns the exclusive rights to exploit his publicity rights, as well as a trademark registration for the mark "TIGER WOODS," for use with art prints, calendars, mounted and unmounted photographs, and similar material.

Defendant Jireh Publishing is the publisher of artworks created by Rick Rush, self-described as "America's sports artist." Rush has created numerous paintings of famous sports figures and sporting events, and Jireh markets limited edition art prints made from the paintings.

The Masters of August

In 1997, Woods became the youngest player ever to win golf's Masters Tournament. In 1998, Rush created a painting entitled "The Masters of Augusta" that commemorated the victory. In the foreground are images of Woods in three poses: completing a swing, crouching to line up a putt, and watching the progress of a putt. Two caddies in his group are depicted, and in the background are likenesses of past golfing greats Palmer, Snead, Hogan, Hagen, Jones and Nicklaus looking down on Woods. Also depicted are the Clubhouse at Augusta National Golf Course and a scoreboard.

Jireh produced and distributed 250 22-1/2" x 30" serigraphs from the painting at a price of \$700 each, and 5,000 9" x 11" lithographs at \$100 each. Each print bore the title "The Masters of Augusta," the artist's name and his signature. Wood's name was not included. Each print was sold in a white envelope, the contents of which included a photo of the artist, and a description of his art and of the painting. The print's description contained 28 lines of text. Woods was mentioned twice; the other figures were also described. The

outside of the envelope included Rush's signature, the legend "Painting America Through Sports," the words "Masters of Augusta," and the name "Tiger Woods."

ETW sued in the U.S. District Court for the Northern District of Ohio, alleging federal Lanham Act violations: trademark infringement under 15 U.S.C. § 1114, trademark dilution under § 43(c), unfair competition and false advertising under § 43(c), as well as violations of Ohio law: unfair competition, deceptive trade practices and violation of the right of publicity. Jireh counterclaimed, seeking declaratory judgment that its prints were protected by the First Amendment and in any event did not violate the Lanham Act. Both parties moved for summary judgment; the district court granted Jireh's motion and dismissed all claims.

U.S. District Judge James Graham, sitting by designation, wrote the opinion for the Court of Appeals affirming the dismissals, joined by U.S. Circuit Judge Eugene Siler. U.S. Circuit Judge Eric Clay dissented: Judge Clay would have reversed and entered an order of liability on the right of publicity claim; he found triable issues of fact, which should require trial. ETW has filed a petition for rehearing.

Judge Graham concluded that the only uses of Tiger Woods' name were traditional trademark "fair uses."

Trademark Claims Based On The Unauthorized Use Of The Registered Trademark "Tiger Woods"

Judge Graham treated as one the federal and state trademark claims for the use of the words "Tiger Woods." He concluded that the only uses of the name were traditional trademark "fair uses" under 15 U.S.C. § 1115(b)(4) because the name/mark was used in its "primary or descriptive sense" and in good faith; that is, Woods was not mentioned to indicate the source but only the "content" of the prints. 2003 WL 21414521, at 3.

The dissent accused the majority of failing to consider survey evidence of actual consumer confusion. *Id.*, at 32. Although 62 percent of respondents to the survey stated they thought Woods was "affiliated" or "connected" with Rush's print, the majority responded that the survey lacked necessary control questions about those terms, and, in any event, was based only on the prints, not on the envelopes, that contained Woods' name. *Id.*, at 3 nn. 3 & 4, *id.* at 18, n. 19.

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Tiger Woods Transformed?

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Trademark Claims Under Lanham, 43(a) Based On The Use Of The Likeness Of Tiger Woods

In deciding the claim based on the use of an unregistered mark in Woods' image, the first step was to determine whether plaintiff had a protectible mark. The majority held that Woods had not alleged that any specific image of him acted as a trademark, or that Rush's image of Woods was a colorable imitation of any trademark in the name, Tiger Woods. *Id.*, at 4 n 5. It held that "as a general rule, a person's image or likeness cannot function as a trademark." *Id.*, at 4.

The dissent argued that prior precedent *allowed* for an image to function as a trademark "as long as there is evidence of consumer confusion as to the source of the merchandise upon which the image appears." *Id.*, at 23. The dissent thus would use evidence of confusion to identify the mark or image that merits protection. In this case, the dissent thought the confusion about the source of Rush's print alone was such evidence of a protectable trademark interest in Woods' image.

Lanham Act, § 43(a) False Endorsement And Unfair Competition Claims

Lanham Act section 43(a) creates an action for claims of unfair competition and false advertising in the nature of a false endorsement. The majority noted that the First Amendment applies to all mediums of expression, including entertainment, paintings, drawings and engravings, even if sold for profit. Woods argued that only Rush's original painting, and not the copies, would be protected, but the majority likened the argument to protecting an original manuscript but not the copies of a book, or a script but not the live performance of a play or a film produced from it. The majority found that the prints here were protected by the First Amendment because they did not propose a commercial transaction.

Citing Ninth Circuit authority, the majority noted that false endorsement occurs when a celebrity's identity (treated as a "mark") is used in connection with a product or service in such a manner that consumers are likely to be

misled about the celebrity's sponsorship or approval of the product or service. *Id.*, at 7. In an ordinary case, the court would apply an 8-factor test to determine the likelihood of such confusion. But, the majority concluded, if the use is protected by the First Amendment, "the likelihood of confusion test is not appropriate because it fails to adequately consider the interests protected by the First Amendment." *Id.*, at 7.

Here, the majority took its cue from the leading authority, *Rogers v. Grimaldi*, 875 F. 2d 994 (2d. Cir. 1989), in which the Second Circuit noted that film titles were both expressive and commercial in nature, but sufficiently a part of the contents of the film to attract First Amendment protection. It struck a balance between the Lanham Act and free speech by creating the rule that even if a title were *impliedly* confusing as to source, First Amendment inter-

ests require that the Lanham Act be narrowly construed not to apply if the title (1) is artistically relevant to the film, and (2) is not *explicitly* misleading as to the source or content of the film. 875 F.2d at 999.

The Ninth Circuit recently adopted the same rule in *Mattel, Inc. v. MCA Records, Inc.*, 296 F. 3d 894 (9th Cir. 2002) affirming dismissal of a Lanham Act claim that the song title "Barbie Girl" constituted a false endorsement, despite a survey showing confusion. Even more recently, the Sixth Circuit had adopted the *Rogers* rule in *Parks v. LaFace Records*, 329 F. 3d 437 (6th Cir. 2003), although concluding that a triable issue of fact existed because it doubted that the use of the name of the civil rights icon, Rosa Parks, as the title of a song about the musical groups' comeback was reasonably related to the song.

The *Woods* majority held that the rule in these decisions was not limited to titles, but applies to all expressive works. *Id.*, at 9 n. 11. The majority found that the presence of Woods' image had artistic relevance to the underlying painting (and prints), and was not explicitly misleading as to source.

The dissent complained that the majority had improperly applied the *Rogers*, *Mattel*, and *Parks* analysis to a case in which a title was not involved. Even if those rules were to be applied, the majority had misapplied them, and

The Court held that, "as a general rule, a person's image or likeness cannot function as a trademark."

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in any event, had not given proper weight to a survey in which 62 percent of the respondents assumed – from looking at defendants’ poster – that Woods was somehow affiliated or connected with it. *Id.*, at 18 n.19. The majority disparaged the survey because the terms were not defined, and “some respondents may have thought that Woods’ mere presence in the print was itself an affiliation or connection.” *Id.*, at 18 n.19. Moreover, the majority stated, nothing in those decisions mandated that *Rogers*’ test be limited to titles. Indeed, even the dissent noted that *Rogers* was applied in *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (2d Cir. 1989) to all works of artistic expression, including parody. *Id.*, at 495.

Thus, while the dissent would hold that the 8-factor test concerning the likelihood of confusion would have to be balanced against the *Rogers*’ “artistic relevance” analysis – in this and in most cases by a jury, the *Woods* majority treats *Rogers* as creating a “safe harbor,” so that if a defendant’s use of a plaintiff’s mark (other than another title) were artistically relevant to the defendant’s work and did not “explicitly” mislead as to source or content, then the First Amendment interest would prevail – even if there were a showing of a likelihood of confusion.

Trademark Dilution

Lanham Act section 43(c) creates a federal cause of action for an unauthorized use of a famous mark that causes the “lessening of the capacity of a famous mark to identify and distinguish goods or services.” Because Woods failed to show that any specific likeness of him functioned as a trademark, the majority held, “it follows that a dilution claim does not lie.” *Id.*, at 5 n.7.

According to the dissent, Woods’ claim was based on the registered mark “TIGER WOODS,” not a vaguely described image or likeness. *Id.*, at 33. The majority responded that any claim based on the registered mark was precluded by the “fair use” defense, and that, in any event, the dissent’s reliance on survey evi-

dence was unavailing because persons who responded to the survey were never shown any materials containing the registered mark. *Id.*, at 5 n. 7.

The Right Of Publicity Claim

The majority first reviewed and concluded that the Restatement Third of Unfair Competition, § 46, sets out the principles that would be followed in Ohio. Thus, Woods had to show that the commercial value of his identity was used without his consent for purposes of trade. However, the Restatement recognizes a First Amendment limitation on liability for news reporting, entertainment and other creative works, including both fiction and non-fiction.

The majority started its analysis by focusing on Comment c to § 46, which observes that celebrities often get sufficient rewards from their success in entertainment or sports activities, and that commercial value is often fortuitous and not earned. The Comment suggests that the public interest in avoiding false endorsement can be pursued by an action against deceptive marketing.

The majority then reviewed various circuit courts’ decisions to determine whether Rush’s work is protected by the First Amendment. It first noted that *Rogers v. Grimaldi*, *supra*, held that First Amendment principles trumped *Rogers*’ right of publicity claim because the title “Ginger and Fred” was clearly related to the content of the movie and was not a disguised advertisement for a collateral commercial product. 875 F.2d at 1004-05.

The majority then discussed, with obvious approval, Judge Kozinski’s opinion dissenting from a denial of an en banc hearing in the Vanna White case, *White v. Samsung Electronics America, Inc.*, 989 F.2d 1512-1516 (9th Cir. 1993), the decision in *Cardtoons, L.C. v. Major League Baseball Players Association*, 95 F.3d 959, 969 (10th Cir. 1996) (holding that *Cardtoons*’ baseball parody trading cards proved a First Amendment defense to the players’ publicity claims, in part because such parody would not hinder *Cardtoons*’ ability to market its own cards), and the decision in

Because Woods failed to show that any specific likeness of him functioned as a trademark, the majority held, “it follows that a dilution claim does not lie.”

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Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180 (9th Cir. 2001) (which exempted the publishers of *Los Angeles Magazine* from liability for violation of the right of publicity, unfair competition and violation of the Lanham Act for the use of the likeness of Dustin Hoffman superimposed on the body of a male model in a dress and posed as Hoffman appeared in the movie “Tootsie”).

Finally, the majority looked to the “transformative elements” test in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal.4th 387, 21 P.3d 797 (Cal. App. 2001) to assist “in determining where the proper balance lies between the First Amendment and Woods’ intellectual property rights.” *Id.*, at 17.

The majority concluded that Rush’s works were substantially informational and had creative content that outweighed any adverse affect on ETW’s market. Balancing the magnitude of the speech restriction against Woods’ interest in protecting his intellectual property, the majority found in favor of defendants. Applying the transformative test, the majority distinguished *Saderup* in that the Three Stooges drawing was an “unadorned, nearly photo-

graphic reproduction,” whereas Rush’s work consisted of a collage of images combined to describe a historic event in sports history and to convey a message about Woods’ achievement.

The dissent chided the majority for engaging in “three separate analyses” and arriving at “three separate holdings.” Because the dissent thought that the *Saderup* decision was a case “nearly on all fours,” it would find no transformation in Rush’s prints, which the dissent characterized as “merely identical to that in the poster distributed by Nike.” *Id.*, at 34. The dissent thought it was clear the prints gain their commercial value by exploiting the fame in Woods’ celebrity status, and, thus the right of publicity was not outweighed by the right of free expression. *Id.* at 43.

ETW was represented by Terence J. Clark of Squire, Sanders & Dempsey, Los Angeles; Jireh was represented by Dennis J. Niemann, Cleveland, Ohio; J. Michael Murray argued on behalf of Amici Curiae.

Louis Petrich is a member of Leopold, Petrich & Smith, P.C., in Los Angeles.

Florida Court Finds ‘Minimum Contacts’ From Telephone Interviews

The District Court of Appeal of Florida, Second District, found minimum contacts between California resident Richard Cole and the forum state of Florida based on a series of phone interviews he gave for an article published in the *Weekly Planet*, a Florida newspaper. *Emerson v. Cole*, 2003 WL 21413847 (Fla.App. 2 Dist. June 20, 2003).

The ruling reversed the trial court’s dismissal of a libel suit, filed by plaintiff Steven Emerson against Cole and the newspaper, for lack of personal jurisdiction. Emerson claims that Cole made defamatory statements about him during the telephone interviews.

Article to be Published by Florida Paper

A determining factor for the court was that Florida was “the place of primary publication.” Cole did not deny that when he granted interviews to *Planet* editor John Sugg, he knew the story would be published in Florida, and thus reach a Florida audience.

The court compared Cole’s situation to that in *Smith v. Cuban American National Foundation*, 657 So.2d 86 (Fla.

Dist. Ct. App. 1995), in which personal jurisdiction was held over a nonresident defendant for statements made in a PBS documentary that could reasonably be foreseen to air in Florida.

Multiple Telephone Interviews

The court also emphasized that, as in *Carida v. Holy Cross Hospital, Inc.*, 424 So.2d 849 (Fla. Dist. Ct. App.1982), *disapproved on other grounds*, Cole had multiple phone conversations with a Florida resident, which led to the suit in question. Cole’s numerous phone interviews with Sugg amounted to a sufficient connection with Florida, though “a single telephone conversation may have been too attenuated.”

Despite the adverse ruling, Cole may not have to worry too much about the suit. According to the *Planet*, Emerson dropped the libel case against the paper and Sugg after a judge ordered him to divulge evidence to back up his claims. Jim Harper, *Emerson Drops His Lawsuit*, *Weekly Planet*, May 21 2003, available at <http://www.weeklyplanet.com/2003-05-21/news.html>.

Oklahoma Judge Lets Libel Stand but Not 'Tag-Along' Claims Invites Challenge to Journalism Expert on *Daubert* Grounds

by Robert D. Nelson and Jon Epstein

While reinstating the defamation claim in a private-figure physician's suit against Oklahoma City's *New York Times* owned television station, KFOR-TV, and one of its reporters, the Oklahoma Court of Civil Appeals emphatically rejected the plaintiff's "tag-along" claims of intentional infliction of emotional distress and false light invasion of privacy. *Magnusson v. New York Times Co.*, No. 97,703 (Oklahoma Court of Civil Appeals, June 24, 2003) (not for publication). The court also seemed to invite a challenge to the plaintiff's journalism expert on the issue of negligence, on *Daubert v. Merrell Dow Pharmaceuticals* 509 U.S. 579 (1993) grounds.

The appellate court sent back the defamation claim to the lower court for further proceedings because it refused to accept KFOR's arguments that the reports were substantially true or protected expressions of opinion.

The reversal of summary judgment was not totally discouraging, because the appellate court went to unusual lengths in its opinion to invite the defendants' *Daubert* challenge to the plaintiff's journalism expert witness.

Consumer Reporting on Doctor

In May 2000, KFOR broadcast two consumer reports by reporter Brad Edwards documenting complaints by patients of Magnusson, an osteopathic cosmetic surgeon, about his plastic surgery services. In general, the reports related patient complaints, presented the responses to them by Magnusson and his staff, and advised viewers how to reach the Oklahoma Board of Osteopathic Examiners if they had questions about a doctor.

The plaintiff sued KFOR and Edwards for defamation, false light invasion of privacy, and intentional infliction of emotional distress.

While not disputing that his patients had experienced problems (and that some of them had sued him for malpractice), Magnusson contended that the patients' complications resulted from their failure to follow his instructions, and that the reports falsely implied he was unconcerned with their

safety or that he negligently performed surgery on them.

KFOR's primary defense to the defamation claim was two-pronged. The station argued that the reports were either indisputably true—the reports accurately and objectively presented both the patients' complaints, usually in their own words and supported by physical evidence of the complications, and Magnusson's response to the complaints—or that the reports were merely non-actionable expressions of the patients' and Magnusson's differing opinions about the quality of his surgical services.

KFOR challenged the false light claim on similar grounds, also arguing that there was no evidence of actual malice, and it opposed the intentional infliction claim on the grounds that its conduct was not extreme and outrageous and that the plaintiff's

alleged injury was not so severe as to meet the requirements of the tort. The district court granted summary judgment to KFOR and Edwards.

No Outrageous Conduct

The 2-1 opinion of the Court of Civil Appeals affirmed summary judgment on the false light and intentional infliction claims,

but it concluded there were factual issues remaining which precluded judgment on the defamation claim.

The court considered the ancillary claims first. In affirming judgment on the intentional infliction claim, it said that the defendants' conduct was a "far cry" from that which the Oklahoma courts had held to be sufficiently outrageous to support an intentional infliction claim. Observing that Edwards presented both sides of the dispute, the court flatly rejected Magnusson's argument that his denial that the patients' claims were true was sufficient to make Edwards' conduct outrageous:

"If that conduct is to be considered outrageous, then the same could be said for any journalist who sought to cover all sides of a story, rather than take a person's denial of accusations at face value."

The court noted not only that Magnusson cited no authority for his argument, but the court said "we doubt any exists."

It expressed concern that "Magnusson's assertion, if correct, would have an obvious chilling effect on a journalist's First

"If that conduct is to be considered outrageous, then the same could be said for any journalist who sought to cover all sides of a story, rather than take a person's denial of accusations at face value."

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Amendment rights and the public's right to know," because the denial by the subject of a story "would very possibly result in the story never reaching the public." The court quoted *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985), that the First Amendment "shields the man who wants to speak or publish when others wish him to be quiet."

False Light Dismissed

The court had little difficulty in affirming summary judgment on the false light claim on the ground there was no evidence of actual malice. The court again commented on Edwards' balanced reporting, holding that Edwards did not recklessly disregard the truth because

"he did not try to determine which side was correct, but left that decision to the viewer. The essence of Edwards' story is not that one or the other positions taken was true, but that different people had taken different positions."

The court said there "is absolutely no evidence in the record indicating Edwards *had knowledge of* the 'falsity' of the patients' claims." The court again rejected the plaintiff's arguments that his denials or explanations put Edwards on notice of falsity:

"Edwards knew that Dr. Magnusson *asserted* they were false, but that is not the same thing."

Defamation Left Standing

The court then turned to the defamation claim. Its decision to reverse summary judgment is difficult to square with the grounds on which it affirmed judgment on the other two claims, and dictum in the opinion suggests the court doubted the merit of the plaintiff's claim. Nevertheless, the court rejected the two principal grounds of defense—substantial truth and opinion—asserted by KFOR.

KFOR cited *Green v. CBS Broadcasting, Inc.*, 29 Med.L.Rptr. 1321 (N.D. Tex. 2000) (affirmed after briefing in Magnusson was completed, 286 F.3d 281 (5th Cir. 2002)), to argue that the broadcast reports were substantially true—it was undisputed that they accurately recounted the patients' complaints and Magnusson's response, and the reports made it clear to the viewer that the statements were merely accusations and denials.

Despite the fact, as the appellate court itself recognized, that "Magnusson [did] not assert Edwards failed to accurately report

the patients' complaints" and that Edwards presented both sides of the story, leaving the truth of the different positions to the viewer, the court nevertheless concluded that a fact issue remained whether the reports were substantially true.

It said the issue was controlled by the Oklahoma Supreme Court's decision in *Weaver v. Pryor Jeffersonian*, 1977 OK 163, 569 P.2d 967, in which that court said, in the context of an unverified letter to the editor, that the media could be held liable for republishing defamatory statements of others. The court did not discuss *Green*, and its passing reference to RESTATEMENT (SECOND) OF TORTS, §§ 578 and 581 (stating the common law of re-publisher liability) suggests that the court did little if any analysis whether concepts about republication should apply where the media, as here, accurately reports both sides of a dispute.

No Fair Comment for Private Figure

The most troubling aspect of the court's decision lies in its treatment of the "opinion" issue. In support of its summary judgment motion, KFOR relied heavily on the decision in *Metcalf v. KFOR-TV, Inc.*, 828 F. Supp. 1515 (W.D. Okla. 1992), in which the court granted summary judgment to KFOR, in part, on the ground that patients' statements about problems they experienced with the plaintiff plastic surgeon—statements substantially similar to those made about Magnusson—were protected expression of opinion.

KFOR argued that patients' comments to the effect that Magnusson botched their surgeries, or that they were dissatisfied with the outcomes, and why, were not actionable because they were not statements of fact capable of being verified as true or false. This defense was especially valid, KFOR argued, with respect to statements by patients that Magnusson alleged only implied that he was not concerned with his patients' safety or that he negligently performed surgery on them.

The appellate court did not discuss any of the cases cited by KFOR, but rejected the "opinion" defense on the ground that "whether considered opinion or 'fair comment,' the doctrine has been construed not to apply against a private individual, 50 AM. JUR.2D *Libel and Slander* § 334 (1995), and we have found no authority to the contrary." The court's reasoning is inexplicable. *Metcalf*, the authority cited and discussed most extensively by KFOR, is a private-figure case, as, of course, was *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which the Magnusson opinion says "immunized expressions of opinion from defamation consequences."

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Invites Challenge to Expert

The most intriguing aspect of the court's decision lies in its treatment of the negligence issue. In *Malson v. Palmer Broadcasting Group*, 1997 OK 42, 936 P.2d 940, and other cases, the Oklahoma appellate courts have repeatedly reversed summary judgments where the private-figure plaintiff has presented the affidavit of an "expert" willing to opine that the media defendants were negligent, regardless of the qualifications of the expert or the reasonableness of his opinions. Magnusson had such an expert, so KFOR did not raise the lack of negligence as a dispositive issue in its summary judgment motion, assuming that to do so would be futile.

Remarkably, the appellate court volunteered its view that "the facts and circumstances of this case would seem to establish Edwards exercised the requisite amount of care" because with respect to "a matter that certainly could be considered newsworthy," he investigated the patients' complaints, contacted Magnusson, and "reported a story that included both viewpoints."

The court said that *Malson* "might be distinguishable," and it expressed concern that

"applying *Malson* here could subject a news organization to costly and lengthy litigation whenever a negative story was published or broadcast, as long as a competitor or academic could be found to give an 'expert' opinion that the journalist did less than what the 'expert' felt was required."

The court observed that in *Christian v. Gray*, 2003 OK 10, 65 P.3d 591, decided earlier this year, the Oklahoma Supreme Court adopted the procedures set out in *Daubert*, and related cases, for determining the admissibility of expert testimony in civil proceedings. The court then said it had

"some doubts whether [Magnusson's expert] based his opinion on the standard of ordinarily prudent persons engaged in journalism or whether he did so based on his idealized notion of how journalists *ought* to behave."

The court said it could not affirm summary judgment on the negligence issue because KFOR did not base its motion on that element of the defamation claim, but the court concluded

its opinion with an expression of concern "about the chilling effect that may result from potential liability for this type of reporting" and all but invited the defendants to mount a *Daubert* challenge to the plaintiff's expert witness.

Dissent Decries Consumer Reporting

In a dissent, one judge said he agreed that the defamation claim should be reversed but he would also reverse summary judgment on the ancillary claims. Invoking Lord Chesterfield's comment that "no man has the right to shout fire in a crowded theater," and repeating Iago's oft-quoted statement about the value of reputation (Shakespeare, *Othello*, Act ii, sc. 3), the dissenting judge decried consumer reporting based on viewer call-ins. He said the "'call-in' pool is almost by definition a biased, skewed sample of the investigative subject

and is not balanced or objective reporting." Sounding much like the typical plaintiff's lawyer, the dissenter said KFOR "designed the investigative report to arouse and titillate, thereby increasing its listener base, its market share numbers, and advertising rate cost, all designed for [KFOR's] financial benefit." KFOR's

reporting was not free speech intended to inform or educate, the judge said, "but rather the dark one of avarice designed to enhance [KFOR's] economic condition at the plaintiff's expense." The dissenting judge would find a fact issue to exist regarding actual malice because, in his view, reasonable people could disagree whether Edwards recklessly disregarded the truth once Magnusson "placed the reporter on notice as to the 'lies' of the patients."

The defendants anticipate filing a petition for rehearing to ask the Court of Civil Appeals to revisit the substantial truth and opinion issues. If rehearing is denied or does not fully dispose of the defamation claim, the defendants anticipate filing a *Daubert* motion.

Robert D. Nelson and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson in Oklahoma City represent The New York Times Co. and Edwards. Magnusson is represented by Holly Hefton and Brett D. Sanger of Brett D. Sanger & Associates, P.C. in Oklahoma City.

"Whether considered opinion or 'fair comment,' the doctrine has been construed not to apply against a private individual, 50 AM. JUR.2D Libel and Slander § 334 (1995), and we have found no authority to the contrary."

West Virginia Supreme Court Finds Amateur Athlete is Not Public Figure

The West Virginia Supreme Court recently ruled 3-2 that a high school athlete was not a public figure, reversing summary judgment for the defendant newspaper. *Wilson v. Daily Gazette*, 2003 W. Va. Lexis 63, (June 13, 2003). Justice Robin Jean Davis remanded the case to the Hancock Circuit Court for a determination on the issue of negligence.

Media Exposure

Quincy Wilson was a star athlete at Weir High School in 1999. He was co-winner of an annual award for West Virginia's best prep football player and had publicly accepted an offer to play for West Virginia University. He also played for his school's basketball team, which reached the state finals. His father, Otis Wilson, played for the Chicago Bears in the 1980s.

The *Charleston Gazette* published two stories about Wilson's alleged conduct following a basketball tournament. The first, "Civic Center Incident Under Investigation," noted that some spectators complained that Wilson "exposed" himself during the post-game celebration. The second, "Time to Clean Up Our Trash," again noted the "allegation" that "Wilson went the extra step and exposed himself."

Three Types of Public Figures

Acknowledging that the West Virginia Supreme Court had not previously addressed the all-purpose public figure category discussed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the court concluded that Wilson was not a "household word," and that he was not in a "position of such 'persuasive power and influence'" to amount to an all-purpose public figure. "Evidence of a limited circle of notoriety" would not suffice.

Concluding that Wilson also was not a limited-purpose public figure, the court used the test in *Suriano v. Gaughan*, 198 W. Va. 339 (1996), which requires that: (1) "plaintiff voluntarily engaged in significant efforts to influence a public debate or voluntarily assumed a position that would propel him to the forefront of a public debate;" (2) the public debate and plaintiff's involvement predate the allegedly defamatory statement; and (3) the plaintiff had access to "reasonable channels of communication" allowing him to respond. After determining that sportsmanship was the theme behind the newspaper articles, the court held the first element of the test could not be satisfied because Wilson had not voluntarily entered a controversy on sportsmanship. Moreover, no evidence was introduced to show that a debate over sportsmanship had existed prior to publication of the

articles. The court emphasized that the controversy must exist prior to publication of the libelous articles for the limited-purpose category to apply.

Finally, the court held, Wilson should not be considered one of the rare involuntary public figures, based on the criteria outlined in *Wells v. Liddy*, 186 F. 3d 305 (4th Cir. 1999). Again, the defect was that Wilson was not a "central figure" in a public discourse that preceded the publications.

As Wilson did not fit into any of the established categories of public figures, the court held, the circuit court erred in deeming him one. Additionally, the court rejected defendant's proposal of a specific public-figure category for nonprofessional athletes.

Ancil G. Ramey and Michelle E. Piziak of Steptoe & Johnson, Charleston, West Virginia, and William E. Galloway, Weirton, W.Va., represented Wilson. The *Gazette* was represented by Rudolph L. DiTrapano, Joshua I. Barrett, and Sean P. McGinley of DiTrapano, Barrett & DiPiero, Charleston, W.Va.

Ohio Court: Editorial Was Protected Opinion

By Louis Colombo

An Ohio Court of Appeals affirmed a lower court's entry of summary judgment against a juvenile court judge in a case that grew out of editorial criticism of the judge for "not knowing" or "flubbing" the applicable local rules in the election of the administrative judge for the court. *Sikora v. Plain Dealer*, No. 814651, 2003 Ohio 3218 (June 19, 2003).

The appellate court applied Ohio's state constitutional opinion privilege, recognized by the Ohio Supreme Court in a post-*Milkovich* decision, which utilizes the four-part *Ollman v. Evans* 750 F.2d 970 (D.C. Cir. 1984) test.

The court drew a clear distinction between the efforts of the editorial writer to verify factual references and the issue of whether the editorial itself was "verifiable" under *Ollman*.

The appropriate inquiry, the court wrote, is whether the "conclusions that are drawn from any factual references" are verifiable, and not whether the underlying factual references that are not themselves defamatory are verifiable. Since the conclusions were not themselves verifiable, this factor weighed in favor of a finding that the editorial was protected opinion.

Louis Colombo of Baker & Hostetler, in Cleveland, along with Bridget M. Brennan and Michael K. Farrell, represented the *Plain Dealer* and associate editor Beth Barber in this matter.

Texas Court Finds Restaurateur is Limited-Purpose Public Figure

A successful and well-publicized steakhouse owner was found to be a public figure by the Texas Court of Appeals in Dallas. *New Times Inc. v. Wamstad*, 2003 WL 21362719 (June 13, 2003). The court granted summary judgment to the defendant newspaper in a defamation case, also finding insufficient evidence of actual malice.

The *Dallas Observer* published a detailed piece on Dale Wamstad, titled "Family Man" in March 2000. The article discussed Wamstad's divorce with his ex-wife, Lena Rumore, including her allegations of abuse, and a court ruling she shot him in self-defense in 1985. The paper also described numerous disputes Wamstad had had with former business partners. While Wamstad himself refused to grant an interview, the largely critical article did mention that he had denied the allegations of abuse. Wamstad brought suit for defamation against the paper, the reporter, Mark Stuertz, Rumore, and two former business associates.

Substantial Media Coverage

A prominent and influential Dallas restaurateur, Wamstad was no stranger to the media. His name had been mentioned in restaurant reviews and business sections concerning restaurant sales and purchases. His restaurant made a top-ten list of steakhouses, which he widely publicized, especially in airline magazines. He received a great deal of press for his defamation lawsuit against rival Ruth Fertel of Ruth's Chris Steakhouse. Moreover, there had been significant coverage of his disputes with and lawsuits against his business partners, rivals, and Rumore.

The coverage of Wamstad had featured his personality as well as his business and legal transactions. He had been referred to as "flamboyant" and "controversial." A popular radio advertisement for his III Forks Restaurant contained a conversation between him, his wife, and two of his children.

Limited-Purpose Public Figure

The magnitude of the media coverage supported the court's finding that Wamstad was a limited-purpose public figure. In reaching that determination, the court used the three-part test developed by the Fifth Circuit, requiring (1) a public controversy, (2) the plaintiff having more than a trivial role, and (3) the alleged defamation relating to the controversy. *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433 (5th Cir. 1987).

For the first element, the relevant question was whether

people were actually discussing the specific question, not whether it was a matter of public concern or whether they ought to be discussing it. The court found that there was a public debate over Wamstad's "contentious relationships."

In determining the extent of Wamstad's role in the controversy, the court considered his access to the media, whether he had sought publicity, and whether he "voluntarily engaged in activities that necessarily involved the risk of increased exposure and injury to reputation." *WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 573 (Tex.1998). Justice Harriet O'Neill concluded that the media coverage "has been substantial and considerably focused on Wamstad's personality, with Wamstad himself participating in the media discussion."

No Actual Malice

In Texas, a defendant can obtain summary judgment by negating actual malice as a matter of law, shifting the burden to the plaintiff to raise a genuine issue of material fact. The defendant produced affidavits signed by Stuertz, managing editor Patrick Williams, and editor Julie Lyons. The affidavits met the requirement that they be "clear, positive, ... direct, ... credible and free from contradictions." Tex. R. Civ. P. 166a (c). Moreover, the court found the affidavits sufficient to "establish the defendant's belief in the challenged statements' truth and provide a plausible basis for this belief." *Huckabee v. Time Warner Enter. Co. L.P.*, 19 S.W.3d 412, 424 (Tex. 2000).

Wamstad countered with several pieces of evidence, including Rumore's admission to Stuertz that she sometimes could not distinguish dreams from reality, a media expert's testimony that the investigation was inadequate, and Williams' statement that the article was, "libelous as hell, but it won't be when I'm through with it." However, Williams testified in his affidavit that the article *as published* was true to the best of his knowledge, regardless of whether it was libelous *as written*. Noting that failure to investigate does not establish actual malice, O'Neill concluded that Wamstad failed to raise a material question of fact on actual malice.

Charles L. Babcock and Jim (James) McCown of Jackson Walker L.L.P. (Houston, Dallas) represented New Times, Inc. Alan S. Loewinsohn of Figari, Davenport & Graves, L.L.P. (Dallas) represented Dale F. Wamstad.

Federal Court in Philadelphia Finds No Defamatory Meaning In Use of Word 'Kooks'

By Gayle C. Sproul

On June 24, 2003, Senior District Court Judge John P. Fullam of the Eastern District of Pennsylvania dismissed with prejudice a defamation claim against Philadelphia Magazine and others. The suit was based on the publication of one word in the February 2003 issue of the magazine, which was devoted to plastic surgery: Kooks. *Smith v. Garber, et al.* (E.D. Pa. 2003)

Malpractice Patient Sues Again

That issue featured an article on the wildly successful cosmetic surgery practice of Dr. Sal Calabro. Calabro had, over the past few years, been a guest on Howard Stern's show and had developed a huge clientele stretching far beyond the confines of Philadelphia. He had hired associate surgeons to help with the caseload, including Dr. Brett Garber. Interviewed for the article, Garber said:

"Over the years, Calabro has been named in a handful of lawsuits; some were thrown out of court, and his name was removed from others directed at the work of his associate physicians. Dr. Brett Garber, who handles some of Calabro's breast work now, is involved in two suits from patients at Calabro's center. 'I'm pissed that I got sued at Sal's, but do I think these are frivolous charges? Yes,' he says. 'Was Sal involved in either of them? No. When you're a celebrity, you're going to get kooks.'"

Jennifer Smith, a patient of Calabro and Garber, had sued both of them for malpractice in Common Pleas Court in Philadelphia in connection with breast augmentation surgery. Alleging that Garber's use of the word "kooks" was aimed at least in part at her, Smith sued Garber, the magazine and the reporter, Richard Rys, in federal court for defamation.

Plaintiff alleged that the use of the word "kooks" was equivalent to a statement that she was insane. In her complaint, she quoted a dictionary definition of "kook," which included among its meanings "one whose ideas or actions are

... insane." Plaintiff then alleged that this was tantamount to a statement that she had a loathsome disease and that it constituted defamation per se.

The defendants filed motions to dismiss, alleging first that the word "kooks," at its essence and in context as used in the magazine article, was incapable of defamatory meaning. The defendants also argued that the article, which never mentioned Smith, was not "of and concerning" her.

In response, plaintiff reiterated the allegations of her complaint and stated that this purported statement regarding her insanity, particularly coming from a medical doctor, was the equivalent of a medical diagnosis of insanity. Plaintiff further argued that because the docket of the Philadelphia court system, where she had sued for malpractice, was accessible online, she was easily identifiable as one of the "kooks" referred to by Garber.

"While it is understandable that plaintiff would resent being referred to as a 'kook,' the article complained of is not reasonably capable of a defamatory meaning."

Kook Isn't Defamatory

Applying Pennsylvania law, Judge Fullam held that the usage of the word "kooks" in this context was incapable of a defamatory meaning. He held:

"In my view, the context here plainly eliminates any possibility that Dr. Garber

was expressing a clinical diagnosis; he was using the slang term which, although probably intended as pejorative, cannot be viewed as asserting a verifiable fact. . . . While it is understandable that plaintiff would resent being referred to as a 'kook,' the article complained of is not reasonably capable of a defamatory meaning."

In reaching this conclusion, Judge Fullam relied on *Kryeski v. Schott Glass Technologies, Inc.*, 426 Pa. Super. 105, 626 A.2d 595, 601 (1993) (statement that plaintiff is "crazy" not capable of defamatory meaning); *Weyrich v. New Republic*, 235 F.3d 617 (D.C. Cir. 2001) (use of the word "paranoia . . . in its popular, not clinical, sense" not defamatory); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974) ("paranoid" and "schizophrenic" used in their popular sense not defamatory); and *Richette v. Philadelphia Maga-*

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No Defamatory Meaning In Use of Word “Kooks”

(Continued from page 18)

zine, 1996 WL 756953 * 1,2 (Pa. Com. Pl. Ct. Phila. Cty.) (article calling plaintiff judge “an emotional wreck,” a “horse’s ass,” and stating that she was “in a world of confusion” not capable of defamatory meaning).

Judge Fullam also held that, although

“there is a serious question as to whether the persons being described as ‘kooks’ were those who had sued Dr. Calabro, or the (two) persons who had sued Dr. Garber, . . . a reasonable reader might interpret the quotation as referring to the persons who sued Dr. Garber, and since there were only two such persons, a reasonable reader might contend that it was indeed this plaintiff who was being referred to as a ‘kook.’”

However, given his ruling on the non-defamatory nature of the use of the word, the complaint was dismissed.

Gayle C. Sproul and Lee Levine of Levine Sullivan Koch & Schulz, LLP, Washington, D.C., and Yardley, PA., represented The Philadelphia Magazine Defendants. Plaintiff was represented by Aaron J. Freiwald of Layser & Freiwald, PC, Philadelphia, PA. Defendant Brett Garber was represented by John F.X. Monaghan, Jr. of Monaghan, Ferrante & Fortin, PC, Elkins Park, PA.

Cop Wins \$110,000 In Retrial

A jury has awarded a police officer \$110,000 in a retrial of a defamation case stemming from a television news report on a police-civilian shooting in St. Cloud, Minn. *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, No. MC-00-2843 (Minn. Dist. Ct., Hennepin County jury verdict July 11, 2003).

Officer Thomas Schlieman sued KARE-TV over a statement made by reporter Dennis Stauffer during coverage of the May 11, 1999 fatal shooting of Kevin Hartwig.

The station won the initial trial in 2001, but the verdict was partially overturned by the Minnesota Court of Appeals in December 2001 because of errors in the jury instructions. *See Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 30 Media L. Rep. 1235 (Dec. 26, 2001) (partially affirming jury verdict for defendant, reversing in part, and remanding), *rev. denied*, No. C0_01_935 (Minn. Mar 19, 2002). *See also LDRC MediaLawLetter* Feb. 2002, at 19.

In the retrial, the second jury found for Schlieman and awarded him \$110,000 on July 11; a detailed analysis of the court proceedings in the case will appear in next month’s *MediaLawLetter*. KARE-TV has already brought post-trial motions for dismissal notwithstanding the verdict.

Patrick T. Tierney of Collins, Buckley, Sauntry & Haugh, P.L.L.P., in St. Paul represented plaintiff Schlieman. Paul Klaas of Dorsey & Whitney L.L.P., in Minneapolis represented defendant KARE-TV in the retrial.

After Nine Years, Bueno and Rocky Mountain News Settle Case

Led Colorado to Reject False Light

The *Rocky Mountain News* has settled a nine-year-old libel and invasion of privacy case prior to retrial, ending a case which led to the Colorado Supreme Court rejection of the false light tort. Details of the settlement were not disclosed.

The lawsuit stemmed from an August 1994 profile of the Bueno family, titled “Denver’s Biggest Crime Family.” The article included a family tree with a picture of plaintiff Manual “Eddie” Bueno, and noted that while he and two other siblings had not been convicted of any crimes, his other 15 siblings all had been.

Bueno sued the newspaper for libel, negligence, false light invasion of privacy, and related claims. After the 1997 trial, the trial court granted a directed verdict for the newspaper on most of the claims, but submitted the false light claim to the jury. The resulting \$106,507 verdict against the newspaper was equally divided into compensatory and punitive damages. *See LDRC LibelLetter*, June 1997 at 8.

On appeal the Supreme Court of Colorado held that Colorado should not recognize the false light tort. *Denver Pub. Co. v. Bueno*, 54 P.3d 893, 894, 31 Media L. Rep. 1137 (Colo. Sept. 16, 2002); *see also LDRC MediaLawLetter*, Oct. 2002, at 23.

On remand, the Court of Appeals reinstated the defamation claims, *see MLRC MediaLawLetter*, Jan. 2003, at 28, and the Colorado Supreme Court declined to review this decision, *see MLRC MediaLawLetter*, May 2003, at 30. This set the case for the retrial that was avoided by the settlement.

Rocky Mountain News editor, publisher and president John Temple explained the settlement in a column in the newspaper. “What was the point of further litigation?,” he asked in the column. “Both sides had already spent nine years and buckets on money battling over their strongly held beliefs. The *News* had already established important First Amendment principles in Colorado’s highest court. Bueno had obtained a jury’s verdict in his favor.

California's Fair And True Report Privilege Applies To Articles Describing Legal Proceedings Even If Articles Contain Inaccuracies

By Rex S. Heinke and Jessica M. Weisel

On June 27, 2003, in a unanimous, published decision, the California Court of Appeal in Orange County confirmed the broad scope of California's absolute privilege for fair and true reports of legal proceedings (Cal. Civ. Code § 47(d)) by holding that the privilege applies even when a publication contains some inaccuracies. *Colt v. Freedom Communications, Inc.*, 2003 WL 21476939, 2003 Daily Journal D.A.R. 7120 (June 27, 2003).

It affirmed the grant of an anti-SLAPP motion brought by media defendants Freedom Communications, Inc. and Freedom Newspapers, Inc. (collectively "Freedom") in an action arising out of articles in the *Colorado Springs Gazette*. The Court also held there was no adequate proof of actual malice.

SEC Allegations of Fraud

Plaintiffs Joanne Colt and her son, Douglas Colt, are members of a prominent Colorado Springs, Colorado, family. When the articles were published, Joanne Colt was a member of the Colorado Springs City Council.

The articles followed the SEC's announcement that it had shut down "Fast-Trades.com," a website operated by Douglas Colt. In a complaint filed against Douglas Colt, the SEC contended that he had "carried out an illegal scheme to manipulate the price of four stocks." The SEC alleged that by promoting the stocks on the Fast-Trades.com website, he drove up the short-term price for stocks that he and others, including Joanne Colt, had purchased in advance. When the price increased following Fast-Trades.com's recommendations, the SEC complaint alleged that the Colts and others sold their stock for profits of about \$345,000.

The SEC also alleged that Douglas Colt and some friends promoted the website "by posting false and misleading messages on hundreds of publicly accessible internet message boards." The messages allegedly disguised the authors' connection with the website and misrepresented the success achieved from following Fast-Trades.com's recommendations. The SEC further alleged that the Fast-Trades.com web-

site published a false track record and misrepresented Douglas Colt's and his friends' trading intentions.

After some litigation, the Colts stipulated to the entry of an SEC consent decree. Although they admitted no wrongdoing, the consent decree enjoined them from the conduct alleged in the complaint and from engaging in various securities law violations. The consent decree also required them to disgorge their profits, but the SEC waived this requirement based on their inability to pay.

The *Colorado Springs Gazette* prominently reported about the SEC action and local response to it in a series of articles and columns.

The Colts sued, alleging claims for libel per se, false light invasion of privacy, interference with contractual relations,

and interference with prospective economic advantage. Freedom filed an anti-SLAPP motion. Orange County Superior Court Judge Robert D. Monarch granted it.

The Court of Appeal affirmed, holding that the Colts could not meet their burden under the anti-

SLAPP statute of demonstrating a probability of prevailing on the merits of their claims.

California's Fair Report Privilege

First, the Court relied on California Civil Code § 47(d), which provides an absolute privilege for a "fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof."

Under this statute, a publication "concerning legal proceedings is privileged as long as the substance of the proceedings is described accurately." 2003 WL 21476939. A newspaper report satisfies the privilege if it captures "the substance, the gist, the sting of the libelous charge." *Id.*

Although the articles and a reporter's Internet postings contained some errors, they still captured the gist and sting of the SEC complaint. The court declined

Although the articles and a reporter's Internet postings contained some errors, they still captured the gist and sting of the SEC complaint.

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CA Court Recognizes Broad Fair Report Privilege

(Continued from page 20)

“to engage in a detailed parsing of words, phrases, and sentences to note the subtle differences between [plaintiffs’ alleged] misconduct and that noted in the articles.” *Id.*

Even If Not Accurate, Got the Gist

Thus, for instance, one article stated the “SEC says . . . Douglas Colt[] built a Web site in February 1999 solely to offer bogus stock tips to get investors to buy worthless stocks that he owned.” Although the Colts contended that the use of a term like “worthless” to describe the stocks was false, because the stocks had an actual value, the Court of Appeal concluded that the term “worthless” accurately conveyed the point that “the victims of plaintiffs’ scheme parted with valuable consideration for stock that was either substantially worthless or certainly worth a great deal less than they paid for it.” *Id.*

Similarly, to gather information from possible victims of the fraud, a *Gazette* reporter posted statements on various Internet message boards, stating that:

“The person who operated fast-trades.com, one of the many fraudulent pump and dump-type Web sites, has been caught by the SEC. This person targeted [name of stock] in March of last year. He drove the stock price up for a matter of hours using false information about the company, thus creating a buying frenzy and then dumped his shares.”

In subsequent emails, the reporter admitted that Douglas Colt had not published false information about the companies and explained that he made the mistake because he was “in a rush.” The Court concluded that even if the Internet statements were “incorrect in an overly literal reading,” the “touting of specific stock constituted an implied representation about its value.” *Id.* The published statements accurately conveyed the gist and sting of the Colts’ alleged misconduct, so the privilege applied.

Admitting Mistake, Not Malice

The Court of Appeal offered a second basis for its decision.

It concluded that the Colts had failed to establish by clear and convincing evidence a probability of proving

that the articles were published with actual malice. *Id.* The Court held the reporter’s admission that he had made an error in his website post did not constitute actual malice. Erroneous statement and subsequent admission “may qualify as negligence, but it is hardly clear and convincing evidence of malice.” *Id.*

The Court also found that other alleged evidence of malice were actually misstatements that described the gist of the Colts’ alleged scheme. Evidence of such “inconsequential nature” was not clear and convincing evidence of malice. *Colt v. Freedom Communications, Inc.* becomes final on July 27, 2003.

The Colts have not indicated whether they intend to seek rehearing before the Court of Appeal or review in the California Supreme Court.

Rex S. Heinke is a partner, and Jessica M. Weisel is a counsel at Akin Gump Strauss Hauer & Feld, LLP in Los Angeles. They represented the defendants.

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50 State Survey 2003-2004: MEDIA PRIVACY AND RELATED LAW

*With a special report on privacy
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Jack Ass Loses \$10 million 'Jackass' Suit Against Viacom

No facts allowing relief in Ass v. Viacom International, Inc.

Viacom need worry no more about the Jack Ass who sued it. A federal trial judge on July 7 dismissed a copyright, trademark and defamation suit brought by a Montana man who changed his name to Jack Ass three years before MTV began airing its "Jackass" television series. *Ass v. Viacom International, Inc.* (Dist. Mont. July 7, 2003).

Chief Judge Donald W. Molloy of the U.S. District Court for Montana dismissed Ass' suit, which sought \$10 million in damages, after finding that Ass utterly failed to state a claim for relief. "[I]t is clear that no set of facts or interpretation of the law that Plaintiff could present would allow recovery in this case," the judge wrote in a straight-faced opinion.

Ass Couldn't Find a Lawyer

Bob Craft, an electrical lineman from Hot Springs, Montana, legally changed his name to Jack Ass in 1997 after creating a cartoon character named Andi Ass in memory of a brother who died in an alcohol-related car crash in 1990.

Ass runs a Web site (www.andiass.com) that promotes sober driving and sells Jack Ass's Beer ("actually a beer bottle with a genuine 'Jack Ass Award' inside it," according to Ass's lawsuit).

If not for MTV, Ass' online efforts might have escaped the notice even of his neighbors. But in October 2000, the Viacom cable network began airing "Jackass," a controversial and short-lived series featuring death-defying stunts of stupidity by star Johnny Knoxville and his cohorts. The series was canceled in August 2001, but was later turned into a hit movie released in October 2002. *Ass v. Viacom International, Inc.*, No. DV-02-111 (Sanders Co., Mont. Dist. Ct. 2002)

That November, Ass filed his suit against Viacom. How he learned about "Jackass" in the first place is unclear, since, according to a report in *The New Yorker*, he owns a television that receives exactly one channel – and it's not MTV.

Ass filed his complaint pro se in the Sanders County District Court because no lawyer would take his case. It was later removed to federal court.

"I couldn't find an attorney," Ass told *The New Yorker* last year. "Listen, lawyers are not just going to pipe up – they're not going to say they don't have courage. They give me lame excuses. One is too busy. They won't do it on contingency. Some say I may have a case and they want to look deeper. Then they don't call back."

Trademark, Copyright and Character

In his suit, Ass accused Viacom of copyright violations, trademark infringement and defamation of character: "I strongly feel that the Defendants Plagiarized, trademark and copyright infringement [sic] on my legal name (Jack Ass) and the cartoon character (Andi Ass). I feel that defendants are liable for injury to a reputation I have built and defamation of character I have created." Ass asked the court to award him \$10 million or "the maximum the law allows."

Molloy held that Ass abandoned his copyright claim by failing to mention it in a response brief, but that in any event Ass never owned a copyright to the word "jackass."

Ass' defamation claim, meanwhile, apparently relied on an argument that Ass had claimed property ownership over "jackass" and turned it into a positive word by using it to promote alcohol awareness, Molloy wrote.

"The essence of Plaintiff's argument seems to be that the use of infantile humor on the television show 'Jackass' injures Plaintiff and gives a negative spin to his alcohol awareness program."

Hardly, the judge held: "The term 'jackass' is one of common usage in the English language, particularly in English slang. The use of this term is almost universally negative. Defendant did not cause any negative connotation to be attached to the term 'jackass'; rather, Defendant capitalized on the established connotations of the term."

Ass came closer – but not very close – to moving forward with his trademark claim. He produced several trademarks from the state of Montana and a transcript of the court hearing in which he changed his name, but Molloy held that wasn't enough.

Ass' trademark in "Jack Ass" the name was dated more than six months after MTV started airing "Jackass" the series. His trademark in "Jack Ass's Brewery" also came too late. Ass acquired trademarks for "Jack Ass's Beer" and "Jack Ass's Enterprises" before the show began, but only by a few months, Molloy wrote.

"There is no danger of consumer confusion between the products," the judge wrote of those two trademarks. "Finally, the trademarks are for products prefaced by the words 'Jack Ass's . . .' which are distinct from Defendant's television show and movie called 'Jackass.'"

Attorneys Kelli Sager of Davis Wright Tremaine LLP in Los Angeles and Rochelle Wilcox of Davis Wright Tremaine in Sacramento and James Goetz of Goetz, Gallik, Baldwin & Dolan in Bozeman, Montana, represented Viacom. The plaintiff appeared pro se.

'Jackpot Justice' Lawsuits to Remain in Federal Court: Statements on 60 Minutes Broadcast Not 'Of and Concerning' Plaintiff Jurors

By Tom Curley

In two related cases brought against 60 Minutes concerning a report on large damage awards in tort suits in Mississippi state courts, a federal trial court has denied the plaintiffs' attempt to remand the cases back to Mississippi state court, holding that the specific broadcast statements at issue were not "of and concerning" the plaintiffs, former jurors in state tort suits.

The decisions on June 30 by Judge David Bramlette of the Southern District of Mississippi in *Berry v. Safer*, No. 5:03-CV-3(Br)(S), and in *Gales v. CBS Broadcasting Inc.*, No. 5:03-CV-35(Br)(S), 2003 U.S. Dist. LEXIS 11723 (S.D. Miss. June 30, 2003), are notable because they examine the propriety of removal in a defamation context. Specifically, the district court held that the plaintiffs could not defeat federal jurisdiction by naming non-diverse defendants whose statements in the broadcast were not "of and concerning" the plaintiffs. The decisions emphasize the strict application of the "of and concerning" element under Mississippi law.

The decisions are notable because they examine the propriety of removal in a defamation context.

Jackpot Justice

The cases arose out of a November 24, 2002 broadcast by 60 Minutes concerning multi-million dollar jury awards in and comparable settlements of personal injury cases in rural Mississippi. The broadcast, entitled "Jackpot Justice," focused on "where lawyers like to go when they sue big corporations for personal injury." According to the broadcast,

"[i]t's not to the big cities where the corporations are headquartered, but to places like, for example, rural and impoverished Jefferson County, Mississippi."

The broadcast observed that "[t]here are more lawsuits filed [in Jefferson County] than there are inhabitants of Jefferson County" and that the southern Mississippi jurisdiction is one in which "plaintiffs' lawyers have found that juries . . . can be mighty sympathetic when one of their own goes up against a big, rich multinational corporation."

Indeed, the disproportionate number of multi-million dollar damage awards and settlements in some Mississippi counties has prompted the U.S. Chamber of Commerce to warn companies about the risk of doing business in that state and the Mississippi legislature has reacted by passing legislation intended to limit some damage awards against health-care providers.

Mississippi Jurors Sue For Libel

Following the broadcast, two lawsuits were filed on behalf of some 35 Mississippi citizens who alleged that they served on Jefferson County juries and were defamed by the broadcast because it allegedly suggested that they had awarded large sums to plaintiffs suing big corporations with-

out a proper evidentiary basis for doing so. Certain plaintiffs also brought related causes of action for, *inter alia*, invasion of privacy and intentional infliction of emotional distress. In one suit alone, Plaintiffs sought to recover a total of \$1.45 billion in actual and compensatory

damages and \$9.2 billion in punitive damages.

The lawsuits named a variety of defendants, including CBS Broadcasting Inc., 60 Minutes correspondent Morley Safer and the two producers of the "Jackpot Justice" broadcast. Also named as defendants were two Mississippi citizens interviewed in the broadcast, Wyatt Emmerich, a newspaper publisher and columnist, and Beau Strittman, a florist who was a plaintiff in a tort suit against a diet drug maker.

Emmerich, explaining the phenomenon of the large damage awards on the broadcast, stated that Jefferson County jurors tend to be "disenfranchised people . . . who have been locked out of the system, who feel like sticking it to the Yankee companies," and that "[t]he African-Americans feel like it's payback for disenfranchisement." Strittman stated that jurors in Jefferson County awarded large verdicts because "they felt as if they were going to get a cut off it . . . under the table."

Ironically, the lawsuits were initially filed in Jefferson County Circuit Court, the very jurisdiction that had been the

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'Jackpot Justice' Lawsuits

(Continued from page 23)

focus of the 60 Minutes report. The defendants removed both cases to the Southern District of Mississippi.

Fraudulent Joinder Argued

The plaintiffs sought to remand the cases back to Jefferson County, arguing that federal subject matter jurisdiction was lacking because complete diversity of citizenship did not exist between the Mississippi plaintiffs and each of the defendants. There were two non-diverse defendants in the cases, Mississippians Emmerich and Strittman, but defendants argued that they had been "fraudulently joined" so as to defeat federal jurisdiction. To prove fraudulent joinder, and thus defeat plaintiffs' attempt to remand the cases to state court, defendants had to establish that the plaintiffs could not state any cause of action against Emmerich and Strittman.

In two opinions that are largely identical, the district court concluded that the plaintiffs could not state claims for defamation (or any other cause of action) against the non-diverse defendants because their statements were not "of and concerning" any particular Jefferson County juror. On the contrary, Emmerich's and Strittman's comments were attempts to explain the largesse of Jefferson County jurors more generally. "As a matter of law, an alleged defamation against all jurors in Jefferson County can have no personal application to any individual juror," the court held.

Not "Clearly Directed" At Plaintiff

The court's opinions emphasized that the "of and concerning" requirement is strictly enforced in Mississippi. Under the Mississippi common law, an allegedly defamatory statement must be both "of and concerning" the plaintiff and "clearly directed toward" the plaintiff. Accordingly, the district court held that the defamatory meaning of the challenged statements with respect to the plaintiffs must be "clear and unmistakable from the words themselves and not the product of innuendo, speculation or conjecture."

While the statements of Emmerich and Strittman in the broadcast singled out no individual juror or jury in particular, other portions of the 60 Minutes broadcast discussed specific damage awards in cases in which the Plaintiffs claimed to have served as jurors. Plaintiffs argued that, taken in the entire context of the broadcast, viewers would have understood these interviewees' comments to be clearly directed at them.

The district court disagreed, holding that under Missis-

issippi law, it would be improper to "look beyond the four corners of what Emmerich and Strittman actually said in the portions of their interviews aired on the program." Although the court acknowledged that the context of the broadcast as a whole was relevant to the "of and concerning" inquiry, "defendants whose statements were merely quoted in a newspaper article or aired on a television program" cannot be held responsible for statements made by others contained within in the same publication or broadcast.

"While Emmerich and Strittman referred to juries and jurors in general, their statements lack the requisite specificity of reference to any of the ... plaintiffs or the juries on which they served," the court observed.

"Therefore, it could not have reasonably been believed by some viewer of the program that Emmerich's or Strittman's statements were intended to refer to the plaintiffs."

The district court's decisions dismissed Emmerich and Strittman from the two cases. The non-Mississippi defendants, including CBS Broadcasting Inc. and its employees, remain in the cases now pending in federal court. However, the district court's reasoning in its denial of the remand motions of course suggests that the plaintiffs will not be able to state a cause of action against any of the remaining defendants.

In both cases, the CBS defendants are represented by in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and by Lee Levine, Jay Ward Brown, Cameron Stracher, Audrey Critchley and Thomas Curley of Levine Sullivan Koch & Schulz, LLP in Washington, D.C., and New York City. Mississippi counsel for the CBS defendants and Wyatt Emmerich are Luther T. Munford, John P. Sneed and Christopher R. Shaw of Phelps Dunbar, LLP in Jackson, and Robert O. Allen of Allen, Allen, Boerner & Breeland in Brookhaven.

Defendant Beau Strittman is represented by W. Wayne Drinkwater, Jr. and Billy Berryhill of Bradley Arant Rose & White, LLP in Jackson. Plaintiffs in the Berry case are represented by solo practitioner Kevin D. Muhammad in Fayette, Miss. Plaintiffs in the Gales case are represented by Christopher W. Cofer of Cofer & Associates, P.A., in Jackson.

Tom Curley is an associate with Levine Sullivan Koch, Washington, D.C.

California Court Greenlights Hidden Camera Eavesdropping Suit But No Damages from Broadcast Allowed

A California Court of Appeal allowed an eavesdropping case to proceed against a television news program that secretly recorded consultations between a doctor and patients, then aired them during a segment called "Caught in the Act." *Lieberman v. KCOP Television, Inc.* 2003 Cal. App. LEXIS 1007 (Cal. Ct. App. 2d Dist. July 3, 2003).

The segment showed plaintiff Dr. Fred Lieberman prescribing prescription pain-killers in a manner allegedly contrary to California law. The court affirmed the trial court's denial of KCOP's anti-SLAPP motion, finding that Lieberman had a viable case against KCOP Television under California Penal Code § 632: "Eavesdropping on confidential communication; Punishment."

However, the Court also held that Lieberman could not recover for damages caused by the broadcast. He had not sued for defamation or any other tort. His only cause of action was based on the anti-eavesdropping statute.

News-gathering Protected from SLAPP

The court determined that the claim could be subject to an anti-SLAPP motion, under California Civil Procedure Code § 425.16, to dismiss the suit on the grounds that the defendant engaged in the alleged conduct in furtherance of its free speech rights, and that the plaintiff had not shown a probability of prevailing at trial.

The court determined that the claim "arose out of acts done in furtherance of the defendant's exercise of a right to . . . free speech . . . in connection with a public issue."

Reporting the news clearly falls within the auspices of the First Amendment. The court held that, in this case, gathering the news would too, even if the unlawful manner in which it were gathered would mean a lesser degree of constitutional protection. The gathering furthered, or assisted, the reporting. Finally, Justice J. Gary Hastings held that criminal activity, specifically the improper issuance of controlled substances, is a matter of great public interest.

The court, however, determined that Lieberman overcame the SLAPP motion by demonstrating a probability of prevailing on the eavesdropping claim.

A Reasonable Expectation of Confidentiality

Section 632 criminalizes recording of or eavesdropping on a "confidential communication" without the consent of all parties. A "confidential communication" occurs when the parties reasonably expect the communication will be limited to each other, and there is no reasonable expectation that the communication might be overheard or recorded. Cal. Pen. Code § 632.

The court found that Lieberman had demonstrated an adequately reasonable expectation of privacy in his consultations with the two undercover KCOP employees to present a prima facie case, though the ultimate determination would be made by a jury.

Each patient brought a companion who stayed in the examining room during the meetings. Because of the presence of the companion, KCOP argued, Lieberman could not expect the conversation to be limited to its own parties, as the companion would obviously overhear.

The court rejected KCOP's argument, finding that the companions were "parties to the communication," part of the conversation, because they listened with Lieberman's knowledge and intent.

Right to Recover Statutory Damages

Lieberman's complaint alleged damages from the broadcast, not from the eavesdropping itself. The court nonetheless found that the § 632 violation was actionable, as injury was presumed once the recording was made.

Penal Code Section 637.2 allows the plaintiff to bring suit for the greater amount of either \$5,000 or three times "actual damages." Cal. Pen. Code § 637.2. To recover under the statute, Lieberman did not have to demonstrate

It held that emotional distress at learning of the surreptitious recording would suffice; the harm to plaintiff's business resulting from the program would not.

Hidden Camera Eavesdropping Suit

(Continued from page 25)

actual damages resulting from the recording. If Lieberman should choose to calculate actual damages, the Court cautioned, they must be limited to the recording itself, and could not include the subsequent broadcast. It held that emotional distress at learning of the surreptitious recording would suffice; the harm to plaintiff's business resulting from the program would not.

No Creation of an Affirmative Defense

Finally, the court declined to create an affirmative defense for § 632 if the defendant was legitimately gathering news. The court noted that KCOP had not shown that the California Constitution nor United States Constitution required the creation of such a defense. KCOP's reliance on *Sanders* did not suffice, as it related to the common-law tort of intrusion rather than § 632, and had postponed making a decision on affirmative defenses. *Sanders v. American Broadcasting Company*, 20 Cal. 4th 907 (1999).

The opinion was written by Justice Hastings and joined by justices Norman L. Epstein and Daniel A. Curry.

Gary Bostwick and Jean-Paul Jassy of Davis, Wright, & Tremaine, Los Angeles, represented KCOP. Zev S. Brooks, Los Alamitos, represented Lieberman.

Ashcroft: Patriot Act Misunderstood

Attorney General John Ashcroft told participants in a conference on "Journalism and Homeland Security," that he needed the media's help in explaining the steps that the government is taking to protect Americans against terrorism.

"We need the help of the news industry, the fourth estate, to inform citizens about the constitutional tools and methods being used in the war against terror," Ashcroft told about two dozen journalists at the conference, according to *The New York Times*. "We need the media's help, for instance, in portraying accurately the USA Patriot Act."

Supreme Court Declines To Review Government Fraud in 1953 Military Secrets Claim

Without comment, the U.S. Supreme Court has declined to reexamine a landmark ruling creating a privilege for secret government information, refusing to hear claims that the privilege invoked by the government in the 1953 case was not based on any actual need for secrecy. *In re Herring*, 539 U.S. ___ (U.S. June 23, 2003) (No. 02M76) (denying motion for leave to file a petition for a writ of error *coram nobis*).

The 1953 case, *U.S. v. Reynolds*, 345 U.S. 1 (1953), arose from the 1948 crash of an Air Force plane that killed three civilian engineers working on a secret military project. In a suit filed by their widows, the government was held in default after it refused to produce its reports on the accident. The U.S. Supreme Court reversed the default ruling, holding that the government could assert a privilege based on the need for military secrecy.

The report on the crash was declassified in 2000, and Judith Palya Loether – daughter of one of the men – discovered that it contained no classified information. She joined with other descendants of the crash victims to have the case re-examined, arguing that the government's claim that the report contained sensitive information was fraudulent. Represented by Wilson M. Brown III of Drinker Biddle in Philadelphia, they filed a motion with the U.S. Supreme Court seeking leave to file a petition for a writ of error *coram nobis*. The somewhat obscure writ allows for re-evaluation of a judicial decision in light of the subsequent discovery of an error in matters of fact in a case. See *MLRC MediaLawLetter*, March 2002, at 45.

The petitioners sought to vacate the *Reynolds* result and reinstate the district court's award with interest – a total of \$1.14 million – plus attorneys' fees and costs. They did not challenge the legal holding in *Reynolds* that the government may invoke a privilege to protect government secrets.

**DCS ANNUAL
BREAKFAST MEETING 2003
FRIDAY, NOVEMBER 14**

Jury Awards Damages Against Candid Camera Sent Through Baggage X-Ray, Plaintiff Claimed Injury

On July 1 a Los Angeles jury awarded \$302,600 to a man who was injured when he traveled through a fake baggage x-ray machine in a segment for "Candid Camera." *Zelnick v. Paxson Communications*, No. BC274299 (Cal. Super. Ct., L.A. County jury verdict July 1, 2003). The defendants are planning to file a motion for judgment notwithstanding the verdict.

The damages were awarded against the show's production company, Candid Camera, Inc., and its host and executive producer, Peter Funt. The PAX-TV network, which airs the show, settled before trial for \$7,500, while the operator of the airport at which the segment was filmed settled during trial for \$95,000.

The segment was filmed prior to the terrorist attacks of Sept. 11, 2001. It involved Funt impersonating an airport security officer at Laughlin/Bullhead International Airport in Bullhead City, Arizona, and ordering passengers to ride the conveyor belt of a fake carry-on baggage x-ray machine.

One of the 13 passengers who traveled through the fake machine was 35-year-old personal fitness trainer Philip Zelnick. Zelnick, who was boarding a flight to California, was initially skeptical when he was told that he had to ride through the machine, and he asked, "Okay, where's the candid camera?" But he eventually complied, and rode through the machine several times. During one of these trips, his thigh and leg were injured as Zelnick got off the conveyor belt.

None of the other passengers were injured, and the segment was broadcast without showing Zelnick's experience.

Zelnick filed suit in May 2001, alleging battery, negligence, false imprisonment, misrepresentation and infliction of emotional distress.

After a four-day trial, the jury found the show's producers liable and awarded \$2,600 in compensatory damages. After additional argument by the parties, the jury also awarded Zelnick \$300,000 in punitive damages.

According to a press release from the producers, "[t]he jury seemed to be primarily concerned with the concept of impersonating an airport guard, although it was clearly established during the trial that the sequence was fully approved and supervised by the airport management and security chief, and was done with the awareness of the airlines and the FAA."

In their statement, Candid Camera and Funt said they would appeal on the basis of the U.S. Supreme Court's statement in *State Farm Mutual Ins. v. Campbell*, 123 S.Ct. 1513, 1524 (U.S. April 7, 2003), that punitive awards that exceed compensatory awards by more than a nine-to-one ratio are unlikely to survive constitutional scrutiny.

Robert P. Baker of McCormick Siepler & Baker in Glendale, Cal. represented Candid Camera and Funt. Pax was represented by R. Dewitt "Kyle" Kirwan of Akin Gump Straus Hauer & Feld in Los Angeles, and Patrick E. Bailey of Bailey and Partners in Los Angeles represented the airport. Zelnick was represented by Andrew B. Jones of Wagner & Jones in Fresno, Cal.



Reporters Protected from Testifying in Murder Trial

By Hugh Stevens

In an important test of North Carolina's shield law, three media companies successfully prevented defense counsel in a high-profile murder case from using reporters' testimony to impeach the credibility of two key prosecution witnesses.

The confrontation between the defense and the news media arose during jury selection in *State v. Peterson* (Superior Court of Durham County, N.C.), in which a Durham novelist is accused of the bludgeoning death of his socialite wife.

Frustrated by repeated news reports that disclosed allegedly prejudicial information, defense counsel for Michael Iver Peterson persuaded the trial judge to allow him to conduct a pre-trial *voir dire* of two police officers, including the principal investigator on the case. When both officers denied under oath that they were the sources of the alleged "leaks," defense counsel issued subpoenas to two television reporters and a newspaper columnist, requesting them to produce to the judge, for *in camera* review, any notes or memoranda tending to show that the officers' denials were untrue.

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Reporters Protected from Testifying in Murder Trial

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Argued Reporters Were Eye-Witnesses

Defense counsel argued that the officers' denials constituted "perjury" or "obstruction of justice," and thus that the subpoenas fell under a section of the shield law that provides that no privilege is available if a reporter is an "eyewitness" to criminal or tortious behavior.

The news organizations – ABC's owned-and-operated television station, the local CBS affiliate and Durham's daily newspaper -- moved to quash the subpoenas on the basis of the shield law and the First Amendment. WTVD, the ABC station, refused to say whether its reporter, Sonya Pfeiffer, had any information potentially responsive to the subpoena, arguing that all of her sources were confidential, and thus that any response "would compromise [such] sources by either identifying or eliminating the two officers in question as sources . . ."

On June 25, Presiding Judge Orlando Hudson granted the motions to quash, ruling that the defense had not met the three-part test required to overcome both the constitutional privilege and the protections of the Shield Law. He also ruled that the circumstances that precipitated the subpoenas did not fall under the "eyewitness" exception contemplated by the Shield Law.

In his order, Judge Hudson wrote that

"Both the statutory privilege and the constitutional privilege are intended to protect the free flow of information about matters and events of public interest, such as the State's prosecution of a citizen for murder, and avoid the infringement on press freedom and independence that occurs when reporters are subjected to in-court examination of their newsgathering activities. This intrusion is especially offensive when the same information can be derived from other sources, implicates confidential sources or is not essential to establishing a critical element of a case. The privilege allows journalists to remain neutral in covering trials and other adversarial proceedings. And while the privilege is not absolute, the balance especially tips in the journalists' favor when the privilege is invoked to protect confidential sources, as in this case."

Hugh Stevens and Amanda Martin of Everett Gaskins Hancock & Stevens, Raleigh, N.C., and Nathan Siegel of ABC News represented WTVD (ABC, Inc.); Robin Vinson of Smith Anderson, Raleigh, N.C. represented WRAL-TV; ; John Bussian, Raleigh, N.C. represented the *Durham Herald-Sun*.

New York Criminalizes Video Voyeurism

'Stephanie's Law' May Limit Media's Hidden Cameras

On June 23, New York Governor George Pataki signed "Stephanie's Law," which will make video voyeurism a felony. 2003 N.Y. ALS 69. Several provisions will be added to the New York Penal Code to criminalize surveillance at certain places and times by use of an imaging device, defined as: "any mechanical, digital or electronic viewing device, camera or any other instrument capable of recording, storing or transmitting visual images that can be utilized to observe a person."

Section 250.45 makes it "unlawful surveillance in the second degree" when a person uses, installs, or permits to be installed, an imaging device to record, view, or broadcast another without their knowledge or consent:

(1) For amusement, entertainment, profit, abuse, or sexual gratification in a place where a person has a "reasonable expectation of privacy" – "a place and time when a reasonable person would believe that he or she could fully disrobe in privacy";

(2) For no legitimate purpose in a "bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel or inn" (with a rebuttable presumption that any such installation has no legitimate purpose); or

(3) under another person's clothing.

Other provisions impose harsher penalties for repeat offenders (250.50), make it a misdemeanor to disseminate the images obtained through unlawful surveillance (250.55), make it a felony to publish or sell the images, and exempt security systems with conspicuously posted written notice, law enforcement personnel performing their duties, and surveillance devices that are obviously placed (250.65).

The law has potential ramifications for the media. Reporters may be limited or prohibited from using hidden cameras. Media counsel should review it with care.

Stephanie's Law will go into effect in mid-August. The law is named for Stephanie Fuller, a Long Island resident whose landlord hid a camera in her smoke detector.

New Jersey Court Upholds Shield Law in 'Reality TV' Case

By David McCraw

The New Jersey Appellate Division has ruled that the New Jersey Shield Law applies to a "reality TV" show that focuses on the treatment of patients in hospital emergency rooms. *Kinsella v. Welch and NYT Television and the New York Times Co.*, No. L-1836-02, 2003 WL 21643211 (N.J. Super. A.D. July 15, 2003).

Release, Still Sues

In July of 2001, the plaintiff, Joseph Kinsella, was brought to Jersey Shore Medical Center for treatment after he fell from a rooftop work site. At the time, a production crew from New York Times Television ("NYTTV") was videotaping at the hospital for the show "Trauma: Life in the Emergency Room," which airs on The Learning Channel.

Kinsella subsequently signed a release authorizing NYTTV to film him and to use the footage on "Trauma." However, the footage featuring Kinsella was never used in the show.

A year later, Kinsella sued The New York Times Company ("The Times") claiming that NYTTV had violated his privacy and committed other torts against him by videotaping his treatment. He claimed that his signed release was invalid because he lacked the capacity to sign as a result of his injuries and because NYTTV fraudulently induced him into executing the document.

Dispute over Outtakes

At the start of discovery, Kinsella sought the un-aired tapes that NYTTV had made of him. The Times refused to produce them, citing the New Jersey Shield Law (N.J.S.A. 2A: 84A-21 to 21.8).

The New Jersey courts have broadly construed the Shield Law to protect both confidential information and unpublished materials. Nonetheless, Monmouth County Superior Court ruled in December 2003 that The Times had to produce the tapes. The court held that the Shield Law applied only to confidential information. The court also ruled that Kinsella's privacy claim was a constitutional claim and that the Shield Law was trumped when a constitutional right was at issue.

App Div: Outs are Protected

The Appellate Division, in a decision on July 15, 2003, rejected that analysis and found that the un-aired tapes were privileged under the Shield Law. The ruling came on an interlocutory appeal while other discovery continued.

Unlike the trial court, the Appellate Division focused on the question of whether the "Trauma" production crew qualified as "news media" and whether the show qualified as "news" under the statutory definitions contained in the Shield Law. While the court found that the show primarily involved human interest stories and was sometimes graphic, it said that "Trauma" had "educational and public policy aspects." After acknowledging there was a "shadowy boundary" between news and entertainment, the court concluded that "Trauma" fell within the statutory ambit of news and therefore was covered by the Shield Law.

Rejects Arguments Against Privilege

The court easily rejected both the confidentiality and constitutional arguments that the trial court accepted. The court noted that the New Jersey Supreme Court had already held that the privilege did not turn on confidentiality in *In Re Woodhaven Lumber & Mill Work*, 123 N.J. 481 (1991), and that the high court had applied the Shield Law to unpublished photographs taken at a fire scene by a newspaper in the *Woodhaven* case.

As for the argument that Kinsella's privacy claim arose under the state or federal constitutions, the court pointed out that no state action was involved in the alleged invasion of privacy. Thus, while a constitutional claim (for instance, a

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Chicago Editor Arrested

The owner of a Chicago-based Arabic newspaper was arrested July 9 on charges that he spied on Iraqi opposition leaders for the government of Saddam Hussein. The government also charged that *Al-Majhar* owner Khaled Dumeisi provided Iraqi intelligence officials based at the UN with press credentials so that they could evade restrictions on their travel beyond New York City.

N.J. Court Upholds Shield Law

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defendant's right to a fair trial) may overcome the Shield Law in some instances and lead to an order compelling journalists to provide evidence, that principle had no bearing in this case, which involved a simple common-law tort claim.

Kinsella had also asserted that the Shield Law should not apply because NYTTV's filming constituted a violation of the state eavesdropping statute. The Appellate Division rejected that argument as well, finding that open videotaping of the patient's conversations was not "surreptitious" and therefore did not come within the scope of the eavesdropping law.

Finally, the court declined to accept Kinsella's argument that The Times had waived the privilege when an NYTTV producer purportedly promised to give Kinsella a copy of all the tapes at the time of the filming. The court pointed out that the facts surrounding the producer's conversation with the plaintiff remained in dispute and that, in any event, a waiver or relinquishment of rights under the Shield Law will be found only in limited circumstances.

While upholding broad application of the Shield Law, the Appellate Division made clear that the Shield Law could not be used as a sword to gain unfair advantage in litigation. The court ruled that The Times had to turn over any of the tapes that it intended to use at evidence and could not withhold the materials from discovery, only to ambush the plaintiff later during trial.

The Times was represented by Peter G. Banta of Winne, Banta, Hetherington & Basralian of Hackensack, N.J. Thomas J. Cafferty of McGimpsey & Cafferty of Somerset, N.J. appeared on behalf of amicus curiae New Jersey Press Association and Reporters Committee for Freedom of the Press. Plaintiff was represented by Gerald H. Clark of Lynch Martin of Shrewsbury, N.J.

David McCraw is an in-house attorney for The New York Times Company.

SAVE THE DATE

**MLRC ANNUAL DINNER 2003
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Patients Sue Over Emergency Room Filming

Hospital patients who claim they were tricked into appearing on a reality TV show are pursuing a national class action lawsuit against the show's producers and a participating hospital. *Castro v. NYT Television*, Mon-L-2743-03 (N.J. Super. Ct. Law Div. June 24, 2003) The lawsuit, filed on behalf of patients filmed since 1998 for The Learning Channel's "Trauma: Life in the ER," alleges the patients were duped into consenting to the filming of their emergency room treatment. The suit also claims film crews invaded patients' privacy by obtaining "private, privileged conversations and communications between Class members and their loved ones, treating physicians, nurses and other health care personnel." The lawsuit alleges that crew members from NYT Television and Discovery Communications told patients that the filming was to be used for doctor training. It further claims that Jersey Shore Medical Center in Neptune, N.J., permitted and worked in concert with the crew members. The named plaintiffs in are Michael Castro and Julio Costa. Both men were filmed in July 2001 for "Trauma." Plaintiffs are seeking actual and punitive damages.

MLRC would like to thank summer interns — Kelly C. Aldrich, University of Washington School of Law, Class of 2004, Anastasia B. Heeger, Brooklyn Law School, Class of 2004, Carter Nelsen, University of Michigan Law School, Class of 2005 and Lauren Perlgut, Columbia University School of Law, Class of 2005 for their contributions to this month's *MLRC MediaLawLetter*.

Legislative Affairs: Federal Update

By Kevin Goldberg

Congress has just returned to Washington, D.C., on July 7 after its Independence Day recess, so there are not many updates to report since the first in this series of monthly updates was published in the June 2003 newsletter. However, two new bills were introduced which may have some relevance to the news media.

Restore FOIA Act (S 609)/HR 2526

- Introduced in the Senate on March 12, 2003 with 5 original co-sponsors: Sens. Patrick Leahy (D-VT), Carl Levin (D-MI), Robert Byrd (D-WV), Joseph Lieberman (D-CT) and Jim Jeffords (I-VT). They have been joined by Senator Bob Graham (D-FL). On June 19, 2003, Rep. Barney Frank (D-MA) introduced the companion measure in the House.
- The Restore FOIA Act seeks to amend the sections of the Homeland Security Act of 2002, which allows private entities to submit information related to protection of the nation's critical infrastructure (mainly in the area of cybersecurity as it affected our nation's banking, water, oil, transportation, energy, telecommunications, and other important industries) in exchange for a promise that the information will not be accessible to the public through a FOIA request and will not be used as evidence of liability in a civil lawsuit. Though the Restore FOIA Act would not repeal these sections of the Homeland Security Act, it would greatly limit the scope of the bill and the protections offered to private industry.
- Despite an excellent editorial on June 18, 2003 in his home state's capital city paper, the Austin American-Statesman, Senator John Cornyn has not been moved to become a co-sponsor of the Senate bill. **MLRC members can be most effective on this bill if they can find Republicans, now in either chamber, who will co-sponsor this legislation.**

Human Rights Information Act (HR 2534)

- Introduced in the House on July 19, 2003 by Rep. Tom Lantos (D-CA) with 25 co-sponsors.

- The bill seeks to increase access to records held by the United States government (other than the INS) about human rights violations committed in countries other than the United States. It would require a government agency to decide, within 60 days of receiving a request for records related to gross human rights violations, whether the request is related to an international mandate to investigate gross human rights violations; the government then would have 120 days to fulfill the request. The request could be "confidentially fulfilled," with the records going only to the requestor; however, they could later be made available to the general public if the agency from which they were requested determines that the need for confidentiality no longer exists.
- As this bill was introduced just before the Independence Day recess, its committee of jurisdiction, the Government Reform Committee, has not taken any action on the bill.

Federal Employee Protection of Disclosure Act (S 1358)

- Introduced in the Senate on June 26, 2003 by Sen. Daniel Akaka (D-HI). It was co-sponsored by Sens. Richard Durbin (D-IL), Charles Grassley (D-IA), Patrick Leahy (D-VT), and Carl Levin (D-MI).
- The bill seeks to protect a crucial source of information for the news media – federal government whistleblowers. It provides a greater certainty as to the information that may be disclosed without fear of prosecution, while also creating new procedures for determining whether a federal government employee has committed a violation which may result in legal action.
- This is another bill that has not seen much action, other than its referral to the Senate Committee on Governmental Affairs. There is no indication that this bill will move quickly.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP, at (202) 452-4840 or kmg@cohnmarks.com.

Pentagon May Embrace Embedding, But Issues and Danger Remain

Clarke Resigns, But Embedding May Stay

While Defense Department spokeswoman Victoria Clarke left her position in mid-June for personal reasons, the policy of embedding reporters with military units that she pioneered during the war in Iraq may (or may not) to continue in future conflicts.

Separately, the official who oversaw the program for the Army said that if American soldiers are deployed in Liberia, "It would have to be considered," Lt. Col. John Robinson of the U.S. Central Command told *Editor & Publisher*. "The assessment would be based on the situation on the ground."

Clarke said at a discussion of Iraq war coverage sponsored by the Brookings Institution (www.brookings.org/comm/events/20030617.pdf), "People can always backslide but I am quite confident people feel so good about this process that you'll see more people in the military embracing it."

Clarke said that inclusion of embedding in the Pentagon's written public affairs doctrine was "under consideration."

Imbeds Mostly Gone, But Tensions Remain

By early July, only 23 journalists remained embedded with American troops in Iraq, according to *Editor & Publisher*.

The magazine also reported that the smaller number of journalists has led to looser rules regarding reporters leaving and joining units. Initially, the Pentagon's policy was that journalists leaving their assigned unit were considered to have abandoned their embedding slot and would not necessarily be reassigned. But in reality several journalists were able to move between units.

Meanwhile, some tensions between the military and the press continue.

Iraq: In Iraq, American forces detained three journalists from the Arabic television channel Al-Aalam, which is operated by Islamic Republic of Iran Broadcasting (IRIB), an official government agency. The three – Sami Hassan, Zohair Mostafa, and Ghuran Tofiq – were arrested in front of the central police building in Baghdad, where they were working on a story about police operations in the city after the ouster Saddam Hussein's regime.

Guantanamo Bay: At Guantanamo Bay, Cuba, where the American government is holding about 680 people cap-

tured during the war in Afghanistan, American troops seized a videotape filmed by a BBC camera and ordered a BBC radio reporter to erase an audio tape recording an incident during which several detainees shouted to journalists taking a tour of the facility. The troops abruptly ended the tour.

Although the radio reporter did erase his tape, he made a copy that was broadcast on the BBC Radio program "Broadcasting House," and is online at www.bbc.co.uk/radio4/news/bh/ram/20030622_guantanamo.ram.

One of the detainees, in accented English, shouted to the reporters: "Are you journalists? ... Can we talk to you?"

"We're from BBC television; we are from BBC TV," responded Vivienne White, a reporter for the BBC television program Panorama.

"Thank you very much," the detainee said. "I've been a long time waiting for you here."

"Sorry?," White asked.

"I've been a long time waiting for you here. It's amazing for us."

As the detainee continued to talk, the American officer leading the tour told the journalists, "either you keep moving or we're going to end it."

The reporters' tour did end, and they were not allowed to see the medium-security area and the camp hospital.

Later, the reporters were told that they had violated the ground rules of the tour by talking to the detainees.

Two More Journalists Die in Iraq

An Australian sound engineer working for NBC News and a British cameraman were the latest journalists to die while covering the war in Iraq.

The sound engineer, Jeremy Little, died on July 6 in an American military hospital in Germany from post-surgical complications after he was injured on June 29 by a hand grenade attack. Little was embedded with the U.S. 3rd Infantry Division as the troops searched the city of Fallujah.

The cameraman, Richard Wild, had arrived in Baghdad two weeks earlier to work as a freelance journalist. He was killed – by a bullet shot to the back of his head at point-blank range – as he was talking with an American military policeman outside the Iraqi National Museum in Baghdad. Wild did not have his camera with him, and the assailant may have thought he was a member of the American military; the next day, an American soldier was killed in the same manner as he waited in line to buy a soda at Baghdad University.

Court Refuses to Halt Discovery in Cheney Task Force Case

A federal appeals court has refused to halt discovery in a case brought by two public interest groups seeking the release of documents from Vice President Dick Cheney's energy policy task force. *In re Cheney, et al*, ___ F.3d ___, 2003 WL 21523362 (D.C. Cir., July 8, 2003).

The 2-1 panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled July 8 that it would not vacate a lower court's order that the National Energy Policy Development Group (NEPDG) turn over documents relating to its meetings in early 2001. In a decision by Judge David S. Tatel, and joined by Judge Harry T. Edwards, the court said it was premature to rule on the constitutional issues presented by the government, and that adequate safeguards were in place to protect confidential information.

The lawsuit, brought in July 2001 by the conservative watchdog group Judicial Watch, and joined later by the conservationist Sierra Club, is seeking information about the input of energy company executives and lobbyists on the formation of the White House's 2001 energy policy. Last December, a federal district court judge dismissed a similar lawsuit filed by the General Accounting Office, saying the agency lacked standing to bring the case.

A Question of Exemption

Judicial Watch sued the NEPDG, Vice President Cheney and other federal officials and private individuals in federal district court, alleging a failure to comply with the Federal Advisory Committee Act (FACA). The open meetings law requires advisory committees to make public all reports, records or other documents used by the committee, provided they do not fall within Freedom of Information Act exemptions.

The key issue is whether the task force can claim an exception to FACA for advisory committees "composed wholly of full-time officers or employees of the Federal Government." Judicial Watch argues that the government cannot claim the exception because several non-federal employees

allegedly attended the group's meetings. Judicial Watch has alleged that Kenneth Lay, former Enron chief; Thomas Kuhn, president of the Edison Electric Institute; Marc Racicot, former Montana governor and chairman of the Republican National Committee, and Haley Barbour, a former Bush campaign adviser and past chairman of the RNC, "regularly attended and fully participated in non-public meetings of the NEPDG as if they were members of the NEPDG, and, in fact, were members of the NEPDG."

Judicial Watch asked the district court to direct NEPDG to turn over "a full and complete copy of all records ... made

available to or prepared for Defendant NEPDG," as well as "detailed minutes of each meeting of Defendant NEPDG ... that contain a record of persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by Defendant

NEPDG."

In response, the government sought dismissal of the action, arguing among other things that applying FACA to the task force's meetings would intrude on presidential authority in violation of separation of powers.

After the district court denied the motion to dismiss, the government moved to halt discovery against Cheney and sought summary judgment on the basis of the administrative record, which consists of President Bush's memorandum establishing the NEPDG, the task force's final report, and an affidavit by one of Cheney's deputies stating that no non-federal employees attended NEPDG meetings.

The district court withheld judgment on the separation of powers claim, but ordered NEPDG last October to produce the documents "or at least detail the reasons why they were privileged" in order to determine if FACA applied.

Mandamus Request Rejected

The government then sought a writ of mandamus from the circuit court vacating the district court's discovery orders

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The key issue is whether the task force can claim an exception to FACA for advisory committees "composed wholly of full-time officers or employees of the Federal Government."

Court Refuses to Halt Cheney Task Force Discovery

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and ordering a dismissal of the case against Cheney. In its July 8 decision, the D.C. Circuit panel rejected the government's mandamus request, saying that it had not identified a "harm" flowing from the district court's challenged rulings that could not be remedied in either the district court or on appeal following final judgment. Judge Tatel wrote:

"Their legal challenges to the district court's refusal to proceed on the basis of the administrative record and to dismiss the Vice President can be fully addressed, untethered by anything we have said here, on appeal following the final judgment. In the meantime, narrow, carefully focused discovery will fully protect the Vice President: Either the Vice President will have no need to claim privilege, or if he does, then the district court's express willingness to entertain privilege claims and to review allegedly privileged documents *in camera* will prevent any harm."

Noting that Cheney had not claimed executive privilege as yet, the court said that

"[w]ere we to hold ... that the Constitution protects the President and Vice President from ever having to invoke executive privilege, we would have transformed executive privilege from a doctrine designed to protect presidential communications into virtual immunity from suit."

Instead, Tatel wrote, limited discovery on the issue of whether non-federal employees attended NEPDG meetings might allow the lower court to sidestep the sensitive separation of powers issue. "[S]uch measures will enable the district court to resolve the statutory question" whether FACA applies to the NEPDG without "sweeping intrusions into the Presidency and Vice Presidency." And if after limited discovery, it turns out that no non-federal personnel participated as *de facto* NEPDG members, the district court will never have to face the serious constitutional issue lurking in this case: "whether FACA can be constitutionally applied to the President and Vice President."

Judge A. Raymond Randolph dissented, arguing that the task force clearly did not fall under FACA and that the majority's opinion threatened the president's ability to seek advice.

"For the judiciary to permit this sort of discovery, authorized in the name of enforcing FACA ... strikes me as a violation of the separation of powers," he wrote. "The intrusion into the inner workings of the Presidency, the disruption this is bound to entail, the probing of the mental processes of high-level Cabinet officers ... the deleterious impact on the advice the President needs to perform his constitutional duties" - all this and more present "formidable constitutional difficulties."

Larry E. Klayman of Judicial Watch and Sanjay Narayan of the Sierra Club represented the appellees. Deputy Assistant Attorney General Gregory G. Katsas argued for appellants.

New York Trial Court: Courtroom Camera Ban O.K.

A New York Supreme Court has rejected a challenge by Court TV to a state law prohibiting courtroom cameras. In a July 15 decision, the court held that New York Civil Rights Law § 52 does not violate the First Amendment, nor Article 1 § 8 of the New York Constitution. *Courtroom Television Network LLC v. New York*, No. 116954/01 (N.Y. Sup. Ct. July 15, 2003). The court refused to apply strict scrutiny to § 52, saying that under Supreme Court of the United States precedent, audio-visual coverage of court proceedings "is neither prohibited nor required under the First Amendment. Thus, it follows that a court may impose reasonable restrictions on audio-visual coverage." *Id.* at 47.

The court reasoned that a rule barring audio-visual coverage of trials is a "time, place, and manner restriction on speech subject to rational basis scrutiny." *Id.* at 48-49. The court said while the U.S. Supreme Court had recognized a right to attend and report on trials, the high court had not intended that holding to be expanded to a right to televise them.

The court also rejected Court TV's argument that the press deserves special consideration as the public's "surrogate." In applying the rational basis test, the court found that it was reasonable that the Legislature would conclude that § 52 advances the State's interest in fair trials. *Id.* at 42.

Unions Hit for Blocking Records Release

By Karl Olson

In a “man bites dog” access case, a California judge awarded attorney’s fees to newspapers against four public employee unions that had unsuccessfully sued the papers and the state to block the release of public records to the papers.

Sacramento County Superior Court Judge Talmadge Jones awarded \$42,665 – the exact amount requested – to Contra Costa Newspapers, Inc., a northern California newspaper group, after a nine-month battle by the newspapers to obtain disciplinary records of approximately 200 employees who work for the California Department of Health Services. The disciplinary records covered a five-year period.

What made the case unusual, however, was that \$36,000 of the fee award was levied against four large public employee unions that had sued to prevent the DHS from releasing the records. The court awarded only \$6,665 against the cash-strapped state, which faces a multi-billion dollar budget deficit.

The fee award against the unions was made under California’s “private attorney general” doctrine (Code of Civil Procedure § 1021.5), which allows a fee award to a party – plaintiff or defendant – who enforces an “important right affecting the public interest, confers a significant benefit on the general public or a large class of persons,” and doesn’t have a sufficient pecuniary interest to bring the suit.

The newspapers showed that obtaining access to the documents – some 10,000 pages of documents covering a five-year period – enforced an important right and benefitted the public, Judge Jones ruled. The court also found that the newspapers showed that obtaining the documents would not sell papers, and that without the prospect of a fee award they would not have enough incentive to fight the suit.

Normally, fee litigation under the California Public Records Act is fairly simple – a prevailing plaintiff shall recover attorney’s fees under the Act. And Judge Jones did award fees under the Public Records Act against the state.

The wrinkle in this case, however, was that the unions brought the suit, suing the state to block release of the records and bringing in Contra Costa Newspapers, which requested the records, as a party. The unions also unsuccessfully appealed Judge Jones’ ruling on the merits, while the state took no position and Contra Costa successfully opposed the appeal.

Several other cutting-edge issues were resolved in the litigation as well. Judge Jones ruled that the public was entitled to see disciplinary records even when the cases had been

resolved by a confidential settlement. He also ruled that discovery in the disciplinary cases – the so-called “Skelly packages” – were public records, and that cases that weren’t final were also public records.

Contra Costa Newspapers, Inc. was represented by Karl Olson and Erica L. Craven of Levy, Ram & Olson. The Department of Health Services was represented by Deputy Attorney General Suzanne Giorgi. California State Employees Association and the Association of California State Supervisors were represented by Nancy Yamada. Professional Engineers in California Government was represented by Gerald James. And the California Association of Professional Scientists was represented by Melinda Williams.

D.C. Circuit Cites First Amendment Interests in Striking Down Rule Disclosing Closed Investigatory Files

The U.S. Court of Appeals for the D.C. Circuit, in an opinion by Judge David Tatel and joined by Judge David Sentelle, ruled that the AFL-CIO and Democratic National Committee (DNC) had First Amendment interests in restricting from public disclosure the records of a Federal Elections Commission (FEC) investigation into alleged campaign finance coordination efforts. *American Federation of Labor and Congress of Industrial Organizations and Democratic National Committee v. Federal Election Commission*, No. 02-5069, 2003 WL 21414308 (D.C. Cir. June 20, 2003), (*aff’g* 177 F.Supp.2d 48 (D.D.C. 2001)).

At issue was an FEC regulation that requires the disclosure of investigatory file materials in closed cases. 11 C.F.R. § 5.4(a)(4) 2000.

Statute Found Ambiguous

Taking the analysis of the agency’s application of a Congressional mandate from *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court of Appeals first found the Federal Election Campaign Act (“FECA”), which established the FEC’s enforcement procedures, including confidentiality and disclosure of investigatory documents, to be ambiguous as to whether confidentiality required under various sections was to be afforded to closed investigatory files.

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FEC Regulation Struck Down

(Continued from page 35)

FEC Creates Constitutional Problem

Applying *Chevron's* second prong, which would suggest deference to a reasonable agency interpretation of an ambiguous statute, the Court of Appeals noted that deference is not accorded to an agency action that "create[s] 'serious constitutional difficulties.'"

In this case, the court held, while the FEC regulation was not inconsistent with the FECA, it failed to "account for the substantial First Amendment interests implicated in releasing political groups' strategic documents and other internal materials." 2003 WL 21414308 at *1.

The Court of Appeals noted:

"The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.

Id. at *6, citing *Buckley v. Valeo*, 424 U.S. 1 (1976), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958).

The AFL-CIO claimed that releasing the names of volunteers and members would make future recruiting difficult and that disclosing descriptions of training programs and strategies would "implicate significant First Amendment interests in associational autonomy." *Id.*, at *9. The Court of Appeals agreed, and noted that while the advanced governmental interests in deterring FECA violations and promoting the FEC's public accountability were valid, there was no need in this instance to "engage in a detailed balancing analysis, for the Commission made no attempt to tailor its policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." *Id.*, at *8-9, citing *United States v. Popa*, 187 F.3d 672, 676 (D.C.Cir. 1999).

Could Encourage Abuse by Opponents

The Court of Appeals also agreed with the AFL-CIO and James Madison Center for Free Speech (amicus curiae), which argued that,

when combined with the Commission's broad subpoena practices, the automatic disclosure regulation "encourages political opponents to file charges against their competitors to serve the dual purpose of 'chilling' the expressive efforts of their

competitor and learning their political strategy so that it can be exploited to the complainant's advantage."

Id., at *9, citing Madison Amicus Br. at 20.

The Court of Appeals disagreed with the commission's argument that there was no First Amendment problem because it would only be disclosing its own agency records, not coercing a party to produce information. Rather, the Court of Appeals recognized that the agency investigators utilize the threat of government sanction to gather any information. *Id.*, at *10.

Hence, while the agency's interests are valid, it must "attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a 'delicate nature... represent[ing] the very heart of the organism which the first amendment was intended to nurture and protect." *Id.*, (citing *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C.Cir. 1981)).

The FEC regulation failed to "account for the substantial First Amendment interests."

Concurrence: Statute is Clear

Judge Karen LeCraft Henderson, concurring in judgment, would not have reached the First Amendment analysis, but instead would have determined that the FECA is plain

and unambiguous. *Id.*, at *12. She would have read "investigation" as used in the statute to mean any investigation, ongoing or completed, and would have read the fact that the statutory provisions do not specify "when the confidentiality requirement expires" to suggest that it "never expires."

The majority found the provision ambiguous, noting that the term "investigation" could mean fact-finding only or both fact-finding and proceedings, and suggesting that the legislative history might only have meant Congress "merely intended to prevent disclosure of the fact that an investigation is pending." *Id.*, at *4-5.

The FEC's case was argued by David B. Kolker, with help on the briefs from Richard B. Bader. Trevor Potter, Lisa J. Danetz and Lawrence M. Noble were on the brief for amicus curiae Campaign and Media Legal Center, et al. in support of appellant. The AFL-CIO and DNC's case was argued by Laurence E. Gold, with help on the brief from Joseph E. Sandler and Michael B. Trister. James Bopp, Jr. and Raeanna S. Moore were on the brief for amicus curiae James Madison Center for Free Speech in support of appellees.

Ninth Circuit Orders Review of Sealed File in Insurance-Fraud Suit

Private Intervenors Win, Public Intervenors Lose in Foltz v. State Farm

The U.S. Court of Appeals for the Ninth Circuit in June rejected an effort by public-interest groups to gain access to documents sealed in an insurance-fraud lawsuit that was settled five years ago. *Foltz v. State Farm Mutual Automobile Insurance Co.*, Nos. 00-35187, 00-35283, 01-35137, 2003 WL 21397723 (9th Cir. June 18, 2003).

A three-judge panel of the appellate court, however, held that the federal trial judge in Oregon who oversaw the case abused his discretion by refusing to release documents to private litigants pursuing another, similar suit.

The appellate court, in an opinion written by Judge Betty B. Fletcher and joined by Judges Diarmuid F. O'Scannlain and Marsha S. Berzon, ordered U.S. District Court Judge Michael R. Hogan to review portions of his decision denying release of discovery material, summary judgment documents and other case information to the private litigants, Tierney Adamson and Kevin Snead.

The panel affirmed Hogan's denial of a motion, filed by the public-interest groups Texas Watch, Consumer Action and United Policyholders, to unseal the case file, holding that the groups' appeal of that denial was untimely.

Settlement Leads to Seal

Debbie Foltz and other plaintiffs sued the State Farm Mutual Automobile Insurance Company and the California Institute of Medical Research & Technology (CMR), alleging that the two defendants conspired to defraud State Farm clients of personal-injury coverage. *Foltz*, 2003 WL 21397723, at *1.

During discovery, Holman signed three protective orders at the defendants' request: the first sealing all documentary evidence and testimony tied to a State Farm motion to disqualify the plaintiffs' law firm; the second sealing a floppy disk produced by CMR during discovery; and the third, a blanket protective order, sealing all other "confidential information" produced in discovery or otherwise filed with the court.

The two sides settled in 1998 after four years of litigation. Judge Holman agreed to a stipulation that the court file be

sealed and released to State Farm, with the exception of minute orders, an amended complaint, the defendants' answer, the settlement stipulation and the final judgment.

In December 1999, the judge allowed Adamson and Snead, and the public-interest groups, to intervene separately in the case. Holman partially granted motions by both groups to unseal case information, holding that State Farm failed to provide "articulable facts" showing a compelling reason to seal the entire case file. *Foltz*, 2003 WL 21397723, at *10. But the judge ruled that discovery, summary judgment and other materials originally filed under seal would remain secret because they contained confidential third-party medical and personnel files, as well as proprietary information related to State Farm.

In two rulings in January and February 2000, Holman unsealed more documents and clarified which would remain secret. The private intervenors appealed both rulings. A year later, in January 2001, the judge denied a renewed motion, filed by the public-interest groups, to unseal. The public intervenors appealed that ruling, but the Ninth Circuit held

that their appeal was filed too late; the groups should have appealed from the early-2000 decisions instead.

Good Cause Required for Seal

The Ninth Circuit panel held that Holman abused his discretion by sealing documents produced during discovery but not filed with the court because he failed to require that State Farm show good cause for such an order as required by Federal Rule of Civil Procedure 26(c).

The rule allows a court to seal discovery materials "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(2). But it requires that the court "identify and discuss the factors it considered in its 'good cause' examination to allow appellate review of the exercise of its discretion." *Foltz*, 2003 WL 21397723, at *4 (quoting *Phillips v. Gen. Motors*, 307 F.3d 1206, 1212 (9th Cir. 2002)).

The Ninth Circuit panel held that Holman abused his discretion by sealing documents produced during discovery but not filed with the court because he failed to require that State Farm show good cause for such an order as required by Federal Rule of Civil Procedure 26(c).

Ninth Circuit Orders Review of Sealed File

(Continued from page 37)

The appellate panel remanded the case on this issue. The floppy disk must be released to the private litigants, the panel held, unless Holman “articulates good cause” to keep it sealed, because the defendants “fail to tie any documents in the court record to the disk.” *Foltz*, 2003 WL 21397723, at *4.

The blanket protective order covered some discovery documents containing confidential information that would meet the “good cause” standard, the Ninth Circuit held, but Holman failed to require that the defendants “show that *specific* discovery documents, whether eventually filed with the court or not, contained such information.” *Foltz*, 2003 WL 21397723, at *4 (emphasis included).

Rights of Collateral Litigants

The private intervenors, in pursuit of a collateral lawsuit, might be entitled to a modification of Holman’s protective orders as a matter of law, the Ninth Circuit held.

“Where reasonable restrictions on collateral disclosure will continue to protect an affected party’s legitimate interests in privacy, a collateral litigant’s request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted.” *Foltz*, 2003 WL 21397723, at *5 (citing *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 475).

This issue also was remanded to the district court, with the appellate panel requiring that the private intervenors demonstrate the “relevance of the protected discovery to the collateral proceedings and its general discoverability therein.” *Foltz*, 2003 WL 21397723, at *6.

Aside from relevance, the district court also must consider the defendants’ reliance on the blanket protective order. Such reliance, however,

“will be less with a blanket [protective] order because it is by nature overinclusive’ . . . [t]hus, reliance on a blanket protective order in granting discovery and settling a case, without more, will not justify a refusal to modify.” *Foltz*, 2003 WL 21397723, at *7 (quoting *Beckman*, 966 F.2d at 475).

Presumption of Access to Dispositive-Motion Discovery Material

The Ninth Circuit reversed and remanded Holman’s order sealing discovery material filed along with the summary judgment motion. The appellate court held that the defendants could not rebut the “presumption of access to judicial documents” where discovery information was attached to a dispositive, rather than a non-dispositive, court motion. *Foltz*, 2003 WL 21397723, at *10 (citing *Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988)).

Holman’s reasoning that the summary judgment material contained confidential third-party medical records, personnel information and trade secrets was faulty, the appellate panel held. Third-party data easily could be redacted from the documents, leaving information that

“would reveal only State Farm’s actions in processing personal injury claims This disclosure might harm State Farm by exposing it to additional liability and litigation but a litigant is not entitled to the court’s protection from this type of harm.” *Foltz*, 2003 WL 21397723, at *11.

The panel also partially rejected State Farm’s argument, on appeal, that it relied on the blanket protective order in consenting to discovery requests and reaching the settlement agreement. Because State Farm failed to show good cause for the blanket protective order, it could not reasonably rely on it, the court held. *Foltz*, 2003 WL 21397723, at *12.

State Farm did, however, show good cause for the protective order sealing material attached to its motion to disqualify the plaintiff’s counsel, the Ninth Circuit held. *Foltz*, 2003 WL 21397723, at *11. To argue that motion, State Farm was required to produce discovery information protected by the attorney-client privilege, the court held.

The appellate court ordered the district court to release the other discovery documents after redacting third-party information unless Holman could “specify sufficiently compelling reasons” for keeping any of the information under seal. *Foltz*, 2003 WL 21397723, at *12.

Attorneys Lawrence Walner of Chicago and Thomas D. D’Amore of Portland, Oregon, represented the private intervenors before the Ninth Circuit. Kathryn H. Clarke of

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Sixth Circuit Upholds Access Restrictions

Accident Report Statute Constitutional

By Amanda G. Main

On June 2, 2003, the Sixth Circuit Court of Appeals, in *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. June 2, 2003), upheld a Kentucky statute that restricts access to accident reports filed with the Department of State Police. The plaintiffs, proposed commercial publishers who sought access to the reports for commercial purposes, alleged that the statute violated their First Amendment right of speech and the Equal Protection Clause.¹

The court upheld the district court's grant of summary judgment to the defendants, the records custodian and various government officials. It held the statute, as-applied to plaintiffs, is a restriction on access to government information, not a restriction on plaintiffs' speech. Thus, plaintiffs' First Amendment rights are not implicated.

Further, the court held that the statute did not violate the Equal Protection Clause – the statute rationally served the state's legitimate interest in protecting accident victims' privacy. Finally, the court held that plaintiffs' challenge to KRS § 61.874, which permits government agencies to charge reasonable fees for reproducing government information, was moot because plaintiffs were not entitled to the data.

The Statute

KRS § 189.635(5) states that all accident reports filed with the Department of State Police shall remain confiden-

tial. However, the reports may be obtained by certain qualified people, including:

“parties to the accident, the parents or guardians of a minor who is party to the accident, and insurers of any party who is the subject of the report, or to the attorneys of the parties” and “news-gathering organization[s].” KRS §189.635(5) and (6).

The statute places an additional restriction on news-gathering organizations; they are only permitted to use the accident reports “for the purpose of publishing or broadcasting the news.” KRS § 189.635(6). News-gathering organizations are specifically prohibited from using or distributing the reports for a commercial purpose, other than reporting the news. *Id.*

Restricted Access, Not Speech

The plaintiffs, attorneys and chiropractors who sought access to the reports for commercial purposes, challenged the statute on First Amendment grounds, as applied to them, and the Equal Protection Clause. Plaintiffs claimed that the statute indirectly restricted their commercial speech, and argued that the court should apply the four-part test of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), to determine the validity of the statutes' restrictions.

The court disagreed with the plaintiffs' characterization of the statute as a restriction on their commercial speech. The court held that the statute merely restricts access to information held and maintained by the government. If the plaintiffs were able to obtain the reports by other means, the statute would impose no restriction on how they could use the information. The only statutory restriction on how the information could be used is imposed on news-gathering organizations. However, because the statute was challenged as applied to the plaintiffs, the plaintiffs could not argue that the statute was unconstitutional as-applied to news-gathering organizations that obtain the accident reports. Therefore, the court held the *Central Hudson* test for commercial speech restrictions was inapplicable to the case at hand.

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Ninth Circuit Orders Review of Sealed File

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Portland, Leslie A. Brueckner of Trial Lawyers for Public Justice in Washington, D.C., and Matthew Whitman of Meyer & Wyse in Portland represented the public intervenors. Stuart D. Jones of Portland, Ralph C. Spooner of Spooner & Much in Salem, Oregon, Franklin Hunsaker of Bullivant, Houser, Bailey, Pendergrass & Hoffman in Portland, and Vanessa Wells of Heller, Ehrman, White & McAuliffe in Palo Alto, California, represented State Farm.

Sixth Circuit Upholds Access Restrictions

(Continued from page 39)

Because the court found the statute is “neither a direct regulation of expression nor a purely content-neutral law of general application,” it considered constitutional objections to the statute on the basis that some speakers are treated more favorably than others. The court found that the statute, as applied to plaintiffs, did not condition access to information based on the nature of their speech, and did not single them out based on the content of their speech. Therefore the statute did not violate plaintiffs’ First Amendment rights.

Rejects Equal Protection Challenge

The court next considered plaintiffs’ Equal Protection challenge. Applying a rational basis standard of review, the court held that protecting accident victims’ privacy was a legitimate state interest and that KRS § 189.635’s limitation on public access to accident reports rationally furthers that interest. The court further found that the ability of news-gathering organizations to publish accident report information did not make the statute constitutionally infirm, and stated:

Kentucky’s legislature might well have concluded that the occasional publication of information contained in an accident report because of its newsworthy nature is less invasive to the overall class of accident victims than the myriad other uses to which such reports could be put. The legislature could have easily assumed that the number of accident reports of interest to news-gathering organizations would be infinitesimal as compared to the overall number of accident reports on file.

Thus, the court held the statute did not violate the Equal Protection Clause.

Finally, the plaintiffs challenged application of KRS § 61.874, which requires that the fees government agencies charge for reproducing information shall be reasonable. The court affirmed the lower court’s decision that this statute’s challenge was moot because plaintiffs are not entitled to the accident reports.

Case Impact

This case precludes entities not otherwise enumerated in the statute from obtaining accident reports, regardless of

the purpose, from the Department of State Police. However, if one of these entities obtains this information from another source, it may be used without restriction.

The only restriction on how the information is used is placed on news-gathering organizations, which can only use accident report information in reporting a news story. Because the plaintiffs in this case were not news-gathering organizations, and could not raise constitutional challenges to KRS § 189.635 as to them, the statute is still vulnerable to constitutional attack by news-gathering organizations.

The case was before Judges Krupansky, Siler and Gilman, who authored the court’s opinion. James M. Herrick of the Kentucky State Police Legal Office in Frankfort, Kentucky, John H. Dwyer, Jr. and Laurence J. Zielke of Pedley, Zielke & Gordinier in Louisville, Kentucky, and D. Brent Irvin of the Office of the Attorney General in Frankfort, Kentucky represented the defendants-appellees. Donald L. Cox and Mary J. Lintner of Lynch, Cox, Gilman & Mahan in Louisville, Kentucky represented the plaintiffs-appellants.

Amanda G. Main is an associate in the Louisville office of Frost Brown Todd LLC and is active in the Firm’s First Amendment, Media & Advertising Law practice group.

¹ In *Amelkin v. McClure*, 205 F.3d 293 (6th Cir. 2000) the court held the statute was not subject to a facial challenge on First Amendment grounds.

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UPDATE: TNN Can Be “Spike TV” Court Vacates Preliminary Injunction

On July 8, Spike Lee settled his lawsuit with Viacom over the planned change of the TNN television network to “Spike TV”. Terms of the settlement were not released by the parties, but New York Supreme Court Justice Walter Tolub lifted his preliminary injunction against Viacom after the parties submitted a stipulation of dismissal and requested the injunction be vacated and recalled. *Lee v. Viacom, Inc.* (N.Y. Sup. Ct. 2003)

In agreeing to that request, Justice Tolub ordered that the injunction ruling (issued June 12, 2003) would have no precedential or other effect.

Viacom is now permitted to make the switch to “Spike TV.”

In a prepared statement read by attorneys for both parties, Spike Lee stated, “I am concerned that my efforts to stop Viacom from using the Spike TV name could have the unintended consequence of threatening the First Amendment rights of Viacom and others.”

In April, Viacom announced it was changing the name of TNN to “Spike TV” and redesigning the network to emphasize and maximize Spike Lee brought claims under the New

York Civil Rights Law in June contending that Viacom used his “name” for commercial purposes without his consent, and that Viacom misappropriated Lee’s name with the intent of misleading the public.

Lee’s request for a preliminary injunction was granted by Justice Tolub on June 12. In his decision, Tolub held that Lee had established a likelihood of success on the merits of his claim for violation of New York’s right of publicity statute. A five-justice panel of the Appellate Division denied Viacom’s motion to stay the injunction. *See MLRC MediaLawLetter*, June 2003, at 33.

That decision was without precedent in New York and, as Viacom argued to the Court in papers seeking reconsideration of the decision, constituted a prior restraint in violation of the federal and New York State constitutions

Marcia B. Paul of Davis, Wright Tremaine (New York); David Boies, Jonathan D. Schiller and Jonathan Sherman of Boies, Schiller & Flexner (Armonk, N.Y.) represented the defendants. Robert Van Lierop of Van Lierop & Burns (New York); Johnnie Cochran of The Cochran Firm (New York); and Gross & Belsky (San Francisco) represented the plaintiff.

Rowling Sues *Daily News* over Potter Scoop

\$100 Million Suit Also Aimed at Unnamed Parties Who Sold Book Early

A story in the *New York Daily News* that summarized J.K. Rowling’s “Harry Potter and the Order of the Phoenix” three days before its release sparked a \$100 million lawsuit by the Scottish author accusing the newspaper of copyright infringement and tortious interference. *Rowling v. New York Daily News Co.* (S.D.N.Y. Complaint June 18, 2003).

The suit, filed by Rowling and her U.S. publisher, Scholastic Inc., also targets five “John Doe” defendants who reportedly made it possible for a *Daily News* staff writer to read an early copy of the highly anticipated novel.

“The Order of the Phoenix,” the fifth installment in Rowling’s “Harry Potter” series, was released for sale at midnight on June 21, following an embargo by Scholastic. The *Daily News* reported that one of its writers bought a copy on June 17 from a Brooklyn health-food store.

The newspaper initially did not disclose the name of the store owner, but later identified him as Carlos Aguila. The suit does not directly name Aguila as a defendant.

Newspaper Outlines Book Plot

The *Daily News* ran two articles about “The Order of the Phoenix” on June 18. The lead story, headlined “Hocus-pocus! We got Harry,” detailed how the newspaper “scored” an early copy of the novel, and included background information on Rowling’s publishing blitz. A 554-word piece at the bottom of the page, “Here’s first look at what happens,” described the plot of the book. It included two direct quotations from the novel and a “spoiler” warning in the fourth and fifth paragraphs:

“If you don’t want to know anything about how Harry and his pals spend their fifth year at the Hogwarts School of Witchcraft and Wizardry, stop now and buy the book when it’s officially released Satur-

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Rowling Sues Daily News over Potter Scoop

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day,” the article stated. “Otherwise, read on for tantalizing tidbits from the new adventure — and don’t worry, we won’t give away the ending.”

The story revealed neither the ending nor the identity of a key character who dies in the book (a plot element Rowling already had made public), although it narrowed the possibilities by noting three who survive. The article outlined early developments in “The Order of the Phoenix,” described several characters new to the series, and briefly detailed the development of several others introduced in earlier installments.

A cluster of photos accompanying both articles included a shot of an open copy of the book, with two inside pages visible and partially legible. The package of stories also was published on the *Daily News* Web site, although “Here’s first look at what happens” is not included in the newspaper’s online archives.

Complaint: Article Spoiled Surprise For Kids

Rowling’s lawsuit alleges that the *Daily News* violated her copyright in “The Order of the Phoenix” under 17 U.S.C. § 106 by printing the photo of two of the book’s inside pages and by publishing “plot elements and character details that go the heart of Rowling’s . . . work, thereby depriving Rowling of her right and ability to control her own creative work.”

The suit also accuses the *Daily News* of tortious interference with contract, arguing that the newspaper knew of embargo agreements between Scholastic and its distributors and intentionally interfered with those agreements. The complaint suggests that the plaintiffs additionally will allege breach of contract and conversion, as well as theft of trade secrets under New York State law, although those claims are not detailed in the suit.

Rowling and Scholastic seek \$100 million in unspecified damages, plus statutory damages for willful copyright infringement under 17 U.S.C. § 101, attorneys’ fees, and any “gains, profits and advantages” obtained by the *Daily News* as a result of the articles.

The complaint claims that the *Daily News* sought to “deprive Rowling of her right and ability to control her own unpublished creative work” and “irreparably harmed the carefully orchestrated, multi million-dollar marketing

and distribution plans for *Phoenix* created by Rowling and Scholastic.”

“Perhaps worst of all,” the complaint argues, the articles and photo “spoil the surprise for *Harry Potter* fans everywhere, especially children.”

The suit does not claim standing to sue on behalf of those fans. Nor does it specify how the marketing campaign was impaired. The complaint does not specifically contend that the *Daily News* articles deterred any potential readers from buying the book.

Dale M. Cendali, Michael R. Patrick and Samantha L. Hetherington of O’Melveny & Myers LLP in New York represent Rowling. Edward H. Rosenthal of Frankfurt Kurnit Klein & Selz, PC in New York represent Scholastic.

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UPDATE: Court Enjoins Author of Anti-Tax Book

Promotion of Book and Tax Scheme (and Book Itself) is Unprotected Commercial Speech

On June 16, Federal District Court Judge Lloyd D. George of the District of Nevada granted the government's request for a preliminary injunction against Irwin Schiff, author of "The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes." *U.S. v. Schiff*, No. CV-S-03-0281-LDG (RJJ), 2003 U.S. Dist. LEXIS 10725 (D.Nev. June 13, 2003).

The injunction prevents Schiff, or any of his associates or businesses, from distributing, marketing or advertising any plan that advises individuals on how to get out of paying federal income taxes, and from assisting anyone else from doing the same.

Judge George ruled that promotions for the scheme and book were unprotected commercial speech and that Schiff incited others to lawless acts, and assisted in their completion.

Schiff's Plan and Book

Irwin Schiff has a long history of challenging the income tax. He has been charged with and convicted of numerous criminal violations of the tax code over the years. Schiff's business is his tax scheme,

which contends that the federal income tax is voluntary. His book instructs individuals on how to avoid paying taxes, and includes detailed instructions and the forms necessary to accomplish this goal. Schiff also offers other books, seminars and audio tapes relating to the tax scheme (some of which are advertised and promoted in "The Federal Mafia").

In February of this year, the IRS raided Schiff's publishing business, Freedom Books, and confiscated records. He and several of his associates were charged with violating the tax code, specifically with promoting an abusive tax shelter (§6700), aiding and abetting an understatement of tax liability (§6701), preparing any part of a return or claim for refund that includes an unrealistic position (§6694), and failing to sign and furnish the correct identifying number on tax returns (§6695). Section 7408 of the code permits the government to seek an injunction against those defendants charged with violating either §6700 or §6701. Section 7407 authorizes an injunction in charges concerning §6694 and §6695.

Judge George issued a temporary injunction against Schiff on March 19, which the court extended on April 11. The tem-

porary restraining order prohibited Schiff or his associates from further violating the tax code; advocating the "false and frivolous" tax position through "The Federal Mafia" or other product or service; and "making any false commercial speech about federal income taxes" through any media, among other restrictions. (See *MLRC MediaLawLetter April 2003 at 9*).

Schiff Promoted Abusive Tax Shelters

The court found that Schiff and his associates violated §6700 by promoting an abusive tax shelter.

First, the court held that Schiff had participated in the organization and sale of a plan that assisted tax-payers in filing false tax returns. Schiff sold his book, along with tapes and other products promoting his tax system, over the Internet, book stores and other mediums. Advertisements for the book

and other materials included claims that the book can show you how to avoid paying your income tax and the book itself contained specific instructions.

Second, Schiff made false and fraudulent statements concerning the plan, and knew that these statements were fraudulent. The court noted that Schiff's legal basis for his tax theories has been rejected by both the Supreme Court and Ninth Circuit. Schiff was aware that his theory that the payment of income taxes is voluntary was not legal. Schiff had previously been convicted for failure to pay income taxes, and even though his conviction was reversed on appeal, he did not make then the argument that taxes were voluntary.

He had also lost several cases in civil tax courts that rebuked his theories, while other individuals who have used Schiff's theories have been convicted of failure to pay taxes. "The Federal Mafia" itself contains a disclaimer informing readers that followers of this plan have gone to jail. Schiff therefore, was aware of the actual state of the law and that his theories were fraudulent.

Third, the statements in the book advocating Schiff's tax scheme were "material," as they "had a substantial impact on the decision-making process" of a taxpayer.

***The court found that the book
"The Federal Mafia"
itself was commercial speech
and could be restrained
through the injunction.***

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Anti-Tax Author Enjoined

(Continued from page 43)

Fourth, there was a high likelihood that future §6700 violations would occur because Schiff was likely to continue promoting his tax scheme. Therefore, an injunction was warranted. The court, without much comment, also concluded that the government had presented a preponderance of evidence that Schiff and his associates had violated §6701 (the knowing assisting or advising of a tax return which understates tax liability).

Book and Its Promotion Not Protected Speech

The court then looked to whether the injunction would violate Schiff's First Amendment rights. The court ruled that advertisements for the book, and the book itself, were unprotected false and misleading commercial speech, and that the book incited individuals to conduct illegal acts (filing false tax returns), and assisted in the commission of a crime (again, the filing of false tax returns).

The Supreme Court, this court noted, recognizing that there is a problem in "drawing bright lines that will clearly cabin commercial speech in a distinct category," (quoting from *Cincinnati Discovery Network Inc.*, 507 U.S. 410, 419 (1993)), has defined commercial speech two ways. The first is the core commercial speech: "advertising pure and simple." The second, however, has a more amorphous quality, encompassing expression "related solely to the economic interests of the speaker and its audience." (Quoting *Central Hudson*, 447 U.S. 557, 561 (1980)).

Applying these definitions, and drawing from precedent in and outside of the Ninth Circuit – including *United States v. Estate Preservation Servs.*, 202 F. 3d 1093 (9th Cir. 2000) -- the court held that Schiff's advertising and promotions for the book and scheme were false and misleading commercial speech.

In *Estate Preservation*, the Ninth Circuit held that an injunction against a fraudulent tax scheme may include "a promoter's statements regarding the tax benefits of his [abusive tax schemes]," and that the promotional statements at issue were commercial speech. *Estate Preservation* at 1106.

Judge George applied *Estate Preservation* to Schiff's promotional activities for the book and tax scheme, and to Schiff's holding himself out as a tax consultant. The judge held them all to be outside the protection of the First Amendment.

Book Can Be Enjoined

The court found that the book "The Federal Mafia" itself was commercial speech and could be restrained through the injunction. The ACLU as amicus, while taking no position on the merits of the tax plan Schiff put out, did argue that the book he published – sold in bookstores as well as on the Internet and containing material that went beyond proposing no more than a commercial transaction – should not be subject to a prior restraint.

Rejecting arguments by the ACLU, Judge George explained that the book was an advertisement for Schiff's tax scheme. The book contained numerous references to, advertisements for and promotions of other products offered by Schiff relating to his scheme, such as audio cassettes and other books.

The inclusion of commentary on public policy issues (the tax code) did not transform the book's character from commercial to political: "commenting on public issues in the context of a commercial transaction does not elevate speech from commercial to political rank." (Quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 68 (1983)).

It was also noted that the commercial speech contained in the book was not used to publish the protect policy comments. The commercial aspects of the book were intended as advertisements for Schiff's other products, not for the ideas inside the book. Again following *Estate Preservation*, the court further held that portions of the book that included "training manual" instructions on how to file claims of zero returns were commercial speech to the extent they promoted Schiff's overall tax scheme.

The court also dismissed the argument put forth by the ACLU that unlike precedent cited by the government, "The Federal Mafia" was not sold face-to-face and could stand independently from the tax scheme. Judge George explained

The court ruled that advertisements for the book, and the book itself, were unprotected false and misleading commercial speech

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Anti-Tax Author Enjoined

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that the book's "very essence" was Schiff's overall tax plan. (citing *United States v. Smith*, 657 F. Supp. 646 (W.D. La. 1986), *aff'd*, 814 F. 2d 1086 (5th Cir. 1987)). The book was advertised by Schiff and his associates as the "starting point" of the scheme, and referred to other Schiff products relating to the scheme, such as seminars and audio tapes.

The court found that any false or misleading parts of "The Federal Mafia" that promote the tax scheme, or Schiff's role as a tax consultant, could be enjoined under *Estate Preservation*.

Schiff's Speech Incited Lawless Action

Recognizing that abstract advocacy was protected, Judge George concluded that Schiff's actions and statements in his products went beyond this protected category and incited lawless action. Schiff explicitly instructs individuals on how to get out of paying income taxes, and provides them with the necessary forms to carry out these instructions. The government's evidence that some 3,100 individuals apparently filed returns following Schiff's scheme, and using his sample forms provided in the book and seminars, had weight with the court.

The ACLU's argument that the book standing alone was too far removed from the scheme to incite individuals was rejected. Merely because the book was sold to a wide audience through impersonal means was immaterial. The court kept coming back to the theme that "The Federal Mafia" was an integral part of the scheme; that the book contained instructions and materials in avoiding the payment of taxes and the exhortation that it includes what is needed to "immediately" stop withholding taxes, claim refunds, etc. Finally, Schiff's advertisements included statements from individuals who did use "The Federal Mafia" to file zero returns.

Scheme Assisted in Illegal Conduct

Finally, the court held that the scheme and book assisted others in committing illegal acts: the filing of false tax returns. Citing precedent holding that the use of speech in a tax scheme can aid in the commission of a crime (*United States v. Flexner*, 98 F. 3d 155, 158-59 (4th Cir. 1996)), Judge George ruled that the government had

proven that Schiff's scheme was intended to aid individuals to avoid paying income tax and that the scheme was used for this intended purpose. The First Amendment could not then be used to shield Schiff, or his associates, from promoting the scheme. Quoting from the Fourth Circuit's decision in *Rice v. Paladin Enters., Inc.*, 128 F.3d 233,2446 (4th Cir. 1997):

"[T]he law is now well established that the First Amendment and Brandenburg's 'imminence' requirement in particular, generally poses little obstacle to the punishment of speech that constitute criminal aiding and abetting, because 'culpability in such cases is premised, not on defendants' 'advocacy' of criminal conduct, but on defendants' successful efforts to assist others by detailing to them the means of accomplishing the crimes."

The Preliminary Injunction

The preliminary injunction issued by the court prohibited Schiff or any of his associates (and their agents) from "organizing, promoting, marketing or selling, or assisting in organizing, promoting, marketing or selling, any plan or arrangement which advises or encourages taxpayers" to avoid paying income taxes, or make any knowingly fraudulent statements concerning the "excludability of income."

Additionally, it also forbid advertising, marketing or promoting "any false, misleading or deceptive tax position in any media"; sell any material that would assist others in violating the tax code; and incite others to violate the tax laws. Defendants were also ordered to provide to the court the names and addresses of all individuals who purchased any product or service from them starting on January 1, 1999.

The lawyers for the defendant were Noel Spaid (Del Mar, CA.). Blaine Welsh of the U.S. Attorney's Office (Las Vegas) and Evan Davis of the Department of Justice — Tax Division (D.C.) represented the U. S. Government. The ALCU, joined by the Association of American Publishers, Inc, the American Bookseller Foundation for Free Expression, the Freedom to Read Foundation of the American Library Association, and the PEN American Center, as Amici, were represented by Allen Lichenstein (Las Vegas) and Robert Nersesian (Las Vegas).

Electronic Trespass Requires Physical, Not Economic, Injury

By Bruce P. Keller and Robert D. Carroll

In *Intel Corp. v. Hamidi*, ___ P.3d ___, 2002 Cal. LEXIS 4205, No. S103781 (Cal. June 30, 2003), the California Supreme Court held that the tort of trespass to chattels does not apply to unsolicited bulk e-mails that neither damaged nor diminished the capacity of Intel's servers. The Court declined to treat Internet trespass as an analog to trespass to real property, which does not require a showing of actual damages.

Hamidi's E-mail Campaign

Kourosch Kenneth Hamidi, a former Intel engineer, formed an organization named Former and Current Employees of Intel (FACE-Intel) to distribute information critical of Intel's employment policies. Hamidi sent six mass e-mails over a two-year period to thousands of employee e-mail addresses (up to 35,000, according to Hamidi's Web site). The e-mails criticized Intel's employment practices, encouraged recipients to consider other employment options besides Intel, and invited them to visit the FACE-Intel Web site for more information.

Many employee recipients asked company officials to stop Hamidi's messages. Although there was no evidence that Hamidi breached Intel's network security, the company was unable to block the mass e-mails, in part because Hamidi sent the messages from different computers each time. Intel wrote to Hamidi and FACE-Intel demanding that he stop sending messages. In response,

Hamidi sent a new mass e-mail.

Intel sued in California state court, pleading causes of action for trespass to chattels and nuisance, and seeking damages and an injunction. Intel later voluntarily dismissed the nuisance action and its damages claim, moving for summary judgment and a permanent injunction solely on the trespass to chattels claim. The trial court granted Intel's motion, permanently enjoining Hamidi and his organization from sending unsolicited e-mail to any Intel address.

A divided panel of the California Court of Appeal affirmed the grant of injunctive relief. The Court of Appeal held that unauthorized use of personal property (in this case Intel's computers) may be actionable as trespass to chattels even without proof of physical damage to the property or an impairment of its functioning. See *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244 (3d Dist. 2001).

The Court of Appeal held that Intel had shown actionable injury with evidence that Hamidi "was disrupting its business by using its property and therefore [that it was] . . . entitled to injunctive relief

based on a theory of trespass to chattels." *Id.* at 249.

"Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any measurable length of time"

Supreme Court Confirms Physical Damage Requirement for E-mail Trespass

The California Supreme Court reversed in an opinion by Justice Werdegar. The court held that "one who intentionally intermeddles with another's chattel is subject to liability [for trespass to chattels] only if his intermeddling is harmful to the possessor's materially valuable interest in the physical condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel for a substantial time." Slip Op. at 8 (quoting Prosser & Keeton, Torts 421-22).

In Intel's case, the Court noted, there was no actual damage to Intel's computer hardware or software and "no interference with its ordinary or intended operation. Intel was not dispossessed of its computers, nor did Hamidi's messages prevent Intel from using its computers for any

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**TO RECEIVE THE
MEDIALAWLETTER BY E-MAIL
(Or Add Others From
Your Organization to Our List)**

**Please Contact
Kelly Chew
kchew@ldrc.com**

Electronic Trespass

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measurable length of time.” *Id.* at 10.

The several “spamming” cases in which Internet service providers (ISPs) have successfully enjoined mass commercial e-mails on a trespass to chattels theory were distinguished on the grounds that the record in those cases demonstrated a “tremendous burden” on the physical capacity of the servers. *See Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1021-23 (S.D. Ohio 1997); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 451-52 (E.D. Va. 1998); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D. Va. 1998); *Hotmail Corp. v. Vans\$ Money Pie, Inc.*, 1998 WL 388381, at *7 (N.D. Cal. Apr. 16, 1998).

Similarly, in those cases involving automated data-collecting “robots” or “spiders,” the records showed “the deleterious impact this activity could have, especially if replicated by other searchers on the functioning of a Web site’s computer equipment.” Slip. Op. at 13 (citing *Register.com, Inc. v. Verio, Inc.* 126 F. Supp. 2d 238, 248-51 (S.D.N.Y. 2000); *eBay, Inc. v. Bidder’s Edge, Inc.* 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2000 WL 1887522, at *4 (C.D. Cal. Aug. 10, 2000).) Those facts, the court held, were simply absent in Intel’s case.

Intel Argued Alternative Harm

The court rejected two specific arguments Intel had made that such physical harm was not required. First, it did not accept the injury suffered by Intel employees when they were “distracted from their work . . . because of the assertions and opinions [Hamidi’s] messages conveyed” was a proper substitute for physical injury to the chattel itself. Slip. Op. at 18-19.

Noting that “Intel’s complaint is thus about *the contents of the messages* rather than the functioning of the company’s e-mail system,” the court held that Intel might more appropriately have relied on the torts of defamation, interference with prospective economic relations, interference with contract, or intentional infliction of emotional distress. *Id.* at 3, 19 (original emphasis).

Second, the court did not accept the analogy of Intel’s intranet to a form of real property. A group of *amici curiae*, represented by University of Chicago Professor Richard Epstein, urged the court to “excuse the required showing of injury to personal property in cases of unauthorized electronic contact between computers, [and thus] extend[] the rules of trespass to real property to all interactive Web sites and servers.” Slip. Op. at 21 (quoting brief of industry groups appearing as *amici curiae* in support of Intel, internal quotation marks omitted).

Although the court recognized that the language used to describe the Internet “derives, in part, from the familiar metaphor of the Internet as physical space” it concluded that “computers, even those making up the Internet, are – like such older communications equipment as telephones and fax machines – personal property, not realty.” *Id.* at 22-23. The court therefore declined to extend the tort of trespass to real property to the “virtual space” of the Internet.

Deciding the case on state common law grounds, the majority opinion declined to reach the First Amendment issues that Hamidi raised.

**The Court did not
Accept the analogy of
Intel’s intranet to a
form of real property.**

Dissenting Opinions

There were two dissenting opinions. Justice Brown agreed with the Court of Appeal that (1) the physical injury requirement for the tort of trespass to chattels should be eliminated, or alternatively, that (2) the injury Intel sustained from lost personnel time should fulfill the damages requirement.

She also viewed the case as one that required a balancing of interests under the First Amendment, relying on the line of cases that hold that “individuals are not required to welcome unwanted speech into their homes.” Slip. Op. Brown Dis. at 3 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (internal quotation marks omitted)); *see also FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (radio waves); *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 738 (1970) (mail); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (amplified sound); *Martin v. City of Struthers*, 319 U.S.

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Electronic Trespass

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141, 147-48 (1943) (door-to-door solicitation).

Under this analysis, Justice Brown would have formed a rule under which Hamidi could have sent unsolicited e-mails to Intel employees until the company asked him to stop, at which point he would have been required to do so. Slip Op. Brown Dis. at 11.

Justice Mosk, an Associate Justice of the Court of Appeal sitting by designation, wrote a separate dissent in which Chief Justice George concurred. Justice Mosk contended that the majority had failed to “distinguish open communications in the public ‘commons’ of the Internet from unauthorized intermeddling on a private, proprietary intranet.” Slip. Op. Mosk Dis. at 1.

He proposed that in the case of unsolicited e-mails, the physical damages requirement of the trespass to chattels tort should be eliminated “when a proprietary computer system is being used contrary to the owner’s purposes and expressed desires, and self-help has been ineffective.” *Id.* at 2.

That Intel’s self-help efforts to stop Hamidi’s unwanted e-mails had failed was significant for Justice Mosk, because, he contended, the Restatement’s “rationale for requiring harm for trespass to a chattel but

not for trespass to land is the availability and effectiveness of self-help in the case of trespass to a chattel.” *Id.* at 5. He reasoned that because self-help was inadequate, the physical damage requirement should be excused.

Although *Intel v. Hamidi* may appear to reverse what some have characterized as a growing trend toward the liberalization of the trespass to chattels tort in the Internet context, it does not significantly change the law. The majority opinion purported simply to affirm the requirement, applied in previous Internet trespass cases, that there either must be physical damage or diminished capacity, or significantly, the potential for such damage, to the plaintiff’s computer hardware or software.

Philip H. Weber, William M. McSwain, Richard L. Berkman and F. Gregory Lastowka of Dechert and Karl Olson and Erica L. Craven of Levy, Ram & Olson represented Hamidi. Linda E. Shostak, Michael A. Jacobs, Kurt E. Springman and Paul A. Friedman of Morrison & Foerster represented Intel.

Bruce P. Keller is a partner and Robert D. Carroll is an associate in Debevoise & Plimpton’s New York office.

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Communications Decency Act May Protect Listserv Operators

Ninth Circuit Describes Circumstances Required for Liability Immunity

By Samuel Fifer and Rob Carter

In a 2-1 decision issued on June 24, 2003, The Ninth Circuit ruled that the safe harbor provisions of the Communications Decency Act ("CDA"), which allow for immunity for providers and users of "interactive computer services" who publish information provided by another information content provider, may apply to electronic mailing list operators. *Batzel v. Smith*, ___ F.3d ___, 2003 WL 21453358 (9th Cir. June 24, 2003).

The court, per Judge Marsha S. Berzon, addressed the issue of when emails submitted to mailing list operators constitute information "provided by" information content providers under the meaning of the statute. Judge Berzon was joined by Senior Judge William Canby Jr., with Judge Ronald M. Gould dissenting as to the CDA claims.

Himmler's Granddaughter?

The case arose out of the following facts: Handyman Robert Smith was working for Ellen Batzel at Batzel's home in the mountains of North Carolina. Smith maintains that, while he was doing work for Batzel, she told him that she was "the granddaughter of one of Adolph Hitler's right-hand men," and that he overheard Batzel tell a roommate that she was related to Nazi war criminal Heinrich Himmler. Smith also claims Batzel told him that several of the paintings in Batzel's house, which Smith described as "old and European," were inherited.

Smith used a computer to search for websites related to stolen artwork, and came upon the Museum Security Network (the "Network"), a nonprofit organization that administers a website and electronic email newsletter, or listserv, related to stolen art. Smith then sent an email to Ton Cremers, the sole operator of the Network, in which Smith indicated that he believed Batzel was a descendant of Heinrich Himmler and that she inherited paintings looted from Jews during World War II.

Cremers read the email, posted the email on the Network website, and forwarded it to the Network listserv.

Smith claims that he had no idea that his email would subsequently be posted on a website or forwarded to the listserv, and later told Cremers that if he thought his email "would be posted on an international message board [he] never would have sent it in the first place."

Listservs as Users of Interactive Computer Services

Batzel brought a defamation action against Cremers for publishing Smith's allegedly defamatory email, and Cremers cited the safe harbor provisions of the Communications Decency Act, 47 U.S.C. § 230, in defense.

A word about the procedural posture of the case is in order here. The district court denied defendants' motions to dismiss for lack of personal jurisdiction -- any appeal on that decision was deemed not timely and the Court of Appeals did not disturb that decision -- and also denied a motion to strike

based on California's Anti-SLAPP statute, Cal. Civ. Proc.Code § 425.16. To successfully resist a motion to strike pursuant to the Anti-SLAPP statute, Batzel would be required to demonstrate a probability that she would prevail on the merits of her complaint. Cal. Civ.

Proc.Code § 425.16. The Ninth Circuit found that the required showing of probability of success turned on an analysis of the Section 230 defenses.

Turning to the Section 230 defenses asserted, the Ninth Circuit indicated that both the Network website and the listserv are potentially immune. Section 230(c)(1) of the CDA provides that "No provider of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

An "interactive computer service" is defined by the statute as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

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Turning to the Section 230 defenses asserted, the Ninth Circuit indicated that both the website and the listserv are potentially immune.

Communications Decency Act

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The CDA defines “information content provider” to mean “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3).

The court noted that there was no need to determine whether Network itself fit the broad statutory definition of “interactive computer service,” because Networks’ use of interactive computer services in operating the website and listserv qualified it as a “user” of such services under §230(c)(1). Rather, the court found that the “pertinent question” in determining immunity was whether Smith was the sole content provider of the email, or whether Cremers was also responsible for its development. Extending precedent set by other courts, the Ninth Circuit found that “traditional editorial functions” such as editing portions of an email or selecting material for publication do not transform an individual into a “content provider” for purposes of § 230.

A Reasonable Person Test for ‘Provide’

Although the court held that Cremers was not a content provider under Section 230, Judge Berzon observed that Cremers still faced liability if Smith did not “provide” Cremers with information under Section 230(c)(1), because “the structure and purpose of § 230(c)(1) indicate that immunity applies only with regard to third-party information provided for use on the Internet or another interactive computer service.” (emphasis in original). As noted above, Smith contends that, when sending the email, he never intended it to be forwarded to a mailing list or placed on a website.

In order to determine whether information is provided for publication to a provider or user of an interactive computer service, the court fashioned an objective test for whether the information was “provided” under the terms of the statute. Specifically, the court observed that the focus should not be on the subjective intentions of the information provider, but rather on “the service provider’s or user’s reasonable perception of those intentions.”

Thus, the court held that a service provider or user has immunity from liability under Section 230(c)(1) when “a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other ‘interactive computer service.’”

The court then remanded the case to the district court to determine, under this standard, whether Cremers knew or should have known that Smith did not intend the email to be published on the Internet.

Dissent: “The CDA Does Not License Anarchy”

Judge Ronald M. Gould, dissenting as to the CDA claims, argued that the majority gave the phrase “information provided by another” an unworkable meaning that would extend the scope of Section 230 immunity beyond what Congress intended. Gould observed that that the intention of the information provider may be impossible to determine from the face of the communication or other facts. Gould further argued that the rule would be incomprehensible to most citizens, as their inquiry to avoid liability would shift from whether it is appropriate for them to distribute a defamatory email to whether the author of that email intended the it to be distributed over the Internet.

The dissent contended that the practical effect of the holding would be to immunize those who make discretionary decisions to spread defamatory communications. Gould argued that “[t]he CDA does not license anarchy,” and an individual’s liability for disseminating a blatant falsehood should not turn on whether that person chose to disseminate it via the Internet rather than through a traditional medium.

Gould feared that the Court’s ruling would “license[] professional rumor-mongers and gossip-hounds to spread false and hurtful information with impunity.” Thus, Gould felt that the proper analysis of Section 230 immunity would be to confine such immunity to those situations where the information is transmitted automatically across a network rather than situations in which a person is actively reviewing content and selecting it for publication.

Although as of this writing no such pleading has been filed yet, it is likely that a petition for rehearing will be filed by Batzel, according to counsel for one of the defendants.

Stephen J. Newman, Latham & Watkins, and Robert P. Long, Kinkle, Rodiger & Spriggs, Los Angeles, CA, represented Cremer and Smith. Howard S. Fredman, Los Angeles, CA. Amicus Curiae: Paul Alan Levy, Public Citizen Litigation Group, Washington, DC represented Batzel.

Samuel Fifer is a partner and Rob Carter is an associate in the Chicago office of Sonnenschein Nath & Rosenthal LLP.

Pennsylvania Compelling ISPs to Block Sites

AG Requests Lead to Broad Blocks of Innocent Sites, Blocks Beyond Pennsylvania

Free speech advocates are concerned about the discovery that the Pennsylvania Attorney General's office has been informally reviewing complaints of websites allegedly containing child pornography and subsequently warning Internet Service Providers ("ISP") to deny access to the websites or face legal action – all absent judicial involvement. Of further concern are the technological limitations to blocking access to websites, described below, which unconstitutionally block innocent speech and block speech beyond Pennsylvania's borders.

Law Requiring Block on Porn Sites

In February 2002, the Pennsylvania state legislature passed a bill which holds ISPs liable for providing access to websites containing child pornography. See 18 Pa.C.S. §§7621-7630 (2002).

Pursuant to the statute, the Pennsylvania Attorney General's office is to receive complaints about ISP access to websites containing alleged child pornography, investigate the websites to find probable cause that any given website contains child pornography, place an application and proposed order with the court, and await a court order. See 18 Pa.C.S. § 7626 (2002).

Within three days of receiving a court order, the Attorney General is to notify the ISP (defined broadly by the statute to include "a person who provides a service that enables users to access content, information, electronic mail or other services offered over the Internet"), in which case the ISP has five days to remove the website or disable Pennsylvania's citizens' access to the website. See 18 Pa.C.S. § 7628 (2002).

An ISP's failure to remove access to the website results in a misdemeanor and fine, and upon subsequent offenses, a felony charge accompanied by an increased fine and possible imprisonment. 8 Pa.C.S. § 7624 (2002). Despite this formal procedure, the Pennsylvania Attorney General has developed an informal system, whereby the court system is bypassed. According to its website, the Attorney General's office claims to have handled over 600 complaints since April 2002, and has delivered approximately 200 informal notifications to ISPs, the majority of which "have been fully cooperative and complied" with the

requests. <www.attorneygeneral.gov/pei/child-safety/index.cfm> (accessed July 7, 2003).

Worldcom Bars Top Site

The only actual court order issued was against WorldCom. After attempting the informal route, the Attorney General proceeded under the formal statutory guidelines, and applied for a court order. On September 18, 2002, a Montgomery County judge ordered WorldCom to disable access to an alleged child pornography website. See <<http://www.attorneygeneral.gov/press/release/cfm?p=E473DE8B-2398-4038-911F37F4314C4E8>>(accessed July 7, 2003).

By September 23rd, WorldCom had blocked access to the alleged child pornography sites, including Terra.es, considered Spain's largest Internet portal and "ranked in the top fifty sites accessed from within the United States (and was the top foreign language site access from within the U.S.)". "WorldCom blocks access to child porn," at <http://news.com.com/2102-1023_3-959045.html> (accessed July 8, 2003); "The Pennsylvania ISP Liability Law: An Unconstitutional Prior Restraint and a Threat to the Stability of the Internet," (February 2003), at 9, at <<http://www.cdt.org>> (accessed July 8, 2003), citing "Top 50 Rankings also Show Terra.es Makes Steady Climb," ComScore Networks, June 21, 2001, available at <http://www.comscore.com/news/pr_greetingcardsites_062101.htm>.

WorldCom had asserted that while it "abhors child pornography" it had "concerns about the breadth of the decision," and had only waited for the formal court order because it wished to comply with the legal procedure. "WorldCom blocks access to child porn," *supra*.

CDT Asks AG to Identify Blocked Sites

In February 2003, the Center for Democracy and Technology ("CDT") requested information from the Attorney General's office regarding the notices sent and websites to which access has been denied. The Attorney General released some information, including the list of ISPs,

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ISPs Liable for Providing Access to Websites

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but the list of Uniform Resource Locators (“URL”) were redacted. [The letters between the CDT and the Attorney General’s office can be found on the CDT’s website, <www.cdt.org>.] The Attorney General’s office claimed that disclosure of the URLs would violate 18 Pa.C.S. § 6312(c), prohibiting dissemination of the depiction of child pornography. See Attorney General’s letter dated April 1, 2003, at <http://www.cdt.org> (accessed July 7, 2003).

Furthermore, the Attorney General claimed that disclosure of URLs would harm the personal security and reputation of any minors depicted on the websites in question, which are listed exemptions to Pennsylvania’s Right to Know Law. 18 P.S. § 66.1, et seq.

The CDT countered by explaining why these exemptions did not apply and why the URLs were public records, suggesting that the URLs were simply addresses and not “depictions” of child pornography under criminal law. CDT’s letter April 22, 2003, at <http://www.cdt.org> (accessed July 7, 2003).

Technological Concerns

According to the CDT, the primary problem associated with Pennsylvania’s Internet Child Pornography statute is that technology limits the methods by which the ISPs can comply. Specifically, there are two ways the CDT suggests an ISP can block access to a URL: either by changing the domain name system table or by blocking access to an Internet Protocol (“IP”) address to which the URL translates. See “The Pennsylvania ISP Liability Law: An Unconstitutional Prior Restraint and a Threat to the Stability of the Internet,” February 2003 at 6-10, at <http://www.cdt.org> (accessed July 7, 2003).

The former method is considered ineffective because many users do not utilize the domain name system table of their ISP. The latter method is objectionable, according to the CDT, because the IP address will be blocked across the entire ISP’s network, which extends beyond Pennsylvania, and one IP address can be — and often is — shared by multiple websites, sometimes numbering in the thousands. *Id.* at 9, citing Benjamin Edelman, “Web Sites Sharing IP Addresses: Preva-

lence and Significance,” available at <http://cyber.law.harvard.edu/people/edelman/ip-sharing>. Pennsylvania’s law would block all websites using the IP address, including those with content unrelated to child pornography.

In addition, the CDT notes that ISP routing tables are not designed to handle hundreds or thousands of null routing exceptions (which block IP addresses). Major changes to the routing tables can cause service outages. *Id.* at 10, citing “WorldCom customers hit by outage,” *The Age*, Oct. 4, 2002, available at <http://www.theage.com.au/articles/2002/10/04/1033538763017.html>; “Net Outage: The Oops Heard ’Round the World,” *Wired*, Apr. 25, 1997, available at <http://www.wired.com/news/technology/0,1282,3442,00.html>.

According to its website, the Attorney General’s office . . . has delivered approximately 200 informal notifications to ISPs, the majority of whom “have been fully cooperative and complied” with the requests.

Constitutional Concerns

The CDT also asserts that the Pennsylvania law violates constitutional due process because the parties do not have an opportunity to be heard, and because probable cause is a lower standard than that required in an ordinary child pornography proceeding. *Id.* at 11-12. The

CDT contends that the law violates the First Amendment because it is a permanent prior restraint on the IP addresses that does not follow procedural safeguards, and it is overbroad because it reaches protected speech. *Id.* at 12-14.

The CDT points out that the Pennsylvania law conflicts with the federal Telecommunications Act of 1996, which established that “legal responsibility for content on the Internet lies with the individuals or entities that publish the content on the Internet, and not with ISPs through whose networks the content can be accessed.” *Id.* at 15, citing 47 U.S.C. § 230. Thus, the CDT takes issue with the fact that ISPs are being punished for providing access to the websites, despite not having any control over the content, while purveyors of child pornography on the Internet are not being targeted. *Id.* at 16.

The Pennsylvania law has yet to be tested in court.

UPDATE: 9th Cir. Ruling on Anti-Abortion Website Stands

On June 27, the U.S. Supreme Court denied cert in *American Coalition of Life Activists v. Planned Parenthood of the Columbia/Willamette, Inc.* without comment. (02-563)(2003 WL 21472876).

The decision leaves intact a Ninth Circuit en banc decision that held that portions of an anti-abortion website, "Nuremberg Files," and "Wanted"-style posters constituted true threats against doctors who perform abortions and were identified on the site and posters. (290 F.3d 1058 (C.A.9 (Or.), 2002)). The Bush Administration had urged the Court to deny cert.

The case stems from suits brought by doctors and abortion clinics against the American Coalition of Life Activist, who ran the Nuremberg website and printed the "Wanted" posters. The site included the names, addresses and photographs of doctors who perform abortions, and advocated these doctors be prosecuted for war crimes.

Plaintiffs claimed that defendants violated the Freedom of Access to Clinic Entrances Act of 1994. At trial, a jury

found that the website and posters were true threats and awarded the plaintiffs \$107 million in damages. A federal district court judge also issued an injunction ordering the defendants to cease the dissemination of the website, posters or any materials designed to threaten the plaintiffs. (41 F. Supp. 2d 1130 (D. Or. 1999)).

A panel of the Ninth Circuit reversed and held that defendants' speech was not a form of threat or intimidation, and was protected by the First Amendment. (244 F. 3d 1007 (9th Cir. 2001)).

But sitting *en banc* upon reconsideration, the Ninth Circuit reversed the original panel's decision and held that the speech at issue constituted true threats. Viewing the site and posters in context, the majority of the *en banc* panel ruled that a reasonable person would see the messages as intimidating to the doctors identified.

The Supreme Court's denial of cert. leaves the *en banc* decision intact.

The punitive damage award was remanded to the district court.

A Victory for Political Speech in Texas Criminal Appeals Court Strikes Down Election Law

By Lisa E. Bowlin and Margaret Boren

Texas' highest criminal court recently struck down a state election law on First Amendment grounds. The law required publishers, printers, and broadcasters to disclose within all political advertisements the identity of the person or entity who contracted for the ad's publication. TEX. ELEC. CODE § 255.001. The statute effectively denied anonymity to certain persons or entities wishing to disseminate political ideas. In *Doe v. State*, the Texas Court of Criminal Appeals found that this election code provision placed an unconstitutional burden on core political speech. *Doe v. State*, No. 254-02, 2003 WL 21077961 (Tex. Crim. App. May 14, 2003).

The case arose during the 1997 municipal elections in Dallas, Texas. A political consultant circulated an anonymous political flier caricaturing an incumbent candidate for the Dallas City Council as "Pinocchio," a "puppet who can't tell the truth." After the election, the Dallas County district attorney's office received a citizen complaint alleging that the flyer violated the Election Code because the

flier—which a publishing company distributed through bulk mail—did not identify the person contracting for its publication.

The state indicted the political consultant for violating the statute. However, the trial court set aside the indictment, finding that the relevant Election Code provision unconstitutionally regulated speech. The case made its way to Texas' criminal court of last resort; that court affirmed the trial court's decision 7-2, in an opinion by Judge Cherly Johnson.

Strict Scrutiny Applied

The first controverted issue on appeal was the appropriate level of scrutiny. The state argued that the court should apply a low level of scrutiny because the statute did not directly forbid speech, but merely prohibited commercial agreements to create and broadcast anonymous political advertising.

However, the court rejected this argument and instead followed the stricter scrutiny applied in *McIntyre v. Ohio*

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A Victory for Political Speech in Texas

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Elections Commission, 514 U.S. 334, 347 (1995), a case in which the Supreme Court struck down a similar Ohio election law requiring any published statements designed to influence voters in an election to identify the person or organization responsible for the statements. In *McIntyre*, the Court found that distributing political leaflets that advocated controversial viewpoints is the very essence of First Amendment expression and that compelling authors of political ads to identify themselves against their will is particularly intrusive because it unmistakably reveals the content of that person's thoughts on a controversial issue. Thus, as in *McIntyre*, because Texas' election statute "burdens core political speech," the Texas Court of Criminal Appeals held that the statute is subject "to exacting scrutiny" and can constitutionally be "upheld only if it is narrowly tailored to serve an overriding state interest."

Rejected State's Interest

The state identified three interests that it claimed justified upholding the election code provision: (1) deterring and punishing political corruption; (2) notifying the public of candidates' allegiances to publishers of political communications; and (3) detecting expenditures that appear to come from individuals but actually come from PACs and corporations.

The court first examined whether the goal of the statute was to address political corruption. The dissent argued that the Texas statute protected the integrity of elections by promoting truthfulness in campaign ads and increasing the amount of information available to the public; the statute was not meant to inhibit individuals' independent communications.

However, the majority remained unconvinced that the statute was effectively tailored toward minimizing political corruption. Importantly, the court found that nothing in the statute limited its application to libelous, false, or fraudulent publications. Rather, the statute applied equally to all political advertisements, regardless of their basis in truth. Thus, the court ruled, the sweeping prohibition embodied in the statute was not justified in the interest of curbing political corruption.

Furthermore, the court found that other provisions in the election code sufficiently protected the other two interests that the State had advanced. Several provisions are aimed at abuse and corruption in campaign financing, thus addressing

the interest in detecting group and corporate campaign expenditures. Likewise, another Election Code provision prohibits political advertisements that purport to emanate from sources other than their true sources. In addition, campaign finance reports are open to public inspection, and political committees are required to report their expenditures. These "alternative, more effective" ways of monitoring the advanced state interests required the court to reject the state's position.

Finally, the state attempted to distinguish *McIntyre* by arguing that persons wishing to avoid the restrictions of the provision at issue could simply publish their own political advertisements, as the provision at issue regulates only agreement between two or more persons. The court rejected this argument, noting that self-publication "severely limits the opportunity to engage meaningfully in the anonymous and constitutionally protected dissemination of political ideas to a numerically insignificant portion of the electorate."

In so concluding, the majority rejected the dissent's view that citizens wishing to promote their views anonymously have other solutions, in that they could write letters to the editor, communicate confidentially with a reporter, post messages on the internet, or distribute flyers copied at a copy center on car windshields. The court noted that such alternatives subject persons wishing to distribute political advertisements personally to the risk of revealing their identities, contrary to the holding in *Talley v. California*, 362 U.S. 60 (1960), that freedom of speech includes the right to engage in the dissemination of ideas without being publicly identified. Furthermore, the dissent's position would limit anonymity to individuals, preventing groups from effectively espousing their political viewpoints.

Thus, the Texas Court of Criminal Appeals held that the Election Code's disclosure provision was not narrowly tailored to serve an overriding state interest and thus did not justify the undue burden it placed on constitutionally protected free speech.

Eric V. Mage and George Miller in Dallas represented the defendant. Assistant District Attorney K. Jefferson Bray represented the state.

Lisa E. Bowlin is an associate in the Media Litigation Practice Group in the Dallas office of Vinson & Elkins L.L.P. Margaret Boren, a 2003 Summer Associate, is a third-year student at the University of Texas School of Law.

Seventh Circuit Affirms Preliminary Injunction Against P2P Service Finds Aimster Service Failed To Show “Substantial Noninfringing Uses”

By Nicole Wong, Kurt Opsahl and Oscar Cisneros

In a detailed discussion of the *Sony Betamax* doctrine as applied to a peer-to-peer file-trading network, on June 30, 2003, the United States Court of Appeals for the Seventh Circuit upheld the district court’s preliminary injunction against Aimster and its founder, John Deep, in *In re Aimster Copyright Litigation*, No. 02-4125, 2003 U.S. App. LEXIS 13229 (7th Cir. June 30, 2003) (upholding *In re Aimster Copyright Litig.*, 252 F.Supp.2d 634 (N.D.Ill. 2002)).

In the absence of any evidence that Aimster is actually employed for substantial noninfringing uses, the Court found that the recording industry demonstrated a likelihood of success on its contributory infringement claim.

Facilitation of File Swapping

Like some other so-called “P2P” file-trading services, Aimster (subsequently renamed “Madster”) enables users to swap music files over the Internet using a centralized searchable database of accessible files. While Aimster itself does not make copies of the music files, it does facilitate users’ ability to find popular (and typically copyrighted) music for the purpose of making unauthorized copies. All communications between Aimster users are encrypted on the system and, as such, Aimster claims that it cannot know which songs its users copy.

The Seventh Circuit did not seriously debate the legality of the exchange of copyrighted works by users of P2P file sharing software, finding that at least some of Aimster’s users were engaged in direct copyright infringement. The court further held that companies – like Aimster – that facilitate infringement may be liable under the theory of contributory copyright infringement. *Id.* at 2. Judge Posner, writing for the *Aimster* court, thus decided this case differently than the recent district court ruling in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 2003 U.S. Dist. LEXIS 6994 (C.D. Cal. 2003), which held two P2P services were not liable for the infringing activity of their users.

Judge Posner engaged in a detailed analysis of Aimster’s service in light of the *Sony Betamax* doctrine articulated by the Supreme Court in *Sony v. Universal Studios*, 464 U.S. 417 (1984). In *Sony*, the Supreme Court held that “the sale of copying equipment ... does not constitute contributory copyright infringement if the product is widely used for legitimate, unobjectionable purposes.” *Id.* at 441. “Indeed,” the Supreme Court stated, “it need merely be capable of substantial noninfringing uses.” *Id.*

Aimster’s Arguments Rejected

The Seventh Circuit rejected the recording industry’s argument that *Sony* only applied to products and not to services, such as Aimster, which have an ongoing relationship with their customers and therefore should also have the ability to control infringing uses.

Aimster at 7. The Court held that the ability of a service provider to prevent infringement is a factor – but not a controlling factor – in determining contributory infringement liability. *Id.* at 8. The Court would not impose upon service providers the burden of preventing

some infringing activity that might result in the demise of otherwise useful and non-infringing services.

Furthermore, the *Aimster* court rejected the Ninth Circuit’s suggestion in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020 (9th Cir. 2001), that actual knowledge of specific infringing uses is sufficient to find contributory liability against a P2P service. *Id.* at 9. Instead, Posner wrote, when a product or service has both infringing and noninfringing uses, then “some estimate of the respective magnitudes of these uses is necessary for a finding of contributory infringement.” *Id.* at 10.

On the other hand, the court also rejected Aimster’s argument that it need only show that its file-trading system *could* be used in noninfringing ways. Rather, in light of the substantial infringing uses of the system, the court held that Aimster bears the burden of producing evidence that its service has ever been used for a noninfringing use or to

The Aimster court rejected the Ninth Circuit’s suggestion in *A&M Records, Inc. v. Napster, Inc.* that actual knowledge of specific infringing uses is sufficient to find contributory liability against a P2P service.

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P2P Injunction Affirmed

(Continued from page 55)

show “that it would have been disproportionately costly to eliminate or at least reduce substantially infringing uses.” *Id.* at 17-18. The Court held that Aimster utterly failed to provide such evidence.

Aimster argued that it did not have the requisite knowledge of infringing activity because its encryption features prevent the company from knowing the content of the files traded using its service. In strong terms, the Court likewise rejected this argument, holding that a “contributory infringer does not obtain immunity by using encryption to shield itself from actual knowledge of the unlawful purposes for which the service is being used.” *Aimster* at 12. In what the Court called a “self-inflicted wound,” Aimster actually hampered its own efforts because the encryption prevented it from uncovering evidence of the service’s noninfringing uses. *Id.* at 18. Such “ostrich-like” practices cannot be rewarded with immunity from liability. *Id.* at 20.

Possible Non-Infringing Uses

While Aimster failed to present evidence of noninfringing uses of its service, the court hypothesized a number of potential noninfringing uses, including trading works outside the scope of copyright or works licensed for free distribution and making fair use of works through time-shifting in the case of users who already owned the works in question. *Id.* at 15-16.

Indeed, the Seventh Circuit acknowledged that P2P technologies can be created for “innocuous purposes” such as transferring business data between a company’s employees. *Id.* at 5. Far from condemning all P2P networks as illegal, the court repeatedly analogized P2P systems like Aimster to AOL’s Instant Messenger service, and suggested that AOL would not be liable for its users’ infringement. *Id.* at 5, 8, and 12.

The court briefly discussed the plaintiffs’ vicarious liability claim, expressing doubt as to whether they would be likely to prevail. *Id.* at 31-32. The Seventh Circuit considered this discussion merely academic, however, as the contributory claim was sufficient for the appeal.

Finally, the court addressed Aimster’s argument that it should not be liable for the infringing activity of its users under the safe harbor provisions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512. Although the court found Aimster was an Internet service provider within the meaning of the DMCA, it rejected this putative defense because Aimster had encouraged its users to repeatedly infringe copyrights using the service, rather than preventing such activity.

The Seventh Circuit’s approach appears to call for courts to evaluate whether file-trading systems *could have been* designed to reduce infringement. The *Grokster* court came to a different conclusion, refusing to impose secondary liability on providers of P2P file sharing software “based upon the fact that a product could be made such that it is less susceptible to unlawful use, where no control over the user of the product exists.” *Grokster* at 48-49.

The Seventh Circuit’s decision in *Aimster* deepens the caselaw on contributory copyright infringement and could possibly set up a circuit split with the Ninth Circuit, which appears to have a different view of *Sony* and will be hearing the appeal of *MGM v. Grokster*’s contributory liability analysis in the coming months.

Bradley Rochlen of Katten, Muchin, Zavis, Roseman in Chicago and Russell Frackman of Mitchell, Silberberg & Knopp in Los Angeles represented the plaintiffs; William L. Montague, Jr. of Stoll, Kennon and Park in Lexington, Ky. represented the defendant, John Deep.

Nicole Wong, Kurt Opsahl and Oscar Cisneros are attorneys with the firm of Perkins Coie LLP in San Francisco.

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German Court Finds ISP Not Liable for Opinions Posted by Users

By Kurt Wimmer & Harris Bor

The issue of the liability of Internet service providers (ISPs) for content posted by Internet users has been a challenging one in Europe. Unlike the United States, where ISPs enjoy a broad exemption from liability by virtue of the Telecommunications Act of 1996, European rules have varied among different countries. The European Union's E-Commerce Directive (2000/31/EU), which was passed in 2000 and has been implemented in most of the 15 EU Member States, generally provides that ISPs are not liable for posted or hosted material unless the ISP has "actual knowledge" that the content is illegal or violates the rights of a third party. But the actual parameters of ISP liability for posted content continues to vary among European countries.

In a precedent-setting case in Germany, *Teltex GmbH v Teletarif.de Onlineverlag* (LG Köln, No. 28 O 627/02), a court in Cologne has ruled that an ISP was not liable for opinions

posted by users of its chat room. More importantly, the court held that under German law and its implementation of the E-Commerce Directive, ISPs do not have a general obligation to monitor postings in their chat rooms for possible illegal material.

The case involved an Internet forum, run by the defendant ISP, which focused on buying or selling mobile telephones. Two users had posted comments in the chat room which were highly critical of the business practices of the plaintiff mobile phone company. The postings related negative experiences involving the plaintiff company and offered informal advice on how to deal with the company (by encouraging customers to take legal action against the company, for example).

The plaintiff argued that the postings were "grossly damaging" to its reputation and that they unfairly encouraged customers to bring actions against the company or to push for penal sanctions. The plaintiff submitted that, in particular, the ISP should be liable for the postings and that it had failed in its obligation to monitor the content of the chat room for ille-

gal material — essentially, that the ISP should not have waited to be alerted to the existence of the material before removing it from the website. The plaintiffs also sought injunctive relief in the form of a cease and desist order against the defendant.

After hearing the arguments of both sides, the court held that the material on the website was not defamatory and it refused to grant a cease and desist order in favor of the plaintiff. In setting out its judgment, the court also remarked that an ISP would not normally be held liable for material held on its website and that there was no general duty for an ISP to monitor the material placed in its chat rooms.

The court stated that it was important to guarantee the freedom of consumers to comment about purchases that they have made to the extent that those comments are not defamatory. The Court suggested that libel might exist where the sole purpose of the comments directed against a third person was to cause that person

damage. The Court felt that was clearly not the case here. Even though some of the suggestions contained in the two postings had no legal basis or contained an element of bad faith, the comments were essentially matters of opinion based on personal experiences. It was also significant that the defendants failed to challenge the accuracy of the experiences described on the website.

Impact of EU Directive

In reaching its decision, the Court had regard to the German Teleservices Act (Teledienstegesetz), which came into force on 1 August 1997. The Act was amended in December 2001 in order to implement the provisions of the EU's E-Commerce Directive. This has resulted in a clearer formulation of the law and in particular the level of responsibility an ISP must take for the supervision of its website and the extent to which an ISP must have knowledge of an illegal activity before becoming liable.

Cases that pre-date the implementation of the E-

The court held that under German law and its implementation of the E-Commerce Directive, ISPs do not have a general obligation to monitor postings in their chat rooms for possible illegal material.

German Court Finds ISP Not Liable

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Commerce Directive demonstrate that German courts have in the past been fairly ready to hold ISPs liable for material on websites under their control and to place on them a broad responsibility to regularly monitor website content.

In 1998, a Munich court held a managing director of CompuServe Germany personally liable for child pornography placed on one of its news server sites (although the German Court of Appeal overturned the ruling). Similarly, in March 2000, a local court in Munich held an ISP liable for infringing copyright held in "MIDI music files" by allowing downloads through its website even though the vendor ISPs had no knowledge of the unlawful content of its site. Instead, knowledge was imputed through the ISPs "scouts" who were self employed and who had the job of screening the website's activity. Further, the Trier Regional Court held that an operator of an online guest book had to check the book weekly for illegal content (Case No. 4 O 106/00).

One may also point to a case in the Dusseldorf Regional Court which found in favor of a Munich lawyer who had objected to online comments insulting him (Case No. 2 a O 312/01) and one in the Cologne Court involving doctored pictures of Steffi Graff posted to a celebrity gossip forum which also found in favor of the plaintiff (Case No. 28 O 346/01).

Shift from ISP Liability

The amendments to the Act, along with cases such as *Teltex* (especially the Court's *obiter* comments), suggest a shift of emphasis. The German Teleservices Act, and indeed the law of all European Member States who have properly implemented the EU's E-commerce Directive, ensures that ISPs will not be liable for information on sites which they host, provided that:

(1) the provider has no actual knowledge of illegal activity or information or, where damages are involved, the ISP is not aware of the facts or circumstances from which the illegal activity or information is apparent, or;

(2) the ISP removes or disables such information when it is brought to its attention. Similar non-liability provisions exist for caching services or where the ISP acts as a mere conduit. On the question of monitoring, Article 8, paragraph 2 of the Teleservices Act, again in line with the E-Commerce Directive, makes it clear that an ISP is

under no general obligation to monitor the information it transmits or stores.

The upshot of the *Teltex* case and current European law is that ISPs may to some extent turn a blind eye to wrongdoing but must act to remove or disable illegal material if they have been alerted to its existence on their website. This is not dissimilar to the process required under the U.S. Digital Millennium Copyright Act, but without the more specific elaboration of procedures required under the DMCA.

One effect of the EU E-Commerce Directive is that ISPs established in a European Member State may now think twice before taking responsibility upon themselves to monitor the material on their websites, as they might well end up inadvertently exposing themselves to unnecessary risk. Interestingly, this is one result of pre-1996 U.S. cases that led to the Telecommunications Act's broad exemption to ISP liability. Unlike the U.S., however, there is no legislation on the horizon to provide U.S.-style protections to ISPs.

Kurt Wimmer is a partner and Harris Bor an associate at Covington & Burling's London office.

Update: Falwell Gets Domain

In the battle over jerryfalwell.com and jerryfallwell.com, Falwell critic Gary Cohn has given in. Cohn gave up the rights to the URLs to prevent a pending federal court date in the Northern District of Illinois. Previously, Cohn had prevailed in the Western District of Virginia, where Judge Norman K. Moon dismissed Falwell's claim for lack of personal jurisdiction. See *Falwell v. Cohn*, 2003 WL 751130 (W.D. Va., March 4, 2003); see also *MediaLawLetter*, March 2003 at 33.

Citing *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), the Western District of Virginia ruled that because Cohn, an Illinois resident, did not aim the website at a Virginia audience, nor did he exhibit manifest intent to expressly target a Virginia audience, there were insufficient contacts for Cohn to anticipate being haled into Virginia court. *Id.*

The World Intellectual Property Organization had previously denied Falwell's transfer of domain name, citing that he had not proven the three elements necessary to establish a domain name transfer, one of the elements being a showing of trademark rights in the name. Recently, however, Falwell realized that he had indeed trademarked his name for his talk show "Listen America" years prior.

Ontario Plaintiff Classes Fail in Defamation Actions Against Publishers Divide Between Québec, Other Provinces, Reaffirmed

By Damion K.L. Stodola

While Québec's Court of Appeal recently certified a class in a defamation action (see *MLRC MediaLawLetter*, June 2003, at 29-30), two Ontario courts have recently dismissed defamation actions brought by groups of plaintiffs against newspaper publishers, reaffirming the divide between Québec and Canada's largest common law jurisdiction on the issue of whether each and every plaintiff in a group must be identifiable in order to sue for libel. See *Gauthier v. Toronto Star Daily Newspapers Ltd.*, No. 03-CV-242345 CP, (Sup. Ct. Jus., June 24, 2003) (Cullity, J.) (available at <http://www.canlii.org/on/cas/onsc/2003/2003onsc10984.html>); *Bai v. Sing Tao Daily Ltd.*, [2003] O.J. No. 1917 (C.A.) (May 20, 2003) (McMurtry, C.J.O.) (available at <http://www.canlii.org/on/cas/onca/2003/2003onca10260.html>).

In *Gauthier*, three Toronto police officers, on behalf of the approximately

7,200 professional and civilian members of the Toronto Police Service (TPS), sought libel damages for the publication of a series of articles that appeared in the *Toronto Star* which criticized the TPS for racial profiling. The plaintiffs alleged that the articles, which refer to the "Toronto police" and the "police" generally, accused them of being racists, bigots, grossly intolerant, and engaging in improper racial discrimination.

In *Bai*, members of Falun Gong alleged that they were defamed by an article in the *Sing Tao Daily* which referred to Falun Gong as an "evil cult". The article, published in the aftermath of September 11, also lumped Falun Gong with other groups such as the Branch Davidians, Solar Temple and the World Trade Center terrorists under an article headlined "Radical Religious Groups Advocate Destroying the World."

In both cases, the plaintiffs' claims were dismissed on grounds that the impugned publications could not be reasonably understood to refer to any particular or all of the members of their class.

"Toronto Police" Cannot Sue Officers

Gauthier was commenced pursuant to Ontario's class action statute, the *Class Proceedings Act*, S.O. 1992, c. 6. Prior to class certification, the media defendants moved to strike the plaintiffs' statement of claim on grounds that the articles could not give rise to a libel action to any or all police officers.

Justice Maurice Cullity agreed with the defendants, and stated that "it is plain and obvious that the alleged defamatory statements in the articles are not capable of being understood to refer to the plaintiffs as individuals or to any particular member of the class." He further held that "the article cannot [...] reasonably be understood to state or suggest that every, or any particular, member of the service has participated in the im-

puted practices or has exhibited racist attitudes."

The judge also alluded to the fact that "vulgar and unfounded generalizations" such as "all lawyers are thieves" or "all police officers are racists" should not be interpreted to apply to each and every member of a

class. Justice Cullity specifically noted that the articles did not suggest that "every member of the force is involved in racial profiling or has racist attitudes."

Falun Gong Decision More Definitive

Likewise, in *Bai*, the Ontario Court of Appeal affirmed the trial court's dismissal of the statement of claim on grounds that the impugned article did not point to a particular member or members of the group. The Falun Gong plaintiffs submitted that references to "Falun Gong" met the "of and concerning" requirement for libel because their unique activities (their physical exercises, meditation and dissemination of literature) made them easily identifiable as Falun Gong members. The court disagreed, underscored the personal nature of a libel action and held that "it is necessary that the plaintiffs show that they are identified or singled out."

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In Bai the court underscored the personal nature of a libel action and held that "it is necessary that the plaintiffs show that they are identified or singled out."

Actions Against Ontario Newspapers Dismissed

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Door Still Open for Large Classes of Plaintiffs

Despite the positive result in *Gauthier*, Justice Cullity's decision leaves a few nuggets for group libel plaintiffs. In contrast with the rule reaffirmed in *Bai* above, Justice Cullity seems to leave open the possibility that a plaintiff does not necessarily need to be identified or singled out from other members of the class in order to state a viable libel action:

"if, contrary to plaintiff's submission, and my opinion, it is necessary for the plaintiffs to have been identified – singled out from the other members of the class – as particular individuals at whom the alleged defamatory statements were directed, it is even more obvious that this test has not been satisfied."

Judge Cullity quotes from *Bai*, but then states that:

"[i]t does not, however, follow that words cannot be defamatory of each member of a class that is determinate in the sense that its members can readily be identified."

In his decision, Judge Cullity cites *Knuppfer v. London Express Newspaper*, [1944] A.C. 116 (H.L.) and a brief passage in *obiter* from the holding in *Elliott v. Canadian Broadcasting Corporation*, (1995), 5 O.R. (3d) 302 (C.A.) (dismissing libel claim but expressly refusing to preclude the possibility that an action for libel might be viable by a class as large as 25,000) for the proposition that a determinate class may be defamed without singling out plaintiffs from other members of the class.

Although counsel for the media defendants did not deny that each member of a class defined generically could be libeled, counsel maintained that such an action might only succeed if the class was small. Justice Cullity noted that the size of the class is not the only relevant consideration but suggested that a class might be defamed if "the intensity of suspicion" created by a publication could reasonably be thought and understood by a sensible reader to refer to the plaintiffs generically described.

In *Gauthier*, Alison B. Woodbury and Tony S.K. Wong of Blakes, Cassels & Graydon in Toronto represented the media defendants. Timothy S.B. Danson and Peter T.J. Danson represented the plaintiffs.

Tony S.K. Wong also represented the media defendants in *Bai*. Rocco Galati represented the Falun Gong plaintiffs.

Damion K.L. Stodola is an associate at the New York office of Coudert Brothers LLP.

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World Summit on Information Society Proposals Could Threaten Free Speech

Draft provisions being considered for adoption at an upcoming U.N. summit on information and communications technology are threats to free expression on the Internet, press advocates warn.

The ostensive goal of the World Summit on the Information Society (<http://www.itu.int/wsis/>), the first phase of which will begin in Geneva this December, is to identify ways that communications technologies can be used to build a new, socio-economically equitable world society. In particular, WSIS aims to ensure that developing countries and disadvantaged communities benefit from technological advances; draft WSIS working papers describe bridging the “digital divide” as critical to eliminating socio-economic differences “between and within” countries. To that end, several proposals focus on improving and increasing access to communications networks, and instituting training and education programs in under-served communities.

The WSIS drafting process is being overseen by the Geneva-based International Telecommunication Union. The ITU, an organization of governments and telecommunications industry representatives, describes itself as “responsible for standardization, coordination and development of international telecommunications.”

WSIS drafts, however, include many provisions that critics say will ultimately produce unnecessary and stifling regulations on Internet news and information, and potentially could set dangerous precedents for limiting traditional news media. Many officials involved in the drafting of the WSIS platform have spoken of a need to regulate cyberspace, especially to secure against terrorism, to control hate speech, pornography and pedophilia, and to protect privacy. WSIS opponents are particularly concerned about any attempts to establish a universal press law that would attempt to

Opponents are particularly concerned about any attempts to establish a universal press law that would attempt to govern Internet content or to establish jurisdiction over U.S.-based media.

tions on Internet news and information, and potentially could set dangerous precedents for limiting traditional news media. Many officials involved in the drafting of the WSIS platform have spoken of a need to regulate cyberspace, especially to secure against terrorism, to control hate

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WSIS Proposals Threaten Free Speech

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govern Internet content or to establish jurisdiction over U.S.-based media.

Good Intentions, Bad Result

The World Press Freedom Committee (WPFC) and other groups warn that if WSIS endorses content restrictions, no matter how well intentioned, countries might interpret such restrictions as authorizing and legitimizing other state media controls.

“Attempts to control [the Internet] now and to place it under state surveillance can only stifle a form of media that could allow everyone everywhere to communicate their messages without being restricted by social, political or national boundaries,” WPFC European Representative Ronald Koven said at a recent conference on “Press Freedom and the Internet,” sponsored by the WPFC and the Association of the Bar of the City of New York.

In particular, critics take issue with provisions that recognize a “right to communicate” and a need to “balance” information flows. Despite their apparent innocuousness, the phrases are being linked to the New World Information and Communication Order (NWICO) – a now-defunct UNESCO-backed program that sought to promote economic and political development in developing countries by controlling the exchange of global information. NWICO sparked a huge controversy in the 1980s and a key justification for the United States’ and Britain’s withdrawals from UNESCO.

During NWICO debates, the “right to communicate” referred to an attempt to redefine free expression and press free-

dom as a collective right of governments or ethnic groups, WPFC has said in its position papers on WSIS. The ultimate goal of the “right to communicate,” WPFC argues, was “to give such collectives the right to take over space or airtime in news media, regardless of the editors.”

Another WSIS draft provision that concerns press advocates is an apparent attempt to qualify guarantees of an “independent and free communication media” by language that such freedoms must be “in accordance with the legal system of each country.” Accepting such a qualifier could legitimize state controls such government-installed firewalls.

For their part, WSIS organizers insist the summit is not aimed at curbing free expression and downplay suggestions that the draft provisions would unreasonably curtail Internet speech. Speaking at the recent Internet freedom conference in New York, Guy-Olivier Segond, the ITU-designated “special ambassador” for WSIS, insisted that Article 19 of the Universal Declaration of Human Rights would be a priority and “basis for action” in the final WSIS plan. Yet, Segond also emphasized that limits on freedom of expression to curtail privacy, child pornography and terrorism would be necessary.

Lack of Transparency Alleged

What has many press groups concerned is an apparent lack of transparency in agenda-setting and drafting leading up to the summit’s opening in December. Media groups do not have direct access to the WSIS drafters, representatives of the

(Continued on page 63)

What is the Civil Society?

There are three main entities contributing to the drafting process: an Intergovernmental Bureau, a Business Bureau and a Civil Society Bureau. The media are represented by one delegate (out of 21) to Civil Society and do not have direct access to the drafting group. The other 20 delegates of the Bureau represent interests such as unions, creators and actors of culture, towns and local authorities, NGOs, youth, gender, indigenous people, handicapped people, etc. The society also includes regional contact points for each continents.

The Civil Society website can be accessed at: <http://www.geneva2003.org/wsisis/indexa02.htm>.

Free speech advocates are concerned that Civil Society are being heavily influenced by a group called Communication Rights in the Information Society Campaign (CRIS) which also holds one seat in the Civil Society under the rubric of “Networks and Coalitions.” CRIS counts among its ranks several people involved in NWICO, including Sean O Siochru, a former secretary general of the MacBride Roundtable (named for the former head of a NWICO-era commission), and Dutch communications theorist Cees Hamelin

WSIS Proposals Threaten Free Speech

(Continued from page 62)

191 member states of the United Nations. Rather, the media's representation in the process is a seat on the Civil Society bureau (see inset), a working group that contributes suggestions to the WSIS architects.

"When we come in with recommendations, they incorporate those into a larger document," WPFC's Koven, the Civil Society media representative, said in a recent interview. "Our media recommendations get lost in a welter of recommendations when it comes to press freedom." Koven said WPFC is particularly concerned that as democratic governments – including the United States – become increasingly concerned with preventing terrorism, state controls over the Internet are becoming more acceptable.

In November 2002, media groups including the Committee to Protect Journalists, the International Association of Broadcasting, the World Association of Newspapers and the WPFC released a statement calling for WSIS drafters to affirm that Internet media will be afforded the same freedom of expression as traditional news media. The group also called for an unqualified endorsement of the free speech guarantees of Article 19, and a total renunciation of any attempts to control the "free flow of information across national frontiers." (<http://www.wpfc.org/index.jsp?page=Statement%20of%20Vienna>).

The United States is being represented in the drafting process by two State Department officials, David Gross and Richard Beaird. They have been conducting a series of public

Council of Europe To Recommend New Media Right of Reply

On June 25, the Council of Europe released the latest draft recommendation on "the right of reply in the new media environment." The bill will ask member states to enact legislation requiring regularly-issued publications to guarantee the publication of a response to inaccurate factual statements made about people which affect their "personal rights." (http://www.coe.int/T/E/human_rights/media)

Provisions

The current draft requires the response to be free of charge, posted promptly, given the same prominence as the original piece, and linked to the original in archives, where possible. Exceptions include where the length of the reply is longer than necessary; if the error has already been corrected; if the reply is in a different language than the source; if the responder cannot show a "legitimate interest"; if the reply constitutes a punishable offense or infringes on the legally-protected interests of a third party, or if the reply concerns "truthful" accounts of public government proceedings.

The resolution applies to "any means of communication for the dissemination to the public of information at regular intervals in the same format, such as newspapers, periodi-

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Comments and concerns about WSIS may be addressed to the following State Department officials. The address for all of them is: U.S. Department of State, 2201 C Street, N.W., Washington, D.C. 20520-5820

Sally Shipman, Telecommunications Policy Advisor
Office of International Communications and Information Policy
ShipmanSA@state.gov

David Gross, Deputy Asst. Sec. of State for International Communications
Office of International Communications and Information Policy

Richard Beaird, Sr Dpty U.S. Coordinator,
Office of Multilateral Affairs
Office of International Communications and Information Policy

Dr. Kim Holmes, Asst Secretary of State for International
Organization Affairs

Key dates in 2003:

July 15-18: Open intergovernmental Drafting Group meeting at UNESCO headquarters in Paris..

August 1: Deadline for NGOs, Civil Society and business entities to request accreditation to PrepCom-3.

August 18: All documents for PrepCom-3, including the outcome of the July Drafting Group meeting, are posted on the WSIS website.

Sept. 1: Executive Secretariat recommendations on entities seeking accreditation to PrepComs and the Summit.

Sept. 15-26: PrepCom-3 in Geneva

Tentative: A PrepCom-4 is possible before the start of the December summit.

Dec. 10-12: WSIS in Geneva.

Council of Europe To Recommend New Media Right of Reply

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icals, radio and television, or to any other service available to the public containing frequently updated and edited information of public interest.” The first draft applied to “professional on-line media”; by March, the “professional” had been dropped. The broad scope has creators of online web-logs (bloggers) worried about its impact.

Legislative History

The Council of Europe was founded in 1949 by the Treaty of London to protect human rights and safeguard the shared interests of its ten European countries.

The Council first addressed the right of reply with the passage in 1974 of Resolution 74(26): “On the Right of Reply – Position of the Individual in Relation to the Press.” Emphasizing the importance of freedom of expression, information from many different sources, and remedy against an attack on reputation, the resolution extended the right to any “mass media of a periodical nature,” including the written press, radio, and television. The right has been reinforced in other media resolutions, such as the European Convention on Transfrontier Television (1989); Article 8 grants a right of reply to people within a jurisdiction where a program is broadcast.

Implementation

Currently, the Council is composed of 45 member states. While members must adhere to certain human rights guidelines, most of the recommendations passed by the Council are subject to ratification by the individual state legislatures. The majority of the 45 countries already have right of reply laws in effect; the UK, Ireland, and Portugal are among those that do not – and are unlikely to add them now.

The measure, even if implemented by the member states, may be very difficult to enforce. Publishers who wish to avoid the mandated replies can create their websites outside of countries that impose such burdens. The superior free speech rights in the U.S., for example, have always made it an attractive haven for revolutionary political sentiments, revisionist history or hate speech, which are illegal in many parts of the world.

The Media Committee will meet in Strasbourg in mid-October to finalize the draft. The Council of Europe is accepting comments and suggestions, preferably in the form of drafting proposals; e-mail media@coe.int by September 15.

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ETHICS CORNER:

Strange 10th Circuit Decision Suggests Lawyers Must Do Continuous Research To Avoid Punitive Liability to Non-Clients

By Bruce E. H. Johnson

In an unusual decision, on April 22, 2003, a divided panel of the U.S. Court of Appeals for the Tenth Circuit upheld a Colorado jury verdict of \$1.5 million, plus a substantial punitive damages award totaling \$9 million, for defamation, invasion of privacy by intrusion (which was reversed on appeal but which did not require any reduction in the award), false light invasion of privacy (though acknowledging that Colorado does not recognize the false light tort), and for violations of the federal wiretap act for using intercepted cordless telephone conversations – all apparently because some Colorado residents relied on the advice of lawyers that such interception was legal. The case offers an interesting story, and presents a warning of the significant risks that may be created by conflicts and by what an appellate court later characterizes as inadequate research.

The case, *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003), grew out of a dispute between two Colorado neighbors in late 1994. As Steve Zansberg noted in the May 2003 issue of the *MLRC MediaLawLetter*:

Shortly after Mitch and Candace Aronson moved from New York into the upscale Denver suburb of Evergreen, Colorado, the Aronsons were invited to a 'welcome party' by William and Dorothy Quigley, who lived two doors away from them. But soon after the initial exchange of niceties, things got ugly. Disputes arose between the two couples concerning their two dogs, their kids, and there were cross-allegations of vehicular assault.

On October 20, 1994, Mitch Aronson, using a police scanner radio inside his house, overheard a cordless conversation between Mrs. Quigley and

another woman. In the course of that conversation, Mrs. Quigley and the woman on the phone jokingly discussed setting a lit scarecrow atop the Aronson house, painting an oven door on the Aronson garage door, and tossing lampshades and bars of soap into the Aronson yard as reminders of the Holocaust.

The overheard conversations included discussions by the Quigleys about "those fucking New York Jews," whom (according to the Aronsons) Mrs. Quigley stated she intended to drive out of the neighborhood within a year.

Based upon what they had overheard, the Aronsons took their concerns to the Colorado Office of the Anti-Defamation League (ADL). Concerned about whether they violated the law by overhearing and recording the Quigleys' telephone conversations,

the Aronsons sought legal advice. The ADL referred them to a private criminal defense attorney, Gary Lozow.

On October 22, 1994, Lozow and his associate, a former assistant United States attorney, researched whether the Aronson's activities violated the Federal Wiretap Act. Based upon their research, they concluded that communications via cordless telephone were expressly exempt from the Act and therefore could lawfully be intercepted and used by the Aronsons. Lozow also contacted an assistant district attorney, who confirmed his advice – that it was not unlawful to intercept cordless telephone conversations. As a result, the Aronsons brought their audio tapes to the district attorney's attention and continued monitoring their neighbors.

On November 5 and November 8, 1994, the Aronsons met with Lozow and another attorney, Stuart Kritzer, plus two employees from the local ADL office.

The case offers an interesting story, and presents a warning of the significant risks that may be created by conflicts and by what an appellate court characterizes as inadequate research.

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Lawyers Must Do Continuous Research

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In those meetings, it was agreed that the Aronsons would continue to provide tapes and transcripts of their neighbor's telephone conversations to the district attorney and the sheriff.

On December 6, 1994, Lozow and Kritzer filed a lawsuit in federal court on behalf of the Aronsons, alleging conspiracy and harassment and violation of the Aronson's civil rights under federal and state civil rights laws, and a variety of state law tort claims. The complaint included verbatim excerpts of several telephone conversations which had been intercepted and recorded.

Saul F. Rosenthal, director of the ACLU's Denver office, was contacted by a *Denver Post* reporter that day and asked for comment on the case. He contacted Lozow and obtained a copy of the complaint. He also held a press conference the next day at the ADL's offices (allegedly despite the initial opposition of Aronson), calling the case "one of the most astonishing cases of anti-Semitic harassment our office has ever confronted" and quoted some of the Quigleys' intercepted anti-Jewish comments about their neighbors. He later appeared on a local radio program discussing the lawsuit. Within days, the district attorney filed criminal charges against the Quigleys.

Learned of Law Change, Withdrew Claims

A few days later, the district attorney, Lozow, and Kritzer discovered that the Federal Wiretap Act had been amended on October 25, 1994, and that the express exemption for taping and using cordless telephone communications had been removed from the statute. The Aronsons immediately withdrew those portions of their lawsuit that were premised upon illegal interceptions of the Quigleys' telephone conversations, but this was not enough to avoid the counterattack from the Quigleys, which resulted in a substantial jury verdict against Rosenthal and the ADL that has been affirmed by the Tenth Circuit. (The Quigleys had already settled their claims with the Aronsons and their attorneys and the district attorney for \$425,000.)

The Tenth Circuit ruled that Mrs. Quigley's anti-Semitic comments (and their implied threats to harass their neighbors) did not involve matters of public con-

cern, thus negating the defense reliance on *Bartnicki v. Vopper*, 532 U.S. 514 (2001). (In addition, the court observed that, unlike the *Bartnicki* defendants, these defendants were aware that the Aronsons were intercepting their neighbors' conversations.)

The same conclusion – that the issues were not matters of public concern – meant that under Colorado law the defamation plaintiff was required to prove only negligence, not actual malice. The court also rejected the fair report privilege, asserting that Rosenthal's comments went beyond the allegations in the Quigleys' lawsuit. Finally, the court affirmed the punitive damages award, citing the "reckless" activities of the attorneys, which it imputed to the ADL, as part of the justification.

Rosenthal and the ADL have filed a petition for rehearing, which is pending with the Tenth Circuit.

Why is This an Ethics Issue?

But this is an "Ethics Corner" article and the underlying case is relevant only for the legal ethics lessons presented. What lawyer lessons does *Quigley v. Rosenthal* offer us?

First, the trial court determined, and the appellate court agreed, that the Aronsons' lawyers, Kritzer and Lozow, were agents of the ADL (and Rosenthal). Thus, all of their activities were imputed to the ADL and Rosenthal. The evidence for this theory consisted of the following facts: they were ADL board members, they had introduced themselves when contacting the District Attorney as acting on behalf of the ADL not the Aronsons, they had developed their "strategy" with the ADL's assistance and involvement, and the ADL had reimbursed the attorneys for some of their expenses.

Obviously, paying close attention to conflict issues, and clarifying who the client is, can help minimize this risk. Being both a board member and a lawyer for an organization may increase the risk of conflicts, and resulting malpractice liability. (There is also a danger in confusing the two roles – where a lawyer serves on a board and provides legal advice. One role is protected by the attorney-client privilege; the other is not.)

Amazingly, the *Quigley* court concluded that there was "sufficient evidence" of a principal-agent relationship between the Aronsons' attorneys and the ADL to go to a jury

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– in part, because Lozow and Kritzer allegedly “shared” the ADL’s concern about preventing anti-Semitism!

The Tenth Circuit panel also pointed out that one of the lawyers had participated in the ADL news conference even though Aronson had not initially supported this idea. Finally, the court placed additional emphasis on the fact that the ADL had reimbursed the deductible for the lawyers’ defense of the claims brought against them by the Quigleys – not an unusual decision since the Quigleys had, after all, alleged in their lawsuit that the lawyers were acting as the ADL’s agents. Because of this apparent confusion of their own roles – at least from the court’s standpoint – these attorneys were deemed to be ADL’s agents for purposes of imputation of liability and punitive damages.

Punitive Award for the Client

Second, although the ADL argued against the punitive damages awards because it had relied on counsel (including the District Attorney), the Court of Appeals went out of its way to fault both Lozow and Kritzer for their recklessness

in having researched only the question of whether interception of cordless telephone conversations was lawful, and not the related and “discrete” issue of whether use of such information was also permitted. This research gap – which normally would be considered mere negligence, if that, in a malpractice context – apparently justified the punitive damages finding. In fact, this was a distinction without a difference, given that the statutory exemption for cordless telephone communications – as of October 22, 1994, at least – had also extended to use and disclosure of the communications.

In his history of the common law, Justice Holmes observed that even a dog knows the difference between being kicked and being stumbled over. Lawyers, however, should not ascribe such practical canine wisdom to judges and juries – at least in the Tenth Circuit, and maybe even elsewhere.

Failure to Research Was Reckless

Third, and directly related to this odd theory of transforming the negligence of outside counsel for the Aronsons into recklessness (And, is it really “reckless” not to redo one’s legal research every week? Is it even negligence?) and then imputing this recklessness to third parties such as the ADL, the Tenth Circuit affirmed the punitive damages award by faulting the hapless lawyers for not re-checking the law in early December 1994 to determine if new laws had suddenly been enacted since their initial inquiry into the Federal Wiretap Law issues on October 22, 1994. The lapse of a few weeks was sufficient to require additional, and updated, research before the lawsuit was filed.

The court concluded with a stunning factual finding from an appellate court that ignored the basic issue of whether lawyers should do continual research after an initial inquiry

into the facts and law:

“In our view, a reasonably competent attorney researching the issue in December 1994 would have discovered the October 1994 amendment.”

The court added: “[w]e believe the attorneys’ failure to research the issue, combined with their use of the tape-recorded conversations,

constituted ‘an extreme departure from ordinary care, in a situation where a high degree of danger was apparent’” and thus supported an award of punitive damages against their non-client, ADL.

From a client’s standpoint, continual legal research on the off chance that, as Dickens’ Micawber might put it, “something will turn up,” seems an unnecessary and useless expense, and is hardly cost-effective. And yet that is precisely what the Tenth Circuit has demanded in *Quigley* – and the victim of this failure to do continual research is not the lawyer, and not the client, but a non-client.

Finally, many of the best points made in the ADL’s appellate court argument, the Tenth Circuit noted, were waived because they were not timely made at the trial court level. (For example, Colorado does not recognize the false light

From a client’s standpoint, continual legal research on the off chance that, as Dickens’ Micawber might put it, “something will turn up,” seems an unnecessary and useless expense, and is hardly cost-effective. And yet that is precisely what the Tenth Circuit has demanded in Quigley.

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tort, so the Tenth Circuit reversed the trial court judgment on the false light claim – but because the ADL’s trial counsel had submitted a lump sum compensatory damages verdict form, the court decided that the reversal did not justify vacating any of the damages award or requiring a new trial.)

No Good Deed Goes Unpunished

The moral of this ugly story? No good deed goes unpunished, especially if a lawyer is doing the good deed. And bad deeds will be turned into worse deeds, as attorney negligence becomes client recklessness.

Finally, conflicts issues between legal work and board work, uncertainty in the designation of your client, coordinating litigation strategy with public interest or other entities that “share” your client’s concerns, obtaining reimbursement for the malpractice insurance deductible from a sympathetic entity seeking to help a board member and volunteer defend an ugly and time-consuming lawsuit, and failure to undertake continual research into the Federal Wiretap Act in the hopes that “something will turn up” – all of this can be used by a trial court and an appellate court to impose a substantial damages award, against someone else.

Bruce Johnson is a partner in Davis Wright Tremaine’s Seattle office, and a member of the DCS Ethics Committee.

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MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on *Howard H. (“Tim”) Hays, Jr., former owner and publisher of the Press-Enterprise of Riverside, CA.*

Tim Hays was in charge of the Press-Enterprise when the newspaper not once, but twice, convinced the Supreme Court of the United States to recognize and expand rights of access to America’s courtrooms. *Press-Enterprise Company v. Superior Court of California* was argued 20 years ago this October and decided in January 1984. Its sequel, generally known as *Press-Enterprise II*, was decided in June 1986.

For his strength and courage of conviction, and, of course, his willingness to spend what it took of his own money to take the cases all the way to the top of the legal system, Mr. Hays deserves the profound gratitude and honor of the public and the media.

The Award will be presented to Mr. Hays by Gary B. Pruitt, Esq., Chairman of the Board, President and Chief Executive Officer of The McClatchy Company.

Following the Brennan Award, the Dinner will feature another sequel, a continuation of the discussion begun last year regarding government secrecy’s impact on military and security coverage – an issue that threatens to overwhelm the principles Tim Hays championed.

IN THE TRENCHES REVISITED: WAR REPORTING AND THE FIRST AMENDMENT – PART II A Panel of Journalists

*Moderated by
Brian Williams
NBC News*