

MILRC Media Law Resource Center

MEDIA LAW LETTER

Reporting Developments Through July 23, 2004

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MLRC TWENTY-FOURTH ANNUAL DINNER
WEDNESDAY, NOVEMBER 17, 2004

WITH PRESENTATION OF THE WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD TO
TED TURNER

WHO WILL BE INTERVIEWED ON THE OCCASION OF THE AWARD BY

Tom Brokaw
NBC News

Important Reminder about DCS Bylaws on Representing Plaintiffs

By Bruce Johnson, President, Defense Counsel Section

The bylaws of the Defense Counsel Section do not allow DCS member firms to represent plaintiffs in “defamation, privacy, or related claims against a media defendant or journalist.”

This is a longstanding rule, and one that is important to the DCS and Media members of MLRC as it affords the membership some degree of assurance that we are sharing our knowledge with those who will use it to further First Amendment defenses and prevent problems and issues, and not ultimately against any one of us in an adversarial context.

Section II.2 of the Defense Counsel Section bylaws states as follows:

Suspension of Membership. In the event that a law firm member of the Section shall undertake representation of a plaintiff or plaintiffs in a defamation, privacy, or related action against a media defendant or journalist, that member shall inform the Executive Committee of such representation, and shall voluntarily suspend its membership in the Section until such matter is finally resolved. During the term of suspension, suspended members will receive none of the benefits of Section membership and will be removed from all listings of active Section membership. If the Executive Committee learns of such representation, it may, after inquiry, require such member to thus voluntarily suspend its membership.

As you know, the MLRC assumes that DCS member firms will take appropriate steps within their respective firms to monitor their client engagements and ensure compliance with this fundamental rule.

In recent years, several firms have voluntarily stepped down from DCS membership when they became involved in a representation against a member of the media or a journalist involving defamation, privacy, or related claims. It doesn’t happen often, but it is distressing to everyone when it does occur.

Such due diligence is important. Given today’s competitive legal climate, involving increasingly routine law firm mergers and frequent lateral hires by law firms, careful scrutiny of potential conflicts is ever more important. In short, a plaintiff’s case may suddenly appear with the coming of a new office or a new partner. Unfortunately, the typical conflicts database system usually does not automatically flag the subject matter of particular lawsuits and may not detect potential noncompliance with DCS bylaws. Lawyer attention is required.

JUST PUBLISHED: MLRC 50-STATE SURVEY: MEDIA PRIVACY AND RELATED LAW 2004-05

Special Thanks to Robin Silverman and Golenbock Eiseman Assor Bell & Peskoe LLP

Editors of the MLRC Privacy Survey

MLRC's updated **50-STATE SURVEY: MEDIA PRIVACY & RELATED LAW** was published this month. All subscribers should have received their copies.

If you do not have a standing order subscription or need an additional copy, you can order this MLRC 50-State Survey by calling MLRC or submitting the order form available at www.medialaw.org.

MLRC wishes to extend special thanks to Robin Silverman and her colleagues at Golenbock Eiseman Assor Bell & Peskoe LLP in New York for taking on the editing of the **MLRC 50-STATE SURVEY: MEDIA PRIVACY AND RELATED LAW 2004-05**.

Robin Silverman, former in-house counsel with MTV Networks, had been assisting us with the *MediaLawLetter*. But when she recently joined Golenbock Eiseman she volunteered to edit the **2004-05 MEDIA PRIVACY SURVEY**.

MLRC, which has been short-handed, is deeply grateful to Robin and her colleagues for undertaking this very significant project.

MLRC
50 State Survey 2004-2005:
Media Privacy & Related Law

*With reports on privacy and related law in all states,
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Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference
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2004 NAA/NAB/MLRC MEDIA LAW CONFERENCE

Forty years after New York Times v. Sullivan:
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Alexandria, Virginia
September 29, 30 and October 1, 2004

*You should have already received your registration materials by mail.
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NAA/NAB/MLRC CONFERENCE
SEPTEMBER 29-OCTOBER 1, 2004
ALEXANDRIA, VIRGINIA
BOUTIQUE SESSIONS ON THURSDAY, 4-5:30

At the upcoming NAA/NAB/MLRC CONFERENCE, there will be a new type of session: The Boutique Session. Registrants to the Conference will be able to select one of six boutique sessions to attend. You will be asked to indicate which one you wish to participate in when you register.

Below are descriptions of the five sessions offered: Prepublication/Prebroadcast 101, Document Retention; Cyber Issues, Mediation and Media Insurance.

Prepublication/Prebroadcast 101

Moderators: Eric Lieberman, Washington Post
David Sternlicht, NBC

This new offering provides an introduction to the world of “lawyering” journalism. The session is designed for attorneys with little or no experience reviewing newsgathering issues and content prior to publication or broadcast. We will talk about the lawyer’s role when reviewing stories, and methods for analyzing risks and advising clients.

Documents Retention Policies

Moderators: Karen Ettleson, Mandell, Menkes, Surdyk, LLC
Corinna Ulrich, Belo Corp.

Panelists: Adam Cohen, Weil, Gotshal & Manges
Beryl Howell, Stroz Friedberg, LLC

Modern technology has fundamentally changed the way businesses generate, use, transmit and store documents. While paper documents remain in favor for more formal communications, especially legal matters, electronic documents are rapidly becoming a standard, especially in less formal settings. E-mail communications alone have created entirely new ways for individuals to interact in conducting day-to-day business.

Greater legal scrutiny of corporate activities and record-keeping, and more emphasis on internal control systems, illustrate the importance of maintaining sound record retention policies. These policies must allow companies to respond appropriately and adequately to requests for records in the context of litigation and other proceedings.

The panel will focus on current topics related to document retention policies, specifically new developments in electronic discovery and forensics. We will discuss how these developments affect companies in general, as well as specifically how they impact media companies.

The panelists bring a wealth of experience in this newly developing area. Each regularly advises companies related to document retention and electronic discovery. Mr. Cohen is the co-author of a treatise entitled “Electronic Discovery, Law and Practice,” published by Aspen Publishers. Prior to her current practice, Ms. Howell was a prosecutor and served as General Counsel of the Senate Judiciary Committee.

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Cyber Issues

Moderator: Jonathan Hart, Dow, Lohnes & Albertson, PLLC

Panelists: Cliff Sloan, WashingtonPost/Newsweek Interactive

Chuck Sims, Proskauer Rose LLP

Nicole Wong, Google

The LDRC is now the MLRC. With this broader mandate, and the proliferation of new media technologies, MLRC members who have agreed on almost everything for many years, now find themselves on opposite sides of issues on which even enlightened minds can differ. This panel will explore some of the issues that divide us, with particular attention to the increasing tension between the desire of technology companies to empower consumers to acquire, store, manipulate, and exploit content, on the one hand, and the desire of content companies to protect their content from digital reproduction and distribution, on the other.

Mediation

Moderator: Steve Comen, Goowin Procter, LLP

Panelists: Jonathan Marks, MarksADR, LLC

Jonathan Donnellan, The Hearst Corporation

David Vigilante, Turner Broadcasting System, Inc.

Various recent studies of federal and state courts throughout the country have analyzed the consequences of the fact that fewer than 2% of all civil cases ever go to trial. Numerous studies have also documented the explosive growth of non-binding mediation as the prevailing dispositive dispute resolution process.

While some business executives of media companies have been hesitant to accept mediation as appropriate for their disputes, enlightened counsel have embraced mediation as a better business alternative to traditional litigation. This boutique session is intended to stimulate a dialogue among the participants about how creative advocates for media clients can most effectively use mediation for the avoidance of litigation or early resolution of litigation.

The discussion will be facilitated by panelists who bring all of the appropriate different perspectives. Specifically, Jonathan Marks is one of the most experienced mediators in the country who has undoubtedly seen a wide range of effective mediation advocacy and use of mediation in media cases and others. David Vigilante and Jonathan Donnellan are experienced both in their private practice and as in-house counsel for media companies in the effective use of mediation. Steven Comen has for many years used mediation as a significant process in many different types of cases and has partnered with in-house counsel to resolve cases for media clients and numerous others.

Media Insurance 101

Moderators: Chad Milton, National Practice Leader, Media Marsh

Rick Fenstermacher, Risk Management Solutions, Inc.

A primer and then some, this session will be a look at the rudiments of media insurance business that most affect media and their counsel:

- How does it work and where does the money go?
 - What factors affect policy forms and underwriting decisions?
 - How are decisions made about defense counsel, defense strategies and settlements?
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Colorado Supreme Court Upholds Prior Restraint Order In Kobe Bryant Case

Media May Not Publish Lawfully Obtained Transcripts

On July 19, the Colorado Supreme Court ruled against an emergency petition from seven media companies challenging a prior restraint order issued by the judge in the Kobe Bryant rape trial. *Colorado v. Bryant*, No. 04SA200, 2004 WL 1613774.

The trial court order, issued on June 24 by Judge Terry Ruckriegle, prohibits seven companies (the Associated Press, CBS Broadcasting Inc., Denver Post Corporation, ESPN, Inc., FOX News Network, L.L.P., Los Angeles Times, and Warner Brothers Domestic Television) from publishing the contents of sealed rape shield hearing transcripts that were inadvertently sent to them by a court reporter.

Prior Restraint “Narrowly Tailored”

On a 4-3 vote, the Colorado Supreme Court upheld the constitutionality of the trial court’s order. The majority found that the order was indeed a prior restraint, a position that the Colorado Attorney General had disputed.

The court, though, ruled that the prior restraint was “narrowly tailored” to serve an “interest of the highest order” – protecting the confidentiality of an evidentiary proceeding under the Colorado rape shield statute – to protect victims’ privacy and the prosecution of sexual assaults.

Attempt to Distinguish Florida Star

The majority decision, written by Justice Hobbs, spends several pages attempting to distinguish its ruling from the U.S. Supreme Court’s decision in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the U.S. Supreme Court struck down as unconstitutional a statute that allowed for damages against the press for publishing the name of a rape victim.

In *Florida Star*, a reporter obtained the information lawfully when police inadvertently left a crime report in the press room. Justice Marshall, writing for the Court stated “where, as here, the government has failed to police itself in disseminating information, it is clear under *Cox Broadcasting*, *Oklahoma Publishing*, and *Landmark Communications* that the imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity.” *Id.* at 539.

Indeed, Justice Marshall added that the responsibility for the loss of privacy rests upon the government for its “mishandling of the information.” *Id.*

Thus where the information was lawfully obtained none of the interests advanced by the Florida statute – the privacy of victims, the safety of victims, and encouraging victims to report crimes – could justify

imposing damages on the newspaper.

Transcript More Private

Justice Hobbs attempted to distinguish the holding of *Florida Star* by arguing that the alleged victim’s sexual conduct discussed in the rape shield hearing transcript “is even more private than a victim’s identity,” citing to Justice White’s comment in dissent in *Florida Star* that “concern for a free press is appropriate, but such concerns should be balanced against rival interests in a civilized and humane society.” *Colorado v. Bryant*, at * 11 citing *Florida Star* at 547 n 2.

The majority also emphasized that the transcripts were marked “sealed.” While this does not, of course, change the fact that the transcripts were lawfully obtained, the court argued that this meant “there was no burden on the press to determine whether it should risk publication and

While the trial court’s order is indeed a prior restraint and “presumptively unconstitutional” under the circumstances “the state’s interest in keeping the in camera proceedings confidential is sufficiently weighty.

Colorado Supreme Court Upholds Prior Restraint Order In Kobe Bryant Case

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sanctions in light of the District Court's prior restraint order, and the specter of the press having to impose self-censorship was not an issue." *Id.*

The majority also downplayed the public interest in what is certainly one of the most high profile cases in recent years, by emphasizing that the information in the transcripts is simply private.

The majority concluded that while the trial court's order is indeed a prior restraint and "presumptively unconstitutional" under the circumstances "the state's interest in keeping the *in camera* proceedings confidential is sufficiently weighty to overcome the presumption in favor of dissemination at this time." *Id.* at *13.

The Dissent

In a strongly argued dissent, Justice Michael Bender wrote that the Order should have been vacated immediately, reasoning that:

*First, most of the private details of the alleged victim's sexual conduct around the time of the alleged rape, which is also the subject matter of the confidential hearings in this case, are already available through public court documents and other sources and have been widely reported by the media. Second, the media did nothing wrong in obtaining the transcripts. Under well-established prior restraint doctrine, these two factors alone require this Court to direct the district court to vacate its order immediately. Id. at *15.*

The dissent also rightly notes the obvious that "It is beyond dispute that these transcripts concern matters of public importance." *Id.* at *16 n. 13.

Background: Transcripts Sent By Mistake

On June 21 and 22, 2004, pre-trial proceedings were held in the Kobe Bryant rape case *in camera*, to determine whether certain evidence concerning the alleged victim's sexual activity would be admissible at trial under the exceptions contained in Colorado's Rape Shield Statute. The District Court Judge had earlier ordered that the evidentiary hearing would be conducted outside the presence of the public, as authorized by that statute.

In the early afternoon of June 24, 2004, a court reporter responsible for transcribing the proceedings in *Bryant* sent an e-mail to each of the companies identified above attaching a copy of transcripts of the closed proceedings of June 21 and 22, 2004.

Upon receiving the e-mail, several editors and reporters reviewed the transcripts, and, recognizing that they contained several newsworthy items, began preparing articles based upon the information in the transcripts.

At 6:36 p.m., on June 24, 2004, some five hours after the transcripts were transmitted, the court reporter sent each recipient another e-mail, attaching an unsigned order dated June 24, 2004, which stated as follows:

It has come to the Court's attention that the *in camera* portions of the hearings in this matter on the 21st and 22nd were erroneously distributed. These transcripts are not for public dissemination. Anyone who has received these transcripts is ordered to delete and destroy any copies and not reveal any contents thereof, or be subject to contempt of Court.

Following the receipt of this unsigned Order, George Garties, the Rocky Mountain Bureau Chief for the Associated Press, contacted the representative of the Office of State Court Administrator responsible for the *Bryant* case, and inquired whether, in fact, the Order had been signed and entered by the District Court. Subsequent to this call, the Judge Ruckriegle phoned Mr. Garties and informed him that the Order had been signed, and that it was in effect.

Media Obeyed Order, But Challenged It

None of the press entities that received the transcripts chose to disobey the court's order and publish a report divulging the contents of the transcripts.

Instead, on Monday, June 28, 2004, the recipients of the transcripts filed an "Emergency Petition for Immediate Relief" with the Colorado Supreme Court, asking that the Court lift the trial court's unconstitutional prior restraint on publication of information the media had lawfully obtained.

The next day, the Colorado Supreme Court entered an Order and Rule to Show Cause, and set an expedited brief-

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Colorado Supreme Court Upholds Prior Restraint Order In Kobe Bryant Case

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ing schedule on the Emergency Petition, requiring the District Court and any other interested party to file its Response within four days (by July 2) and the Reply Brief of Petitioners by noon on Wednesday, July 7.

Pursuant to that order, both the District Court and the District Attorney filed briefs in opposition to the News Media's emergency petition on July 2, 2004. No brief was filed by Mr. Bryant or by the alleged victim.

DA: Transcripts Not Lawfully Obtained

In their two Responses, the District Court and DA argued (a) that the trial court's order was not a prior restraint, but an extension of the Court's earlier closure order; (b) that the press had not "lawfully obtained" the transcripts, because they were aware of the Court's orders closing the proceeding and prohibiting court personnel from making prejudicial pre-trial statements; (c) that the matter was not properly "ripe" for decision on an emergency writ, because the petitioners had not first sought relief from the trial court, (d) that the order was justified in light of the fair trial and privacy interests implicated by the transcripts' contents, and (e) that the case should be remanded to the trial court for entry of findings prior to any decision on the merits.

The Colorado Supreme Court flatly rejected four of the government's arguments, but adopted in its own fashion the privacy rationale.

Media: "Prior Restraint"

The Media petitioners argued that the transcripts were lawfully obtained and that the trial court's order was unquestionably a "prior restraint" – points the Colorado Supreme Court accepted.

The media petitioners also argued that there was no reason to seek relief from the trial court before filing the Emergency Petition because the order was itself unconstitutional (entered without any findings or prior notice to the media), and the trial judge had personally phoned the AP Bureau Chief to make clear he stood by his order.

The fact that the trial judge had not submitted any findings in support of the Order in response to the Supreme Court's show cause order further demonstrated both the fatal deficiency of the order and the futility of seeking any such findings from the trial court, either before the petition was filed, or on remand.

The media petitioners, relying on *Florida Star*, then demonstrated why the interests asserted by the trial court as the basis for the order – the fair trial rights of the defendant and the privacy rights of the alleged victim – were insufficient under the circumstances (where so much of the information concerning the alleged victim's rape kit examination were already in the public domain) to justify such an extraordinary and "most pernicious" form of censorship, one that the United States

Supreme Court has never found constitutional (even in cases involving a criminal defendant's confession and The Pentagon Papers that allegedly implicated national security concerns).

***The media companies filed
an application ... to stay the
prior restraint order pending
certiorari review.***

The Next Step?

On July 21, the media companies filed an application with U.S. Supreme Court Justice Stephen Breyer, Circuit Justice for the Tenth Circuit, to stay the prior restraint order pending certiorari review.

Thomas B. Kelley and Steven D. Zansberg of Faegre & Benson in Denver represent the seven media companies in this case.

DUES REMINDER!

**MLRC members who haven't paid
their 2004 dues should contact
Debby Seiden of MLRC at
212-337-0200 ext. 204,
dseiden@ldrc.com**

Pennsylvania Newspaper Wins Libel Trial Judge's Wife Sued for Libel; Judge, for Loss of Consortium

On July 14, *The Daily News* of McKeesport, Pennsylvania, its former editor, and a reporter won a unanimous jury verdict on a libel claim brought by Helen Popovich, wife of Pennsylvania Superior Court Judge Zoran Popovich. *Popovich v. The Daily News Publishing Co.*, No. GD 99-6343 (Pa. C.P. 2004). The jury also rejected a loss of consortium claim brought by Judge Popovich.

Background

At issue was an article in the local newspaper about an automobile accident involving Mrs. Popovich. On June 9, 1998, she was involved in a two-car highway accident.

On June 16, *The Daily News* published a story by reporter Harry Bradford that police said that Popovich was going to be cited in the accident. The article also stated that "Police said that there was no contraband in the Popovich vehicle or any indications that she may have been driving under the influence of a controlled substance." Finally, the article said that police were still investigating the accident.

Bradford's sources for this information were interviews with police officers. His two requests for a copy of the police report on the accident were refused by police department personnel.

Judge Popovich, a former McKeesport mayor and Allegheny County Common Pleas Court judge, and now a senior judge on the Pennsylvania Superior Court, responded with an angry phone call to the newspaper.

He told the newspaper's managing editor, Pamela Cotter, that the police report, which he said he had a copy of, stated that the other driver was going to be cited, not his wife.

The police again refused the reporter's request for the accident report, but he was able to obtain an accident report, for a fee, from the town Borough Clerk.

This report stated that the other driver was going to be charged. Based on this information, on June 25 the newspaper published a "clarification" stating that Helen Popovich was not going to be charged.

But the report obtained from the Borough Clerk was wrong. The final police report, in fact, cited Helen Pop-

ovich for failing to yield to oncoming traffic and failure to stop at a stop sign. She was subsequently cited for these offenses, was found guilty of both charges, and fined.

Plaintiffs: "Article Implied Drug Use"

Helen Popovich's suit originally included additional claims for invasion of privacy and infliction of emotional distress. In September 2003, Allegheny County Court of Common Pleas Judge R. Stanton Wettick dismissed all but her libel claim, and dismissed all of Judge Popovich's claims against the newspaper except his claim of loss of consortium.

The trial court held that a jury should decide whether the June 16th newspaper article falsely implied that Mrs. Popovich used illegal drugs. The parties agreed that Mrs. Popovich was a private figure.

A trial, plaintiffs' counsel sought to show that the paragraph in the June 16 article stating "there was no contraband in the Popovich vehicle or any indications that she may have been driving under the influence of a controlled substance" – but adding that police were still investigating the accident – falsely implied illegal drug use.

Plaintiffs' argued that the reporter was negligent in relying on a single police officer for the "no contraband" statement.

The newspaper defendants argued that this was a routine traffic accidents report. Both sides had prepared expert witnesses to testify about the article, but none were called.

Article Not Defamatory

After a two-day trial, the 12-member jury returned an unanimous verdict for the defendants, finding that the paragraph at issue did not defame Helen Popovich. Because the statement was not defamatory, the jury did not have to address Judge Popovich's loss of consortium claim.

The Daily News was represented by Michael Adams of Cipriani & Werner in Pittsburgh. Judge Popovich and Mrs. Popovich were represented by Theodore Chylack of Sprague & Sprague in Philadelphia.

“Twists” and Turns

\$15 Million Verdict on Retrial of Hockey Player’s Misappropriation Claim

By Joseph E. Martineau

Previous issues of the *MediaLawLetter* (August 2003) and the LDRC *LibelLetter* (July 2000, November 2000, August 2002) reported on the case of *Tony Twist v. TCI Cablevision of Missouri, Inc.*¹

In the case, former professional hockey player Tony Twist sued comic book creator Todd McFarlane, alleging misappropriation of name because a character in the comic was named after the hockey player.

Initially, those involved in defending the case believed that the court would quickly reject the player’s claims on the grounds that the comic book’s use of the name was literary and artistic expression protected by the First Amendment. However, the case has suffered as tortured an existence as the lead character in the comic book.

Background

The case got off to a bad start when the trial judge denied defendants’ motion to dismiss and later motion for summary judgment, almost scoffing at the First Amendment defenses asserted. Then, in July 2000, after a two week trial, a jury awarded \$24.5 million, representing roughly 20 percent of the revenues derived from the comic book.

Fortunes (literally and figuratively) were reversed when, on Halloween in 2001, the trial judge reversed the verdict on a motion for judgment notwithstanding the verdict. In so doing, the trial judge implied that he had made a “grievous mistake” in submitting the case to a jury.

Things continued to look good, when in July 2002, a three judge panel of the Appellate Court for the Eastern District of Missouri affirmed the trial court’s JNOV, holding that the use of the plaintiff’s name in the comic book was protected under the First Amendment.²

In so ruling, the appellate court was critical of the case and of the trial court’s trivialization of the First Amendment defense, saying “[b]ecause all of the legally operative facts necessary to a decision on [the First Amendment] question were present and uncontested when the motion for summary judgment was heard, we conclude that this case should never have been tried on the merits.”³ It then said:

While a proud hallmark of our system of justice requires that we err on the side of trial on the merits, some trials that should never have taken place, while capable of serving a role in the orderly development of the law, can in fact do more damage to our system of values than others. This is especially true where First Amendment rights are at stake.⁴

Salvation for *Spawn* was only temporary. On July 29, 2003, the Missouri Supreme Court reversed the trial court’s JNOV and vacated the appellate court’s favorable opinion. The supreme court held that the plaintiff had made a subsmissible case for violation of his “right of publicity.”

It held further that the use of the plaintiff’s name and identity was not protected under the First Amendment because there was a commercial purpose in using the plaintiff’s identity and because that use outweighed any use for artistic or expressive purposes.⁵ The court used a test which it coined the “predominant use test.”⁶ The case was remanded for a new trial because of an error in instructing the jury.

After a three-week trial, which largely mirrored the original trial, on July 9, 2004, a jury returned a \$15 million verdict against *Spawn*’s creator for using the Tony Twist name.

Spawn and the Two “Tony Twists”

In 1992, Todd McFarlane left a successful career illustrating *Spider-Man* and other comic books for Marvel Comics and started his own comic book called *Spawn*. *Spawn* is about a CIA assassin named Al Simmons, who was killed in a plot by his corrupt boss.

Simmons went to hell, but made a deal with the devil to return to earth so he could see his wife, Wanda. Instead of returning in human form, however, the devil resurrected Simmons as a Hellspawn, a ghostly being, unrecognizable from his former living self. As a Hellspawn, or *Spawn* for short, he has superhuman powers, but struggles with how to use them.

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The first issue of *Spawn* was the largest selling comic book ever. Beginning with the sixth issue, a vicious, foul-mouthed mafia don appeared. Though unnamed in that issue, in later issues, the mob boss was referred to as “Antonio Twistelli” and eventually “Tony Twist.” *Spawn*’s extraordinary success inspired other *Spawn* related materials, including a line of toys, a movie and an adult animated television series – some of which included the Twist character.

Around the time McFarlane was starting *Spawn*, a hockey player named Tony Twist, who became known for his ability to pummel opposing players, entered the National Hockey League. He eventually came to play for the St. Louis Blues.

During the mid-90s, Twist acquired local prominence as a sports celebrity and promoter of charitable causes, as well as some national recognition as a hockey “enforcer,” *i.e.* fighter, including a *Sports Illustrated* article “Fighting for a Living” and an episode of HBO’s *Real Sports*. Twist’s hockey career ended in August 1999 when, on the same day that the Blues decided not to renew his contract, he sustained serious injuries in a motorcycle accident.

Player’s Name Used Intentionally

Though the subject of some early dispute, it seemed apparent that McFarlane, an avid hockey fan, had intentionally used the name of the hockey player for the fictional mobster and that the hockey player served as an inspiration for the comic book character.

McFarlane had virtually admitted as much in an interview published in his own comic books and in an interview with a comic book trade magazine. Moreover, McFarlane regularly used names of his friends and family for characters in his comic books, and had used the names of at least two other hockey players for characters of shorter duration than the Twist character.

Beyond similarity of name, however, the real and the *faux* Twist lacked any resemblance. They did not look alike; their professions were not the same; and they hailed from different parts of the world. At trial, the plaintiff tried to contend that both had similar personas as “enforcers” in their respective trades — something picked up on later by the Missouri Supreme Court.

The First Trial

From the inception of the case, the defendants asserted two primary defenses: one under the First Amendment and one that claimed the fictional Twist was not the hockey player. Based on the argument that no person could believe that the comic character actually portrayed the plaintiff, the trial court dismissed a defamation claim on “of and concerning” grounds, but allowed the misappropriation claims to proceed.

The defendants eventually raised the same defenses in a motion for summary judgment. However, the trial court rejected the First Amendment defense, characterizing it as a “superficial knee-jerk First Amendment rationale.”⁷

Instead, the trial court ruled that, notwithstanding the First Amendment, a misappropriation claim would exist against the author of a fictional work using a celebrity’s name (i) if the name was intentionally used for the purpose of advancing the author’s economic interest *and* (ii) if an economic advantage was in fact derived *or* the celebrity suffered harm as a consequence.

As to the issue of whether readers of the comic books purchased them because of the perceived relationship between the fictional character and the real life celebrity, the trial court ruled that although it was dubious, this was an issue of fact appropriate for jury resolution.

In later granting the JNOV, the trial court continued to apply the same analysis. In rejecting the jury’s verdict, it held that the plaintiff had failed to make a submissible case because he failed to prove that the comic book creator used the name intending to derive a commercial advantage from such use or that he had derived economic advantage as a specific result of using the name of the hockey player.

The Appellate Court’s Opinion

Although the appellate court agreed with the result reached by the trial court in entering its JNOV, it rejected the trial court’s reasoning. Unlike the trial court, the appellate court recognized the First Amendment as a formidable barrier to the plaintiff’s claims, and one that should have ended the case early — well before the \$24.5 million verdict.⁸

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The Supreme Court’s Opinion

In reversing the JNOV, the court found that the evidence could support a violation of Twist’s right of publicity. Further, because the supreme court found that the use was “predominantly” for commercial purposes, McFarlane’s use of Twist’s name was not protected under the First Amendment.

Right of Publicity

The supreme court described the tort of misappropriation of name as one of the four invasion of privacy torts. In turn, it recognized the right of publicity as a unique type of misappropriation claim designed “to protect a person from losing the benefit of their [sic] work in creating a publicly recognizable persona.”⁹

According to the court, the required elements of proof in such a claim were (i) the defendant intentionally used the plaintiff’s name as a “symbol of his identity” (meaning that the name must be understood by the audience as referring to the plaintiff); (ii) without consent; and (iii) with the intent of deriving a *commercial* advantage.¹⁰

The supreme court disagreed with the trial court’s ruling that Twist failed to present a submissible case that his name was used as a “symbol of his identity.” The court found that the use of the same name and the use of a similar persona of “enforcer” created “an unmistakable correlation” between the two Twists.¹¹ The court further stated that this element was also supported by Twist’s fame as an NHL star and by comments made to him and to his mother by hockey fans who believed that Twist was affiliated with the *Spawn* character.

The court found the same evidence sufficient to prove that McFarlane acted intentionally to create the impression that Twist was associated with *Spawn*, and therefore was sufficient to establish McFarlane’s intentional use of the name for the purpose of advancing his commercial interests.

Intentional use of Twist’s name and identity to advance commercial interests was also demonstrated by actions taken to market products, including the court said (despite a lack of support in the record) those with the likeness of the Twist character, directly to hockey fans. In addition, the court categorized statements that readers would con-

tinue to see current and past hockey players’ names in the books as inducements to readers to continue to purchase the comic book in order to see the name of Twist and other hockey players.

Right of Publicity and the First Amendment

The supreme court then addressed whether the use of the name and identity was “for the purpose of communicating information or expressive ideas about that person” such as in news, entertainment and creative works, and thus protected speech under the First Amendment. The court found an expressive component to the use of Twist’s name and identity based on the metaphorical reference to tough-guy “enforcers.”

However, it held that the literary value was sufficiently outweighed by the commercial value so as to overcome First Amendment protections. The court characterized the use of Twist’s identity and name as “predominately a ploy to sell comic books and related products rather than an artistic or literary expression.”¹² When this occurs, the court stated, “free speech must give way to the right of publicity.”¹³

The court considered and rejected the “relatedness” test of the RESTATEMENT (THIRD) OF UNFAIR COMPETITION, which provides First Amendment protection for the use of a person’s identity in expressive works where the name of an identified person is not used to attract attention to that work *solely* for the purpose of obtaining a commercial benefit.¹⁴

The court also considered but did not follow the “transformative” test of California that provides First Amendment protection when the use contains “significant expressive content other than plaintiff’s mere likeness.”¹⁵ Both tests in practice, the court decided, stretched the application of the First Amendment by protecting *any* expressive use of a name and identity. The court said, “though these tests purport to balance the prospective interests involved, there is no balancing at all — once use is determined to be expressive, it is protected.”¹⁶

The court believed that its “predominant use” test best balanced the competing interests of the property right to the commercial value of a name and identity and the right of an artist to free speech. Under that test:

If a product is being sold that predominantly exploits the commercial value of an individual’s identity, that

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product should be held to violate the right of publicity and not be protected by the First Amendment, even if there is some “expressive” content in it that might qualify as “speech” in other circumstances. If, on the other hand, the predominant purpose of the product is to make an expressive comment on or about a celebrity, the expressive values could be given greater weight.¹⁷

Instructional Error and Remand for New Trial

The supreme court ruled that plaintiff had made a permissible case under the standard it pronounced, and that the trial court erred in granting JNOV. However, it did hold that a new trial was appropriate given that the trial judge had failed to instruct the jury that they had to find that the defendants used the plaintiff’s name “with the intent to derive” or “for the purpose of deriving” a commercial advantage. According to the court:

Although the evidence supported a finding that respondents used Twist’s name and identity “with the intent to derive a commercial advantage,” alternatively, the jury could have found that respondents had no intent to obtain a commercial advantage -- that there was a different purpose for using the name -- and to the extent that some advantage was obtained, it was merely incidental. In fact, respondent McFarlane so testified in his defense, adding that the real reasons he used Twist’s name were one, it’s a pretty cool name, and, two, it’s easy to remember, it’s an easy thing -- cause I create a lot of characters, you need sort of easy ways to remember names. ... And again ... [with] Twist, you always sort of have a Twist ending.¹⁸

U.S. Supreme Court Rejects Certiorari

Although supported in an amici brief submitted on behalf of McFarlane by several noted authors of books and television (including Larry David, whose longstanding show *Seinfeld* had as one of its most entertaining characters a fictitious rendition of New York Yankees owner, George Steinbrenner), McFarlane’s attempt at certiorari to the United States Supreme Court was rejected.

The Second Trial

A different trial judge presided at the second trial, but reports from McFarlane’s trial counsel suggest that the second trial, otherwise, mirrored the original trial. That McFarlane knowingly used the name of the hockey player was not disputed. That he did so for commercial reasons was hotly disputed.

The evidence tying the use to an attempt to gain commercially was anecdotal at best. It really amounted to nothing more than that set forth by the Missouri Supreme Court in its opinion.

The trouble is, of course, that the supreme court has now seemingly sanctioned that evidence as sufficient to support a verdict for Twist. There is always the hope that better reason will prevail, but there has been no change in the make up of the supreme court that would provide much promise that a change is coming anytime soon.

The jury instructions came almost verbatim out of the supreme court’s opinion -- so there is little chance to argue anywhere below that the jury was misguided on the law, any misguidance of course came from the supreme court and not from the trial court.

Plaintiff’s Experts

According to defense counsel, to prove his damages at the trial, the plaintiff offered purported expert witness testimony of a St. Louis University marketing professor, who testified as he had in the first trial, that the use of Twist’s name was worth 15% to 20% of the gross receipts earned by *Spawn*’s creator.

Remarkably, that “expert” was allowed to testify even though he never empirically reviewed the amounts received by other celebrities whose names were used to promote a commercial product or the amounts hockey players had received for use of their names for endorsement purposes.

Another “expert” was a former beer marketer who, also without any research, was allowed to opine that the hockey player had lost endorsement value of from \$3 to \$50 million -- even though the evidence showed that plaintiff had never made more than \$16,000 from endorsements in any year that he was a hockey player.

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A former fellow hockey player testified that Twist was commonly known to hockey fans when McFarlane decided to use the name.

Regarding this and similar evidence offered at the first trial, the original trial judge noted in his order granting JNOV: “Speaking of evidence, the Court is fain to observe that it has seldom seen less credible evidence than that presented on damages by plaintiff,” and he referred to this evidence as “junk economics” and exercises in “speculation.”¹⁹

Even the Missouri Supreme Court seemed concerned with this evidence, referring to it as “*purported* expert testimony.”²⁰ According to defense counsel, however, the second trial judge was not particularly disturbed by the minimization of this evidence by his preceding jurists, agreeing with plaintiff’s counsel that such concerns related strictly to the weight of evidence and not admissibility. It remains to be seen how he will react to it on post-trial motions.

Post-trial Motions

McFarlane has thirty days to file post-trial motions, which he has promised to do. Thereafter, the trial court has 90 days to rule on those motions. If McFarlane is unsuccessful in that challenge, he will then have a right to appeal, but a big problem for him could be in posting a bond sufficient to cover the judgment. (Defense counsel reports that McFarlane is uninsured, and that the only insured entities prevailed in the trial.)

Analysis

The *Twist* opinion puts Missouri at odds with the holdings in most other jurisdictions. Where an item subject to a claim of infringement of the right of publicity involves pure expression, – *i.e.* an item that has no utility independent of expression (*e.g.*, a newspaper, a book, a movie, and yes, even a comic book), – most courts have applied a test that protects it unless the use is exclusively commercial in the First Amendment sense of commercial speech (*e.g.* an advertisement for a product or service).

The test employed by the Missouri Supreme Court – the predominant use test – gives too little regard to the First

Amendment interests of free expression that are at stake, and it conflicts with the First Amendment paradigm that courts cannot concern themselves with the relative value to be assigned to works of literary and artistic expression.

While the “predominant use” test may have viability in applying right of publicity claims to items not involving pure expression, *i.e.* items having utility independent of expression (*e.g.* coffee mugs, tee shirts, and possibly even sports trading cards, such as in the *Cardtoons* case²¹), applying such an analysis to purely expressive words creates a grave risk of severely impinging the creative energy and efforts of those who inform and entertain us.

In the now legally meaningless words of the *Twist* appellate court:

The test employed by the Missouri Supreme Court – the predominant use test – gives too little regard to the First Amendment interests of free expression that are at stake.

To extend the right of publicity to allow a celebrity to control the use of his or her identity in a work of fiction would grant them power to suppress ideas associated with that identity, placing off-limits a useful and expressive tool. This, in turn,

would effectively revoke the poetic license of those engaged in the creative process. To proscribe their right to use certain names, works, thoughts and ideas would ultimately apply to the rest of us, impeding our ability to express ourselves.²²

On a practical level, the *Twist* test further complicates an already confusing area of the law, and it creates a divergent, more celebrity-favorable standard for right of publicity claims in Missouri than elsewhere.

One must now ponder whether celebrities (*e.g.* Johnny and Edgar Winter²³), who find the law in most of the country less favorable to right of publicity claims, will now come to Missouri seeking relief which they could not get elsewhere.

In *Zacchini v. Scripps Howard Broadcasting Co.*, the United States Supreme Court said that “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”²⁴ This was the policy

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underlying its recognition that the First Amendment would not bar a claim against a defendant’s pirating of a professional performance.

That policy is entirely justifiable. But it does not justify the enormous damage award in *Twist v. TCI*. Little was taken from the hockey player Tony Twist. Because no one would realistically construe the non-look-alike *Spawn* character as a real life depiction of him or his activities, his reputation was not tarnished. Because there was little evidence that the defendants attempted to parlay the hockey player’s modest success and limited recognition into success for *Spawn*, there was little, if any, commercial exploitation of his identity. (It seems fair to say that *Spawn* benefited commercially no more from Tony Twist, the hockey player, than Tony Twist, the hockey player benefited from *Spawn*.)

Moreover, how can it be said that the recognition value of the hockey player correlated to enhanced revenues for *Spawn* of \$15 million or that the hockey player’s name – a name which had never attracted more than \$16,000 per year in endorsement value – was hurt to that degree?

According to defense counsel, interviews of jurors after the verdict suggested that the jury had little idea on how to calculate damages and averaged their respective opinions as to the proper amount of damages.

Indeed, the only theft that is threatened here is the court-sanctioned theft of McFarlane’s creative efforts and energies by giving the hockey player a substantial portion of the total revenues of the entire *Spawn* empire.

This gives the hockey player, who never contributed anything to *Spawn*, possibly as much as seems to have been made by *Spawn*’s creator. “[I]t is difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation, for the use made of [an individual’s identity in a work of fiction].”²⁵ Allowing this verdict to stand “would actually sanction the theft of [defendants’] creative enterprise.”²⁶

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

McFarlane was represented by Michael Kahn, Blackwell Sanders Peper & Martin, St. Louis, Missouri. Tony

Twist was represented by James Holloran, Holloran & Stewart, St. Louis.

Joseph E. Martineau is with Lewis, Rice & Fingersh in St. Louis, Missouri.

¹ *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc.*, No. 972-9415 (Mo. Cir. Ct. 22d, St. Louis City, Mo.).

² *See Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc.*, 2002 Mo. App. LEXIS 1577 (Mo. Ct. App. E.D. July 23, 2002) (also available at: <http://www.osca.state.mo.us>).

³ 2002 Mo. App. LEXIS . at 55.

⁴ *Id.* at 56.

⁵ *Twist v. TCI Cablevision of Missouri, Inc.*, 110 S.W.3d 363, 375 (Mo. 2003).

⁶ *Id.* at 374.

⁷ *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc.*, No. 972-9415 (Mo. Cir. Ct. 22d, St. Louis City, Mo. 2000), “Memorandum Order and Judgment dated October 31, 2000, hereinafter “Memorandum” at 9, n

⁸ *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc.*, 2002 Mo. App. LEXIS 1577 (Mo. Ct. App. E.D. July 23, 2002) (also available at: <http://www.osca.state.mo.us>).

⁹ *Twist*, 110 S.W.3d at 368.

¹⁰ *Id.* at 375.

¹¹ *Id.* at 370.

¹² *Id.* at 374.

¹³ *Id.*

¹⁴ RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 47 cmt. c (1995). The comment lists examples of protected uses of a name including creative works of fiction and nonfiction produced for profit but states that “if the name or likeness is used solely to attract attention to a work that is not related to the identified person, the user may be subject to liability for a use of the other’s identity in advertising.” *Id.*

¹⁵ Citing *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003). In *Winter*, Johnny and Edgar Winter brought suit under California’s right of publicity statute regarding the use in a comic book of two villains named Johnny and Edgar Autumn. *Id.* at 476. The characters were drawn with hair and albino features similar to the musicians. *Id.* The court held that the comic books did not depict the musicians literally and were “merely part of the raw materials from which the comic books were synthesized.” *Id.* at 479. Under the California rule, the court stated that a purpose to generate interest in a product and to increase sales is irrelevant to the application of protections under the First Amendment. *Id.*

¹⁶ *Twist*, 110 S.W.3d at 374.

¹⁷ *Id.*

¹⁸ *Id.* at 375.

¹⁹ Memorandum at 10, 18.

²⁰ *Twist*, 110 S.W.3d at 363 (emphasis added).

²¹ *Cartoons v. Major League Player’s Ass’n.*, 95 F.3d 959 (10th Cir. 1996).

²² 2002 Mo. App. LEXIS . at 40.

²³ *Winter v. D.C. Comics*, 69 P.3d 473 (Cal. 2003).

²⁴ *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977).

²⁵ *Guglielmi v. Spelling-Goldberg Productions*, 160 Cal. Rptr. 352 (Cal. 1979)(Bird, C.J., concurring), quoting Hill, “Defamation and Privacy Under the First Amendment,” 76 COLUM. L. REV. 1205, 1305 (1976).

²⁶ *Cartoons v. Major League Baseball Players Assoc.*, 95 F.3d 959, 976 (10th Cir. 1996).

Update: Mistrial in Punitive Phase of Pensacola News Journal Trial

In late June, a Florida court declared a mistrial at the start of the punitive damages phase of the false light trial against the *Pensacola News Journal*. *Anderson Columbia Co., Inc. v. Pensacola News Journal, Inc.*, No. 2001 CA 001728 (Fla. Cir. Ct., Escambia County mistrial declared June 23, 2004). (J. Jones).

In December 2003, a jury awarded the plaintiff \$18.28 million in compensatory damages on a false light claim against the newspaper, finding that an article falsely implied that plaintiff deliberately shot and killed his wife. The jury was unable to decide on a punitive damage award and the court declared a mistrial on that issue. *Anderson Columbia Co., Inc. v. Pensacola News Journal, Inc.*, No. 2001 CA 001728 (Fla. Cir. Ct., Escambia County partial verdict Dec. 12, 2003); see *MLRC MediaLawLetter*, Dec. 2003 at 11.

Jurors Dismissed

Circuit Judge Michael Jones declared the mistrial in the punitives phase as opening arguments were to begin, after he dismissed two of the six jurors for failing to disclose information on their questionnaires. The judge seated two alternate jurors, but there were no additional alternates.

One juror reported that she had shot a gun, but did not elaborate that she used it to kill her husband, for which she served 12 years in prison. The other juror was dismissed after he was found to be involved in two lawsuits – one seeking asbestos damages, the other involving his daughter's traffic accident. He had stated that he and his family were not involved in any lawsuits.

False Light Compensatory Award

The lawsuit, originally filed by paving company Anderson Columbia and its owner Joe Anderson, Jr., in March 2001, alleged that a series of articles and an editorial examining the paving company's environmental record and contracts with the Florida Department of Transportation were false and defamatory and resulted in lost business. Anderson also brought an individual claim for false light over an article that recounted the death of his wife in a hunting accident.

Anderson's false light claim was the only issued that survived by the time the case went to trial in December 2003. The article at issue contained several paragraphs describing a 1998 hunting accident in which Anderson, shooting at a deer, accidentally shot and killed his wife.

Circuit Judge Michael Jones declared the mistrial after he dismissed two of the six jurors, leaving no alternates.

Newspaper Sought to Stay Punitive Phase

The newspaper had sought to stay the retrial on punitive damages pending appeal of the compensatory damage award, but a motion to stay was denied by the Florida Supreme Court.

The *Pensacola News Journal* is represented by Dennis Larry of Clark, Partington, Hart, Larry, Bond & Stackhouse, Bob Kerrigan of Kerrigan, Estess, Rankin & McLeod, LLP, both in Pensacola, and Robert Bernius of Nixon Peabody LLP in Washington, D.C.. Anderson is represented by Willie Gary and Madison McClellan of Gary, Williams, Parenti, Finney, Lewis, McManus, Watson, & Sperando, in Stuart, Fla.

DID YOU GO TO TRIAL IN 2003? If you know of a libel, privacy, or case with related claims that went to trial in 2003, please let us know. It will be included in our annual report on trials, which will be published early next year. E-mail your information to erobinson@ldrc.com.

Football Coach and School District Settle Libel Case Ending Non-party Reporter's Ordeal

A Minnesota high school football coach settled a libel suit against his former school district and school officials, ending a long running battle to get a third party reporter to disclose the identities of his confidential sources used in a 1997 article reporting on the school district's firing of plaintiff.

Wally Wakefield, a 74-year old part time sports reporter for a local newspaper, was subpoenaed to provide information in a defamation suit brought by Richard Weinberger against a school district. Wakefield's article reported that unnamed school district officials "had enough of Weinberger and his behavior ... [including] his temper, inappropriate comments and foul language, which people claim he uses to intimidate players."

The school district reportedly paid \$184,000 and gave a written apology to plaintiff. The case was scheduled to go to trial on July 19.

The settlement, though, comes not before a contempt fine against the reporter and a disappointing decision from the Minnesota Supreme Court that lowered the bar on obtaining evidence from third party reporters in libel suits.

Last year a divided Minnesota Supreme Court, in an opinion written by Justice Alan Page, granted plaintiff's mo-

tion to compel Wakefield to reveal his confidential sources for the article. *Weinberger v. Maplewood Review*, 668 N. W.2d 667, 31 Media L. Rep. 2281 (Minn. 2003).

The intermediate appellate court had quashed the subpoena, finding that plaintiff had failed to establish a prima facie case of falsity. Considering the issue solely under Minnesota's shield statute, Minn. Stat. § 595.021-025, the Minnesota Supreme Court reversed. The Court held that under the state statute, a plaintiff in a defamation action need only show "that the identity of the source will lead to relevant evidence on the issue of actual malice." *Id.* at 673.

A sharp dissent written by Justice Meyer, chided the court for "fail[ing] to give any First Amendment context to its decision." *Id.* at 676.

Reporter Paid Contempt Fine

The trial court had imposed a \$200 a day fine on Wakefield for refusing to name his sources. He recently paid \$16,800. A defense fund for the reporter raised the money to pay the fine.

Wakefield was represented by Mark Anfinson.

UPDATE: Steve Wynn, Publisher Settle Libel Case Before Retrial

Casino executive Steve Wynn settled his libel suit against Barricade Books a few months before the case was scheduled for retrial. *Wynn v. Smith*, No. 95-A-348109-C (Nev. Dist. Ct. dismissed June 25, 2004).

Details of the June 25 settlement were not disclosed, although Wynn's attorney released a letter from the publisher apologizing for a statement in a book catalogue that formed the basis of the suit.

Wynn sued Stuart, his company Barricade Books, and author John L. Smith over a statement in Barricade's catalogue that the publisher's biography of Wynn "details why a confidential Scotland Yard report called Wynn a front man for the Genovese family."

At the 1997 trial, the jury found that Barricade and Stuart published the statement with actual malice, and awarded Wynn \$2.1 million in compensatory damages and over \$1 million in punitive damages. The book's author won summary judgment before trial because he did not prepare the catalogue copy.

In 2001, the Nevada Supreme Court threw out the \$3.2 million damage award because of a faulty jury instruction on actual malice. *See Wynn v. Smith*, 16 P.3d 424, 29 Media L. Rep. 1361 (Nev. 2001). *See also LDRC Libelletter*, February 2001 at 3.

The trial court had instructed that actual malice could be found "where the publisher entertained doubt as to the veracity of an informant or the accuracy of a report and the defendant failed to make reasonable efforts to investigate." The Nevada Supreme Court held that the failure to require "serious doubt" "effectively reduced the standard of proof required to establish malice."

Stephen Wynn was represented on appeal by Frank A. Schreck of Schreck Brignone in Las Vegas and Barry Langberg of Strook, Strook & Lavan in Los Angeles. Lyle Stuart and Barricade Books were represented on appeal by JoNell Thomas, Las Vegas, and Deutsch Klagsbrun & Blasband, New York.

New Jersey Appeals Court Dismisses Misappropriation Claims Against Reality Show

By David McCraw

The New Jersey Appellate Division ruled in June that persons filmed for reality television shows do not have a cause of action for commercial misappropriation of their names or likenesses. *Castro v. NYT Television*, 2004 WL 1439687 (N.J. App. June 29, 2004).

Background

The court's ruling came in a group of cases brought by several plaintiffs who sued New York Times Television after they were filmed – with their written consent – for the show *Trauma, Life in the E.R.* at a hospital in New Jersey. The court also dismissed three other related claims in the suits, including an “unjust enrichment” claim in which plaintiffs sought to be paid for allowing themselves to be filmed.

NYT TV brought the appeal after Monmouth County Superior Court had denied in part its motion to dismiss several causes of action on the pleadings. In its motion, NYT TV did not challenge the principal claims brought by plaintiffs – causes of action sounding in invasion of privacy – and the case is now expected to return to the trial court for discovery.

Footage Not Used for Trade Purposes

In ruling on the commercial misappropriation issue, the Appellate Division began by noting that the cause of action would be available only if the footage had been used for “trade purposes.”

No cause of action lies, however, when a person's image or likeness is used for a noncommercial purpose, such as a news program or an entertainment feature, which, according to the court, was the case here. “It is irrelevant whether a videotape is broadcast in connection with a television story about important public events or a subject that provides only entertainment and amusement.”

Plaintiffs argued that only programs presenting hard news should be exempt from liability for misappropriation, but the court declined to embrace that narrow approach. The court pointed out that newspapers and news broadcasts frequently mixed human interest material and more informative news and concluded that the courts should not become involved in distinguishing between the two.

In so doing, the court relied on cases interpreting the state Shield Law, where the New Jersey courts have traditionally employed an expansive view of what constitutes newsgathering and journalism.

Plaintiffs had also alleged a cause of action for unjust enrichment, asserting that NYT TV should not be allowed to profit without paying them for being filmed. The court spent little time rejecting that claim. The court cited *Fasching v. Kallinger*, a 1986 New Jersey case in which relatives of a murder victim sought payment from the author and publisher of a book about the crime. In *Fasching*, the court dismissed the unjust enrichment cause of action because the relatives never had a reasonable expectation of payment. The same principle applied to the *Trauma* plaintiffs and defeated their claim, the Appellate Division held.

“Absent express agreement, a member of the general public who is subject to videotaping for a television program cannot reasonably expect that he or she will receive payment from the producer of the show,” the court wrote. “In fact, a substantial First Amendment issue would be raised if a court were to find a right of compensation in such circumstances.”

Patients Rights and Consumer Claims Dismissed

Also dismissed by the court were two claims arising under New Jersey state statutes, one for the alleged violation of the Patient Bill of Rights and the other brought under the Consumer Fraud Act.

The Appellate Division ruled that no private right of action was permitted under the Patient Bill of Rights, which

**No cause of action lies, however,
when a person's image or likeness
is used for a noncommercial
purpose, such as a news program
or an entertainment feature.**

(Continued on page 22)

New Jersey Appeals Court Dismisses Misappropriation Claims Against Reality Show

(Continued from page 21)

sets out a scheme for administrative enforcement through the Department of Health. In dismissing the statutory consumer fraud claim, the court found that plaintiffs had failed to identify any consumer transaction in which defendants allegedly engaged in deception. While the complaints assert that plaintiffs were misled into signing consents, the exchange did not involve the sale or advertisement of any merchandise, services, or real estate.

Before the Appellate Division, NYT TV was represented by Chuck Sims and Matt Morris of Proskauer

Rose. J. Bary Coccoziello of Podvey Sachs of Newark, N.J. represented defendant Jersey Shore Medical Center. Ross Lewin of Windels Marx Lane & Mittendorf of Princeton, N.J. represented amicus curiae New Jersey Hospital Association. Plaintiff was represented by Gerald H. Clark of Lynch Martin of Shrewsbury, N.J. and Kevin L. Parsons of Gill & Chamas of Woodbridge, N.J.

David McCraw is Counsel at The New York Times Company.

Suzuki v. Consumers Union Disparagement Case Settled

On July 8, Consumers Union announced it had settled a long running product disparagement lawsuit brought against it by the Suzuki Motor Corporation. The case was originally dismissed on summary judgment, but was reinstated last year by the Ninth Circuit.

In a stinging dissent from a denial of rehearing en banc (on a 13-11 vote), Judge Kozinski notably observed, “If Suzuki can get to trial on evidence this flimsy,” he wrote, “no consumer group in the country will be safe from assault by hordes of handsomely paid lawyers deploying scorched-earth litigation tactics.” *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1121 (9th Cir.), *cert. denied*, 124 S.Ct. 468 (2003).

Background

In a 1988 magazine article, and in a subsequent anniversary issue and pledge drive, *Consumer Reports* described the vehicle as “Not Acceptable” due to a propensity to roll over. In 2002, and in an amended decision in 2003, the Ninth Circuit reversed summary judgment in favor of Consumers Union, holding there was sufficient evidence of actual malice to defeat summary judgment based on evidence that Consumer Union engaged in “rigged testing,” failed to adequately investigate flaws in its testing, and, because it was in debt at the time of test-

ing, it had a “financial motive” to publish “a blockbuster story to raise CU’s profile and increase fundraising revenues.” Over a vigorous dissent by Judge Ferguson, the court also rejected the application of the “independent examination” standard in reviewing summary judgement in a media libel case.

No Monetary Compensation

According to CU’s press release, no monetary compensation was paid. Instead, after reciting their mutual respect for each other, CU issued a clarification over the review of the Suzuki Samurai that was at issue in the litigation.

Among other things CU announced that the statement that the 1988 Samurai “easily rolls over in turns may have been misconstrued and misunderstood. CU never intended to state or imply that the Samurai easily rolls over in routine driving conditions.”

Both sides agreed not to refer to the Samurai testing or rating or their litigation in any advertising, promotional or fundraising materials; and agreed that references to the Samurai review would include a copy or link to the settlement.

The press release is available at:

www.consumersunion.org/pub/core_product_safety/001236.html#more

Court Dismisses Misappropriation Claim Over 9/11 Memorial Photo

By Peter G. Banta

On June 22, 2004 the U.S. District Court in New Jersey held that a photo image of a minor plaintiff which was taken at a public memorial service soon after September 11, 2001 and displayed on a photo agency's web site, was not an invasion of privacy and granted summary judgment dismissing the complaint. *Delle Chiaie v. Corbis Corporation and Sygma Photo News, Inc.*, (Civ. No. 02-3076, D. N.J., June 22, 2004) (J. Lifland).

Background

A few days after September 11, 2001, during a memorial service at a minor league ball park in rural Sussex County New Jersey, a freelance photographer took a photograph of a three year old boy holding a lighted candle and an American flag as tears flowed down his cheeks. No consent was obtained from the subject or his father.

The photo ran in the local daily and was acquired by photo agency Corbis/Sygma to offer for non-commercial licensing. Corbis/Sygma posted on its website a "thumbnail" image of the photo along with 35 others showing images of various post 9/11 memorial services. Unless a potential user obtained a license, only a degraded image, with a Corbis watermark, could be downloaded by a viewer.

Misappropriation and Distress Claims

The father sued for intentional infliction of emotional distress and for commercial misappropriation of the image on behalf of his son. The case was removed to Federal Court where the Magistrate Judge denied the plaintiff's application to proceed anonymously.

The father filed an amended complaint deleting his intentional infliction of emotional distress claim. After discovery, the defendants moved for summary judgment, which Judge Lifland granted, holding that New Jersey follows the Restatement (Second) of Torts, Section 652C, comment d.

The Court held the photo to be newsworthy and plaintiff was in a public place. The Court rejected plaintiff's argument that the defendant's profit motive made

the display a commercial use. The image was only offered for license for non-commercial uses, and had only been licensed once.

The Court stated that even though the display was not authorized by plaintiff:

undesirable publicity is insufficient to constitute a tort where the publication involves a matter of public concern. By attending a public memorial service, plaintiff forfeited any reasonable expectation of privacy. Additionally, plaintiff's name appears nowhere on the image, which is in low resolution and 'thumbnail' size format.

Because of the paucity of case law on web page displays in privacy actions, defendants cited the holding in *Kelly v. Arriba Soft Corporation*, 280 F.3d 934 (9th Cir. 2002) arguing that a thumbnail image of a photo on a web site was not a violation of the Copyright Act. Judge Lifland's opinion confined itself to a discussion of privacy cases in New Jersey, and did not reference *Kelly*.

Because the Court held there was no invasion of privacy under New Jersey Law, it did not reach the First Amendment arguments advanced by defendants.

Peter G. Banta, of counsel to Winne, Banta, Hetherington, Basralian & Kahn, P.C. in Hackensack, N.J. represented the defendants.

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Fourth Circuit Gives Broad Reading to Opinion Defense

Statements about Prior Litigations Protected as a Matter of Law

Giving a very broad reading to the opinion defense, the Fourth Circuit this month affirmed that statements about a protracted litigation were all opinion or hyperbole as a matter of law, including describing an affidavit as “some 60 pages of fact and fiction, innuendo, half-truths, exaggerations and fabrications.” *Schnare v. Harris Publications*, No. 03-1879, 2004 WL 1557804 (4th Cir. July 13, 2004) (per curiam).

In a five-page decision, the Fourth Circuit panel of Judges Gregory, Michael and Niemeyer affirmed the district court’s granting of a 12(b)(6) motion in favor of an author and publisher, holding that the article’s “snide tone, stern quotations, and responsive posture,” made clear to reasonable readers that the article was no more than a “lustful and imaginative expression of the contempt felt” toward an adversary.

Background

At issue was a three part article published in *Dog News* magazine that recounted and commented on a surprisingly bitter series of litigations over the breeding standards for Labrador Retrievers.

In 1994, the plaintiff in this case, and other owners, breeders, and sellers of Labrador Retrievers, sued the American Kennel Club to enjoin it from implementing and enforcing new standards. After that action failed, several breeders filed a class action antitrust suit against the American Kennel Club seeking to stop the new standards. This action was also unsuccessful and ended when the U.S. Supreme Court declined to hear an appeal in 2001.

In January and February 2002, *Dog News* published a three-part article entitled, “Revising A Standard,” about the controversy over the revised breed standard and the years of litigation that followed.

The author of the article (also named as a defendant) was a Labrador breeder who had been a proponent of the new standards. He began by stating that “the intent of this communication is to answer the half-truths, innuendoes and outright lies perpetrated by certain parties to the suit, and their fellow travelers, to bemuch [sic] the reputation and good name of some officers and directors, and to tell the true story.”

The article discussed in detail the author’s dispute with plaintiff over the breeding standard and the ensuing litigations. Commenting on an affidavit submitted by plaintiff in one of these case, the author wrote:

I looked up the meaning of ‘affidavit’ in Webster’s Dictionary, it is defined as follows. ‘A written declaration upon oath; A statement of facts in writing signed by the party and sworn to or confirmed by declaration before an authorized magistrate.’ It says nothing about nor does it include fabrications, distortions, half-truth, innuendo or hearsay. Rather it should be a statement of facts.

The article also included what the court described as “increasingly excited language.” It included biblical quotations, e.g. “Father, forgive them, for they know not what they do,” “thou shalt not give false testimony against thy neighbor” and “do not go about spreading slander about your people.”

The article described plaintiff’s affidavit in one of the litigations as “some sixty pages of fact and fiction, innuendo, half-truths, exaggerations and fabrications,”

Protected Opinion

Affirming the district court’s Rule 12(b)(6) dismissal, the Fourth Circuit found that all the statements at issue were either opinion or hyperbole. The court rejected plaintiff’s argument that the article implied plaintiff committed perjury.

The court reasoned that red flag words such as “lie,” “fabrication,” and “falsehood,” are not defamatory on a per se basis, but rather must be analyzed in context. Looking at the article in context the court concluded that “Many of the statements are only vaguely insinuating and not even arguably defamatory.” Other statements, “which on their face are accusations of lying, are actually vigorous and angry expressions of disagreement.”

In context, readers would understand the repeated accusations of lying as “expressions of outrage.” *Citing, e.g., Horsley v. Rivera*, 292 F.3d 695, 701-02 (11th Cir.2002); and *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 730-31 (1st Cir.1992).

The court concluded that the challenged statements all “belong to the language of controversy rather than to the language of defamation.”

Brian Koide and Robert Richardson Vieth, Cooley Godward, Reston, Virginia, represented Harris Publications. Steven Bancroft and John Nicols, Fairfax, Virginia, represented the author Bernard Ziessow. George E. Marzloff, Stafford, Virginia, represented plaintiff.

Oklahoma Supreme Court Gives Expansive Reading to Fair Comment Privilege in Private-Figure Libel Case

By Jon Epstein and Robert Nelson

The Oklahoma Supreme Court unanimously affirmed summary judgment for KFOR-TV, the New York Times-owned television station in Oklahoma City, and its reporter, Brad Edwards, in a private-figure plastic surgeon's libel claim. *Magnusson v. NY Times Company, et al.*, No. 97,703, 2004 WL 1447694 (Okla. June 29, 2004).

In a decision written by Judge Kauger, the court held that two consumer news reports concerning the surgeon, James Magnusson, which focused on alleged complications arising from plastic surgery were protected by the common law privilege of fair comment.

It also held that media defendants may use that privilege, affording individuals the opportunity for honest expression of opinions on matters of legitimate public interest based on true or privileged statements of fact, to defend against a defamation claim filed by a private figure.

Background

In May 2000, KFOR broadcast two consumer reports by Edwards documenting complaints by some of Magnusson's patients. In general, the reports related some patients' 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.

Dr. Magnusson 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 or made the complaints, or that KFOR had accurately reported what the patients said, 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.

Trial Court Granted Summary Judgment

KFOR and Edwards argued to the trial judge 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, as well as Magnusson's

response to the complaints – or that the reports were merely nonactionable expressions of the patients' and Magnusson's differing opinions about the quality of his surgical services.

The defendants challenged the false light claim on similar grounds and also argued that there was no evidence of actual malice. They opposed the intentional infliction claim on the grounds that their conduct was not extreme and outrageous and that Magnusson's alleged injury was not so severe as to meet the requirements of the tort. The district court granted summary judgment for both defendants.

Libel Claim Reinstated on Appeal

The Oklahoma Court of Civil Appeals affirmed summary judgment on the false light and intentional infliction claims; however, it concluded that there were factual issues remaining which precluded judgment on the defamation claim.

The defendants had successfully argued in their summary judgment papers that Magnusson could not sustain his constitutionally-imposed burden of proving that the statements were demonstrably false either because those statements were substantially true – i.e., to the extent they could be deemed statements of fact, they accurately reported the facts concerning the patients' complaints – or because those patients' complaints were not statements of fact at all, but were opinionative in nature.

To a point, the Court of Civil Appeals agreed. It said that Edwards "received information from consumers about a matter that certainly could be considered newsworthy. He investigated their complaints. He contacted the object of their complaints. He then reported a story that included both viewpoints."

However, the Court of Civil Appeals rejected the defendants' argument that the statements about which Magnusson complained were not actionable. That court mistakenly concluded that "whether considered opinion or fair comment, the doctrine has been construed not to apply against a private individual."

Supreme Court Vacates Libel Ruling

The Oklahoma Supreme Court granted certiorari. It vacated the Court of Civil Appeals' opinion with respect to the

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Oklahoma Supreme Court Gives Expansive Reading to Fair Comment Privilege in Private-figure Libel Case

(Continued from page 25)

defamation claim and affirmed summary judgment for the defendants.

The court recognized fair comment as a common law defense which affords legal immunity for public comment about matters of legitimate public interest. It noted that the purpose of that defense is to promote the free and open exchange of ideas.

The court noted that the common law fair comment privilege differs from both the common law fair report privilege and its statutory counterpart.

Although all three concepts overlap, the court said, the scope of the fair comment privilege, encompassing expressions of opinion on all matters of public opinion, is broader than either the common law or statutory fair report privileges, both of which have their roots in political speech concepts and encompass public interest reports on official actions or proceedings.

Fair Comment Applied

In explaining the applicability of the fair comment defense, the court said that a statement is generally privileged when it: (1) deals with a matter of public concern; (2) is based on true or privileged facts; and (3) represents the actual opinion of the speaker, but is not made for the sole purpose of causing harm.

In making the privilege determination, courts look to the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a consideration of whether a statement implies the existence of undisclosed facts.

The court then held that the defense applied to the reports about Dr. Magnusson because the availability and skills of surgeons constitute matters relating to a community's public health; the stories accurately reported the patients' opinions or conclusions about the plaintiff's professionalism; and the comments from the patients are nonactionable "judgmental statements," opinionative but not factual in nature.

The court specifically observed that where the tone of the broadcast is "pointed, exaggerated, and heavily

laden with emotional rhetoric and moral outrage," viewers are put on notice to expect speculation and personal judgment. References to "botched" surgeries and "devastating" scars are opinionative or judgmental statements and should not be interpreted as stating actual facts.

The court expressly joined the "overwhelming majority of jurisdictions" which have protected similar broadcasts because such criticisms are "the type of statements that our society, interested in free and heated debate about matters of social concern, has chosen to protect."

In support of its holding, as "a logical framework for determining the scope of the protection guaranteed by the Oklahoma Constitution," the court cited *Green v. CBS, Inc.*, 286 F.3d 281 (5th Cir.), cert. denied, 537 U.S. 887 (2002); *Campbell v. Citizens for an Honest Government*, 255 F.3d 560 (8th Cir. 2001); *Phantom Touring, Inc. v. Affiliated Publications, Inc.*, 953 F.2d 724 (1st Cir.), cert. denied, 504 U.S. 975 (1992); and *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), and several other cases rejecting liability for media reports reflecting judgments and opinions of individuals involved in a controversy.

Interestingly, the court also repeatedly cited *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). In a footnote, the court observed that *Milkovich* "changed the terminology" but "not the underlying substance" of existing law about opinion: "Rather than recognize a constitutional distinction between 'fact' and 'opinion,' the Supreme Court recognized a constitutional distinction between 'fact' and 'non-fact'."

In upholding the application of the fair report privilege, the court was particularly persuaded by the fact that the reports were presented as part of the "In Your Corner" series and were clearly identified as investigations into claims by patients in which both negative and positive disclosures were made about Magnusson and as to which the doctor was given the opportunity to respond.

The court appears to have been impressed that the defendants tried to present the plaintiff's response to various criticisms and included comments from a patient who was pleased with her experience with Magnusson. It noted that when opposing opinions are presented in a communication, the personal and nonfactual nature of the relative statements is underscored.

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Oklahoma Supreme Court Gives Expansive Reading to Fair Comment Privilege in Private-figure Libel Case

(Continued from page 26)

Privilege Applies to Private Figure Suits

After determining the range of the common law privilege of fair comment, the court also determined that the fair comment defense applies in a defamation suit brought by a private individual. The court said that issue had not been squarely decided in a “precedential pronouncement” by the Oklahoma Supreme Court.

However, it found that in two of its previous cases and in two Court of Civil Appeals decisions, the courts had assumed or implied that the fair-comment privilege could be a defense in a private-figure defamation action.

The court concluded that this assumed applicability “coincide[s] with the majority position that the defense may be utilized in a defamation cause brought by a private individual.” The court cited eleven state and federal cases as representative of the majority and four cases holding otherwise.

The court rejected Magnusson’s argument that even if the privilege could apply in a private-figure defamation action, his case had to be remanded to have a jury determine if the two reports were expressions of opinion protected by the privilege. The court said it “is a question of law for the court to determine whether a published statement is within the protected class of speech.”

In its conclusion, the court said that the judiciary “must be slow to intrude into areas of editorial judgment,” and that it is not its duty to “correct” the opinions expressed by the patients or to punish the media for communicating their statements.

Dr. Magnusson was represented by Holly Hefton in Oklahoma City.

Robert D. Nelson and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson in Oklahoma City represented The New York Times Co. and Brad Edwards.

Libel Suit over Spelling Bee Article Dismissed

By George Freeman

A State Supreme Court judge in Long Island has granted a motion by The New York Times to dismiss a libel case arising from a New York Times Magazine article of September 1, 2002. *Goldstein, et al. v. The New York Times Company*, No. 13327/03 (Nassau Sup. Ct. June 16, 2004).

The libel case was brought by a family, three of whose children finished in the top 20 of the National Spelling Bee contest. The story portrayed the family as zealously devoted to winning the spelling bee competition.

The complaint alleged that they were defamed by the story inasmuch as it portrayed them as misfits and outcasts.

For example, the article stated that the family only looked forward to one week a year, the week of the National Spelling Bee, “when they are among their tribe;” that they were “misfits who find a home in the precision of the dictionary and the safety of kin;” that the parents decided spelling was “worth the devotion of hundreds upon hundreds of hours of repetitive memory work, with the potential payoff, a shot at the national bee, and its attendant brief

fame and free educational software;” and it also made a comparison to the obsessed children as being “Jon-Benet without the beauty pageant.”

Article Not Defamatory

In dismissing the complaint, the court adopted the various arguments *The Times* made in its briefs. The court concluded that the passages sued upon were not reasonably susceptible to a defamatory meaning.

In addition, the court found that the passages were privileged expressions of opinion. The court concluded: “that the article, as written, did not meet the plaintiffs’ expectations, was disappointing and unflattering is not relevant to the court’s consideration of the legal issue presented.”

It summarized that the Times’ freelancer “used facts obtained in interviews with the plaintiffs and others, developed his own opinions about the family and spelling bee participants and wrote an article which falls within the ambit of constitutional protections afforded.”

George Freeman and David McCraw, in-house counsel at the New York Times, represented the paper in this case.

Oregon Court Holds Fair Report Privilege Is Not Absolute

In a libel case with unusual facts, an Oregon federal court held that the state's fair report privilege is not absolute. *Gunter v. The Guardian Press Foundation, dba Oregon Observer, et al.*, 2004 WL 1088290 (D.Or. May 14, 2004) (Hogan, J.).

The court held that the state's common law fair report privilege is conditional and can be lost where the publisher made its statement in bad faith or did not have a reasonable belief in the truth of its statement.

Defendant a Sham Newspaper?

The case arose out of a property dispute between Lucinda Gunter and Aleck Turnbow. Gunter obtained a judgment in her favor in this case.

Turnbow later paid the *Oregon Observer* \$5,000 to investigate and publish a story about the property case. It published a story claiming that Gunter "perjured herself" at trial. The article tracked a new pro se complaint filed by Turnbow against Gunter and state defendants.

Gunter sued the Turnbow, his legal adviser and the *Oregon Observer* for defamation. The *Observer* claimed its publication was absolutely privileged as a report of the new complaint filed against Gunter.

Proving that bad facts can make bad law, the court denied summary judgment to the publication on the ground that the fair report privilege is only conditional.

The court largely accepted allegations in opposition to summary judgment that the *Oregon Observer* was essen-

tially a "con game." The publication offered "investigative services" to disgruntled litigants. In the instant case, plaintiff alleged that upon payment from Turnbow, the *Observer* and a lawyer drafted a complaint against her. The *Observer* then reprinted without investigation the allegations from the complaint it essentially crafted.

Conditional Fair Report Privilege

Under these facts, the court quickly concluded that the article was not protected by an absolute fair report privilege. The court found no Oregon authority to support an absolute fair report privilege, and instead cited a 1933 case for the proposition that reports of judicial proceedings "should be fair and accurate and should be made with good and not with bad motives." *Mannix v. Portland Telegram*, 144 Or. 172, 182-83, 23 P.2d 138 (1933).

Here the court found evidence of both actual malice and gross negligence on the part of the *Oregon Observer* defeated any conditional privilege to publish allegations from the complaint.

The *Oregon Observer* was represented by Foster A. Glass, P.C., Bend, Oregon. Defendant Aleck O. Turnbow and Roger Weidner represented themselves pro se. Lucinda Gunter was represented by Claud A. Ingram Jr., Eugene, Oregon.

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New York Appellate Court Affirms Dismissal of Libel Action Against *Sing Tao Daily*

By Peter Karanjia

In a terse three-page opinion, a five-judge appeals court panel unanimously affirmed the dismissal of a libel action against *Sing Tao Daily*, a Chinese language newspaper widely distributed throughout the country. *Ng v. Chee Kong Tong Supreme Lodge Chinese Freemason of the World*, 2004 N.Y. Slip Op. 05585, 2004 WL 1444950 (N.Y. App. Div. 1st Dep't June 29, 2004)

Background

This lawsuit arose out of an organizational dispute between two lodges of the Chinese Freemasons, a civic organization, over U.S. leadership and control of their fraternal order.

In November and December of 2002, *Sing Tao Daily* published three advertisements placed in the newspaper by defendant Chee Kong Tong Supreme Lodge Chinese Freemasons of the World (the "World Lodge") and its leaders. The advertisements concerned plaintiff Woon Ng, a "Grand Priest" of rival lodge, the Chinese Freemason Grand Lodge of U.S.A. (the "U.S. Lodge").

The advertisements announced that the World Lodge defendants had suspended Mr. Ng for conducting meetings and appointing officers without authorization from the World Lodge and "corruptly exceeding [his] authority in violation of [the World Lodge] rules." Mr. Ng and the U.S. Lodge (along with several of its local affiliates) sued *Sing Tao Daily* as well as the World Lodge and its leaders, alleging that the advertisements accused him of "corruption" and "illegal" and unauthorized acts.

On the same day their Complaint was filed in the New York Supreme Court, New York County, both Freemason lodges and their leaders held dueling press conferences reporting on their respective positions in the lawsuit.

The leaders of the World Lodge stated their contentions that Woon Ng was acting without authority. *Sing Tao Daily* reported on the parties' conflicting positions in a newspaper

article published the following day. Thereafter, plaintiffs promptly amended their Complaint to include in their suit the article reporting on their original Complaint and statements made by the World Lodge defendants at their press conference.

Trial Court Dismisses Complaint as "Without Merit"

On August 26, 2003, *Sing Tao Daily* and the World Lodge Defendants filed separate pre-discovery motions to dismiss the claims asserted in the Amended Complaint. In a ruling from the bench, a New York trial level court (Solomon, J.) granted both motions in their entirety.

Justice Solomon held that the challenged statements in

The Appellate Division's decision reaffirms that all that is required to trigger the strong statutory fair report privilege is that the report be a "substantially accurate" report of a judicial proceeding.

the newspaper article were absolutely privileged under New York Civil Rights Law § 74 as fair and accurate reports of a judicial proceeding. She also ruled that the statements in suit arose out of an internal organizational dispute and were not capable of a defama-

tory meaning, observing that "[t]his is a lawsuit that shouldn't have been brought and certainly should not have been brought with fanfare, because it was without merit."

Affirmed on Fair Report Grounds

Unanimously affirming the lower court's decision (with costs), the Appellate Division held that the newspaper was protected by the "absolute privilege" accorded by Section 74 of the New York Civil Rights Law, which provides that "[a] civil action cannot be maintained against any person . . . for the publication of a fair and true report of any judicial proceeding[.]"

In reaching this conclusion, the Appellate Division implicitly rejected the argument raised by plaintiffs on appeal that the privilege under Section 74 of the Civil Rights Law could be defeated simply because plaintiffs had alleged in their pleadings that the defendants had published the statements at issue with "actual malice."

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NY Ct. Affirms Dismissal of Libel Action Against *Sing Tao Daily**(Continued from page 29)*

Consistent with case-law firmly establishing the “absolute” nature of the privilege, the Appellate Division’s decision reaffirms that all that is required to trigger the strong statutory fair report privilege is that the report be a “substantially accurate” report of a judicial proceeding (citing *Holy Spirit Ass’n for Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67, 424 N.Y.S.2d 165, 167 (1979)).

Another interesting aspect of the Appellate Division’s decision is that the fair report privilege applied with full force, even though World Lodge had not yet filed their Answer to the Complaint at the time of their press conference.

That conclusion was consistent with cases such as *Hudson v. Goldman Sachs & Co.*, 304 A.D.2d 315, 757 N.Y.S.2d 541 (N.Y. App. Div. 1st Dep’t 2003) which have upheld the application of the privilege to pre-Answer statements to the press on the ground that parties should be free to publicly discuss their position in a dispute “in a forum other than Court” without the need to first file an Answer.

Were it otherwise, a plaintiff would be privileged under Section 74 to talk publicly about the allegations of its complaint, but defendants would be unfairly censored from responding publicly until an Answer was filed. *Hudson*, 757 N.Y.S.2d at 542.

The Appellate Division also accepted defendants’ arguments that the statements in suit were not reasonably susceptible of a defamatory meaning. Although the court did not elaborate on this point in its brief opinion, its ruling appears to reflect the view of one of the panel members expressed during oral argument that – read in context – the advertisements did not charge Woon Ng with corruption or illegal acts but only a breach of the World Lodge’s internal fraternal rules.

Thus, the allegations could not reasonably be interpreted as statements that would tend to expose plaintiffs to “public contempt, ridicule, aversion or disgrace, [etc.]” See *Foster v. Churchill*, 87 N.Y.2d 744, 751, 642 N.Y.S.2d 583, 587 (1996). Finally, the Appellate Division also affirmed the lower court’s decision on the additional and independent ground that the statements in suit were non-actionable statements of opinion.

Plaintiffs were represented by Steven Verveniotis of Miranda & Sokoloff, LLP, Mineola, Long Island. The non-media defendants were represented by Paul A. Winick of Thelen Reid & Priest, New York.

Peter Karanjia is an associate with Davis Wright Tremaine LLP in New York. Together with Robert D. Balin and Kai Falkenberg, he represented Sing Tao Newspapers New York Ltd., owner of Sing Tao Daily.

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Dead Men Make Lousy Witnesses

By Charles D. Tobin

Recognizing that dead witnesses are difficult to produce – let alone cross-examine – a suburban Pittsburgh trial judge has dismissed a defamation and false light claim that the plaintiff attempted to revive after six years of inactivity. *Zotter v. North Hills News Record, et al.*, slip op., No. GD97-001775 (Pa. C. P. June 24, 2004).

While granting a lack of prosecution motion would be a no-brainer for this case in other jurisdictions, the procedure ordinarily is not so kind to Pennsylvania defendants.

Background

Following discovery and the presentation of evidence on the petition, Common Pleas Court Judge A. J. Wettick in June granted a judgment of non pros and dismissed plaintiff Carl M. Zotter's lawsuit against Gannett's former newspaper, the *North Hills News Record*. Zotter, a former police chief of Ross Township, brought the lawsuit in 1997 based on the newspaper's coverage of an agreement he had reached in a prosecution against him.

Zotter had been charged with theft by deception and unsworn falsification after he allegedly falsely claimed mileage and constable fees for personal service of subpoenas. In a township investigation, many of the witnesses said they either never received the subpoenas or received them by in the mail. Zotter was not entitled to collect fees for service by mail.

In 1996, Zotter entered into an agreement with prosecutors under the state's accelerated rehabilitative disposition program. He paid restitution, served probation, and did not receive a conviction. While the newspaper's story contained accurate details about the agreement, the headline and lead sentence reported that Zotter had agreed to "plead guilty." Zotter's lawsuit alleged this phrasing defamed him and cast him in a false light.

Plaintiff Attempts to Revive Suit After 6 Years

Shortly after the complaint was filed in 1997, the paper filed a preliminary objection by way of demurrer asking for dismissal on grounds that the publication, read in its en-

tirety, was substantially accurate and privileged. The court, however, denied the motion on procedural grounds. The newspaper filed its answer and heard nothing further from Zotter for more than six years.

In November 2003, however, Zotter filed a notice that he was ready to proceed to trial. Under local court rules, the case automatically was placed on the court's issue docket. The newspaper was given a six-month window to commence and complete discovery.

Pennsylvania's common law is hostile to lack of prosecution motions. Under the case law, the trial court cannot grant "non pros" bids unless the defense can meet its bur-

den to show that plaintiff failed to act with "reasonable promptitude," cannot show a "compelling reason" for the delay, and the defendant will suffer "actual prejudice" because of the lapse of time. Moreover, there is no automatic period of time after which the court will

presume prejudice. *Jacobs. v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998).

Plaintiff Claimed Deliberate Delay

The newspaper's counsel took plaintiff's deposition in aid of its non pros petition. Zotter testified that he and his counsel made a deliberate decision to delay prosecuting his case. Zotter testified that he had entered, then retired from, the private security business and had not wanted the lawsuit to interfere with his new career. He also testified that the "political atmosphere" in the Pittsburgh area in the late 1990s would have prevented him from getting a fair trial.

In its non pros petition, defense counsel argued:

- Zotter's calculated delay reflected a lack of reasonable promptitude, his explanations did not constitute compelling reason, and he should not be rewarded for the strategic decision of waiting six years.
- Gannett had sold the *News Record* during the period of delay and its new owner later folded the newspaper. The defense therefore no longer had ready access to witnesses it would have consulted or called in 1997.
- Two police officers who worked for Zotter – one of whom had cooperated with investigators, the other of

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Granting the newspaper's non pros motion, Judge Wettick found that plaintiff had "not offered a compelling reason for this delay."

Dead Men Make Lousy Witnesses

(Continued from page 31)

whom handled the subpoenas when they came into the police department – had died in the interim.

- The newspaper also was prejudiced because the judge who had approved Zotter's agreement with prosecutors, and who was later quoted in the newspaper as saying that Zotter “admitted he committed the offense and was admitted to ARD,” also died.

No Good Reason for Delay

Granting the newspaper's non pros motion, Judge Wettick found that plaintiff had “not offered a compelling reason for this delay.” Noting that high-profile criminal cases have been tried in the same year as the indictments were brought, he found “no merit to plaintiff's statement that he could not have received a fair trial until years after the lawsuit was filed.”

The judge also found that the deaths of the two police officers constituted actual prejudice to the defense. He noted as well that the damages claim would hinge on any impact the coverage had on Zotter's “personal, professional, and public integrity.” “Thus, were the case to proceed, a jury in 2004 or 2005 would be attempting to sort out the impact of an April 1996 newspaper article on plaintiff's reputation and on plaintiff's life”

Zotter's counsel, Irving M. Portnoy and Mark E. Milson, of Evans, Portnoy, Quinn & O'Conner in Pittsburgh, have taken the first steps toward initiating an appeal of the dismissal.

Charles D. Tobin is with the Washington, D.C. office of Holland & Knight. Along with Perry A. Napolitano and Steven E. Klein, of Reed Smith LLP in Pittsburgh, he represented Gannett's former newspaper in this action.

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Ramseys' Libel Suit Against Fox News Is Transferred To Colorado

By Jason Conti

A federal district court judge recently transferred from Georgia to Colorado a libel suit filed against the Fox News Channel by the parents and brother of Jon-Benet Ramsey, the six-year-old murdered in December 1996 in her family home in Colorado. *Ramsey, et al., v. Fox News Network, d/b/a Fox News Channel*, No. 1:03-CV-3976-TWT, 2004 WL 1516455 (N.D.Ga. July 6, 2004).

The defamation case stems from a December 2002 Fox News broadcast marking the six-year anniversary of Jon-Benet's death. The amended complaint alleges that the gist of the broadcast was that one or more of the plaintiffs, parents John and Patsy, and her brother, Burke, killed Jon-Benet because they were the only three known individuals in the house the night of her murder.

Case Transferred in Interests of Justice

Fox News moved to transfer the case from Georgia to Colorado, arguing that it was more convenient for the parties and for the witnesses, and that a transfer was in the interests of justice.

In his 12-page decision issued on July 6, 2004, Judge Thomas W. Thrash Jr. first analyzed the convenience of the parties. The Court found it significant that none of the parties in the case currently reside in Georgia.

Although the Ramseys lived in Georgia at the time of the 2002 broadcast, they have since moved to Michigan. The Court noted that while a plaintiff's choice of forum is usually significant, it becomes less so when a party moves out of their chosen forum.

The Court determined that the convenience to the plaintiffs would be substantially the same in either forum. In contrast, the Court recognized that Fox News would greatly benefit from a transfer, as five of Fox's eight Denver bureau employees participated in preparing the broadcast.

The Court also took note of Fox News' assertion that trial in Georgia will significantly impact its ability to conduct business in its Colorado bureau if those persons must travel to Georgia for a trial. The Court concluded that the convenience of the parties strongly weighed in favor of transfer.

Next, the Court determined that the convenience of non-party witnesses also weighed heavily in favor of transfer. The Court found that the convenience of key non-party witnesses, which is the most important factor in a transfer analysis, would be greatly enhanced if this case was transferred to Colorado.

Fox News identified a significant number of key liability witnesses (many of whom are present or former law enforcement officials) who primarily live in Colorado, while the plaintiffs identified damage witnesses mainly from Georgia.

The Court determined that because the vast majority of plaintiffs' witnesses were plaintiffs' friends and family, they would be more willing to travel to a different forum than the key liability witnesses in Colorado.

The Court concluded that transfer was appropriate because few, if any, key witnesses in this case have a connection with the Northern District of Georgia.

Finally, the Court analyzed the various components that

comprise the interests of justice analysis. The Court noted that transferring the case to Colorado would provide compulsory process over key liability witnesses, and would reduce litigation costs. According to Judge Thrash, numerous documents are located in Colorado, and a transfer would offer the possibility of a jury view of the Ramseys former home.

The Court noted that while Georgia has an interest in protecting its citizens, and indeed Georgia law may still apply, these factors are outweighed by other considerations.

Additionally, the Court discounted the plaintiffs' claim that they would be unable to obtain a fair trial in Colorado, concluding that measures can be taken to ensure fairness in sensational cases such as this. Ultimately, the Court noted that this is primarily a Colorado case, with a Georgia connection that is, at best, now tenuous.

The plaintiffs are being represented by L. Lin Wood and Katherine M. Ventulett of L. Lin Wood, P.C. of Atlanta.

Slade R. Metcalf, Dori Ann Hanswirth and Jason P. Conti of Hogan & Hartson L.L.P., New York City, and Judson Graves of Alston & Bird LLP in Atlanta, represented The Fox News Channel.

The Court also took note of Fox News' assertion that trial in Georgia will significantly impact its ability to conduct business in its Colorado bureau if those persons must travel to Georgia for a trial.

Lawyer's Inadvertent Disclosure Doesn't Waive Reporter's Privilege

By David McCraw

The New Jersey Appellate Division has held that a lawyer's inadvertent production of unaired news footage in discovery does not constitute a waiver of the reporter's privilege under the state's shield law and ordered opposing counsel to return the material. *Kinsella v. Welch and NYT Television*, 2004 WL 1439871 (N.J. App. June 29, 2004).

The issue arose in the ongoing litigation between New York Times Television and a New Jersey man who claims his privacy was invaded when he was filmed at a New Jersey hospital for the reality show *Trauma, Life in the ER*. While the plaintiff, Joseph Kinsella, consented in writing to the filming of his treatment, he is now seeking to have the consent deemed invalid in the litigation.

Background

Last year, in an earlier appeal, the Appellate Division ruled that the New Jersey Shield Law applied to a reality TV show like *Trauma* and held that NYT TV could withhold unaired footage from discovery. 827 A.2d 325, 31 Media L. Rep. 1961 (N.J. App. 2003). The court made one exception to that ruling, however: NYT Television was required to turn over any footage it intended to use at trial.

Following that decision, NYT TV determined that it would use certain parts of the unaired Kinsella tapes at trial. But when New Jersey counsel for NYT TV produced the tapes, they failed to remove footage of other patients that was contained on the same cassettes.

Once the error was discovered, NYT TV requested that opposing counsel return the inadvertently produced material. When that request was rebuffed, NYT TV took the matter up with Judge Louis Locascio of Monmouth County Superior Court.

Judge Locascio declined to order that the tapes be returned. He held that NYT TV was required to produce a cassette in its entirety if any part of it was to be used at trial, even if it contained footage of other patients having no connection to Kinsella and his lawsuit. He sidestepped the issue of privilege and waiver by holding that the Appellate Division's 2003 decision had ordered production of all

"videotapes" to be used at trial and did not allow for production of only parts of a tape.

Tape Must Be Returned

In June, the Appellate Division reversed that ruling, finding that *the unaired material was privileged under the Shield Law and no waiver had occurred as a result of the inadvertent production.*

The Appellate Division recognized that the law was unsettled on what test should apply to determine when an inadvertent disclosure results in the waiver of a privilege. While declining to articulate a "global rule" regarding waiver, the court said that "the inadvertent disclosure by NYT's counsel of the entire videocassettes containing

footage of plaintiff does not warrant a finding of waiver, even if the gross negligence of counsel could support a finding of waiver under other circumstances."

The court held that the inadvertent disclosure did not constitute the sort of "knowing and voluntary" waiver that is required in a case involving the Shield Law.

The court went on to note that NYT TV's prompt notice to plaintiff's counsel of the mistake undermined any argument that plaintiff might have had about reliance on the materials in preparing his case. The court also pointed out that the patients shown in the unaired footage had a privacy interest.

In their appellate brief, Kinsella's lawyers argued that the original Appellate Division decision would allow NYT TV to selectively edit scenes of Kinsella to make the footage more favorable to the defense case.

In fact, the Kinsella footage on the cassettes had been produced without editing, and the court stood by its earlier decision without addressing that part of plaintiff's argument in its decision.

Before the Appellate Division, NYT TV was represented by Chuck Sims and Matt Morris of Proskauer Rose. Plaintiff was represented by Gerald H. Clark of Lynch Martin of Shrewsbury, N.J.

David McCraw is Counsel at The New York Times Co.

"The inadvertent disclosure by NYT's counsel of the entire videocassettes containing footage of plaintiff does not warrant a finding of waiver"

First Circuit Ruling on Intercepted E-mails Reduces Electronic Privacy

By Robert A. Bertsche

In a decision that the Electronic Frontier Foundation said “dealt a grave blow to the privacy of internet communications,” the First Circuit Court of Appeals recently construed the federal wiretap law in a manner that the court itself admitted eviscerates much privacy protection for e-mails. *United States v. Councilman*, No. 03-1383, 2004 U.S. App. LEXIS 13352 (1st Cir. June 29, 2004).

A panel of the First Circuit ruled 2-1 that the vice president of an internet service provider for dealers in rare books had not violated the Wiretap Act when he created and used software designed to allow him to copy and read all e-mail from Amazon.com that was addressed to his customers.

The case turned on the fact that the software program operated entirely within the confines of the ISP’s computer, during the fraction of a second when the e-mails were in “electronic storage” at the ISP.

In a decision written by Circuit Judge Torruella and joined by Senior Circuit Judge Cyr, the panel said the Wiretap Act protects against interceptions of electronic communications only while they are being transferred, not while they are in electronic storage.

The impact of the decision is to require that interceptions that take place within the ISP’s computer must be prosecuted, if at all, under the federal Stored Communications Act, which contains substantially fewer procedural protections for privacy than the Wiretap Act.

Federal prosecutors had opposed dismissal of the indictment, even though the court’s ruling – while barring prosecution of Councilman – will make it far easier for government investigators to search and seize e-mail.

The dissent ripped the majority’s conclusion as one that “would undo decades of practice and precedent regarding the scope of the Wiretap Act and would essentially render the Act irrelevant to the protection of wire and electronic privacy.” 2004 U.S. App. LEXIS 13352 at *67 (Lipez, J., dissenting).

The Storage-Transit Dichotomy

According to the indictment, Bradford Councilman was vice president of Interloc, an online book listing service for rare and out-of-print books. Interloc acted as the service provider for certain book dealer customers, who obtained e-mail accounts ending in “@interloc.com.”

Councilman allegedly directed Interloc employees to create a computer code (called “procmal,” short for “process mail”) that would intercept, copy, and store all electronic communications sent from Amazon.com to Interloc’s subscriber dealers. Using that code, Councilman allegedly intercepted thousands of messages, and he

and other employees routinely read them for the purpose of gaining competitive advantage.

Critical to the court’s decision was the fact that the procmal operated only on messages at a time when they were contained within the random access memory (RAM) or on hard disks, or both, within

Interloc’s computer system. Based on that fact, the Court dismissed the indictment. It said that because the messages were contained in “electronic storage,” they “could not be intercepted as a matter of law.”

That conclusion arises from the difference between the Wiretap Act’s definition of a “wire communication” and an “electronic communication.” The Wiretap Act imposes criminal penalties on “any person who – (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.” 18 U.S.C. sec. 2511(1)(a).

A “wire” communication (typically, a telephone call) is defined as “any aural transfer” via wire, cable or other like connection, and the definition specifically includes “any electronic storage of such communication.” The reference to “electronic storage” explicitly extends the Wiretap Act’s protections to telephone calls after they are stored in voicemail.

By contrast, the definition of an “electronic communication” – “transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in

The dissent ripped the majority’s conclusion as one that “would undo decades of practice and precedent regarding the scope of the Wiretap Act.”

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1st Cir. Ruling on Intercepted E-mails Reduces Electronic Privacy*(Continued from page 35)*

whole or in part by a wire, radio, electromagnetic, photo-electronic or photooptical system” – includes no mention of the electronic storage of such communications.

From that difference, the majority concluded that unlike a voicemail, an electronic communication that is in electronic storage is not susceptible to being intercepted in the manner prohibited by the Wiretap Act. That was particularly so, the majority said, in light of the Wiretap Act’s broad definition of “electronic storage” to include “any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof.” 18 U.S.C. sec. 2510(17)(A).

Next in a Line?

The majority conceded that its conclusion leaves the scope of electronic communications covered by the Wiretap Act “obviously reduced,” but justified its ruling as a next logical step in a line of cases construing the statute.

In *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994), the Fifth Circuit said that seizure of sent but unretrieved e-mail temporarily stored on a company’s hard disk drive was not an interception prohibited by the Wiretap Act.

In *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002), *cert. denied*, 537 U.S. 1193 (2003), the Ninth Circuit said it was not an interception to access messages contained while in electronic storage, and not acquired during transmission.

The electronic communications at issue in *Councilman* are different because Interloc’s software obtained e-mails while they were still being transmitted, and before they were received by the intended recipients. The majority found that distinction unpersuasive, however, in light of what it considered the clear language of the statute. It added: “[T]he language may be out of step with the technological realities of consumer crimes, [but] it is not the province of this court to graft meaning onto the statute where Congress has spoken plainly.”

Blistering Dissent

The dissent, written by Justice Lipez, took a more functional view of the statute – one that it said “makes sense in the real world” – by discarding the majority’s dichotomy between a communication contained in “storage” and one that is “in transit.”

It relied on dicta from the First Circuit’s decision last year in *In re Pharmatrak*, 329 F.3d 9, 21-22 (1st Cir. 2003), which had in turn quoted the district court’s ruling in *Councilman*, 245 F. Supp. 2d 319, 321 (D. Mass. 2003): “As one court recently observed, ‘[t]echnology has, to some extent, overtaken language. Traveling the internet, electronic communications are often – perhaps constantly – both “in transit” and “in storage” simultaneously, a linguistic but not a technological paradox.’”

The dissent noted that the “electronic storage” part of the definition of “wire communication” was added in order to ensure that voicemails be protected

by the Wiretap Act. The absence of that language from the definition of “electronic communication” should not be taken to exclude from the Wiretap Act e-mails that are very briefly contained in electronic storage during the process of transmission from sender to recipient.

Consequences

The *Councilman* decision “will have far-reaching effects on personal privacy and security,” according to the dissent, because the level of protection that Congress has afforded to communications under the Wiretap Act is far more comprehensive than that which has been provided to messages contained in storage, which fall under the Stored Communications Act, 18 U.S.C. sec. 2701(a).

Unlike the Wiretap Act, the Stored Communications Act does not require the government to follow the procedures for obtaining a wiretap order before capturing stored e-mail; law enforcement officers “can seize stored records for any crime for which they can get a search warrant; their search can extend to the limits of the

(Continued on page 37)

The majority conceded that its conclusion leaves the scope of electronic communications covered by the Wiretap Act “obviously reduced,” but justified its ruling as a next logical step in a line of cases construing the statute.

1st Cir. Ruling on Intercepted E-mails Reduces Electronic Privacy*(Continued from page 36)*

Fourth Amendment; they do not need to report the progress of their search to courts; and defendants do not have an extra-constitutional right to suppress evidence from illegal searches.”

Thus, the effect of *Councilman* will be to make it easier for the government, as well as private ISPs, to seize e-mails that are temporarily stored while in transit to their destination. Justice Lipez said he found it “inconceivable that Congress could have intended such a result merely by

omitting the term ‘electronic storage’ from its definition of ‘electronic communication.’”

The government has requested, and received, until August 27, 2004, to request rehearing by the panel or by the First Circuit *en banc*. Representing the government are Gary S. Katzmman, Michael J. Sullivan, and Richard P. Salgado. Representing Councilman is Andrew Good.

Robert A. Bertsche is a partner at Prince, Lobel, Glovsky & Tye LLP in Boston and chairs the firms Media and Intellectual Property Group.

Fourth Circuit Affirms Dismissal of Direct Infringement Claim Against Website

Finds No Volitional Conduct Despite Screening Procedure

By John Maltbie

Holding that Internet Service Providers (“ISPs”), “when passively storing material at the direction of users in order to make that material available to other users upon their request, do not ‘copy’ the material in direct violation of § 106 of the Copyright Act,” the Fourth Circuit, in a 2-1 decision, affirmed a grant of summary judgment in favor of LoopNet, Inc. (“LoopNet”), an online commercial real estate listing service that permits its subscribers to post textual information and photographs relating to commercial properties on its website. *CoStar Group, Inc. v. LoopNet, Inc.*, 2004 WL 1375732, *10 (4th Cir. June 21, 2004).

The decision reaffirms – and potentially expands – the pre-Digital Millennium Copyright Act (“DMCA”) decision in *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) (“*Netcom*”), which held that an ISP serving as a passive conduit for copyrighted material is not liable as a direct infringer. The decision also provides that ISPs are not limited to relying on the “safe harbor” provisions of the DMCA when facing a claim for direct infringement.

Background

The plaintiff, CoStar Group, Inc. (“CoStar”), is a national commercial real estate information provider, which claims to have collected the most comprehensive database of information on commercial real estate markets and commercial properties in the United States and the United Kingdom. CoStar’s database, which is made available to customers through the Internet and otherwise, includes a large collection of photographs of commercial properties for which CoStar owns the copyright.

Defendant LoopNet, allows subscribers, generally real estate brokers, to post commercial real estate listings to its website. LoopNet subscribers can submit both textual

information and photographs concerning property listings for posting on the LoopNet website.

If a photograph is submitted by a subscriber, the photograph is uploaded to LoopNet’s system and reviewed by a LoopNet employee. According to the Court, the “LoopNet employee . . . cursorily reviews the photograph (1) to determine whether the photograph in fact depicts commercial real estate, and (2) to identify any obvious evidence, such as a text message or copyright notice, that the photograph may have been copyrighted by another.

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The decision reaffirms – and potentially expands – the pre-Digital Millennium Copyright Act (“DMCA”) decision in Religious Technology Center

4th Cir. Affirms Dismissal of Direct Infringement Claim

(Continued from page 37)

If the photograph fails either one of these criteria, the employee deletes the photograph and notifies the subscriber.” *CoStar Group, Inc.* at *1. Otherwise, the photograph is accepted and made available for viewing.

Beginning in 1998, CoStar discovered that its copyrighted photographs were being posted to LoopNet’s website. Upon receiving notice from CoStar, LoopNet removed the photographs and instituted an inspection policy. *Id.* at *2.

Despite the new policy, CoStar continued to find its images posted to LoopNet’s website and ultimately filed an action for copyright infringement, violation of the Lanham Act, and several state-law causes of action.

The parties subsequently filed cross-motions for summary judgment that resulted in a district court decision that LoopNet had not engaged in direct infringement under the Copyright Act, but allowed CoStar’s contributory infringement claim to proceed. The district court relied on the rule from *Netcom* that an ISP that provides only “passive” or “automatic” Internet services is categorically immune from direct copyright infringement claims based on material posted or displayed by the ISP’s users.

Thereafter, the parties stipulated to the dismissal of all claims except the direct infringement claim and CoStar took the instant appeal.

On Appeal

On appeal, CoStar argued that the district court erred for two reasons. First, CoStar asserted that Congress, in enacting the DMCA, had codified and supplanted *Netcom*, which according to CoStar was a policy-driven liability-limiting decision that did not follow traditional copyright law. Following the enactment the DMCA, however, CoStar claimed that any immunity for the passive conduct of an ISP such as LoopNet must come from the safe harbor immunity provided by the DMCA.

As the district court had already held that LoopNet did not qualify for DMCA immunity for a portion of CoStar’s direct infringement claims, CoStar contended that summary judgment should have been entered in its favor on those claims.

Second, CoStar asserted that even if an ISP that did not qualify for DMCA immunity could still attempt to avail itself of *Netcom* immunity, it would be improper in this case

because LoopNet is not a “passive,” “automatic” purveyor of electronic information of the kind involved and contemplated in *Netcom*. Rather, CoStar argued, LoopNet strictly controls the content of all information submitted to its website, and most notably, reviews and approves every single photograph prior to making it available for viewing.

Netcom Immunity Affirmed

In rejecting CoStar’s contentions, the Court of Appeals began by restating the principle underlying *Netcom* — “[a]lthough copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant’s system is merely used to use a copy by a third party.” *Id.* at *3, quoting *Netcom*, 907 F. Supp. at 1370.

This principle, the Court found, was not as far outside traditional copyright law as CoStar contended. Rather, the Court of Appeals found that the court in *Netcom* “made a particularly rational interpretation of [17 U.S.C.] § 106 when it concluded that a person had to engage in volitional conduct — specifically, the act constituting infringement — to become a direct infringer.” *Id.* at *6.

Likening LoopNet to the owner of a copy machine “whose customers pay a fixed amount per copy and operate the machine themselves to make copies,” and who is not considered a direct infringer even if the customer duplicates an infringing work, the Court found that an ISP “should not be found liable as a direct infringer when its facility is used by a subscriber to violate a copyright without intervening conduct of the ISP.” *Id.* at *5.

As for CoStar’s contention that *Netcom* had been supplanted by the DMCA, the Court of Appeals held CoStar’s position was simply not supported by the language of the DMCA, which provides that the defenses set forth therein are not exclusive. Further, the Court found that the lack of explicit instructions from Congress stating that the DMCA is intended to supplant *Netcom* and the legislative history of the DMCA weighed against CoStar’s position. The Court concluded that “Congress intended the DMCA’s safe harbor for ISPs to be a floor, not a ceiling, of protection.” *Id.* at *10.

The Court of Appeals also rejected CoStar’s claim that irrespective of the DMCA, LoopNet’s conduct does not satisfy the passivity requirement of *Netcom*.

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4th Cir. Affirms Dismissal of Direct Infringement Claim

(Continued from page 38)

While acknowledging that LoopNet's photograph review policy constitutes "volitional conduct to block photographs measured by two grossly defined criteria," the Court found that "this conduct, which takes only seconds, does not amount to 'copying,' nor does it add volition to LoopNet's involvement in storing the copy." *Id.* at *11.

As the Court explained, "The employee's look is so cursory as to be insignificant, and if it has any significance, it tends only to lessen the possibility that LoopNet's automatic electronic responses will inadvertently enable others to trespass on a copyright owner's rights. In performing this gate-keeping function, LoopNet does not attempt to search out or select photographs for duplication; it merely *prevents* users from duplicating certain photographs." *Id.* [emphasis in original].

Again analogizing LoopNet to the owner of a copy machine, the Court compared LoopNet's review procedures "to an owner of a copy machine who has stationed a guard by the door to turn away customers who are attempting to duplicate clearly copyrighted works," and concluded that "LoopNet has not by this screening process become engaged as a 'copier' of copyrighted works who can be held liable under §§ 501 and 106 of the Copyright Act." *Id.*

Dissent Finds Infringement

In dissent, Circuit Court Judge Roger L. Gregory did not disagree with the majority's discussion of the "direct in-

fringement doctrine within the cybersphere post-DMCA." *Id.* at *12. Rather, Judge Gregory took issue with the majority's comparison of LoopNet to the owner of security guard-protected copy machine. "These ill-fitting characterizations," Judge Gregory asserted, "lead the majority to the erroneous conclusion that LoopNet is not liable for direct infringement despite its volitional screening process." *Id.*

Judge Gregory argued "that the majority expands the non-volitional defense well beyond *Netcom* and subsequent holdings, and gives direct infringers in the commercial cybersphere far greater protections than they would be accorded in print and other more traditional media." *Id.*

To illustrate his point, Judge Gregory creates his own analogy, likening LoopNet to the publisher of a for-profit freely distributed magazine consisting of real estate listings. According to Judge Gregory, applying the same set of facts and circumstances to a different medium – print – would clearly result in a finding of direct infringement liability to his hypothetical magazine because its employees make a conscious choice as to whether a given image will appear in its electronic publication, or whether the image will be deleted from the company's system."

CoStar was represented by O'Melveny & Myers, L.L.P., Washington, D.C., LoopNet was represented Perkins Coie, L.L.P., San Francisco, California.

John Maltbie is an associate in the Intellectual Property Department of Torys LLP, New York, New York and a former Staff Attorney with the MLRC.

No "Free Ink" for Political Advertiser

By Paul E. Kritzer

A political write-in candidate's lawsuit against the media because he didn't get any "free ink" during the campaign has been voted down by a California appellate court. *Barker v. Gulf-California Broadcasting Company et al.*, "Tentative Opinion," E034620, Super. Ct. No. INC34032, (Cal. App., 4th Dist., Division 2 June 30, 2004) (designated not for publication).

Background

John Barker was a write-in candidate in the 2002 Republican Primary election in California's 45th Congressional

District, opposing incumbent Mary Bono (R.-Cal.). To publicize his campaign, Barker bought a \$10,000 advertising schedule from the Palm Springs *Desert Sun* and \$5,000 ad schedules from local stations KMIR-TV and KESQ-TV. The ad schedules were published and broadcast on schedule.

Seventeen days before the election, on the same day that it published one of Barker's ads, the *Desert Sun* published a front-page statement that Mary Bono was running "unopposed."

According to the plaintiff, the newspaper promised to correct the statement. A week later, the newspaper published its 2002 Election Guide, which failed to include information

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No “Free Ink” for Political Advertiser

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about Barker or his write-in campaign. On the morning of the election, KMIR-TV reported that Mary Bono was running “unopposed.”

Candidate Sues Media

Barker sued *The Desert Sun*, KMIR-TV and KESQ-TV3 in Riverside County Superior Court on Feb. 13, 2003. Barker alleged (a) fraud – intentional misrepresentation, (b) tortious breach of covenant of good faith and fair dealing, (c) intentional infliction of emotional distress, (d) negligence and (e) age discrimination.

In his first amended complaint, filed Feb. 28, 2003, Barker dropped the allegations of age discrimination and intentional infliction of emotional distress but added new claims for constructive fraud and breach of contract. He claimed damages in excess of \$6 million. Barker, who is not a lawyer, brought the action *pro se*.

The heart of his claim was that he received no special consideration in exchange for his advertising contract. “Plaintiff expected to receive some *free ink* from the *Desert Sun* newspaper, and on television news,” Barker said in his complaint, “but for the money Plaintiff spent, Plaintiff received nothing.”

On the other hand, Barker complained, incumbent Bono was “given priceless front page advertisement, with photographs in the *Desert Sun* on several occasions. This is priceless advertisement you cannot buy for even \$100,000 an issue.”

In April 2003, the court sustained the defendants’ demurrers to plaintiff’s first amended complaint but allowed Barker leave to amend his complaint. On May 29, 2003, Barker filed his second amended complaint. In August 2003, the trial court dismissed plaintiff’s second amended complaint, under the California anti-SLAPP statute. The court also awarded the defendants’ attorneys’ fees and costs of \$2,372.

Appeals Court Affirms Dismissal

On June 30, 2004, the California Court of Appeal, 4th Appellate District, Division 2, released a “Tentative Opinion” that upheld the dismissal. The appellate court characterized the gravamen of the case as a complaint

that Congresswoman Mary Bono “received greater exposure in the media than plaintiff.”

The appellate court rejected plaintiff’s arguments that the defendants owed him a fiduciary duty to report on his candidacy or a contractual duty to cover his campaign. The court affirmed that the action arose from “free speech concerning a public issue” and that plaintiff failed to establish a probability of success on the merits.

The court rejected each of plaintiff’s arguments.

Fraud – Intentional Misrepresentation: “... *the operative complaint is wholly lacking in any allegations that could amount to fraud....*”

Constructive Fraud: “... *there is no fiduciary relationship between plaintiff and defendants*”

Breach of Contract: “*Here, the only ‘contract’ arguably alleged in the operative complaint is plaintiff’s purchase of advertising from The Desert Sun and KMIR. ... We, like defendants, are at a loss to the nature of the ‘contracts’ alleged to have been breached.*”

Tortious Breach of Covenant of Good Faith and Fair Dealing: Dismissed because the covenant does not extend beyond the contract that it was based upon.

Negligence: “[T]he law imposed no duty upon defendants to interview plaintiff ... to acquiesce to plaintiff’s interpretation of what constitutes ‘front page news,’ to make ‘corrections’ or other statements

In early 2004, John Barker ran again in the Republican Primary against incumbent Congresswoman Mary Bono. He didn’t purchase any ads from *The Desert Sun*, KMIR or KESQ for this campaign. He lost.

The defendants were represented by Roemer, Harnik & Nethery LLP in Indian Wells, California.

Paul E. Kritzer is VP & General Counsel-Media of Journal Communications, Inc. in Milwaukee, Wisconsin.

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COPA Revisited: Supreme Court Rules Again on Child Online Protection Act

By Michael A. Bamberger

On June 29, 2004, the U.S. Supreme Court ruled for the second time on the constitutionality of the Child Online Protection Act ("COPA"). *Ashcroft v. ACLU II*, 124 S.Ct. 2783 (2004).

This was the third time that the Supreme Court had considered the issue of Congress trying to "make the Internet safe for minors by criminalizing certain Internet speech."

In 1997, in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court held the Communications Decency Act of 1996 unconstitutional in relevant part because it was not narrowly tailored to serve a compelling government interest and because less restrictive alternatives were available.

In response to the *Reno* decision, Congress passed COPA in 1998. COPA imposes criminal penalties of a \$50,000 fine and six months in prison for the knowing posting for "commercial purposes" of World Wide Web content that is "harmful to minors." (Prior to COPA, there was no federal statute applying the "harmful to minors" standard.) See 47 U.S.C. § 231.

COPA also provides for an affirmative defense to those who employ specified means to prevent minors from gaining access to the prohibited materials on the website. These affirmative defenses are basically age-verification systems such as credit, other identifying cards or a digital certificate.

The First Trip to the Supreme Court

COPA was challenged in the United States District Court for the Eastern District of Pennsylvania by a wide range of Internet providers and users, seeking a preliminary injunction. In 1999, after a testimonial hearing, the court granted a preliminary injunction on the ground that plaintiffs were likely to prevail on their argument that there were less restrictive alternatives available — one leg of the strict scrutiny that is applied in cases such as this. 31 F. Supp.2d 473, 27 Media L. Rep. 1449 (E.D.Pa. 1999).

In 2000, the Third Circuit affirmed the preliminary injunction, but on a different ground. The Court of Appeals concluded that the community standards component of the

harmful to minors standard in COPA by itself rendered the statute unconstitutionally overbroad. 217 F.3d 162, 28 Media L. Rep. 1897 (3rd Cir. 2000).

The Government sought certiorari, which was granted, and the Supreme Court reversed, holding that the community standards language did not, standing alone, make the statute unconstitutionally broad. 535 U.S. 564 (2002).

On remand, the Court of Appeals concluded that the statute was not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve its interest of preventing minors from using the Internet to gain access to materials deemed harmful to them. 322 F.3d 240 (2003).

Supreme Court Again Grants Cert.

Once again certiorari was granted by the United States Supreme Court. After argument, a five-person majority of the Court affirmed the district court's decision to grant the preliminary injunction. The opinion of the Court, written by Justice Kennedy, affirms "for the reasons relied on by the district court," declining to consider the correctness of the other arguments relied upon by the Court of Appeals.

The Court found that the issue before it was whether the challenged regulation is the least restrictive means among available, effective alternatives. Since the primary alternative considered by the district court had been blocking and filtering software, the Supreme Court focused on that alternative. The Court found that filters are less restrictive than COPA and may in fact be more effective.

A concurring opinion by Justice Stevens, joined by Justice Ginsberg, basically states that the statute is unconstitutional and remand is not required.

Justice Scalia dissented, following the argument that he spelled out when dissenting in the *Playboy* case — namely that "commercial pornography," "the sordid business of pandering by deliberately emphasizing the sexually provocative aspects of non-obscene products in order to catch the salaciously disposed," is constitutionally unprotected.

Finally, Justice Breyer, writing for himself, Chief Justice Rehnquist and Justice O'Connor, argued that the stat-

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COPA Revisited: Supreme Court Rules Again on Child Online Protection Act

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ute is constitutional, contending that the “harmful to minors” category is “only slightly” more expansive than that which is obscene and that therefore COPA’s impact is small.

Case Will Return to District Court

Since the issue came up to the Supreme Court in the context of the grant of a preliminary injunction, the matter was remanded to the district court for proceedings consistent with the opinion of the Court — presumably hearings on the present state of the Internet and, as the Court suggests, further evidence on the relative restrictiveness and effectiveness of alternatives to COPA.

The majority opinion in fact specifically states that the opinion does not foreclose the district court from concluding upon a proper showing by the Government that meets the Government’s constitutional burden as defined in the opinion, that COPA is the least restrictive alternative available to accomplish Congress’s goal.

Analysis

There are a number of particularly interesting issues raised in the various opinions. With respect to the majority opinion, a fair amount of time is spent discussing the effectiveness of alternatives.

The Court both compares the effectiveness of filters to the remedies of COPA, stating that the Government has failed its burden of showing the district court that filtering is less effective.

It concludes, “The Government’s burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective. [Citing *Reno* at 874.] It is not enough for the Government to show that COPA has some effect. Nor do respondents bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show that they are less so.”

It is not clear how this test works. For one thing, prior case law has not required the less restrictive alternative to be *more* effective. Further, does the majority mean that even if a governmental restriction is substantially more restrictive than the proposed alternative, were the proposed alternative

minimally less effective than the governmental restriction, that the “no less restrictive” portion of strict scrutiny has been met? It is not clear.

And how does one weigh effectiveness? One method might well be more effective against one aspect of the perceived harm while an alternative may be more effective as to a different aspect of the perceived harm. Once again it is not clear. It will be interesting to see how this aspect of the case is handled on the rehearing before the district court.

The opinion of Justice Stevens (joined by Justice Ginsburg) is far more protective of First Amendment speech. Firstly, he supports the position of the previously reversed 2000 decision of the Third Circuit that by applying community standards, the Government is penalizing speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children’s consumption.

He then points out how restrictive COPA is, stating that it is a criminal statute with significant penalties (including incarceration) with affirmative defenses which can only be asserted after prosecution. He goes on to say, “Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as ‘obscene’ since ‘the line between communications which offend’ and those which do not is too blurred to identify in criminal conduct.” He finds that criminally punishing harmful to minors material which was not previously part of federal law only compounds the problem.

Justice Breyer’s view of the statute is very different. He finds that moving from *Miller* obscenity and *Ginsberg* “harmful to minors expands the statute’s scope only slightly.” In his opinion, material which appeals to the prurient interests of adolescents will almost inevitably appeal to the prurient interests of some group of adults as well, a fact not in the record and found to the contrary by other courts.

Finally Breyer stated that, “One cannot easily imagine material that has serious literary, artistic, political or scientific value for a significant group of adults but lacks such value for any significant group of minors.” I disagree.

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COPA Revisited: Supreme Court Rules Again on Child Online Protection Act

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For the last few years I have been representing media and Internet plaintiffs challenging the state law equivalents of COPA. One example that I have used which I think is contrary to Justice Breyer's statement is "The Joy of Sex" which, I have argued, has serious value to an adult and probably an older teenager, but probably does not have serious value to an 11 or 12-year-old boy, although the pictures at least may well appeal to his prurient interests.

Breyer then argues that filtering and blocking software is not an alternative which is less restrictive. Rather, in his view it is part of the status quo, since it is already available. (Plaintiffs argued that the alternative is to create governmentally-supported encouragements to use filtering and blocking.) Breyer contends that

since this is part of the status quo, the loaded question which the majority posits is "Would it be less restrictive to do nothing?", the answer to which is self-evident.

Breyer then goes on to attack the efficacy of filtering. One of his points is that filtering "depends upon parents willing to decide where their children will surf the Web and able to enforce that decision." This view of the government as a "superparent" has implications that invite concern.

We are not done with COPA. A factual trial with possible appeals means that there is more to come.

Ann Beeson of the ACLU argued the case on behalf of plaintiffs to the U.S. Supreme Court. Solicitor General Theodore Olsen argued on behalf of the Government.

Michael A. Bamberger, a partner in the New York office of Sonnenschein Nath & Rosenthal LLP.

Tort Reform, Arnold-Style: Publicity Suit Dismissed

By Elliot Brown and H. Jay Hulings

The Ninth Circuit has terminated actor-politician Arnold Schwarzenegger. *Schwarzenegger v. Fred Martin Motor Company*, No. 02-56937, 2004 WL 146244 (9th Cir. June 30, 2004) (Fletcher, Kleinfeld, Wardlaw JJ).

Background

The suit arose from April 2002 advertisements Fred Martin had placed in local Ohio newspapers, the *Akron Beacon Journal* and the *Canton Repository*. The ads consisted primarily of typical automotive retail ad copy – small photographs and descriptions of various cars available for purchase or lease from Fred Martin.

However, in the thicket of information and screaming copy ("WE WON'T BE BEAT!"), Fred Martin had placed a one-inch square photograph of Schwarzenegger as "The Terminator," with a cartoon speech bubble stating: "Arnold says 'Terminate EARLY at Fred Martin!'"

Schwarzenegger promptly sued Fred Martin and its advertising agency in Los Angeles, alleging that the ads had "affected, and will continue to affect, Plaintiff's future offers of employment in motion pictures, endorsements and otherwise." Schwarzenegger claimed viola-

tions of his right of publicity under California's statutory and common law and sought damages "in excess of Twenty Million Dollars (\$20,000,000)," which he alleged was the "reasonable value" of Fred Martin's use of his name and likeness.

No Personal Jurisdiction

After removing the case to federal court on diversity grounds, Fred Martin moved to dismiss on the ground that the California court lacked personal jurisdiction over Ohio-based Fred Martin. (The Florida-based advertising agency had an office in Los Angeles and therefore did not contest personal jurisdiction. It later settled out of the case.)

The district court granted the motion, rejecting Schwarzenegger's claim that Fred Martin's contacts with California established general jurisdiction. The court found Fred Martin's contacts consisted of "mere purchases or contacts incident to those purchases" of cars and the maintenance of an Internet site, and thus did not establish general jurisdiction over the company.

The trial judge also rejected Schwarzenegger's claims of specific jurisdiction, holding that while Schwarzenegger

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Tort Reform, Arnold-Style: Publicity Suit Dismissed

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was located in California and thus “the brunt of the alleged injury . . . would be felt California,” there was no evidence that Fred Martin purposefully directed any of its activities toward California residents.

Ninth Circuit Ruling

The Ninth Circuit affirmed. The court made quick work of Schwarzenegger’s “quite implausibl[e]” argument that California had general personal jurisdiction over Fred Martin. The various, fleeting contacts pointed to by Schwarzenegger, the court ruled, “fall well short of the ‘continuous and systematic’ contact that . . . constitute sufficient ‘presence’ to warrant general jurisdiction.”

The Ninth Circuit then turned its attention to Schwarzenegger’s more plausible argument that California had specific jurisdiction because the foreseeable injury to L.A.-based Schwarzenegger met the “effects test” of *Calder v. Jones*, 465 U.S. 783 (1984).

The Ninth Circuit stated that to succeed in showing that Fred Martin’s activities were “purposefully directed” under a *Calder* analysis, Schwarzenegger had to establish that Fred Martin “(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.” The Ninth Circuit emphasized that these three elements is distinct. “[S]omething more” than “mere foreseeability” that the plaintiff would suffer harm in a forum is necessary to establish specific jurisdiction in that forum.

The Ninth Circuit stated that the term “intentional act,” as used in the first element of the test, has a “specialized meaning.” Relying in part on the Restatement (Second) of Torts, the Court defined “act” as the “external manifestation of the actor’s will [sic] that mattered, not “any of its results.” That is, “the act is the pulling of the trigger and not the impingement of the bullet upon the other’s person.”

The Court next interpreted “expressly aimed” as required by the second step of the analysis to “depend[,], to a significant degree, on the specific type of tort at issue.” For instance, in *Calder* the defendant published a false article that was specifically “directed” at a California resident.

The Ninth Circuit found no similar targeting of California or its residents by Fred Martin. Applying its definition of “intentional act,” the court held that the Fred Martin’s

placement of the advertisements in Ohio newspapers was not “expressly aimed” at California.

Rather, the purpose of the advertisement, specifically the portions that were the basis of the suit, was to induce Ohio residents to “terminate” their leases at Fred Martin. The advertisement was never circulated in California, “and Fred Martin had no reason to believe that any Californians would see it and pay a visit to the dealership.”

The fact that Schwarzenegger may theoretically have suffered harm in California because he lives there was thus insufficient to trigger specific jurisdiction. Having concluded that Schwarzenegger could not meet the “expressly aimed” element of the *Calder* test, the court affirmed the dismissal of Schwarzenegger’s action against Fred Martin.

By bringing and losing this appeal, Schwarzenegger has clarified that Hollywood stars do not have a nearly automatic right to sue out-of-state residents in California courts. Under the interpretation of *Calder* advocated by Schwarzenegger, the foreseeable injury to a celebrity living in LA would be enough to hale a defendant into a California court. The Ninth Circuit was not willing to adopt Schwarzenegger’s expansive notions of personal jurisdiction and therefore bid “hasta la vista” to his \$20 million suit against an Ohio resident for its locally-directed advertising.

Schwarzenegger was represented by Martin Singer of Lavelly & Singer in Los Angeles.

Elliot Brown and H. Jay Hulings are with Irell & Manella, LLP in Los Angeles. They represented defendant Zimmerman & Partners Advertising, Inc. in the suit. The views expressed herein are their own.

MLRC would like to thank summer interns Adam Mandel, Michigan Law School; Jessie Mishkin, Harvard Law School; Phu Nguyen, Yale Law School and Julie Zando Dennis, Cardozo Law School for their contributions to this month’s MediaLawLetter

Florida Court Rules CNN Has Right to Copy Suspected Felons List

By Johnita P. Due and Rachel Fugate

In a decision hailed by the news media and civil rights organizations, Florida Circuit Court Judge Nikki Ann Clark declared unconstitutional a Florida public records exemption which was relied on by the Division of Elections (the "Division") to deny CNN's request for a copy of the state's list of 47,763 people suspected to be felons and ineligible to vote ("Suspected Felons List"). *Cable News Network LP, LLLP v. Florida Dep't of State*, Case No. 2004 CA 001259 (Fla. 2d Cir. Ct. July 1, 2004) (J. Clark). See also *MediaLawLetter* June 2004 at 21.

Background

Florida is one of only a handful of states that does not automatically restore voting rights to convicted felons who have completed their sentences. The Suspected Felons List was to be used to purge from the voting rolls felons who had not restored their voting rights.

A similar list had come under fire after the 2000 presidential election, which was decided by only 537 votes in Florida. After that election, several civil rights organizations filed a class-action suit against the State of Florida for allegedly wrongfully disenfranchising thousands of voters by, among other things, relying on an inaccurate felons list. (That case, *NAACP v. Smith*, was settled in September 2002. See <http://www.lawyerscomm.org/ep04/stateagree090402.pdf> for a copy of the settlement agreement.)

The Division had offered CNN and other news media the opportunity to inspect the current Suspected Felons List, but had prohibited them from taking notes or making copies, based on a public records exemption, Section 98.0979, which was enacted after the 2000 presidential election. CNN sued for access and declaratory relief on May 28, 2004,¹ asserting the "enormous public interest [in] independently scrutinizing the potential disenfranchisement of such a large pool of citizens in what portends to be another closely contested presidential race." After an expedited hearing before Judge Clark on June 9, 2004, the parties cross-moved for summary judgment.

The Ruling

In her decision granting CNN summary judgment, Judge Clark recognized that "the right to inspect the suspected felons list without the right to copy the list would be valueless."

The threshold issue the court had to determine was whether Section 98.0979, which made the Suspected Felons List available for inspection but not copying, constituted a public records disclosure exemption governed by the strict dictates of Article I, Section 24 of the Florida Constitution.

Article I, Section 24 provides

"[e]very person the right to inspect or copy any public record made or received in connection with the official business of any public body . . . except with respect to records exempted pursuant to this section . . ."

"The right to inspect the suspected felons list without the right to copy the list would be valueless."

Fla. Const. art. I, § 24(a). Article I, Section 24 mandates that any law creating an exemption to the right to inspect or copy public records must specific requirements. It must contain a statement of public necessity and be no broader than necessary; and it must relate to a single subject and contain only exemptions to and provisions governing enforcement of the public's right of access. Fla. Const. § art I, 24(c).

Although the Division had made the list available for inspection, it was not made available for "inspection and copying." The Division argued that the "inspect or copy" language in the Florida Constitution must be read in the disjunctive and that because Section 98.0979 allows citizens to inspect the suspected felons list, it did not create an exemption to Article I, Section 24 of the Florida Constitution and, thus, did not have to comply with its requirements governing exemptions.

The Court flatly rejected the Division's argument, ruling instead that the right to inspect included the right to copy. Judge Clark declared, "[t]he right to inspect

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Fla. Ct. Rules CNN Has Right to Copy Suspected Felons List

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without the right to copy is an empty right indeed.” In so finding, the court stressed that it is the right of the public citizen – and not that of the government – to decide whether they want to inspect or to copy a record.

Judge Clark’s ruling is the first interpretation of the “inspect or copy” language found in the Florida Constitution. The order safeguards the right of the *citizen* to choose whether to inspect public records or copy public records or both.

After finding that Section 98.0979 was indeed an exemption to Article I, Section 24 since it took away the right to copy a public record, Judge Clark found that “Section 98.0979 does not articulate a public necessity for limiting access to the List. The court cannot and will not speculate what the public necessity might be. Nor can the court construe or imply the public necessity from the language of the statute itself.” Because the Florida Legislature did not comply with the requirements of Article I, Section 24, the court found the statute was unconstitutional.

As the statute was enacted unconstitutionally, the court ruled it was void *ab initio* – “[t]he effect is the same as if the statute never existed and was never on the books.” Therefore, CNN’s request for the Suspected Felons List was governed by the dictates of Florida’s Public Records Act, Chapter 119, Florida Statutes, which expressly requires public agencies to provide copies of public records. Thus, since there was no valid exemption precluding the copying of the Suspected Felons List, the court ordered the Division to make a copy of the list available immediately.

The Division decided not to appeal Judge Clark’s decision and began making copies of the list available to the news media and other members of the public who requested it that very day.

Public Scrutiny Leads to State’s Abandonment of List

Within one short week of Judge Clark’s ruling, intense public scrutiny of the list by the news media, civil rights groups and others revealed significant inaccuracies and flaws that ultimately led the State to abandon the list as a tool to remove ineligible felons from the voting rolls.

Early analyses conducted by *The Miami Herald* and by the *South Florida Sun-Sentinel* and the *Orlando Sentinel* compared the names on the list with state clemency records

and found that more than two thousand voters should not be on the list because their voting rights had been restored by the state’s clemency process.

The Division challenged those findings, claiming that they did not take into account Florida Department of Law Enforcement records which would show that “some of the people who received clemency could have committed another felony and lost their voting rights again.”

However, it was also soon discovered that hundreds, if not more than a thousand, voters whose names appeared on the list were on the list because they had registered to vote before their rights had officially been restored through the clemency process. At first the Department of State said those voters would not be permitted to vote if they did not re-register, but then changed its position after pressure from the ACLU and other civil rights groups.

The final and perhaps most surprising controversy surrounding the Suspected Felons List was the discovery that “Hispanic” was not included as a racial classification in the database. This resulted in only 61 Hispanics being included in the list of 47,763 names.

Therefore, Hispanic felons who should have been purged from the voting rolls under Florida law because their voting rights had not been restored would not have been purged because their names would not have appeared on the Suspected Felons List if they had classified themselves as Hispanic when they registered to vote.

Hispanics in Florida tend to vote Republican. Florida Governor Jeb Bush called the classification flaw an “an oversight and a mistake” and Secretary of State Glenda Hood felt she was left with no choice but to order the Suspected Felons List “retroactively void.” Her office was investigating how the classification error had gone undetected for so long.

Judge Clark’s ruling in *CNN v. Florida Department of State Division of Elections* helped the news media fulfill its traditional watchdog role over the government by shining public light on the State’s inaccurate and flawed list.

Johnita P. Due is senior counsel for CNN. Rachel Fugate is an associate at Holland & Knight, which represented CNN and many of the other intervenors in this case.

¹ ABC, Inc.; Media General Operations, Inc.; New York Times Management Services, Inc.; Lakeland Ledger Publishing; Florida Today; News Press; Pensacola News Journal; Tallahassee Democrat; the First Amendment Foundation and the American Civil Liberties Union of Florida intervened in the case.

Washington Supreme Court Hands Press a Victory on Access to Sealed Court Records

By Judith Endejan

On June 24, 2004, by a unanimous vote, the Washington Supreme Court ruled that judicial records may not be sealed unless they satisfy a stringent test that allows for sealing only under the most compelling circumstances. *Dreiling v. Jain*, No. 73756-8, 2004 WL 1404179.

Dreiling v. Jain is a shareholder's derivative suit brought by shareholders of a Pacific Northwest dot.com company, InfoSpace, Inc. A Special Litigation Committee ("SLC") was formed to investigate the plaintiff's claims.

The InfoSpace SLC ultimately filed a motion to terminate the plaintiff's case. The parties had agreed to a blanket protective order, endorsed by the judge, that allowed the parties to effectively seal virtually every substantive pleading under seal.

Of particular importance were pleadings related to the SLC's Motion to Terminate, all of which were placed under seal. The trial court even sealed a key ruling with respect to the Motion to Terminate!

Court Favors Access to Court Records

Justice Chambers, writing for the Washington Supreme Court, opened the opinion with strong language favoring open court records.

Justice in all cases shall be administered openly ... Const. Art. I, sec. 10. The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny.

Court Adopts Guidelines

The Court expressly adopted guidelines for civil cases that it had developed in a 1982 criminal case, *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). These guidelines require an examination of five factors prior to sealing or closure:

1. The proponent of closure and/or sealing must make some showing of the need for closure by identifying specific interests that would be endangered.
2. Anyone present when the closure motion is made must be given an opportunity to object.
3. The court and all parties should carefully analyze whether the restricted method for curtailing access would be the least restrictive means available and effective in protecting the interests threatened. The court emphasized that the burden rests with the proponent of closure where Sixth Amendment rights are not implicated.
4. The court must weigh the competing interests of the public and parties and base a decision on specific findings and conclusions.
5. The Order must be no broader in its application or duration than necessary to serve its purpose.

In addition to holding that the *Ishikawa* guidelines apply to closure attempts in civil cases, the court adopted, with approval, Ninth Circuit guidelines for trial courts confronted with a motion to place documents under seal, whether the documents are pure discovery or are filed in support of dispositive court action. *See Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122 (9th Cir. 2003).

Under the *Foltz* standards, the proponent of closure bears a heavy burden for each document sought to be protected to show that specific prejudice or harm will result if no protective order is granted. Entire documents should not be sealed if they can be redacted. Under *Foltz*, particularized findings must also be made by the trial court.

With respect to the materials under seal in *Dreiling v. Jain*, the Court remanded the case to the trial court to consider unsealing the documents, consistent with the guidelines provided in the Opinion.

The InfoSpace Special Litigation Committee was represented by John Tang of Latham & Watkins LLP, Menlo Park, California.

The Seattle Times was represented by Judith A. Endejan and Janis G. White of Graham & Dunn PC, Seattle, Washington.

No Media Access to Sentencing Letters

The federal judge presiding over the sentencing of Mafia crime boss Peter Gotti rejected a media request for access to pre-sentencing letters submitting directly to the court. *U.S. v. Gotti*, No. 02-CR-606, 2004 WL 1385867 (E.D.N.Y. June 22, 2004).

Despite the result, the decision by Eastern District of New York Judge Frederic Block is notable for giving thoughtful consideration to the First Amendment issues involved.

After a lengthy analysis of an issue on which there is little case law (the court found only three district court cases on point), Judge Block concluded that while there is no First Amendment right of access to pre-sentencing letters, they are subject to a presumptive common law right of access as judicial records.

Here the common law right of access was ultimately outbalanced by the privacy interests of the letter writers. But in guideline for his future cases, Judge Block announced the helpful standard that “[l]etters received from public officials seeking to use their offices to impact a sentence will invariably be disclosed.”

Background

At the commencement of sentencing last March, Judge Block noted to defense counsel and prosecutors that he had received a number of letters about defendant and would make them available to counsel. These included letters from Gotti’s wife and from his long-time mistress.

The prosecutor gave copies of the letters to a reporter from the *New York Post*. (A portion of the decision involves the court upbraiding the prosecutor for leaking the letters.) Excerpts from the letters soon appeared in the newspaper after Gotti’s mistress killed herself.

In what was quintessential tabloid fodder, Gotti’s mistress “railed against his being accused of being a crime boss” while the “the excerpt from Mrs. Gotti’s letter appeared under the caption: ‘Don’s Venomous Wife Penned Poison Letter Asking Judge For Max.’”

Access to Letters

Addressing a media motion for access, the court concluded that there was no First Amendment-based right to the documents since there was no historic disclosure of pre-sentencing letters, citing the “experience” and “logic” prongs of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

However, the court ruled that the letters were subject to a common law right of access as judicial documents. As applied by the court, this meant balancing the privacy interests of the letter writers with the “public’s entitlement to open sentencing proceedings.”

Citing the private nature of the letters submitted and the determination that they played no role in his sentencing decision, Judge Block declined to make the letters public.

David McCraw, Counsel to The New York Times, appeared for the press; Gerald Shargel, for Peter Gotti; and Daniel Alonso for the government.

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The Princess, the Paparazzi and the Press

Privacy Law Marches Forward Through Europe

By Matthew Nicklin

Princess Caroline of Monaco's recent victory over the paparazzi in the European Court of Human Rights has serious implications for the media in the UK. See *von Hannover v Germany*, ECHR June 24, 2004. The full Judgment (and a case summary) is available at www.5rb.com/casereports/detail.asp?case=267.

Background

For some 10 years the Princess has been taking legal action in an effort to stop a number of magazines in Germany from printing paparazzi photographs of her going about her daily life: collecting her children from school, shopping or exercising. Save for winning some limited protection from intrusion into the life of her children, her actions have failed.

While German law does provide protection from intrusion into a "secluded place," the German courts were not satisfied that the places where the Princess had been photographed qualified. Princess Caroline was a "figure of contemporary society *par excellence*"; she had to accept publication of photographs of her taken in public.

In contrast, the European Court of Human Rights ("ECHR") in Strasbourg upheld her complaint that this did not adequately protect her privacy rights under Article 8 of the European Convention on Human Rights. Germany has three months to appeal the decision to the full court.

Impact on UK Law

As it stands, the decision is significant not just because the ECHR has recognised that her privacy rights were infringed by photographs taken in public and semi-public places, but also because the domestic law of Germany (which had at least attempted to strike a balance between privacy and freedom of expression) was found wanting in its protection for privacy.

Across Europe, the ECHR's decision is indicative of a significant shift towards the French model of protecting privacy. As the Association of German Magazine Editors had submitted to the ECHR, the German domestic law had tried to set careful boundaries around the private life of public figures and that the resulting law was somewhere between the very restrictive French privacy laws and the comparatively permissive position in the UK.

Nevertheless, the ECHR felt that this compromise position provided insufficient protection for Article 8 rights.

Unlike Germany, the UK Parliament has not even attempted to provide legislation to strike a balance between privacy and freedom of expression. The Human Rights Act

Across Europe, the ECHR's decision is indicative of a significant shift towards the French model of protecting privacy.

1998 was proffered by Parliament as a protection for the media against the Courts, but has proved to be a modern day Trojan Horse. It was used by the Court of Appeal in *Douglas v Hello! Ltd* [2001] QB 967 to

recognize and give effect to "privacy rights" by importing Article 8 rights via the qualifications on freedom of expression set out in Article 10(2) (see §§134-136).

Courts Interpreting Scope of Privacy Rights

Instead of grappling with this undoubtedly difficult issue and attempting to set a balance between these competing rights, UK Parliament has abdicated responsibility and simply left it up to the Courts. Indeed, in June 2003, the Government firmly rejected calls by the House of Commons Select Committee for Culture, Media & Sport that privacy legislation should be introduced.

The failure to legislate (and the consequent privacy void) has ushered in a period of judicial activism. Yet, the Courts are not acting unconstitutionally. Under the Human Rights Act 1998, Parliament has required the courts to take into account the jurisprudence of the ECHR and act consistently with it.

Practically, this means they must give effect to ECHR decisions when interpreting English law. Consistent with the

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UK's Convention obligations, the English courts must respect and give effect to privacy rights and, in default of Parliament providing such protection by legislation, they will fashion the common law in order to fill the void.

This state of affairs presents the judiciary with an almost completely blank canvass. According to their temperament, some judges are enthusiastic about this, others are more cautious. Granted, they have the law of breach of confidence to work with as a guide, but confidence and privacy are not the same, and the effort to "shoe-horn" the latter into the former is neither satisfactory nor, in the long run, likely to be successful. See Lord Phillips MR at §69 in *Campbell v MGN Ltd* [2003] QB 658.

In particular, as the Princess Caroline decision, and the *Peck* decision before that shows, the ECHR does not accept that the fact that some event may have taken place in public necessarily places it outside the sphere of an individual's private life. In *Peck v United Kingdom* (2003) 36 EHRR 41, the ECHR held that a right of privacy could apply in favor of a man whose failed suicide attempt on a public street was captured by a municipal video surveillance camera.

The ECHR prefers to look at whether the person was carrying out an official or public duty or whether they were simply going about their daily life. The latter instance would give rise to a legitimate expectation of privacy; the former would not.

It is interesting to note that, a few weeks before the ECHR judgment in the Princess Caroline case, the House of Lords in *Campbell* decided that under the common law:

"the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

See *Naomi Campbell v MGN Ltd* [2004] 2 WLR 1232 per Lord Nicholls at §21, cf §§84 and §111 per Lord Hope; §§134-137 per Baroness Hale. The "reasonable expectation of privacy" test is also used in the Code of Conduct of the Press Complaints Commission - <http://www.pcc.org.uk/cop/cop.asp>.

Their lordships expressly rejected any higher test of whether publication of the information would be "highly

offensive." See §22 per Lord Nicholls and §135 per Baroness Hale. (The test was originally introduced by the High Court of Australia in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 §42 and then picked up by the English Court by Lord Woolf CJ in §11(vii) *A v B (Flitcroft v MGN Ltd)* [2003] QB 195. The "highly offensive" test will be familiar to US lawyers as an essential ingredient in the tort of intrusion. See *Restatement (Second) of Torts* 2d (1977) vol 3, §652B at 378.)

Indeed, and as the *Campbell* decision re-emphasized, under the Convention freedom of expression (Article 10) has no presumptive priority over privacy (Article 8). Where they come into conflict, the Court has to balance between the competing (yet equal) rights.

This process involves assessing the extent and justification of the interference with the subject's privacy interests as compared with the extent and justification of the interference with the media's freedom of expression.

In Princess Caroline's case this balancing process came down firmly on the side of privacy. The ECHR was fairly dismissive of the suggestion that the media's Article 10 rights should outweigh her privacy rights:

"... the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public...."

von Hannover v Germany at §§65-67.

The equal ranking of privacy and freedom of expression under the European Convention requires the Court to assess the value of the speech against the invasion of privacy. In Princess Caroline's case, freedom of expression came a very poor second.

Of course, in the US the position would be very different. Such privacy rights that the law recognises are subordinate to the constitutional protection for free speech.

While the ECHR and the US Supreme Court would agree on the self-evident value and importance of freedom of expression, the Convention of Human Rights ranks this alongside the right to respect for private life.

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Impact on UK Media

What does this mean for the UK media? First, it would appear that the English courts are likely to (indeed they must) give effect to the *Caroline* judgment.

While this is likely first to bite those sectors of the media that are dependent upon snatched celebrity photographs as their staple output, the decision is by no means limited to photographs.

Next in the firing line will be the familiar “*kiss and tell*” stories. See e.g. the discussion in Lord Hoffman’s speech in *Campbell* (§56). It is difficult to imagine that revelations about the sexual conquests and prowess of celebrities and similar trivialities, which have so entertained newspaper readers in the UK for many years, will be found to be anything other than unjustifiable invasions of privacy from now on.

Put simply, this speech is of such low value that it will usually be outweighed by the subject’s privacy rights.

Second, the interpretation of privacy given by the press regulatory body, the Press Complaints Commission (“PCC”) will have to be adjusted. Hitherto, the PCC has taken the orthodox approach that a person cannot have a reasonable expectation of privacy in matters that take place in public.

For example, Elton John’s former wife, Renate, complained that publication of photographs of her going about her daily life in a car park and petrol station forecourt were invasions of her privacy. Her complaint was rejected by the PCC:

“The Commission could not consider that a public car park or a petrol station were places where anyone could have a reasonable expectation of privacy. The complainant was outdoors in places where any number of people were entitled to be without restriction... The Commission understood that the attention that the complainant had received was clearly unwanted but recognised that the photographs had been taken in a public place

while she was not engaged in any private activity. Furthermore, they could not be held to illuminate any aspect of her private life.”

Complaint of 6 April 2000.

Adjudication <http://www.pcc.org.uk/reports/details.asp?id=280>.

Following the Princess Caroline decision, the PCC would have to accept that privacy rights do extend to the mundane activities of one’s daily life, even in public places, so that intrusion by the media requires proper justification. Without proper justification there is a breach of privacy.

Equally, it is likely that the PCC’s victory in Judicial Review proceedings brought by the newsreader Anna Ford, [2002] EMLR 95, would be decided differently in the light of the Princess Caroline decision. Like Princess Caroline, Ms Ford complained about the publication by *The Daily Mail* newspaper and *OK!* magazine of photographs

showing her on a beach.

The PCC rejected her complaint on the grounds that the beach in question was publicly accessible and that Ms Ford could not therefore have any “*reasonable expectation of privacy*.” Decisions of the PCC that are not consistent with the ECHR’s interpretation of privacy are likely to be susceptible to Judicial Review.

Decision May Spur Parliament to Act

Finally, the effect of the *Caroline* decision is to suggest that the UK media ought to now give thought to asking the UK government for a statutory privacy law. Although this might seem the equivalent of suggesting that turkeys should vote for Christmas (or Thanksgiving), it is the only practical way in which the media could swing the pendulum back towards freedom of expression.

Without legislation, the reality is that, in the shaping of privacy law, the UK courts have little to work with other than the jurisprudence of the ECHR.

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The UK media ought now to give thought to asking the UK government for a statutory privacy law ... it is the only practical way in which the media could swing the pendulum back towards freedom of expression.

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Unless there is some framework of domestic law (beyond the self-created common law protection for privacy), there is little room for the application of the important concept of the margin of appreciation.

This doctrine – which allows individual countries a limited amount of discretion as to how convention rights will be protected in their domestic law - is discussed in *Caroline*. See *von Hannover v Germany* at §57.

Although the German law was eventually found wanting, the UK has no legislation to offer at all. (The ECHR accepted the UK Government's submission in *Spencer v United Kingdom* (admissibility decision, 16 January 1998: Application No. 28851/95) (1998) 25 EHRR CD 105 that there were various remedies provided under the common law which might provide adequate protection for privacy rights.) Eventually, though, the common law will develop a set of parameters, but are the media content to allow the Judges to fix them?

If, as it appears, the Princess Caroline decision represents a significant tilt towards restriction of press freedom in pursuit of privacy rights, then the only really effective remedy is for the UK Parliament to legislate where it wants the balance to be struck.

At least in that political process the views and concerns of the media can be expressed and, if accepted, accommodated in the resulting legislation. Such a step would put the media in a much stronger position to utilize arguments based on the margin of appreciation. Without legislation, the media enjoy no real protection from what may prove to be an inexorable march towards ever more stringent privacy laws.

Matthew Nicklin is a Media Barrister at 5 Raymond Buildings in London.

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German Court Enjoins Publication of Novel Depicting Assassination of Chancellor

By Jörg Soehring

In June, a German Court of Appeal enjoined the publication of a crime novel on petition from German Chancellor Gerhard Schröder. The novel depicted the political assassination of a purportedly fictitious German Chancellor who bore striking similarities to the real Chancellor.

While the court order will strike US media lawyers as unconstitutional censorship, viewed against the background of German law it is far less unusual a result than the reader might suppose.

The court found that the novel violated the personality rights of Chancellor Schröder, which under German law must be balanced against free expression rights.

Background

The provocatively titled book “The End of the Chancellor – The Final Rescue Shot” tells the story of a fictitious drugstore operator’s successful assassination plan against a less fictitious German Chancellor. The book was written under a pen name and published by Betzel Verlag.

The Chancellor in the novel is strikingly similar to Gerhard Schröder in physical description. His private domicile is in Hanover, Chancellor Schröder’s hometown. And, like the real Chancellor, he is on his fourth marriage. In addition, the setting for the novel is Germany’s contemporary social and political environment.

The novel’s fictitious Chancellor leaves the reader without the slightest doubt that the author intended to portray the real Gerhard Schröder, whose image was depicted on the cover of the book’s first edition – in the cross hairs of a rifle scope. In April, the Court of Appeal enjoined publication of the book based on this cover. The book was reissued with a new cover, but Chancellor Schröder renewed his objections based on the book’s content.

Why the assassination plan? The Chancellor’s Government and the majority supporting it in Parliament have sponsored a number of laws over the last two years that have cut deeply into Germany’s social welfare benefits – both in reality and in the purported fiction.

Many people have to live on smaller budgets these days and naturally, they (and the fictitious protagonist in the

book) do not like it. This is reflected in recent election results. The governing German Social Democratic Party has suffered landslide losses in each of the various State and local elections over the last eighteen months, as well as in the recent election for the European Parliament.

Moreover, the German government recently implemented, as a reaction to international terrorism, the statutory justification of a “final rescue shot” – the intentional shooting down of hijacked airplanes or the intentional killing of hijackers or other terrorists by the police.

Why, asks the book’s fictitious drugstore operator, should I not be entitled to exercise the right to kill in my devotion to rescue my country from what I consider to be a dangerous, if not criminal Chancellor, if the police are justified in doing the same to fight “other criminals?”

The protagonist kills the Chancellor at an election campaign event with one well aimed gun shot. He gets away with it. And the reader of the book will find sufficient language in its text leaving him or her with the conviction that the author applauds the assassination.

This is the background for Chancellor Schröder’s application for an injunction prohibiting distribution of the book after a few copies of the two editions had been sold to the public.

The Legal Framework

The German Constitution has incorporated the concept of free expression in its bill of basic human rights, a right encompassing freedom of the press, broadcasting, and also literature, music, and art.

The German Federal Constitutional Court has always shown a high regard for this centerpiece of constitutional freedom over the fifty years of its existence. There is no other area of individual freedom that the Court has so actively defended against interference by government authorities.

But unlike the Bill of Rights in the US, the German Constitution itself provides some limitations to the free expression concept. The dignity of the human being is also a basic right granted by the Constitution, translated as a right to an unharmed personality for the purposes of civil law.

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German Court Enjoins Publication of Novel Depicting Assassination of Chancellor

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Since its early days the Federal Constitutional Court established the principle that these rights must be balanced against each other in cases where conflicts arise. In fact, where freedom of expression is outweighed by personality rights, the reaction of German law is undisputed: The plaintiff is entitled to a cease and desist order issued by the courts to prevent the violator from publishing the infringing language again.

A detailed analysis of the principles that the courts have developed over time to deal with these conflicts is beyond the scope of this article. But readers should be alert to the fact that enjoining speech or literature to protect personality rights is something German law has known and accepted for many decades.

Against this background, it may be easier to understand how the Hamburg Court of Appeals could arrive at its decision to prohibit further distribution of the novel, and that such prohibition would not generally be regarded as censorship in Germany.

The prominence of Chancellor Schröder was not a driving factor in the Court's analysis. It is obvious that only a prominent person could have been the focus of such a politically oriented book designed to draw public attention. The lower court had nevertheless dismissed the petition for the injunction, based on the theory that the novel was constitutionally protected and the Chancellor's dignity did not outweigh this constitutional right.

The Court of Appeal, however, only touched on the delicate issue whether the novel enjoys the specific "literature" protection of the Constitution and left this question undecided. Instead, in a very brief opinion, the court found that the novel was about a living and identifiable person – Chancellor Schröder – and concluded that describing and applauding his assassination violated Schröder's dignity rights. While this is not expressly stated in the written reasons, it may well be that the court concluded the book could inspire a real assassination attempt on Schröder.

And the intentional violation of a person's dignity is exactly where the freedom of literature as well as the freedom of speech have hit their limits in a long series of cases over the last fifty years in the German legal environment.

What's Next?

The Hamburg Court of Appeal rendered its decision in an ex-parte ruling, as is the practice in many German cases dealing with defamation or violations of personality rights.

It is by no means necessarily the end of the legal battle. It is now for the book's publisher, Betzel Verlag, to decide whether it will contest the ruling. If so, the case will be taken to ordinary civil litigation, possibly all the way up to the Federal Constitutional Court.

If that happens, we'll see the final result in some two or three years, in all likelihood. It's a borderline case, as the differing decisions of the two courts show. The final outcome is hard to predict, but it would not be surprising if the Hamburg Court of Appeal's injunction stands.

Dr. Jörg Soehring is a partner with Latham & Watkins LLP in Hamburg, Germany.

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ISPs Acting Passively Are Not Liable For Copyright Infringement According to Canadian Supreme Court

Canadian Copyright Act May Apply Extraterritorially

By Damion K.L. Stodola & Jason Crelinsten

On June 30, 2004, the Supreme Court of Canada held that a group of internet service providers (“ISPs”) acting exclusively as “internet intermediaries” are not liable to pay royalties on music files exchanged over their systems. *Canadian Association of Internet Providers v. Society of Composers, Authors and Music Publishers of Canada*, 2004 SCC 45 (“CAIP v. SOCAN”).

The Court agreed unanimously that ISPs are exempt from the exigencies (and thus royalty payments) of the *Copyright Act* (“the Act”) by virtue of § 2.4(1)(b), which provides protection for those ISPs who provide the conduit for information communicated by others but who lack actual knowledge of infringing content.¹

Of particular interest to American readers is the Court’s discussion of the Act’s potential extraterritorial effect. Citing *Dow Jones v. Gutnick* and decisions from American, French, and Canadian courts, the Court held that liability for infringement of the Canadian Copyright Act might attach to communication of infringing material originating outside of the country.

Copyright Law’s Extraterritorial Effect

Justice Binnie, writing for the majority, found that for purposes of the Act, a communication occurs within Canada when it has a “real and substantive connection” to Canada, regardless of its geographic point of origin. This reverses the initial holding by the Copyright Board, which had held that “[t]o occur in Canada, a communication must originate from a server located in Canada on which content has been posted.”

This decision is an important announcement from the Court regarding its willingness to apply the “real and substantial connection” test as a means of statutory interpretation.

According to the Supreme Court, “a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, is ‘both here and there.’” Justice Binnie stated that

“[i]n terms of the Internet, relevant connecting factors [justifying jurisdiction in Canada] would include the *situs* of the content provider, the host server, the intermediaries and the end user.” However, “the weight to be given any particular factor will vary with the circumstances and the nature of the dispute.”

This effectively extends the potential reach of the *Copyright Act* extraterritorially, and has the potential to make foreign parties liable under Canadian law.

Justice Binnie cited to American caselaw for the proposition that this approach is consistent with American jurisprudence. See *National Football League v. PrimeTime 24 Joint Venture*, 211 F.3d 10 (2nd Cir. 2000); *Los Angeles News Service v. Conus Communications Co.*, 969 F.Supp. 579 (C.D. Cal. 1997).

While highlighting the potential for cross-border liability in copyright cases, Justice Binnie was careful to mention that this liability is not automatic and must be determined with reference to the facts. Furthermore, in addressing the issue of potential duplicated liability (for copyright duties in both sending and receiving nations), he suggested that the solution lies in international or bilateral agreements not unlike current tax treaties.

Providers of “Means of Communication” Exempted

However, in light of the Court’s decision, the issue of jurisdiction should be less worrisome to American ISPs, as the Canadian standard for ISPs’ liability is substantively similar to the American approach in the *Digital Millennium Copyright Act* (“DMCA”), the European attitude in their *E-Commerce Directive*, and the WIPO Copyright Treaty, 1996.² This standard is based on a distinction between passive transmission of information and active involvement in the content being transmitted.

In Canada, the Act provides an exemption to liability for those entities whose only activity “consists of providing the means of telecommunication necessary for another per-

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ISPs Acting Passively Are Not Liable For Copyright Infringement According to Canadian Supreme Court

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son to ... communicate.” In other words, a provider of only the *means* of communication is exempt from liability.

SOCAN argued that by engaging in “caching,” the storage of pieces of data to facilitate transmission speed and decrease transmission cost, the ISPs were actively communicating material in violation of authors’ rights.

The Court ruled that since “caching” is content neutral and “necessary to maximize the economy and cost-effectiveness of the Internet ‘conduit,’” its existence should not eliminate the protection of § 2.4(1)(b). However, the Court specified that caching does not attract copyright liability only if it is done for technical reasons related to delivery speed and cost.

The shelter provided by § 2.4(1)(b) is related only to certain functions of an ISP, namely the provision of means of communication. The Court stated that insofar as an ISP engages in the provision of content, or the creation of embedded links which “automatically precipitate a telecommunication of copyrighted music from another source,” it will not be able to claim the benefit of the exemption.

Notice and Take Down

Another potential head of liability in the Canadian context is the act of “authorizing a communication” under s. 3(1) of the Act. The Court, however, dismissed SOCAN’s argument that ISPs were authorizing copyright infringement. The Court stated that one “does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.”

The Court indicated that courts should presume that “authorization of an activity occurs only so far as it is in accordance with the law.” While not expecting ISPs to police the totality of content on their servers, the Court explained that if a host server provider (an ISP in most cases) receives notice of copyrighted material on its server, then it may take appropriate steps to eliminate such content.

These steps include compelling the offending party to remove the content via a “take down notice.” Failure to do so, the Court writes, could result in a finding that the ISP had “authorized” an infringing communication within the meaning of the Act.

This “notice and take down” approach has already been adopted in the United States and in the European Community.³ In this case, Justice Binnie explicitly suggested this method be enacted by Parliament for the Canadian copyright context as well.

Clarifying Copyright Infringement

This decision will also have the likely benefit of clarifying the law as to whether peer-to-peer (P2P) file sharing is legal in Canada. As was reported in the March 2004 issue of the *Media Law Letter*, a Canadian court held that ISPs were not obligated to provide the names of 29 alleged file-swappers, in part because P2P file sharing was held not to be copyright infringement. *BMG Canada Inc. v. John Doe et al.*, No. T-292-04 (Ont. Fed. Ct.). This decision is currently being appealed.

BMG suggests, contrary to the Supreme Court’s decision, that an ISP need not concern itself with an author’s notice of infringing activity when the infringing material is being communicated through P2P file sharing (as opposed to being displayed on an ISP subscriber’s website). Moreover, it will be difficult to uphold *BMG* in the face of the Supreme Court’s determination concerning “notice and take down.”

If an ISP is obligated to remove copyrighted material from its server when it has been given notice of the material’s existence, then an individual maintaining similar files in a shared directory would likely be in a similar, if not identical, position. The Supreme Court’s latest decision provides further ground for resolving these inconsistencies when the appeal on *BMG* is heard.

Conclusion

The Supreme Court has provided important guidance for ISPs operating in Canada. However, due to the Court’s adoption of the “real and substantial connection” standard for determining whether a communication has occurred “in Canada,” ISPs operating outside Canada with end-users in Canada have an interest in this decision.

The Court has brought Canada’s legal treatment of ISPs in line with other national and international standards, like the American DMCA and the EU’s *E-Commerce Directive*.

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ISPs Acting Passively Are Not Liable For Copyright Infringement According to Canadian Supreme Court

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The Canadian approach insulates ISPs from liability for copyright infringement where their only function is the provision of means of communication. Furthermore, when given notice of infringing material present on their hardware, the Court indicates that the ISPs must take steps that can include removal of such material.

Development of a Canadian legislative scheme for these issues has yet to be completed, though the Court suggested the “notice and take down” provisions enacted in other countries as an “effective” remedy.

SOCAN was represented by Gowling Lafleur Henderson, Ottawa. Appellant ISPs were represented by McCarthy Tétrault

Damion K. L. Stodola is an associate and Jason Crelinsten is a summer associate at Coudert Brothers LLP in New York.

¹ In 1988, the Copyright Act was amended to provide to copyright holders the sole right to “communicate the work to the public by telecommunication, and to authorize any such acts.” §3(1)(f). The Society of Composers, Authors and Music Publishers of Canada argued before the Copyright Board that ISPs were liable under this provision of the Act whenever allegedly infringing material was transmitted across their networks or stored on their servers. Although the Copyright Board ruled in favor of the ISPs, an intermediate court of appeal held that the ISPs’ “caching” of material was sufficient to bring ISPs within the ambit of the Act.

² Digital Millennium Copyright Act, 17 U.S.C. §512 (1998); EC, E-Commerce Directive 2000/31 of the European Parliament and of the Council of June 8, 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), [2000] O.J.L. 178/1, Preamble, clause 42; WIPO Copyright Treaty, 1996, CRNR/DC/94, art. 8, Agreed Statements, art. 8.

³ *Ibid.*

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London's "Indecent Proposal" Slander Case Ends in Loss for the Claimant

By Dominic Ward

For media lawyers adept at handling the customary travails and uncertainties of litigation, the field of slander usually provides the greatest challenges – how to prove to a jury what was said, how the words were spoken and what they mean.

When the slander concerns allegations of sex and adultery in the orthodox Jewish community the result is unsurprisingly incendiary. So it was in *Maccaba v Lichtenstein* in London's High Court, which has provided enough twists and turns to justify the many inches devoted to it in news columns.

On 25 June 2004, after a 41-day trial spread over 2 months (the longest slander trial in English history), and after deliberating over 6 days, the jury rejected Brian Maccaba's claim that Rabbi Dayan Lichtenstein had spread slanders that he was a sexual predator and a serial adulterer with married Jewish women.

Maccaba, chief executive officer and founder of Cognotec, was alleged to have offered \$1 million to buy the wife of a friend in order to marry her.

The judgment is presently *ex tempore* and not yet available to the public. However, what can be said at this stage is that the jury found that those words which Lichtenstein had spoken were unlikely to have disparaged Maccaba; moreover, those statements were deemed substantially true and that Lichtenstein was not actuated by malice.

Maccaba had failed in April 2004 in his interim application to have the case taken away from the jury (for hearing by judge alone) on the ground that parts of the Claimant's evidence – lengthy transcripts of the allegedly slanderous statements including certain Hebrew phrases made by Lichtenstein in conversation, which Maccaba had covertly recorded – would be incomprehensible to a jury.

A more detailed examination will follow in a subsequent issue once the judgment becomes available to the public.

The claimant was represented by Clive Freedman QC. The defendant was represented by solicitor-advocate David Price.

Dominic Ward is a media lawyer and libel specialist with Finers Stephens Innocent, London.

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Third Circuit Stays Media Ownership Rules

By Kathleen Kirby

On June 24, 2004, a three-judge panel of the United States Court of Appeals for the Third Circuit released its decision in the controversial appeal of the FCC's July 2003 "Omnibus" *Report and Order* ("Order") on media ownership regulations, which had significantly relaxed the agency's restrictions on common ownership of television stations, radio stations and daily newspapers. *Prometheus Radio Project v. FCC*, 2004 WL 1405975 (3rd Cir. June 24, 2004).

In a 2-1 decision, written by Chief Judge Ambro and joined by Judge Fuentes, the Court affirmed portions of the Commission's decision, but found fault with the FCC's proposed new limits on TV, radio and cross-media combinations, and remanded the case to the Commission for further proceedings.

In doing so, the Third Circuit extended the stay on implementation of the new media ownership rules it had imposed last fall, effectively leaving the previously existing (pre-July 2003) ownership restrictions in place pending completion of the agency proceedings on remand.

The following is a brief summary of the Court's decision and its apparent impact on future FCC regulation of media ownership.

Standard of Review Under Section 202(h)

The Commission's *Order* was promulgated as part of the periodic review requirements of Section 202(h) of the Telecommunications Act of 1996. (Under the 1996 Act, the FCC was required to conduct such a review biennially. Congress has since changed the law to provide for quadrennial review.)

Section 202(h) requires the FCC to determine whether its broadcast ownership rules are "necessary in the public interest as a result of competition," and to repeal or modify those rules "no longer in the public interest."

Several parties challenged the FCC's interpretation of the word "necessary." Also before the Court was the question of whether, under Section 202(h), the FCC can act not only to deregulate, but also to adopt more stringent media ownership rules.

"Necessary" Means "Useful, Convenient, or Appropriate"

The Third Circuit affirmed the FCC's interpretation of the "necessary in the public interest" test in Section 202(h) to embody the same test that applies to its ordinary rulemaking determinations, namely, whether a rule is a "useful," "convenient," or "appropriate" means to serve the public interest.

The Court rejected arguments that the term "necessary" as used in the statute requires a showing of "indispensability" or that the deregulatory purpose of Section 202(h) mandated a more stringent interpretation of the "necessary in the public interest" test. Thus, under the Court's ruling, the Commission is required to determine whether its rules remain in the public interest.

FCC May Increase Regulatory Burdens Under § 202(h)

Rejecting arguments that Section 202(h) embodied a "presumption in favor of deregulation" or a "one-way ratchet" in the direction of deregulation, the Court held that the FCC is free to modify its rules in ways that increase regulatory burdens during periodic reviews under Section 202(h).

The Court found that any deregulatory purpose inherent in Section 202(h) is given force by requiring the Commission periodically to justify its existing regulations, a requirement that the Court stated would not otherwise exist.

No Special Burden To Justify Rules

The Court found that the Commission had been "misguided" by the D.C. Circuit's previous characterization of Section 202(h) as requiring application of a "deregulatory presumption" in *Fox* and *Sinclair*, and concluded that the statute does not – as the FCC had found in its *Order* – "upend traditional administrative law principles" requiring affirmative justification for repealing or modifying rules.

Under Section 202(h), the Court held, the Commission still must provide a reasoned analysis to support a decision to repeal or modify rules, and bears no special burden to justify retention of its rules.

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Third Circuit Stays Media Ownership Rules

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National Television Ownership Rule

Audience Reach Cap: The FCC's *Order* would have raised the limit on the share of nationwide television households a single entity is permitted to reach from 35 percent to 45 percent. While the case was pending before the Court of Appeals, however, Congress effectively superseded the FCC's determination by including in the 2004 Consolidated Appropriations Act a directive to set the cap at 39 percent.

The Court ruled that Congress' action rendered challenges to the FCC decision on this issue moot, thus leaving the cap at 39 percent. Given that Congress has now set the cap at 39%, the Court's stay presumably does not cover the national television ownership cap or, if so, will be lifted with respect to the cap.

UHF Discount: The Third Circuit ruled that the Appropriations Act provision on the cap also mooted questions about the UHF discount, which had been challenged by several parties. The Court determined that altering the current 50 percent UHF discount could undermine Congress' specification of a precise 39 percent cap.

Further, the Appropriations Act insulated the UHF discount from periodic review because it is a rule "relating to" the national audience limitation. The Court further stated, however, that the FCC could consider changes to the discount in a separate rulemaking proceeding, outside the periodic reviews required by Section 202(h) of the 1996 Act.

Dual Network Rule: The dual network rule, which prohibits joint ownership of two or more of the "Big Four" television networks (ABC, CBS, Fox, and NBC) was not changed by the FCC and not challenged on appeal. Accordingly, that restriction remains in effect.

Cross-Ownership Rules

Elimination of Cross-Ownership Ban: In considering the FCC's treatment of cross-media combinations, the Court of Appeals turned first to the FCC's decision to repeal the long-standing prohibition on newspaper/broadcast cross-ownership.

The Court concluded that "reasoned analysis supports the Commission's determination that the blanket ban ... was no longer in the public interest." Thus, the Third Cir-

cuit found that the FCC properly relied on record evidence that "existing (grandfathered) newspaper-owned broadcast stations produced local news in higher quantity with better quality than other stations."

Based on statistical as well as anecdotal evidence, the Commission had gone on to conclude that the cross-ownership ban undermined the agency's goal of fostering localism. The Court upheld that determination, as well as the FCC's conclusion that a blanket prohibition is not necessary to ensure diversity in local markets.

The Court noted that the agency had offered two appropriate rationales for its diversity conclusion. First, the evidence did not establish that commonly owned outlets have a uniform bias or "necessarily speak with a single, monolithic voice." Second, other media sources, including cable and the Internet, offset to some extent the loss in viewpoint diversity from newspaper/broadcast consolidation.

Some Ownership Limits Upheld: Despite affirming the FCC's repeal of the blanket ban on cross-ownership, the Third Circuit held that the FCC properly determined to retain some limits on cross-media consolidation.

First, the Court found that the Commission reasonably concluded that retention of some restrictions on newspaper/broadcast cross-ownership is necessary to ensure diversity in the local marketplace. In addition, the Court rejected arguments that the remaining cross-media limits violate the Equal Protection Clause of the Fifth Amendment and the First Amendment.

The Court found the Equal Protection claim to be foreclosed by the Supreme Court's 1978 decision upholding the original ban, which found that newspaper owners were treated in "essentially the same fashion as other owners of the major media of mass communications."

The Court rejected the contention that changes in the marketplace were sufficient to justify disregarding the Supreme Court's determination. The First Amendment claim similarly had been rejected in the 1978 Supreme Court decision, and the Third Circuit declined to rule otherwise or to repudiate the "scarcity rationale" that supports FCC ownership regulation. The Court of Ap-

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Third Circuit Stays Media Ownership Rules

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peals therefore applied a “rational basis” standard of review to the FCC’s decision and upheld continued limitation of cross-ownership as a reasonable means of promoting the public interest in viewpoint diversity.

Specific Cross-Media Limits Lack Reasoned Analysis:

However, because of flaws in the “Diversity Index” (“DI”) employed by the agency as support for the Cross-Media Limits (“CMLs”), the Court found that the FCC had failed to provide a reasoned analysis for the specific limitations it adopted.

The DI, which is loosely based on the Herfindahl-Hirschmann Index (“HHI”) used by the DOJ and FTC to measure competition, attempts to assess the diversity of viewpoints offered by local news and informational outlets. The DI weights different types of media outlets according to their popularity as local news sources.

The DI includes broadcast TV, radio, daily newspapers, weekly newspapers, and the Internet, but not cable. Each outlet within a particular category was assigned an equal market share. For example, broadcast TV was assigned a share of 33.8%. Because the New York City market has 23 TV stations, each was assigned a 4.3% share in the DI (33.8% divided by 23).

The FCC applied the DI to a range of sample markets in order to assess current levels of diversity and determine what types of combinations would pose an unacceptable diversity risk. The Court stated that the FCC had not identified any consideration other than the DI as having influenced the formulation of the CMLs.

Although the Court noted that it did not object “in principle” to the FCC’s use of the DI “as a starting point” for assessing local diversity, it found that the DI employed “several irrational assumptions and inconsistencies.” Specifically, the FCC: Gave too much weight to the Internet as a media outlet; irrationally assigned outlets of the same media type equal market shares; and inconsistently derived the CMLs from the DI results.

Weighting of the Internet: Noting the FCC’s decision to exclude cable operators from the DI because of its doubt regarding the extent to which they provide local news, the Court found that the agency should have applied the same basic rationale to the Internet.

Specifically, the Court found that the FCC had failed to account for evidence that most sources of news and information on the Internet are national, not local. The agency further ignored evidence, according to the Court, that many sites that are local are co-owned with other local media and, thus, do not truly increase diversity.

The Court also concluded that the Commission had placed too much weight on websites of individuals (such as political candidates) and entities (such as local governments), because these sources do not aggregate and distill information like true “media” outlets do. On remand, the FCC must either exclude the Internet from the DI or provide a better explanation of its inclusion in light of the exclusion of cable.

Equal Market Shares: The Court found that the FCC’s decision to assign equal market shares to outlets within a media type was inconsistent with its decision to assign different weights to the different types of outlets themselves. The Court further concluded that this decision negated the FCC’s rationale for the DI in the first place—to allow it to measure actual diversity levels.

On this point, the Court also noted that this methodology understated levels of concentration by disproportionately weighting sources that offer no local news and that the assignment of equal market shares generated absurd results (such as equating the New York Times Company’s co-owned daily newspaper and radio station in the New York DMA with the Dutchess Community College Station).

Inconsistency of DI and CMLs: Finding that the CMLs permitted some combinations where the increases in diversity concentration – as measured under the DI – were generally higher than for other combinations that are not permitted under the new rules, the Court also determined that the FCC drew its lines in an inconsistent manner.

Inadequate Notice: The Court further found that the FCC had given “questionable” public notice of and opportunity to comment on the DI, specifically stating that it would be “advisable” that any new diversity “metrics” be made subject to public notice and comment on remand.

Local Television Ownership Rule

Top-4 Rule: The Third Circuit upheld a provision of the FCC’s new rules prohibiting common ownership of more than one top-4 ranked station in a given market. Finding that

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a “significant ‘cushion’ of audience share percentage points generally separates top-4 stations from the 5th ranked stations,” the Court affirmed the Commission’s determination that a top-4 restriction would ensure that station consolidations did not lead to excessive market power.

The Court rejected arguments that the top-4 restriction would unreasonably deny needed duopoly relief in many small markets because it fails to reflect the fact that many top-4 ranked stations—particularly in smaller markets—are in financial distress. The Court found that there was “ample evidence” in the record to support the “agency’s line-drawing decision,” and also noted that the Commission had made provision for waivers in appropriate cases.

Numerical Limits: The Court remanded for further consideration the numerical limits applicable to same-market combinations of television stations primarily on the basis of the Commission’s “equal market share approach.”

Under this approach, the Commission decided to construct its numerical limits to ensure that each market would have six-equal sized competitors. Thus, the Commission decided to allow television “triopolies” in markets of 18 stations or more, and duopolies in markets of 17 or fewer, both subject to the restriction on a combination of top-4 stations.

The Court, however, held that the FCC’s rationale for using an equal share approach—namely, that market share is too fluid to serve as the basis for its regulations—was inconsistent with the FCC’s decision to retain the top-4 restriction.

In addition, the Court stated that the Commission chose its six equal-sized competitor benchmark to ensure that markets would not exceed an HHI score of 1800, yet relaxed the local television ownership rule to allow more concentration in markets that already exceeded that chosen benchmark. Accordingly, the Court remanded the numerical limits to the FCC “to support and harmonize its rationale.”

Failed Stations: The Court also remanded the FCC’s elimination of the requirement that, in a transaction that seeks a waiver of the duopoly rule based on the fact that the station to be acquired is “failed” or “failing,” the parties demonstrate that no out-of-market buyer is willing to purchase the station.

The FCC based its elimination of that requirement on a finding that in most circumstances, only an in-market buyer would be willing to purchase a failed or failing station. The

Court, however, noted that the Commission had adopted the original requirement regarding out-of-market buyers in part to expand opportunities for minority and women buyers, but had failed to discuss how its elimination of the requirement would affect that goal.

Proposals for Advancing Minority Ownership: The Court noted that the FCC in its *Order* had deferred consideration of a number of proposals advanced by the Minority Media and Telecommunications Council (MMTC) to promote diversity in broadcast ownership. The Court told the FCC that these proposals should be considered in the rulemaking proceeding that the agency will conduct in response to the remand.

Local Radio Ownership Rule

Arbitron Markets: The Court upheld a provision of the rules that would change the definition of a “radio market” for purposes of the local ownership rules from a contour-based to an Arbitron-based definition.

The Third Circuit rejected out of hand arguments that, by changing the market definition methodology, the FCC violated Section 202(h)’s presumption in favor of deregulation, noting its conclusion that “§ 202(h) is not a one-way ratchet.” The Court held that the switch to an Arbitron-based definition was a reasonable exercise of the FCC’s rulemaking authority, and one that would resolve troublesome inconsistencies.

Inclusion of Noncommercial Stations: The Commission’s *Order* included for the first time in the tally of radio stations in a local market noncommercial stations, and the Court affirmed the FCC’s decision.

The Court rejected arguments that the inclusion of non-commercial stations increases the number of stations in a given market and thereby allows more consolidation under the numerical limits. Since the change to Arbitron markets operates as a net decrease in most markets’ size, the Court said, it undercut claims that it was inconsistent for the FCC to increase the size of local markets while retaining the existing numerical limits.

Limits on Transferability: By virtue of its switch to an Arbitron-based definition for local radio markets, the FCC’s *Order* would render certain clusters of commonly owned radio stations that are permissible under the “old” rules non-compliant with the “new” rules.

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Third Circuit Stays Media Ownership Rules

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The FCC prohibited the sale of such noncompliant radio station combinations except to certain “eligible entities,” and the Court upheld the restriction. The Court reiterated that Section 202(h) permits both regulatory and deregulatory modifications to the Commission’s rules, and therefore the FCC’s decision to impose limits on transferability was permissible.

In addition, the Court rejected arguments that the restrictions were unconstitutional under the Due Process and Takings Clauses of the Fifth Amendment, since broadcast licenses are not protected property interests.

Attribution of Radio Joint Sales Agreements: The Court also affirmed the FCC’s decision to make same-market radio joint sales agreements (“JSAs”) attributable to the selling party.

The Court agreed with the FCC’s determination that modification of its attribution policy was necessary to “reflect accurately the competitive conditions of today’s local radio markets, and thus prevent its local radio rule from being undermined.” The Court also dismissed the suggestion that the attribution of JSAs raised constitutional questions under the Fifth Amendment’s Takings Clause, since the Commission would not invalidate or interfere with any contracts.

Numerical Limits: The Court determined, however, that the FCC insufficiently justified its retention of the existing numerical station caps which, in tiers based on market size, permit common ownership of up to eight radio stations in a market (and no more than five in a single service (AM or FM)).

Notably, these numerical caps were set by Congress as part of the 1996 Act. Still, consistent with its decisions to remand the CMLs and the local television numerical limits, the Court faulted the FCC’s rationale that the existing numerical caps facilitated competitive radio markets of five equal competitors.

The Court viewed this benchmark as inconsistent with the fact that the DOJ/FTC Merger Guidelines (on which the FCC had relied in formulating the local television limits) consider a five equal competitor market “highly concentrated.”

Moreover, the Court found no indication in the record that the existing numerical limits would actually result in markets of five equal-sized competitors, because evidence showed that most markets were dominated by anywhere from one to four

owners. The Court held that the FCC failed to explain why it could not take actual market share into account when deriving the numerical limits. Additionally, the Court found unjustified the FCC’s retention of separate “subcaps” on AM and FM stations.

Chief Judge Scirica’s Dissent

Chief Judge Anthony Scirica issued a 93-page partial dissent, emphasizing that he would lift the stay, allow the Commission’s media ownership rules to go into effect, and permit the quadrennial review process to run its course to give the Commission and Congress the opportunity to monitor the effect of the proposed rules on the media marketplace.

Judge Scirica argued that the majority failed to accord the FCC’s decision-making appropriate deference, instead choosing to substitute its own policy judgment for that of the Commission and upsetting the ongoing review of broadcast media regulation. Judge Scirica also noted that vacating and remanding the proposed rules to the Commission, in essence asking the agency to start from “zero,” will preserve the existing rules in place for months or even years, and suggested that the resulting delay will likely leave the public worse off than if these rules were allowed to take effect.

Further Proceedings

As explained above, the Court extended its stay of the Commission’s proposed rules pending the completion of further proceedings on remand. Thus, the “old” rules (with the probable exception of the 35% national ownership cap) will remain in effect.

Interested parties are entitled to petition the Third Circuit for rehearing or to request review by the U.S. Supreme Court. The Court has noted, however, that, after necessary recusals, too few judges are available to permit rehearing *en banc*, and that any request for rehearing will be addressed by the same panel that decided the case.

Accordingly, the chances for any significant change on rehearing are slim. Thus, unless the Supreme Court decides to review the Third Circuit’s decision, the next step will be further consideration by the FCC, a process that could extend into 2005 or beyond.

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Survey Shows Greater Support for First Amendment Values

Americans support for their First Amendment freedoms, which was shaken by the events of 9/11, appears to be returning to pre-9/11 levels, according to the annual State of the First Amendment survey, published by the First Amendment Center in collaboration with American Journalism Review magazine.

Copies of the survey are available online at: http://www.firstamendmentcenter.org/sofa_reports/index.aspx

In 2002, 49 percent of Americans surveyed agreed that “the First Amendment goes too far in the rights it guarantees.” This year, that number fell to 30 percent. “Two years after the terrorist attacks in New York and Washington, D.C., our nation appears to have caught its breath – and regained some perspective,” said Ken Paulson, former executive director of the First Amendment Center, now editor of USA Today.

The survey, conducted annually since 1997, examines public attitudes toward freedom of speech, press, religion, and the rights of assembly and petition.

The national survey of 1,000 respondents was conducted by telephone between May 6 and June 6, 2004. The age group of the respondents was evenly separated, and the sex roughly divided. Racially, 77% were white, 9% black, and 5% Hispanic. 36% identified themselves as Democrats, while 26% were Republicans. 40% replied that they made less than \$40,000, while 54% made more than \$40,000. 27% were Protestant, 22% Catholic, and 2% Jewish. 20% described themselves as fundamentalist Christian.

According to Paul McMasters, Ombudsman of the First Amendment Center, this year’s survey measured public attitudes about issues in today’s headlines: the effort to amend the Constitution to ban flag-burning; proposals to expand regulation of so-called indecent material in the media; attempts by government officials and private advocates to lower the “wall of separation between church and state;” and scandals involving made-up stories and facts at major news organizations.

McMasters claims that one theme persists over the eight years that the First Amendment Center has con-

ducted the State of the First Amendment survey: “In the minds of many Americans, there is a troubling disconnect between principle and practice when it comes to First Amendment rights and values.”

For example, nearly 8 in 10 believe the press has a government watchdog role, but 4 in 10 believe the press has too much freedom.

Following the sensational fallout from singer Janet Jackson’s Super Bowl halftime show, advocacy groups pressured the Federal Communications Commission and Congress to rein in the media’s perceived excesses by enacting tougher laws, strengthening regulation and dramatically increasing fines for indecent programming.

This survey offers evidence, however, that a large majority of Americans believe that parents, not government, should be shielding children from such material. When asked who should be primarily responsible for keeping inappropriate material away from children, 87% said parents, as opposed to 10% “publishers,” and 1% “government officials.”

Despite 58% responding that the current amount of government regulation of entertainment programming on television is “about right,” 49% would extend broadcast regulations to late-night and overnight programs. Broadcasters and producers should note that these respondents would have current regulations regarding references to sexual activity extended to cover all 24 hours; and 54% would extend those regulations to cable, which currently is not covered by such FCC rules.

McMaster says that when the First Amendment Center began sampling public attitudes toward First Amendment freedoms eight years ago, one goal was to identify areas where more education was needed.

The current survey suggests that much work needs to be done to better educate Americans about the First Amendment. While 58% could name “speech” as one of the specific rights guaranteed by the First Amendment, only 1% could name “petition.” The other rights were similarly vague in the minds of respondents: only 17% could name “religion;” 15% “press;” and 10% “assembly.”

In 2002, 49 percent of Americans surveyed agreed that “the First Amendment goes too far in the rights it guarantees.” This year, that number fell to 30 percent.

LEGISLATIVE UPDATE

Sensitive Security Information; Parents Empowerment Act

By Kevin Goldberg

Summer in Washington, DC means hot days and a lackluster Congress. After a week off to celebrate Independence, Congress has returned to a bill that would further restrict access to records related to transportation security.

Sensitive Security Information Held by the Transportation Security Administration

- The term “Sensitive Security Information” (“SSI”) first burst on to the scene in the mid-1970s. However, sections of the Homeland Security Act of 2002, which further expanded the definition of SSI and restricted its distribution to the public through the Freedom of Information Act, have brought this issue to the forefront of concerns amongst those who commonly make FOIA requests. A section of a highway funding bill and interim rules issued by the Transportation Security Administration have increased fears that access to this unclassified information will be gone forever.
- Sensitive Security Information is currently defined by the Transportation Security Administration as information that would:
 - Be an unwarranted invasion of personal privacy;
 - Reveal a trade secret or privileged or confidential commercial or financial information;
 - Be detrimental to the safety of passengers in transportation.

Section 3029 of HR 3550 (the “Safe, Accountable, Flexible and Efficient Transportation Act of 2004”) would add the following to the underlined language: “transportation facilities or infrastructure, or transportation employees,” thus infinitely broadening the scope of government records that would satisfy the definition of SSI. That section would also prevent any State or local government from enacting, enforcing, prescribing, issuing or continuing in effect any law, regulation, standard, or order to the extent it is inconsistent the SSI definition and regulations.”

Thus, state and local governments would be rendered powerless in fighting against threats to the transportation infrastructure.

- This bill is currently before a conference committee, which is ironing out the differences between the versions passed by the House and the Senate (the Senate version of this bill has the offending provisions, while the House does not). The Conference Committee has resisted addressing this SSI provision, which means it would remain in the bill. A glimmer of hope exists, however, as there is a relatively strong chance that the Congress will simply pass a “continuing resolution” to maintain funding of transportation initiatives without passing this bill as a permanent fix.
- At the same time, similar changes are being contemplated by the Transportation Security Administration itself, which is accepting comments on interim rules that have made these and other changes to expand the breadth of SSI. Comments can be filed until July 19, 2004.

Parents’ Empowerment Act (HR 4239)

- Although there is little to no chance that this bill will receive a hearing in the House Judiciary Committee, much less actually pass, it is worth noting simply because of the outrageous penalties it offers for speech that has been granted full First Amendment protection.
- Introduced on April 28, 2004 by Rep. Duncan Hunter (R-CA), this bill would provide a civil action for a minor “injured” by exposure to an entertainment product containing material that is harmful to minors. The most interesting aspect of the bill is that it appears to punish the print and Internet media as equally as the broadcast media, despite the fact that both print and Internet publishers have repeatedly received broad constitutional protection from courts at all levels, including the United States Supreme Court (actually, the most interesting aspect may be that Rep. Hunter chose to potentially alienate constituents in the entertainment industry by introducing the bill).
- Specifically, the bill allows for a civil suit to be brought by a person acting on behalf of a minor against a person who knowingly sells or distributes

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Legislative Update

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materials that are harmful to minors (1) if the seller or distributor knows that a substantial number of minors will be exposed to the material and (2) that the minor is likely to suffer personal or emotional injury as a result. The minor can receive at least \$10,000 for each instance of injury, as well as punitive damages and attorney's fees. The entertainment products covered by the bill can take the form of a "picture, photograph, image, graphic image file, drawing, video game, motion picture film or

other similar visual representation or image, book, pamphlet, magazine, printed matter or sound recording." It applies to pornographic or obscene materials found in these entertainment products.

- It is shocking to note that the bill has not received any action from the House Judiciary Committee.

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

GAO Says Government Medicare Videos Were "Propaganda"

The United States General Accounting Office ("GAO") issued a report on May 19, 2004 concluding that the Department of Health and Human Services ("HHS") and Centers for Medicare and Medicaid Services ("CMS") violated the Consolidated Appropriations Resolution of 2003 ("CAR"), by producing video news releases that failed to sufficiently identify their government origin.

The report concluded that the video news releases – which were sent to broadcast news stations – constituted illicit "propaganda" according to CAR's definition: "materials that are self-aggrandizing, purely partisan in nature, or covert as to source," and not expressly authorized by Congress.

The report is available on the GAO website at: www.gao.gov/decisions/appro/302710.htm.

The GAO concluded that production of the video news releases was outside the scope of CMS's mandate and therefore its budget. Accordingly, CMS violated the Antideficiency Act, 31 U.S.C. § 1341 ("ADA") by expending unappropriated funds. The ADA requires that violations be reported to Congress and the President – presumably relying on the political process to deter future violations.

Videos to Explain Medicare Law

Video News Releases ("VNRs") are popular press-release devices that contain pre-packaged video clips that can be used or edited quickly for news broadcasts. CMS created VNRs to inform the public about the impact of the new Medicare Prescription Drug Improvement and Modernization Act of 2003 – albeit from the current Administration's per-

spective. HHS distributed the VNRs in a media-kit that also included B-roll and lead-in scripts for news anchors.

Actors were used to appear as reporters and used conventional tag lines, such as "In Washington, I'm Karen Ryan reporting." While the media kits showed that the material was disseminated by HHS, the video footage did not. Television audiences that viewed the VNRs would only know that the clips were produced by the government if broadcasters using them informed viewers.

Because the clips could (and were likely to) be broadcast without such qualification, the GAO Report concluded that the VNRs constituted propaganda "because they were misleading as to [their] source."

Impact of the Report

The GAO report is limited in effect. GAO opinions are not binding on the executive branch. Moreover HHS estimated the total production cost of the videos to be only \$42,750.

What is significant, though, is the GAO's strict application of the prohibition on propaganda under the CAR. The report concludes

"In limiting domestic dissemination of the U.S. government-produced news reports, Congress was reflecting the concern that the availability of government news broadcasts may infringe upon the traditional freedom of the press and attempt to control public opinion."

PREPUBLICATION COMMITTEE REPORT

Reporting Mean And Ugly Quotes: Key Points To Remember

By Rachel Matteo-Boehm and Brendan Starkey

Media practitioners who engage in pre-publication review are familiar with the difficulties posed by accusations or name-calling in a letter to the editor, article, or other news report.

Does one person's less-than-flattering comment about another person constitute an actionable statement of fact, or does it fall into the category of non-actionable hyperbole, rhetoric, loose or figurative speech – in other words, the type of speech that we commonly refer to as opinion? The line between the two categories is not always so clear.

So how does one determine what kinds of mean and ugly quotes are deemed to be statements of fact and which ones are more properly classified as opinion? Prior to the Supreme Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), many courts relied on a multi-factor "totality of circumstances" inquiry to determine whether a statement was one of fact or opinion.

Most famously, in *Ollman v. Evans*, 750 F.2d 970 (D. C. Cir. 1984), the United States Court of Appeals for the District of Columbia Circuit focused on four factors in distinguishing between unprotected fact and protected opinion: (1) the specific language used; (2) whether the statement was verifiable; (3) the general context of the statement within the article or column, taken as a whole; and (4) the broader context in which the statement appeared (i.e., the section of the paper in which the statement appeared).

In *Milkovich*, the Supreme Court rejected the concept of a "wholesale defamation exemption for anything that might be labeled 'opinion'" and focused on two factors.

Constitutional protection, the court said, extends to statements that (1) are not provably false; or (2) that "cannot 'reasonably [be] interpreted as stating actual facts'" about an individual.

In the intervening 14 years, courts have noted the change, but in most cases continue to apply their pre-*Milkovich* tests. What was once protected as "opinion" is instead found to be incapable of being proved false, or is categorized as rhetorical hyperbole, epithet, or "loose, figurative" language which cannot reasonably be interpreted as stating actual facts. Drawing on these cases, there are several rules of thumb for handling mean and ugly quotes:

Epithets Not Actionable – Provided They Don't Ring True

The more outrageous the language used, the more likely it will be found nonactionable. The more believable a statement sounds, the riskier it is. Publishing a quotation calling a convicted murderer a "bastard" was protected because, taken in context, no reasonable person would understand it to mean that his mother "was not chaste at the time of her marriage." *Weinberg v. Pollock*, 19 Media L. Rep. 1442 (Conn. Super. Ct. 1991).

An editorial referring to a candidate for public office as a "fascist" was protected because "allegations of fascism, anti-Semitism, or other accusations of ethnic bigotry" are imprecise and ambiguous as commonly used. *Condit v. Clermont County Review*, 675 N.E.2d 475 (Ohio Ct. App. 1996).

Calling someone an "asshole," "cocksucker," "chicken butt," "loser," or "skank" would probably be protected. *See Bebo v. Delander*, 632 N.W.2d 732 (Minn. Ct. App. 2001); *Seelig v. Infinity Broadcasting Corp.*, 119 Cal. Rptr. 2d 108, (Ct. App. 2002); *Yeagle v. Collegiate Times*, 497 S.E.2d 136 (Va. 1998).

But referring to that person as a "slut" or "drug using teenage homosexual prostitute" might not be. *See Bryson v. News America Publ'ns, Inc.*, 672 N.E.2d 1207 (Ill. 1996); *Anson v. Paxson Communications Corp.*, 736 So.2d 1209 (Fla. Dist. Ct. App. 1999).

Keep in Mind the Speaker and the Subject Matter

The identity of the person who made the statement and the circumstances under which it was made may make a difference.

Quotes from politicians accusing other politicians of conspiracy were held nonactionable partly because they "were uttered in the midst of a political controversy, an occasion where readers expect heated debate and self-serving assertions." *Lyons v. News Group Boston, Inc.*, 612 N.E.2d 1168 (Mass. 1993).

Similarly, a letter to the editor accusing a corporation of attempting to avoid legal restrictions on the importation of endangered chimpanzees was protected partly because the writer was an animal rights advocate and the letter related to

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an ongoing public controversy over live animal testing. *Immuno A.G. v. Moor-Jankowski*, 567 N.E.2d 1270 (N.Y. 1991).

And in *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994), a letter to the editor suggesting that “payoffs” prompted a judge to “let ... off” a criminal defendant was protected partly because it was published in the “wider social context” of a controversial and well-publicized trial regarded as the latest in a string of local scandals.

In that context, the court held, the “reasonable reader” would have been aware of the underlying facts and understood the letter as one writer’s interpretation of those events, rather than established fact.

Context Is Important

Mean and ugly quotes shouldn’t be viewed in isolation. The language that surrounds those quotes often makes a difference.

In *Keohane*, the statements in the letter to the editor were protected partly because the letter was “replete with the sort of ‘imaginative expression’ and ‘rhetorical hyperbole’ the Supreme Court has regarded as particularly worthy of constitutional protection.”

The court noted that the letter’s author frequently expressed her views using capital letters and multiple exclamation points, and “colorful and exaggerated terms” like “sickie,” “terrorists,” “sleaze,” and “scum.”

Similarly, in a newspaper article on an easement action against the property of Beatle George Harrison, the quote “I’m being raped by all these people” was held nonactionable because “[e]ven the most casual reader would understand that ‘these people’ — whether neighbors of Harrison or persistent journalists — were not actually raping Harrison.”

Read in context, the statement was “an expression of his frustration over the circuit court’s decision in the Easement Action.” *Gold v. Harrison*, 962 P.2d 353 (Haw. 1998).

Context can tip the scales the other way, as well. In *Kumar v. Brotman*, 617 N.E.2d 191 (Ill. Ct. App. 1993), the word “scam” was found to be actionable where “[t]he gist of the article — that plaintiff was ‘working a scam’ by filing frequent, unwarranted lawsuits to procure pecuniary settle-

ments” — was sufficiently factual to “cause the average reader to infer that plaintiff’s lawsuits, especially the ones highlighted in the article[,] ... were unwarranted or bogus.”

Taken in that context, according to the court, the word “scam” would not be understood as hyperbolic opinion, but instead as an allegation of criminal fraud. (Note the term “scam” was held nonactionable under different circumstances in *NBC Subsidiary*, discussed below).

Consider the Nature of the Publication

A reference to a political activist’s “paranoia” in a *New Republic* article was protected because, read in context, the reasonable reader would not understand it to be a psychological diagnosis. The court explained that “*The New Re-*

public is ... well-known to be a magazine of political commentary, a self-described ‘Weekly Journal of Opinion.’

Presented in such a loose manner, in such a well-understood context, the article’s reference to ‘bouts of ... paranoia’ is neither verifiable nor

does it imply specific defamatory facts.” *Weyrich v. The New Republic, Inc.*, 235 F.3d 617 (D.C. Cir. 2001).

But this factor did not insulate the entire article. Other quoted anecdotes reporting that the plaintiff had “snapped,” erupted in a “volcano of screaming,” and “froth[ed] at the mouth,” were sufficiently verifiable to be defamatory if proven false. As the court explained, the “article’s political ‘context’ [did] not indiscriminately immunize every statement contained therein.”

Placement Is Important (But Not Determinative)

In *Keohane*, one of the factors indicating that the statements in the letter to the editor would not be taken as stating actual facts was their placement in the editorial section, “a traditional forum for debate, where intemperate and highly biased opinions are frequently presented and, absent credentials which make the author particularly credible, often times should not be taken at face value.”

Similarly, in *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917 (M.D. Fla. 1996), a letter to the

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**Mean and ugly quotes
shouldn’t be viewed in
isolation. The language that
surrounds those quotes
often makes a difference.**

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editor referring to the plaintiff's book as "a fraud" was protected partly because it "appeared in a medium that invites opinion, in that it was a letter to the editor and published in [the newspaper's] 'Commentary' section."

Yet this factor does not always carry the day. In *Milkovich*, a sportswriter was sued for his column alleging that local school officials had "lied" at a judicial hearing. The fact that the statements at issue were contained on the sports page, "a traditional haven for cajoling, invective, and hyperbole," was one reason cited by the Ohio Supreme Court in its conclusion that the statements would not be taken as fact. But the United States Supreme Court was not swayed.

Without addressing context, the court held that "the connotation that [the coach] committed perjury [was] sufficiently factual to be susceptible of being proved true or false."

Likewise, in *Wasserman v. Haller*, 627 N.Y.S.2d 456 (App. Div. 1995), letters to the editor "were reasonably susceptible of a defamatory meaning and did not constitute personal opinion since they reasonably appeared to contain assertions of objective fact which [did] not fall within the scope of protected opinion."

State the Facts, Correctly and Completely

If key facts are left out or not reported at all, the statement might be taken as a provably false factual assertion. In *Kanaga v. Gannett Co., Inc.*, 687 A.2d 173 (Del. Super. Ct. 1996), a news article appearing under the headline "Patient Feels Betrayed" alleged that an obstetrician-gynecologist had recommended an unnecessary hysterectomy. The article quoted the patient as saying, "I can only conclude that [the doctor] ... chose the treatment plan that was most profitable for her with no concern for me."

The court noted that the article did not report any facts to support that contention. What facts were presented implied that the procedure was unnecessary, while those tending to exonerate the doctor were not reported. The court held that "it [could] not be said that [the patient's] opinion as reported ... is 'patently conjecture.'" A reader could reasonably assume that it was based on undisclosed facts. Without more information, it would not be "clear to the average reader that [the patient] added two and two and got nine."

On the other hand, in *NBC Subsidiary, Inc. v. Living Will Center*, 879 P.2d 6 (Colo. 1994), a local television news program reported on a living will kit which, for \$29.95, provided information, legal forms, and some supplementary services.

The gist of the report was that the necessary forms could be obtained at little or no cost elsewhere. The report included an interview with a medical ethicist who characterized the product as a "scam" whose buyers had been "totally taken." The court concluded, "[t]here is no suggestion that [plaintiff] is perpetrating a fraud or deceiving the public with respect to its product.

Rather, the broadcast simply notes the cost of [plaintiff's] product and compares it with alternative sources of obtaining a living will." Since the broadcast provided the facts on which the assertion was based, the viewer would not mistake it as a provably false allegation of wrongdoing.

Factual context is particularly important if the speaker is in a position to know something that the average reader may not. In *Keohane*, the letter to the editor accusing the judge of corruption was held nonactionable partly because it was one citizen's interpretation of well-publicized events whose underlying facts would have been familiar to the reasonable reader.

In contrast, a city council member's implication that the judge was bribed was found to be actionable partly because "[w]hen a city councilman speaks with a reporter, a reasonable person could believe that the [statement] is based on [undisclosed] defamatory facts ... which the audience can reasonably expect to exist." *Id.*

Thus when quoting someone who might be regarded as an insider or an authority on a particular subject, it would be safest not to present his or her quote in isolation.

Of course, the facts should be accurate. As the high court noted in *Milkovich*, "[e]ven if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact."

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ETHICS CORNER

The Corporate Attorney-Client Privilege, the Corporation, and the Journalist

By Roberta Brackman

Assume that counsel is vetting a report, or counseling after a claim or complaint has come in, and is talking not only to news management but also to the employee journalist involved (leaving freelancers aside for the moment). These are the folks who have the information upon which counsel will render her advice – these are the folks in the know and they are certainly not, generally speaking, corporate decision makers.

What if the journalist later wants to assert the attorney client privilege as to these communications but the company does not? Or vice versa? What if the journalist wants to waive the privilege to reveal legal advice provided to protect his or her reputation? What if the company wants to protect that very advice?

The legal and ethical answers to these and many related questions will likely be determined, in the first instance, by the circumstances under which the communications initially took place.

If counsel had successfully navigated her way through the conflicts issue at the outset of the discussion with the journalist, identified the corporation as her client — rather than the individual journalist — and the journalist is nevertheless talking to counsel to obtain the advice of counsel for the corporation, it is likely that the communication will fall within the corporation's attorney client privilege — a privilege which, under these circumstances and in most jurisdictions, the journalist will be able to assert and protect, but not waive.

Corporations can protect communications and documents reflecting communications with their counsel just as individuals can, but because corporations can only speak or act through individuals, it is not always clear when the privilege exists, who can assert it and who can waive it on behalf of a corporation.

To the extent that there is any clarity as to who can assert and/or waive the privilege, the rules that do exist

may not protect a media company whose employees often enjoy unlimited access to the media, which can result in waiver of the privilege without any actual corporate blessing or authority.

As more media and non-media companies alike find themselves facing legal fallout from renegade and/or terminated employees, the issue of protecting the attorney-client privilege, or strategically waiving it, may become more important than ever.

Who Controls the Corporation's Privilege

Historically, the determination of who could assert the privilege on behalf of the corporation was decided under the control group test, which focused on the communicating employee's rank within the corporation and whether "he is (or personifies) the corporation" and is in a position to control or take a substantial part in decisions with respect to issues about which counsel was sought. *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F.Supp. 483, 485 (E.D.Pa. 1962).

Rarely, if ever, would a journalist be considered part of the control group or decision making management of a corporation.

The control group test was most prevalent in the 1960s and 1970s, until it was rejected in *Harper & Row Publishers, Inc., v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam* 400 U.S. 348 (1971) (by an equally divided court) and implicitly rejected by the Supreme Court in *Upjohn v. United States*, 449 U.S. 383 (1981).

In *Upjohn*, the Court determined that the results of an internal investigation were protected by the attorney client privilege, relying on the following factors: the communication was made to counsel at the direction of corporate supervisors for the purpose of obtaining legal advice; information not available from upper level management was necessary for legal inquiry of counsel; the communication concerned matters within the employees' corporate duties; the employees were aware that the communications were

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being gathered in order to gain legal advice; and, the communications were considered highly confidential by the corporation. *Id.* at 394-95.

Thus, the Court rejected the control group test, but did not enumerate a new test, holding instead that the determination should be made on a case by case basis, *Id.* at 396, emphasizing the importance of a corporation's ability to communicate openly about potential legal issues, and recognizing the importance that middle and lower-level employees can have in such issues. *Id.* at 391.

This case by case approach, in some form or another, has come to be known as the "subject matter" test, and has been more or less followed by most federal and state courts since *Upjohn*. See e.g., *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1492-93 (9th Cir. 1989); *Shriver v. Baskins-Robbins Ice Cream Company, Inc.*, 145 F.R.D. 112 (D.Co. 1992); *Alexander Grant & Co. Litigation*, 110 F.R.D. 545, 547 (S.D.Fla. 1986); *Macey v. Rollins Environmental Services (NJ), Inc.*, 432 A2d 960 (N.J. App. 1981).

But while the caselaw is not always consistent, it is more likely that the privilege will be found to have been properly asserted if the court finds more, rather than fewer, of the *Upjohn* criteria – that the communication at issue was between employees in the know and corporate counsel, was for the purpose of obtaining legal advice, took place at the request or behest of corporate management, was about matters within the scope of the journalist employee's duties and was considered highly confidential by the corporation.

As to waiver, however, there appears to be a bit less leeway and it is most likely that the corporation, not the individual employee, will be able to waive the privilege on behalf of the corporation.

Federal and state courts generally hold that a corporation's management will always have the power to waive the privilege for the corporation. See e.g., *Commodity Futures Trading Commission v. Weintraub*, 105 S.Ct. 1986, 1991 (1985); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1371 (10th Cir. 1997); *U.S. v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996); *Allen v. Burns Fry, Ltd.*, No. 83 C 2915, 1987 US Dist LEXIS 4777 *3 (N.D. Ill. June 8, 1987); *Venture Law Group v. Superior Court*, 118 Cal. App. 4th 96, 102, 12 Cal. Rptr.3d 656 (2004).

This power is normally exercised by the officers and directors, consistent with their fiduciary duties to act in the best interests of the corporation. *Weintraub, supra* at 348.

Indeed, it has been held that former officers and former employees of the corporation do not hold and thus cannot waive the corporation's privilege, *Chen* at 1502, and that the authority to waive the privilege passes to new management upon a takeover or purchase. *Weintraub* at 348.

Can Journalists Waive By Talking to the Media?

However, in the media context, such black and white rules are often less clear in their application. What if you are dealing with a journalist with unlimited access to the media?

Consider, for example, a journalist employee who disagrees with an approach taken by her company. With ample access to the media and arguably without any authorization from the company, she becomes an outspoken critic and discloses what otherwise would have been the corporation's privileged communications. Should this be considered a waiver of the privilege for the corporation? Technically maybe not, but in at least one case the contrary answer was inescapable.

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Ethics Corner

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In *Brown & Williamson Tobacco Corp. v. Wigand*, No. 101378/96, 1996 WL 350827 *6 (S.Ct. N.Y. Feb. 28, 1996) (unpublished), a New York trial court found that CBS waived its corporate attorney-client privilege when employees made repeated public appearances discussing the legal basis for not broadcasting the interview with Jeffrey Wigand.

CBS was not a party in the *Wigand* case and while the majority of the case was about the reporter's privilege, CBS also argued that its employees were not authorized to waive the attorney-client privilege, citing *Weintraub* at 348. Thus their comments to the media should not waive the privilege for the corporation.

One of the disclosures was made by Mike Wallace on the *Charlie Rose Show*, and others included repeated public appearances by *60 Minutes* producer Don Hewitt and other CBS journalists. The court stated that it was hard to believe that CBS had not approved of, or tacitly consented to, the widespread and ongoing public airing of otherwise privileged communications, and thus found CBS waived the attorney client privilege at least with respect to the content of the disclosures. *Id* at *7.

What Can Media Counsel Do?

What guidance can we find to protect the attorney client privilege since *Upjohn* and protecting against its waiver following *Wigand*?

Be prepared. Be prepared for the possibility that the journalist at the center of a controversy might become a renegade, and might feel differently than his corporate employer about asserting or waiving the privilege by public statements.

Lay the best possible groundwork by being clear from the outset in conversations with the journalist that: counsel represents the company, the communication with counsel is taking place at the direction of corporate supervisors for the purpose of obtaining legal advice from the journalist, the journalist has the necessary information concerning the matters at issue which are within the journalist's responsibilities, and the communication is considered highly confidential by the corporation.

When faced with an unhappy or renegade journalist, consider the *Brown and Williamson* case when deciding whether or not to cut the journalist loose. The odds are better that as a former employee the journalist's public statements will not be found to constitute a waiver of the attorney client privilege, but cutting him or her loose might unleash statements which you might otherwise have some power to control. Either way, you should advise your client to make clear its position that the journalist is not authorized to waive the privilege.

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