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MEDIALAWLETTER

Reporting Developments Through July 27, 2005

Appeals Exhausted, New York Times Reporter Judith Miller Jailed for Contempt

Federal Shield Law Bill Gets Hearing in Senate

As has been widely reported, on July 6 *New York Times* reporter Judith Miller was sentenced to 120 days in jail for contempt of court for refusing to reveal confidential source(s) to the federal grand jury investigating whether any government officials violated the Intelligence Identities Protection Act by leaking the name and identity of CIA agent Valerie Plame.

Her confinement for contempt of court followed closely on the heels of the U.S. Supreme Court's decision denying petitions for certiorari in the case. *In re Grand Jury Subpoena,* 397 F.3d 964 (D.C. Cir. Feb. 15, 2004) (Sentelle, Henderson, Tatel, JJ.), *rehearing en banc denied*, 405 F.3d 17, *cert. denied,* 73 USLW 3686, 73 USLW 3702 (U.S. Jun 27, 2005) (No. 04-1507); *see MLRC MediaLawLetter* June 2005 at 17.

The denouement also included Time magazine's decision to comply with the special prosecutor's subpoena, and Matthew Cooper's decision to do likewise after receiving a specific and personal waiver from his source, Presidential advisor Karl Rove.

Time's decision to comply with the subpoena sparked considerable discussion in the journalism community. And the revelation that Rove was Cooper's source has set off a wave of speculation over the ultimate legal and political consequences of the special prosecutor's investigation. *See, e.g., MLRC's MediaLawDaily* July 6 to date.

On the legal front, the notable developments included the special prosecutor's veiled threat of a criminal contempt charge against Miller and the Senate Judiciary Committee's hearing on the proposed federal shield law – which took place under this backdrop.

Criminal Contempt?

On July 1, Miller's lawyers filed a motion with D.C. District Court Judge Thomas Hogan seeking reconsideration of his prior ruling that Miller should be held in confinement for contempt or failing that, that she be sen-

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Appeals Exhausted, New York Times Reporter Judith Miller Jailed for Contempt

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tenced to home confinement. The motion argued in essence that because of Miller's principled motive for silence " confinement ... offers absolutely no realistic likelihood of being effectively coercive."

In a forceful reply brief, Special Prosecutor Patrick Fitzgerald opposed the request arguing that Miller's stance was disputed within the journalist community and never condoned by the courts.

> *"While this Court most certainly recognized that Miller (along with Matthew Cooper and Time Inc.) was acting responsibly and in good faith by appealing the Court's order of October 2004 the Court has made no statement at any time condoning any putative effort by Miller to violate the Court's order after that order was affirmed unanimously by the Court of Appeals, and after Miller's petitions for rehearing and certiorari had been denied. Indeed, such conduct is a crime."*

In a footnote to this paragraph, the Special Prosecutor asked the court to advise Miller of the potential of a criminal contempt charge.

> *"[T]the Court should advise Miller that if she persists in defying the Court's Order that she will be committing a crime.... A clear indication that the Court views defiance of its Order as criminal behavior, as opposed to conduct which can be condoned, may have a positive effect on a contemnor who looks to the views of 'opinion leaders' for support."*

Citing U.S. v. Monteleone, 804 F.2d 1004 (7th Cir. 1986) (civil contemnor subsequently convicted and sentenced for criminal contempt). For more information on the differences between civil and criminal contempt see MLRC's report *Reporter's Privilege: Distinguishing Civil and Criminal Contempt* Jan. 2005.

The special prosecutor added that Miller's decision not to testify may in fact change if during confinement "her 'irresponsible martyrdom' obstructing an important grand jury investigation is seen to undercut, not enhance, the credibility of the press and with it any case to be made for a federal reporter's shield law."

Federal Shield Law Hearing

On July 20, the Senate Judiciary Committee heard testimony from proponents of a Federal Shield Law, including Senator Richard Lugar (R-Ind)and Congressman Mike Pence (R-Ind), sponsors of The Free Flow of Information Act of 2005 S. 1419 and H.R. 3323, and Senator Christopher Dodd (D-Ct) sponsor of a separate proposal.

On hand to speak in favor of the bill were Matthew Cooper and Norman Pearlstine of Time Inc., retired New York Times columnist William Safire, and lawyers Floyd Abrams, Lee Levine and Professor Geoffrey Stone of the University of Chicago Law School.

The written testimony is available online at <http://judiciary.senate.gov/hearing.cfm?id=1579>. And a video stream of the hearing is archived online at www.cspan.org

The supporters of the bill received a generally favorable reception from the Senate Committee. But Deputy Attorney General Paul Comey submitted written testimony opposing the bill stating that it "would create serious impediments to the Department's ability to effectively enforce the law and fight terrorism."

> *For example, obtaining source information may be the only available means of abating a terrorist threat or locating a kidnapped child. Certainly, in the face of a paramount public safety or health concern or a national security imperative, the balance should favor disclosure of source information in the possession of the news media. For example, on September 11, 2001, the U.S. Attorney's Office for the Northern District of California requested authorization to subpoena facsimiles that were sent to a San Francisco, California television station from individuals who had predicted eight weeks earlier that September 11th would be "Armageddon." Under the bill, the Government would have been unable to obtain that information.*

A full report is on the hearing appears at the end of this newsletter.

D.C. Circuit Upholds Contempt Citations of Four Journalists in Wen Ho Lee Matter

By Charles D. Tobin and Deanna K. Shullman

The D.C. Circuit Court of Appeals has upheld contempt citations against four journalists who refused to reveal their sources to Wen Ho Lee, the scientist suing the government for leaking information prior to his felony conviction for mishandling classified data. *Lee v. Dept. of Justice, et al.*, Case Nos. 045302, 04-5321, 04-5322, 04-5323, 2005 WL 1513086 (D.C. Cir. June 28, 2005).

The decision in this civil case came one day after the U.S. Supreme Court declined certiorari of the *New York Times* and *Time* magazine reporters' contempt citations arising out of the grand jury investigation of the leak of a CIA agent's identity.

Background

Wen Ho Lee was indicted in 1999 on charges of mishandling classified nuclear information while Lee worked as a computer researcher at the Los Alamos National Laboratory. Lee, initially under intense investigation on suspicion of espionage, in 2000 pleaded guilty to a single count of unlawful retention of national defense information after the government was unable to establish that he had transferred the data to China, as originally suspected. At Lee's sentencing, the federal judge in New Mexico apologized to the scientist for his months-long incarceration while the government had interrogated him.

Lee had been under surveillance for several years, but for reasons the government never fully explained, had remained in his sensitive position at the laboratory. In a year-long series of leaks about the investigation, various Clinton administration officials within the departments of Energy and Justice, and the FBI, all pointed fingers at each other about why Lee had remained with access to nuclear codes. The coverage also focused on weaknesses in the espionage case, reporting on the doubts of many knowledgeable about the investigation that the government would ever be able to prove that claim.

Lee ultimately filed a claim under the Privacy Act, 5 U.S. C. 552a, in U.S. District Court in Washington, D.C. against all three of these agencies. The entire lawsuit alleges Lee's rights were violated by the willful leaking to the press of information about him maintained by the government in a "system of records" – the gravamen of a Privacy Act claim. Lee claims that in addition to truthful, private information about him, the government also leaked false information that damaged his reputation and caused him emotional harm.

After deposing 20 government witnesses, including former FBI Director Louis Freeh and former Energy Secretary Bill Richardson, Lee issued subpoenas *duces tecum* to five non-party journalists: Pierre Thomas (at the time with CNN, now with ABC News), Jeff Gerth and James Risen (both with the *New York Times*), Robert Drogin (with the *Los Angles Times*), and Josef Hebert (with the Associated Press). All five journalists moved to quash on the basis of the journalists' privilege in civil cases.

District Court Decision

The district court, Judge Thomas Penfield Jackson, in October 2003 denied the motions to quash. Without discussing most of the journalists individually, he collectively ordered them to sit for deposition and answer any questions regarding the identity of their sources of information about Lee. *Lee v. United States Dep't of Justice, et al.*, 287 F.Supp. 2d 15 (D.C. Cir. 2003). The journalists each declined at their depositions to answer certain questions on the basis of the journalist's privilege.

In August 2004, Lee obtained an order from the district court adjudging each of the five journalists in civil contempt and fining them $500 per day until compliance with the court's underlying order. The fine was stayed pending appeal. *Lee v. United States Dep't of Justice, et al.*, 327 F. Supp. 2d 26 (D.C. Cir. 2004).

Appeals Court Decision

The D.C. Circuit heard consolidated oral argument in all five journalists' appeals on May 9, 2005. Seven week later, on June 28, 2005 – one day after the Supreme Court turned aside the appeals of another D.C. Circuit panel's decision affirming journalists Judith Miller's and Matt Cooper's contempt citations in the Valerie Plame grand jury investigation – the circuit issued its opinion upholding the contempt citation for four of the five *Wen Ho Lee* jour-

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D.C. Circuit Upholds Contempt Citations of Four Journalists in Wen Ho Lee Matter

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nalists. *Lee v. United States Dept. of Justice, et al.*, Case Nos. 045302, 04-5321, 04-5322, 04-5323, 2005 WL 1513086 (D.C. Cir. June 28, 2005).

It is important to note that Circuit Judge David Sentelle, an appointee of President Reagan, wrote both the controlling opinion in the Miller-Cooper decision (*In re Grand Jury Subpoena*, 397 F.3d 964 (2005)) and the unanimous opinion in the *Lee* case. The other judges on the *Lee* panel were Raymond Randolph, an appointee of President George H.W. Bush, and Judith Rogers, appointed by President Clinton.

Contrary to the concerns of many, the D.C. Circuit in *Lee* did not outright rescind all protections of privilege in civil cases. Instead – although arguably in lip service only, given their cursory application of the privilege to the facts under review – the panel acknowledged the vitality of *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), a civil Privacy Act decision in which the court had affirmed the quashing of journalists' subpoenas on grounds of a First Amendment privilege in civil cases. The *Lee* panel reaffirmed that "'in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege. '" *Lee*, 2005 WL 1513086 at p. 8 (quoting *Zerilli*, 656 F.2d at 712). The recognition of a First Amendment privilege protecting sources in civil litigation contrasts with the court's refusal earlier this year to recognize a similar privilege with respect to grand jury proceedings in the Miller-Cooper decision.

***The D.C. Circuit in* Lee *did not outright rescind all protections of privilege in civil cases. Instead, although arguably in lip service only, the panel acknowledged the vitality of* Zerilli v. Smith.**

Applying *Zerilli*, the D.C. Circuit in the *Lee* decision applied an abuse of discretion standard, rejecting the journalists' arguments that application of the privilege in their case required *de novo* review. The D.C. Circuit, without any further analysis and no individualized discussion of any of the reporters, held that the information Lee sought went to the "heart of the case" as the *Zerilli* precedent requires: "If [Lee] cannot show the identities of the leakers, Lee's ability to show the other elements of his Privacy Act claim . . . will be compromised."

The court rejected the journalists' contentions that their testimony would be cumulative of each other's, stating that the journalists may have discussed the Lee case with different sources, and speculating that the argument could excuse all journalists any time information is leaked to more than one person.

On the second part of the *Zerilli* test, exhaustion of alternative sources, the D.C. Circuit in *Lee* also conducted no individual review of the record as to each reporter. Rejecting any sort of quantitative analysis of the number of alternative sources deposed, the court held that exhaustion must be analyzed on a case by case basis, and, again deferring to the lower court's discretion, held that the trial judge is in the best position to determine if alternative sources were reasonably exhausted.

The court further held that it is not necessary that Lee depose "every individual who conceivably could have leaked the information" and that the list of a hundred potential alternatives from the record, which journalists Gerth and Risen detailed in their briefs, "only accentuate[d] the unreasonable burden of discovery they attempt to place on a plaintiff." *Id.* at 14.

The court concluded that the district court had not abused its discretion in finding journalists James Risen, Josef Hebert, Bob Drogin, and Pierre Thomas had violated the order requiring them to answer questions about the identity of their sources. The D.C. Circuit held, however, that *New York Times* reporter Jeff Gerth never violated the court's order, agreeing with his argument that the he had been entitled to testify that he did not know the identity of most sources in articles he co-wrote with James Risen, and that the one question he refused to answer was ambiguous enough to cover confidential sources in stories other than the Lee investigation. The court reversed Gerth's contempt citation.

The four journalists have advised the district court that they intend to seek rehearing in the D.C. Circuit at the end of July. The district court, with Judge Rosemary Collyer presiding following Judge Jackson's retirement last year, will consider a contempt motion against a sixth journalist, Walter Pincus of the *Washington Post*, at a hearing on August 2.

Charles D. Tobin, with the Washington, D.C. office of Holland & Knight LLP, and Deanna K. Shullman with the firm's Ft. Lauderdale office, represent journalist Pierre Thomas in this matter.

Alabama Shield Law Does Not Protect Magazines

Court Reverses Order to Compel on Qualified Privilege Grounds

By Gary Huckaby

The Eleventh Circuit Court of Appeals this month handed down its opinion on a reporters' privilege issue in the high profile libel case brought by Mike Price, former University of Alabama football coach, against *Sports Illustrated* magazine. *Price v. Time, Inc.*, No. 04-13027, 2005 WL 1653730 (11th Cir. July 15, 2005) (Carnes, Pryor, Forrester, JJ.).

Ruling on an interlocutory appeal taken by defendant Time, Inc., the Court held that *Sports Illustrated* was not protected by Alabama's Shield Law against the compelled disclosure of its confidential sources because it was a magazine and "magazines" were not specifically listed in the statute. In considering the reporter's privilege under the First Amendment, the Court reversed the trial judge on its ruling that Price had exhausted all reasonable alternative means to discover the identities of the confidential sources and that the magazine must now disclose its confidential source.

The Court indicated that defense counsel would have an ethical duty to advise the trial court if the confidential source testified falsely during the required depositions.

Background

The interlocutory appeal was taken by *Sports Illustrated* and its author, Don Yaeger ("Yaeger"), in a libel case filed against it by Price in 2003. The case was first filed in state court but was removed by the defendants to the U.S. District Court for the Northern District of Alabama. The magazine had published an article about certain conduct of Price while he was in Pensacola, Florida, for a pro-am golf tournament in the Spring of 2003. The article reported that while in Pensacola, Price, among other things, had visited a strip club and that he later engaged in sex with two women in his hotel room.

The reporter, Yaeger, relied upon a confidential source for the reports about sexual activity in the hotel room. Price admitted that there was a woman in his hotel room and that she ordered approximately $1,000 in food and beverage from room service, but he denied having sex with her.

Early in the discovery process in the case, Price sought the identity of the confidential source from Yaeger and *Sports Illustrated*. The defendants objected, relying on the Alabama Shield Law (Ala. Code Sec. 12-21-142) and the First Amendment reporter's privilege set out in *Miller v. Transamerican Press, Inc.*, 621 F. 2d 721 (5th Cir.), *modified on reh'g*, 628 F. 2d 932 (5th Cir. 1980) (per curiam). The trial judge overruled *Sports Illustrated's* and Yaeger's objections and ordered disclosure of the confidential source.

Alabama's Shield Law provides that no employee of any "newspaper, radio broadcasting station, or television station, while engaged in a news-gathering capacity," shall be compelled to disclose his or her sources. Magazines are not specifically mentioned. *Sports Illustrated* and Yaeger contended that the term "newspapers" should be construed to include "magazines."

11th Circuit Decision

The Eleventh Circuit panel held that the plain meaning of the statute did not include magazines and that the defendants were not entitled to the absolute privilege of the statute.

The Court, however, reversed the trial judge on its ruling ordering disclosure, stating that the exhaustion requirement under *Miller* had not been satisfied. (*Miller* holds that a libel plaintiff seeking disclosure of a confidential source must exhaust all other reasonable avenues to discover the identity before the court can order disclosure by the reporter.) In this case, no depositions had been taken of the women most likely to have knowledge of the relevant events.

The court opined that upon taking the depositions of these four women, the plaintiff would have exhausted all other reasonable avenues.

In its comments on the exhaustion issue, the Court indicated that defense counsel would have an ethical duty

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Alabama Shield Law Does Not Protect Magazines

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to advise the trial court if the confidential source testified falsely during the required depositions. The assurance that counsel would advise the trial court of false testimony was "important because it assures us the identity of the confidential source (or perhaps the absence of one) is virtually certain to be discovered either from the deposition testimony of the women or through the ethically compelled disclosures of counsel for the defendants, correcting any material testimony that he knows to be false."

Conclusion

While the decision of the Court upholding the reporter's privilege under the First Amendment is pleasing, its narrow construction of the shield law is disappointing. The shield law decision presents questions under the First Amendment and Equal Protection Clause since it accords protection to one form of media to the exclusion of another. We urged the Court to reasonably construe the statute in a manner that would avoid these constitutional problems.

The ethical duty on defense counsel set forth by the Eleventh Circuit also raise serious concerns. Counsel has a duty to avoid presenting false evidence in the furtherance of his client's case. The Court's opinion would expand this duty to require counsel to remedy false testimony even by an adverse witness or where the false evidence is harmful to his client's case. The implications of the Court's decision may reach far beyond this case. In virtually every case at least one witness might be expected to offer testimony that is contrary to what a client has told defense counsel in confidence. Presuming you believe your client on the issue, are you now to disclose to the court this false adverse testimony?

No decision had been made as to whether further appellate review would be sought.

Gary Huckaby of Bradley Arant Rose & White LLP, in Huntsville, Alabama, represents the defendants in this case. Plaintiff is represented by Stephen D. Heninger, Heninger, Burge, Vargo & Davis, LLP, Birmingham, Alabama.

IN NEXT MONTH'S
MLRC *MediaLawLetter*
ETHICS CORNER...

THE *Ethics Corner* COLUMN WILL DISCUSS THE ETHICAL DUTIES OF DEFENSE COUNSEL TO REMEDY FALSE TESTIMONY OF WITNESSES

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Criminal Defendant Not Entitled to Pierce California Shield Law

Addressing the interplay of California's Shield Law, Cal. Const., art. I § 2(b), and a criminal defendant's right to a fair trial, an appeals court last month affirmed a double-murder conviction, rejecting the defendant's claim that she should have been allowed to pierce the state shield law to cross examine a reporter about unpublished information from an interview she gave to the reporter. *People v. Vasco*, No. G03196, 2005 WL 1533048 (Cal. App. June 30, 2005) (Aronson, J.).

Background

The defendant Adriana Vasco was convicted of first and second degree murder for participating in a murder for hire scheme. Vasco gave a jail house interview to *Orange County Register* reporter William Rams in which she described the murders and made exculpatory claims of coercion. Her statements were reported in paraphrases and direct quotes.

The Court was unmoved by the defendant's "indict the press" strategy.

The prosecution called Rams as a witness at trial to testify about the information published in his article. The trial court denied defense counsel's request to question the reporter on how he obtained the interview, whether he took notes or made a recording and whether the defendant made exculpatory statements that were not published in the article. The court found after proffers that there was no reasonable possibility that the answers to such questions would materially assist the defense. Defense counsel then chose not to cross examine the reporter.

Appeals Court Decision

On appeal, the defendant argued that the application of the Shield Law violated her right to confrontation and to a fair trial, attempting to invoke the specter of recent press scandals to question the credibility of the reporter. The effort received prominent news coverage in Southern California.

The Court was unmoved by the defendant's "indict the press" strategy, pointing out that she had presented no specific reason to question the accuracy of the *Register's* reporting and had even corroborated the reporting at trial in her own testimony.

The court appeared to accept the argument that when a reporter is required to testify for the prosecution on direct examination (ostensibly as to published information only) and the defendant then establishes that her fair trial rights would be compromised unless she is permitted to pierce the shield law, the proper remedy is to strike the reporter's testimony altogether or keep the reporter off the stand in the first instance. This issue has not been previously addressed by a court of appeal (at least not in a published opinion).

On a more negative note, the court in dicta strongly questioned in a footnote whether a reporter meets the threshold test for invoking the shield law if the party who seeks unpublished information is the source of that information. Describing the issue as "troublesome," the court noted that there is no risk that the confidence of the source will be breached in such instances; nor will the reporter's ability to gather news be hindered.

This limitation on the Shield Law was "hinted" at in another appellate decision, *People v. Sanchez*, 12 Cal. 4th 1, 56 n.3 (1995), but the court did not resolve the issue here because the defendant had not raised it.

James Grossberg and Ashley Kissinger, Levine Sullivan Koch & Schulz; and Kelli Sager and Alonzo Wickers IV, Davis Wright Tremaine, Los Angeles, represented Freedom Communications and reporter William Rams as Amicus Curiae.

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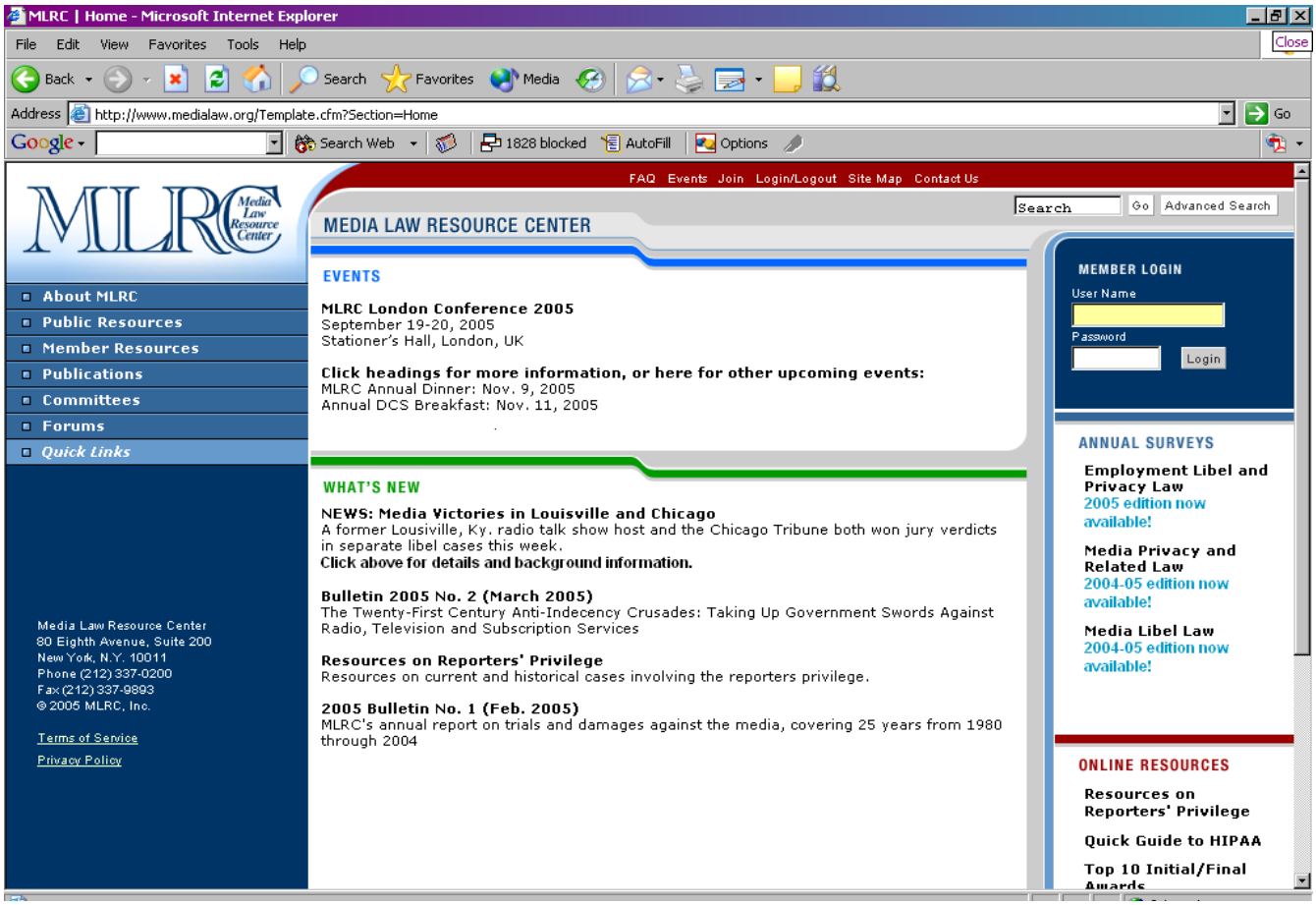

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Computer Plucked from Trash Leads to Prior Restraint Battle

By Bernard J. Rhodes

The evening before the semi-annual "Bulky Item Pickup Day" in Mission Hills, Kansas – a tony suburb of Kansas City – is better than Christmas Eve to scavengers. That evening Dr. Daniel Bortnick, a plastic surgeon with the Monarch Plastic Surgery group, set his old office computer out at the curb in front of his house, expecting it to be picked up the next day by the trash hauler. Before that could happen, however, the computer was picked up by a local scavenger.

A day or two later, the scavenger purchased a stick of RAM memory, inserted it in the computer, and booted up the computer. What he found was startling: scores of "before" and "after" photographs of Monarch plastic surgery patients, as well as the names of 600 patients, financial information on the practice, and even the social security numbers of Bortnick's partners.

Plaintiff analogized the instant dispute to the prior restraint upheld in the Kobe Bryant case.

The scavenger then called Tim Vetscher, a reporter for KCTV, the CBS-affiliate in Kansas City, and invited him to view the contents of the computer. Later, the scavenger allowed KCTV to copy the contents of the "My Documents" folder of the discarded computer.

Vetscher then began calling patients whose photographs were on the computer in an effort to obtain an interview with one of the patients. One of the patients Vetscher called then called Monarch, whose lawyer contacted the station and demanded that the station (1) not use any of the information from the computer, and (2) stop contacting Monarch's patients.

The station responded by pointing out that Bortnick had abandoned all rights in the computer when he set it out at the curb and that the patient-physician privilege belonged to the patients (and not the doctor) and that KCTV was therefore free to speak to any patient who chose to talk to the station.

Claim for Injunctive Relief

Three weeks after Monarch's lawyers first contacted KCTV about the computer, Monarch filed a lawsuit against Meredith Corporation, the owner and operator of KCTV, in Johnson County, Kansas District Court. The lawsuit alleged no cognizable cause of action and the one count in the petition was titled "Claim for Injunctive Relief."

At the same time it filed the suit, Monarch obtained an *ex parte* temporary restraining order against the station from Johnson County District Court Judge Kevin P. Moriarty. The order prohibited the station from (1) contacting any Monarch patient whose information was on the discarded computer, (2) broadcasting any photographs or patients' names from the computer, and (3) generically "using" any of the "data or information retrieved from Monarch's computer" for any purpose.

While the TRO stated on its face that it was issued at 8:30 a.m. that day, Monarch's counsel did not give the station notice of the TRO until that afternoon, a Friday.

On Sunday, June 19, the station removed the lawsuit to the United States District Court for the District of Kansas. The following morning the station filed an emergency motion to dissolve the TRO. That afternoon District Court Judge John W. Lungstrum scheduled a conference for Tuesday afternoon.

At the conference Judge Lungstrum asked KCTV's counsel, "as an officer of the court," to advise the court when KCTV intended to air its report on the discarded computer. Counsel responded that the report was scheduled to air the following week.

Judge Lungstrum then raised, *sua sponte*, the question whether he had subject matter jurisdiction over the lawsuit. He explained that the state court petition sought an injunction only, and not money damages. He said, therefore, he had serious doubts about whether KCTV had met the amount-in-controversy requirement for diversity jurisdiction. He then ordered KCTV to show cause by 5 p.m. the following day why he should not dismiss the matter for lack of subject matter jurisdiction.

In its response to the show cause order, KCTV explained that Monarch alleged in its state court petition that without the requested injunction KCTV was going to broadcast a "sensationalized" story that would cause it

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irreparable harm. The station further pointed out that the petition alleged that without the requested injunction Monarch would lose current patients and have a difficult time attracting new patients.

KCTV then provided evidentiary support for the fact that Monarch's business generated millions of dollars a year in revenue and that any diminution in that business, therefore, would likely exceed $75,000. KCTV further argued that the state court petition further alleged damaged to the patients' privacy rights and, by referencing plaintiffs' verdicts in other privacy cases (with the assistance of MLRC research attorneys), those rights were worth more than $75,000.

Judge Lungstrum was unimpressed. On the afternoon of Friday, June 24, he remanded the case to state court. He ruled that while KCTV's allegations of financial damage might have been sufficient if KCTV had been the plaintiff, they were insufficient to support KCTV's burden of supporting its removal. He explained that while a federal court plaintiff's allegations of jurisdiction are entitled to a presumption of validity, a removing defendant's allegations are not entitled to any presumption. Instead, he ruled that because the state court petition did not allege damages in excess of $75,000, he did not have subject matter jurisdiction.

KCTV immediately refiled its emergency motion for dissolution of the TRO with the state court that same afternoon. Monarch filed its opposition that evening. In it plaintiff analogized the instant dispute to the prior restraint upheld in the Kobe Bryant case. Specifically, Monarch asserted that just as the Colorado Supreme Court had held in that case that the victim's privacy right outweighed the First Amendment right of the media in reporting on the inadvertently e-mailed transcript of a court hearing in which the victim testified as to her prior and subsequent sexual history, the privacy rights of Monarch's patient outweighed KCTV's First Amendment rights.

KCTV filed its reply on Sunday. With the invaluable assistance of Steve Zansberg from Faegre & Benson (who provided pleadings and background on the Bryant case), KCTV explained why the Kobe Bryant case was wholly inapplicable.

HIPAA Rights Cited

At 8 a.m. on Monday, June 27, Johnson County District Court Judge Moriarty – who had originally granted the TRO – heard oral argument on KCTV's motion to dissolve the TRO. At the conclusion of the hearing, Judge Moriarty continued the prior restraint. In so ruling he found that the TRO was valid because the patients' "HIPAA privacy rights" outweighed the station's First Amendment rights.

The next day, after waiting on a copy of the transcript of the prior day's hearing, KCTV filed an emergency petition for writ of mandamus with the Kansas Supreme Court. In it KCTV pointed out that HIPAA does not create a private right of action and that, in any event, it only applies to health care providers, and not to the media. KCTV further argued that even if HIPAA did apply to the media, it was axiomatic that the constitutional right contained in the First Amendment necessarily outweighed a statutory right created by Congress.

When the Kansas Supreme Court refused to rule by Thursday afternoon, the station made the decision to go ahead with the news report that evening.

Station Disobeys Injunction

The station then waited. And waited. When the Kansas Supreme Court refused to rule by Thursday afternoon, the station made the decision to go ahead with the news report that evening – as it had promised its viewers in promotional spots that had been airing since Sunday.

The report contained a discussion of Bortnick's carelessness in discarding the computer, explained what was on the computer and featured interviews with a patient (in silhouette) who had had breast reduction surgery and whose photograph was on the computer, as well as a local plastic surgeon who explained that Bortnick should have never have had the computer at home, and of course should have never set it out at the curb.

The report included the "before" photograph from the computer of the woman who was interviewed in the report. The report also contained a screenshot showing file names from the computer, though none of the file names contained patients' names.

The report was accompanied by an editorial from the station's general manager in which he explained that the station went forward with its report despite the court's or-

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der because the story was too important to wait and because KCTV never intended to broadcast photographs of patients without their consent, nor did it ever intend to "out" patients who had had plastic surgery by using their names on-air.

Following the airing of the report, on July 5, Monarch obtained leave from Judge Moriarty to conduct expedited discovery in anticipation of a hearing on Monarch's motion to convert the still-pending TRO into a preliminary injunction. One week later – before Monarch had served its discovery requests – a purported class action lawsuit was filed against Monarch and Bortnick by two patients alleging negligence, invasion of privacy, breach of fiduciary duty and the tort of outrage.

Two days later, Monarch served just two discovery requests on KCTV: a document request for copies of the information the station had copied from the discarded computer and an interrogatory asking the station to identify all persons who had been shown the computer's contents.

KCTV responded by providing a copy of the data from the computer and by explaining that the only person outside the station who had been shown any of the information from the computer was the Monarch patient who had been interviewed and who had been provided a copy of her "before" photograph from the computer. Later the same day Monarch unilaterally dismissed its lawsuit against KCTV.

In the accompanying order of dismissal Judge Moriarty expressly dissolved his prior restraint order. Following receipt of the order dissolving the TRO, KCTV notified the Kansas Supreme Court – which had yet to rule on the pending petition for writ of mandamus – that the prior restraint order had been lifted.

KCTV had recently broadcast two similar reports about businesses that had carelessly discarded confidential information: one concerned a title company which discarded loan applications and other financial records in a dumpster, while the other concerned an employee of a national brokerage firm who had discarded a computer which contained financial records of customers.

In both instances, following the airing of the report on the businesses' actions, KCTV destroyed the confidential data it had acquired. In fact, in one of the two cases the station included in its broadcast report the fact that it was going to destroy the confidential data. Pursuant to that past practice, following the dismissal of Monarch's lawsuit and the dissolution of the prior restraint, KCTV destroyed all remaining copies of the computer data.

The class action lawsuit against Monarch and Bortnick is pending.

Bernard J. Rhodes, David C. Vogel and Carrie Josserand of Lathrop & Gage L.C. represented KCTV. Monarch Plastic Surgery and Daniel Bortnick were represented by Kirk Goza of Goza & Honnold, LLC, J. Eugene Balloun, David Rameden, Neely L. Fedde of Shook, Hardy & Bacon LLP, and Jonathan A. Bortnick of Bortnick, McKeon, Sakoulas & Schanker, PC.

MLRC would like to thank the MLRC Summer Interns — Michael Eskenazi, Fordham Law School; Miriam Osner, Columbia Law School, and Elizabeth Robertson, University of Houston Law School — for their contributions to this month's issue of the *MediaLawLetter*

Judge Issues Prior Restraint Against Publishing Suspect's Mug Shot Pending Completion of Photo Line-up

By Steven D. Zansberg

On Wednesday, July 6th, a state court judge in Colorado issued an order enjoining two newspapers (*The Boulder Daily Camera* and *The Longmont Daily Times-Call*) from publishing the mug shot photograph of Phillip Bernard Martinez, who had been arrested on charges of second-degree assault and ethnic intimidation. Martinez is accused of attacking a bi-racial University of Colorado student, Andrew Sterling, on June 3, and breaking his jaw.

Boulder County Court Judge John Stavely issued the order just hours after the Boulder County Sheriff's Office had released the mug shot photo to *The Boulder Daily Camera* newspaper and the newspaper had already posted Martinez's mug shot on its website at www.dailycamera.com.

The prior restraint order was issued at the request of Boulder District Attorney Mary Lacy, on grounds that the D.A. needed to conduct a photo line-up with potential witnesses. The D.A. argued that "[p]ublishing the suspect's photograph in the newspaper has the serious possibility of tainting the remainder of the investigation." That same day, another Colorado state court judge, Boulder County District Judge Roxanne Bailin, sealed the arrest warrant affidavit, and the remainder of the court file concerning Phillip Martinez, for sixty days.

Although *The Boulder Daily Camera* maintained Martinez' mug shot photograph on its website, it opted not to publish his photograph in the print edition of its newspaper in violation of Judge Stavely's order. Instead, on Friday, July 8, attorneys for *The Daily Camera* filed a motion asking the judge to reconsider and to rescind the prior restraint order. Judge Stavely set the matter for a hearing on Thursday, July 14th.

However, on Tuesday, July 12th, the District Attorney filed a pleading asking the judge to lift the prior restraint order, citing the fact that the photo line-up had been completed. Accordingly, Judge Staveley rescinded his order, and vacated the hearing on *The Boulder Daily Camera*'s challenge to that order.

Steven Zansberg is a partner with Faegre & Benson in Denver. The Boulder Daily Camera *was represented by Marc Flink of Baker & Hostetler's Denver office.*

Third Circuit Affirms Injunction Against "Tax Protestor" Website

The Third Circuit affirmed a permanent injunction against the publisher of a website selling "bogus strategies" to individuals looking to avoid the payment of income tax. *United States v. Bell*, No. 04-1640, 2005 WL 1620325 (3d Cir. July 12, 2005) (Scirica, Rendell, Fisher, JJ.).

Background

Defendant Thurston Paul Bell, a "professional tax protestor," ran a website offering his services to clients looking to employ the "U.S. Sources argument" as a means of avoiding the payment of income taxes. According to the argument, domestically earned wages of U.S. citizens are not taxable because such wages are not specifically mentioned in the IRS's list of items of gross income that "shall be treated as income from sources within the United States." *See* 26 U.S.C. § 61(a).

The government initially sought and obtained a preliminary injunction against Bell which subsequently was turned into a permanent injunction. Pursuant to the injunction Bell was prohibited from

> "directly or indirectly, by means of false, deceptive, or misleading commercial speech … organizing, promoting, marketing or selling … the tax shelter, plan or arrangement known as the 'U.S. Sources argument' … or any other abusive tax shelter, plan or arrangement that incites taxpayers to attempt to violate the internal revenue laws,"

or from assisting others in doing so.

Defendant was further required to contact all clients and potential clients to inform them of the order and their potential liability for filing fraudulent returns; to remove "false commercial speech, and materials designed to incite others to violate the law (including tax laws)" from his website and post a copy of the court's order; and to inform the government of the identities of all individuals whom he had helped file tax returns.

The Third Circuit affirmed that the speech on Bell's website was predominately commercial speech even though it was coupled with "token political commentary."

Third Circuit Decision

On appeal, the Third Circuit affirmed that the speech on Bell's website was predominately commercial speech even though it was coupled with "token political commentary." The Court held that information about the U.S. Sources argument was not subject to First Amendment protection in that it was misleading and promoted unlawful activity.

The injunction did not improperly restrict Bell's First Amendment right to engage in protected political speech in so far as it forbid him from engaging in non-commercial speech that incited others to violate the tax laws. The Court disagreed with the district court's determination that the speech could be enjoined under the incitement test of *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Instead, the Court construed the injunction narrowly to ban "false commercial speech and aiding and abetting violations of the tax laws rather than *Brandenburg* incitement" in order to avoid raising constitutional issues.

The Court further held that ordering defendant to post the injunction on his website was not compelled speech, but a reasonable regulation "to prevent deception of customers."

Finally, the Court ruled that requiring defendant to provide the government with a list of people who bought his products did not violate his right of free association, noting that "the government's interest in enforcement of the tax laws outweighs rights of association that may be implicated by disclosure."

The defendant was represented by Anthony N. Thomas and Jeffrey J. Wood of Thomas & Associates, Harrisburg, PA. Paula K. Speck of the U.S. Department of Justice, Tax Division argued the appeal for the government.

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Seventh Circuit Affirms Decision For *Chicago Sun-Times* Against Michael Jordan's Mistress

By Damon Dunn

A *Chicago Sun-Times* column about Michael Jordan's former mistress could be innocently interpreted as describing a "gold digger" rather than a prostitute, the Court of Appeals for the Seventh Circuit has ruled. *Knafel v. Chicago Sun-Times,* No. 04-2152, 2005 WL 1523209 (7th Cir. Jun 29, 2005) (Evans, Bauer, Flaum, JJ.). The Court unanimously affirmed the dismissal of Karla Knafel's suit for defamation *per se* against the *Chicago Sun-Times*.

Background

Knafel had sued over a column authored by the *Sun-Time's* Richard Roeper. The column, headlined *"Is Karla Knafel's Affection Really Worth $5million?,"* discussed Knafel's ongoing lawsuit against the NBA star over an alleged promise to pay her $5 million for, among other things, keeping quiet about their affair.

Knafel claimed that she was defamed because Roeper's column accused her of committing the crime of prostitution. Roeper's column pondered what female groupies expect to obtain from encounters with celebrities. He wrote that one possibility is that "there are some women who see a famous horny guy, blink their eyes and hear the ka-ching of a cash register. Women like Karla Knafel."

Roeper also explained his perspective on Knafel's lawsuit against Jordan:

> In other words, you had sex with a famous, wealthy man, and you claim he promised to pay you $5 million to keep quiet about it, and now you want your money.

Roeper summed things up by writing:

> Knafel was once an aspiring singer. She's now reportedly a hair designer. But, based on the money she's been paid already and the additional funds she's seeking in exchange for her affair with Jordan, she's making herself sound like someone who once worked in a profession that's a lot older than singing or hair designing.

Knafel's suit alleged that Roeper's column asserted that her sexual encounters with Jordan rendered her a prostitute. She reasoned that, because prostitution is criminal, injury to Knafel's reputation should be presumed under defamation *per se*.

The *Sun-Times* moved to dismiss the case, arguing that Knafel had failed to state a claim upon which relief could be granted. Knafel responded by moving to take discovery, including depositions of Roeper and his editors. District Court Judge Amy J. St. Eve stayed Knafel's request for discovery and ultimately dismissed the case with prejudice.

Judge St. Eve applied the "innocent construction rule," under which a party cannot maintain an action for defamation *per se* if the statement is reasonably capable of an innocent construction. She found the statements could be "reasonably read to impute to Knafel's avarice rather than the commission of prostitution." *See MLRC MediaLawLetter* April 2004 at 11.

Knafel appealed, arguing that the District Court should have allowed discovery before entering a dismissal. She also argued that the District Court could not dismiss the case under Fed. R. Civ. P. 12(b)(6) under the recent Seventh Circuit precedent of *Muzikowski v. Paramount Pictures*, 322 F.3d 918 (7th Cir.2003).

Knafel argued that *Muzikowski* requires that "innocent construction" be treated as a question of fact in federal court rather than a question of law and that her case must be decided by a jury rather than by a judge. Knafel also contended that the District Court improperly relied on court records in the *Jordan v. Knafel* case when granting the *Sun-Times'* motion to dismiss.

Seventh Circuit Decision

The Seventh Circuit opinion, authored by Judge Evans, dubbed Knafel's argument that the District Court looked outside the federal pleadings as an "air ball" bereft of a demonstrable foundation.

Turning to the merits, the Court held that 1) Knafel was not entitled to take discovery, 2) the innocent con-

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Seventh Circuit Affirms Decision For Chicago Sun-Times Against Michael Jordan's Mistress

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struction rule can be decided on a motion to dismiss in federal court, and 3) the column was not defamatory as a matter of law because Roeper did not necessarily imply that Knafel committed the crime of prostitution.

Reasoning that criminal acts of prostitution involve a "discrete event" Judge Evans wrote:

> The most likely interpretation of the words is that Knafel is a gold digger, a woman who wants a longer term relationship with a man because of his money, not one who would look at a wealthy man and see a chance to make a few quick bucks (or even quite a few quick bucks) for a one-time encounter.

Knafel v. Chicago Sun-Times, 2005 WL 1523209 at *4.

The Court also stated that Roeper's reference to Knafel working in an "older" profession implied a reference to prostitution, but also could be interpreted to mean that she was demeaning herself for money, not necessarily selling sex. The words "sound like" implied similarity but not identity.

Roeper's reference to Knafel working in an "older" profession implied a reference to prostitution, but also could be interpreted to mean that she was demeaning herself for money, not necessarily selling sex.

In determining that Roeper's column was capable of an innocent construction, the Court relied on two recent Illinois appellate decisions that also involved *Sun-Times* stories, *Salamone v. Hollinger International, Inc*., 807 N.E.2d 1086 (2004), which held that the term "reputed mobster" was subject to an innocent construction and *Harrison v. Chicago Sun-Times*, 793 N.E.2d 760 (2003), which held that a headline stating the plaintiff "kidnapped" her daughter should, as a matter of law, be innocently construed as not describing a crime.

The Seventh Circuit's *Knafel* decision clarifies the reach of *Muzikowski*, in which the Court had reversed the dismissal of a libel complaint on innocent construction grounds as improvident under Rule 12(b)(6). The Seventh Circuit explained that *Musikowski* holds that motions to dismiss will be denied in libel cases only where the question of innocent construction cannot be resolved by reference to the pleadings, such as where the plaintiff is not named in the offending publication.

Knafel thereby limits one incentive for a plaintiff to sue in federal, as opposed to Illinois courts. All courts in Illinois are required to apply the innocent construction rule as a threshold test for pleading defamation *per se*.

Damon Dunn of Funkhouser, Vegosen, Liebman & Dunn, Ltd. represented the Chicago Sun-Times and Michael T. Hannafan, Blake T. Hannafan, and Nicholas A. Pavich of Michael T. Hannafan & Associates, Ltd. represented Knafel.

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Eighth Circuit Affirms Summary Judgment Over Air Safety Rating

By John Borger

If Aviation Charter, Inc., owner of the plane that crashed and killed U.S. Senator Paul Wellstone of Minnesota days before the 2002 elections, thought that it would have an easier time suing a newspaper's source rather than the paper itself for statements critical of its safety record, it must have been disappointed on July 21, 2005 when the Eighth Circuit affirmed summary judgment in favor of the company which had given it a poor safety rating and commented on that rating in an interview with the *Star Tribune*. *Aviation Charter, Inc. v. Aviation Research Group/US and Joseph Moeggenberg*, Civ. No. 04-3040, 2005 WL 1691643. (Wollman, Gibson, Colloton, J.J.).

A year earlier, District Court Judge Paul Magnuson held that the concededly public-figure plaintiff could not show malice on the part of Aviation Research Group/US (ARGUS), or its president, Joseph Moeggenberg. *Aviation Charter, Inc. v. Aviation Research Group/US and Joseph Moeggenberg*, 2004 WL 1638176 (D. Minn. 2004); *see also MediaLawLetter* August 2004 at 26.

The Eighth Circuit did not even have to reach the malice question, however. It determined that the allegedly defamatory statements specified by the plaintiff either were not false, were not defamatory in the context of the overall newspaper article, or were not susceptible of being proven either true or false. "In analyzing a defamation claim," the court wrote, "we must consider the context within which the statement was made."

The news coverage that led to the litigation began in the months after the fatal crash of the senator's small plane in northern Minnesota, when the *Star Tribune* published numerous articles about the charter company, its pilots, and its owners. Its January 16, 2003, article entitled "Wellstone charter firm got poor safety evaluation," described the pre-crash conclusions of ARGUS, an aviation consultant that sells information regarding safety ratings of air charter service providers to businesses, government agencies, and other consumers.

ARGUS compiles historical incident information from public files at the Federal Aviation Agency and the National Transportation Safety Board, sorts it by carrier, and "scores" the data for about 850 operators. For about a year before the crash, Aviation Charter received the lowest rating, "does not qualify" ("DNQ"), with a safety record in the lowest 8 percent of all carriers. The article reported the safety rating and comments by ARGUS' founder, Joseph Moeggenberg.

Aviation Charter contended that the rating and accompanying statements damaged its reputation, and sued ARGUS and Moeggenberg but did not sue the Star Tribune. The complaint specified seven statements.

The allegedly defamatory statements were not false, were not defamatory in the context of the overall newspaper article, or were not susceptible of being proven either true or false.

In one allegedly defamatory statement, Moeggenberg told the newspaper that Aviation Charter had "a history of problems." Taking a literal approach, the Eighth Circuit held that the "only interpretive analysis we need to apply" to that statement "is to determine whether more than one past event cited in ARGUS's report could fairly be characterized as a problem." The court found three incidents that met that test: (1) a crash that killed two and injured one; (2) an unauthorized flight by an intoxicated student pilot; and (3) several in-flight emergencies resulting from equipment malfunction.

Another allegedly defamatory statement in the article asserted that the ARGUS report indicated that Aviation Charter drew 15 Federal Aviation Administration (FAA) enforcement actions. The FAA makes a clear distinction between "legal enforcement actions" and "administration actions," and the ARGUS report incorrectly characterized administration actions. Thus, ARGUS's statement was technically incorrect. However, "the statement in context was not defamatory" because the newspaper article immediately followed the improper characterization with the explanation that most of the FAA violations "were minor or administrative matters and none resulted in a fine."

"Moreover," the court continued, "any potential harm caused by the improper characterization was over-

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Eighth Circuit Affirms Summary Judgment Over Air Safety Rating

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shadowed by at least three other eye-catching observations highlighted in the *Star Tribune* article: (1) the pilot of the aircraft that crashed apparently had a felony fraud conviction and had misrepresented his experience; (2) the crash may have been caused by a lack of experience by the pilot and co-pilot; and (3) according to ARGUS, Aviation Charter had a poor safety record relative to other carriers of its size."

The court therefore "conclude[d] as a matter of law that Moeggenberg's use of the term 'enforcement actions' could not have tended to harm Aviation Charter's reputation in the community." Although not using the term "incremental harm," the court effectively applied the principle that a minor inaccuracy could not have harmed plaintiff's reputation in the context of news coverage that contained far more serious statements. Some of these other context-providing statements had first appeared, at greater length, in the newspaper's prior coverage of the crash.

Although not using the term "incremental harm," the court effectively applied the principle that a minor inaccuracy could not have harmed plaintiff's reputation in the context of news coverage that contained far more serious statements.

The court held that a third statement – Moeggenberg's comment that Aviation Charter had "a lot" of enforcement actions for a company of its size – was not defamatory, for the same reasons.

The four remaining statements were all permutations of ARGUS's comparative rating that "Aviation Charter, relative to other carriers of its size, has an unfavorable safety record." The court turned to the test of *Milkovich v Lorain Journal Co.*, 497 U.S. 1, 21 (1990): whether the comparison was "sufficiently factual to be susceptible of being proved true or false." The court held that it was not, and explained:

> [A]lthough ARGUS's comparison relies in part on objectively verifiable data, the interpretation of those data was ultimately a subjective assessment, not an objectively verifiable fact. … ARGUS chose which underlying data to prioritize, performed a subjective review of those data, and defined "safety" relative to its own methodology.

Distinguishing *Milkovich*, the Eighth Circuit held that ARGUS's interpretation of the public database information available on Aviation Charter was "a subjective interpretation of multiple objective data points leading to a subjective conclusion about aviation safety" and therefore was not a provably false statement of fact.

The court also rejected Aviation Charter's claims based upon the Lanham Act and Minnesota's Deceptive Trade Practices Act. The Lanham Act claim failed because ARGUS was not in commercial competition with Aviation Charter. Although the state MDTPA action did not require proof of competition between the parties, it failed because the technically untrue statement that Aviation Charter had fifteen FAA enforcement actions did not disparage its business, given the full context of the newspaper article.

Patrick T. Tierney of St. Paul, Minnesota, represented Aviation Charter. Eric R. Heiberg of Minneapolis, Minnesota, argued for ARGUS and Moeggenberg; Jeffrey W. Coleman and Stephen F. Buterin of Minneapolis also appeared on the ARGUS brief.

John P. Borger is a partner at Faegre & Benson LLP in Minneapolis, MN.

Fifth Circuit Affirms There's No Jurisdiction Over German Publisher

By Thomas Leatherbury

The Fifth Circuit recently affirmed the dismissal of a suit alleging claims for libel, intentional infliction of emotional distress, tortious interference, and civil conspiracy against several German publishers for lack of personal jurisdiction. *Fielding v. Hubert Burda Media, Inc.*, No. 04-10297, 2005 WL 1531441 (5th Cir. June 30, 2005) (Jolly, Davis, Clement, JJ.).

Background

Plaintiffs Thomas Borer, the former Swiss ambassador to Germany, and his wife, Shawne Fielding, a former Miss Dallas and Mrs. Texas, sued Hubert Burda Media, Bertelsmann AG, and Gruner & Jahr and a number of related companies for publication of numerous articles about an alleged affair Borer had with a German model and cosmetic saleswoman while he was ambassador.

The allegations, based on statements the model made and later recanted, were originally published by a non-party Swiss magazine and were republished in *Bunte* and other magazines owned by the Burda defendants and in *Stern* and other magazines affiliated with the other defendants. In the wake of the publicity, Borer lost his ambassadorship and Fielding suffered a miscarriage.

Fifth Circuit Decision

The Fifth Circuit reviewed the district court's determination of lack of personal jurisdiction *de novo*. The Court discussed the U.S. Supreme Court's holdings in *Calder* and *Keeton* as well as pertinent Fifth Circuit and other federal precedents. With respect to *Burda*, the Court found that a Texas circulation of approximately 70 copies of *Bunte* per week out of a total weekly printing of approximately 750,000 issues did "not meet the 'substantial number of copies ... regularly sold and distributed' requirement of *Keeton*."

In looking at the *Calder* "effects test," the Court held that the "clear focus of the seven *Bunte* articles was the alleged affair between Borer and [the model] and its aftermath, activities which occurred in Germany and Switzerland."

Passing references in one *Bunte* article to Texas and to Fielding's ex-husband in Dallas and the republication of a picture from her SMU yearbook "served merely to supply background, biographical information." The research done by a Burda contractor in Texas was of only "marginal importance."

The Court found that the brunt of the effects of the articles was felt in Germany, not in Texas. The Court further concluded that plaintiffs had not shown that the Burda defendants knew that sufficient harm would be suffered in Texas to fix jurisdiction there or even that the plaintiffs had resided in Texas during any time relevant to the suit. Thus, the trial court was correct in holding that it did not have specific personal jurisdiction over the Burda defendants.

In considering whether to exercise specific personal jurisdiction over Gruner & Jahr, the publisher of *Stern*, the Court reached a similar conclusion since *Stern* sent only about 60 copies a week to Texas, since the *Stern* articles made no reference to Texas or to Fielding's prior activities in Texas at all, and since the *Stern* articles contained no information obtained from Texas or Texas sources.

The brunt of the effects of the articles was felt in Germany, not in Texas.

Finally, the Court considered the propriety of the exercise of general jurisdiction over Bertelsmann in the context of plaintiffs' complaint that they were denied the opportunity to take additional jurisdictional discovery. Although the Fifth Circuit appeared to accept the single business enterprise theory adopted by one intermediate Texas court – that a court may exercise general personal jurisdiction over an out-of-state corporation when a subsidiary of the out-of-state corporation is subject to the court's general jurisdiction – the Court found that the Plaintiffs had not made an adequate showing to justify the exercise of general jurisdiction over Bertelsmann.

The Plaintiffs had shown only that a Bertelsmann subsidiary had a registered agent for service of process in Texas and that this did not suffice to establish general jurisdiction. The Court concluded that the Plaintiffs had "not even made a preliminary showing of jurisdiction" and thus could show no prejudice from the district court's refusal to allow them to pursue additional jurisdictional discovery.

Tom Leatherbury and Mike Raiff, Vinson & Elkins L.L.P., represented Hubert Burda Media, Inc. and related defendants. Robert L. Raskopf and Marc C. Ackerman, White & Case LLP, represented Gruner & Jahr. Charles L. Babcock, Jackson Walker L.L.P., represented Bertelsmann. Plaintiffs were represented by Larry Lesh and Kent C. Krause.

Tenth Circuit Affirms Lack of Jurisdiction Over Out-of-State Reporter

In another recent circuit court decision on personal jurisdiction, the 10th Circuit Court of Appeals affirmed that a Utah federal court had no jurisdiction over a Washington, D.C. reporter who conducted research about alleged abuses at plaintiff's schools. *World Wide Association of Specialty Programs and Schools v. Houlahan*, No. 2:04 CV 107 DAK, 2005 WL 1097321 (10th Cir. May 10, 2005) (unpublished) (Henry, Bricoe, Murphy, J.J.).

Plaintiff is an association of specialty schools for troubled teens with its principal place of business in Utah. The defendant, a Washington, D.C. reporter, researched a story for UPI about alleged abuse at association schools located in New York, South Carolina, Jamaica, and Mexico. Plaintiff alleged that in the course of researching the allegations, the reporter made defamatory statements to potential and former students and their parents (all located outside of Utah) as well as a Utah attorney who had filed numerous suits against plaintiff.

Affirming dismissal, the Court held that defendant's acts were not targeted at the state of Utah. Moreover, the Court held that denying plaintiff's request to take additional jurisdictional discovery was not an abuse of discretion absent "an explicit, supported motion" for discovery.

NY Court Dismisses Claims Against California Resident for Lack of Jurisdiction

A New York federal court dismissed libel and related claims against a California defendant over online bulletin board and website postings, for lack of personal jurisdiction. *McConnell v. Cummins*, No. 03 Civ. 5035 2005 WL 1398590 (S.D.N.Y. June 13, 2005) (Buchwald, J.). The court noted that "[w]hen a case only involves online postings of information, rather than commercial transactions, it is unlikely that jurisdiction will be appropriate" unless the postings are specifically targeted to the state.

The case involved "a bitter online feud" between plaintiff, a New York publisher of an online newsletter on small cap stocks, and defendant, a California critic. In online investor bulletin boards, such as RagingBull.com and on her own website, defendant accused plaintiff of taking money from companies to tout their stocks and called her a "fraudster," "hypster unextraordinaire," "paid stock promoter," "insane," and a "criminal."

Plaintiff sued, alleging tortious interference with existing and prospective business relationships, defamation, prima facie tort, and intentional infliction of emotional distress.

Granting a motion to dismiss, the New York court held that defendant's online postings "do not provide a basis for jurisdiction" in New York where there was no evidence that defendant targeted her comments to New York. *Citing, e.g., Revell v. Lidov*, 317 F.3d 467, 471 (5th Cir. 2002). The court noted defendant's uncontroverted affidavit stating that "no web page on any of my web sites or public message postings have ever been directed at the forum state of New York. Anything I advertise, publish, or state as a matter of free speech is intended to be read by the entire worldwide internet audience, and is not directed at any specific forum."

Both parties proceeded pro se.

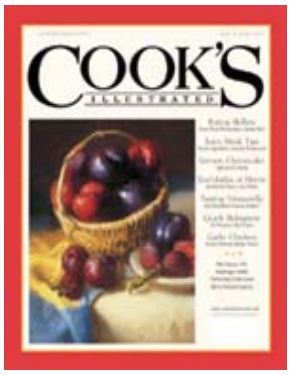
Magazine's Grill Review Well Done

Court Grants Directed Verdict, Citing No Proof of Actual Malice

Cook's Illustrated magazine won a directed verdict on June 1 in a defamation case brought by the manufacturer of a gas grill that the magazine had criticized in a 2003 review. *Thermal Engineering Corp. v. Boston Common Press, Ltd.*, No. 04CP4002202 (S.C. C.P. directed verdict June 1, 2005).

Background

In May 2003, *Cook's Illustrated* magazine published the results of tests of gas grills that it had conducted in co-operation with Consumer's Union, publisher of *Consumer Reports* magazine. The article was generally negative about the grill made by Thermal Engineering, saying that its unique heating process created higher temperatures than other grills, and might require modification of recipes.



Thus the Thermal Engineering grill was rated as "not recommended" in the article. (*Consumer Reports* also published its own article which rated Thermal Engineering's grill below other grills, but that magazine was not sued.)

Thermal Engineering sued the magazine in South Carolina's Court of Common Pleas in Columbia, alleging that the *Cook's Illustrated* review was false and defamatory and had led to reduced sales of its grills.

Court Rulings and Trial

Prior to the start of trial, Judge John L. Breeden, Jr. held that as a company that advertised its goods to the general public, Thermal Engineering was a public figure that would have to show actual malice. At trial, plaintiff failed to address the issue of actual malice.

The company's president testified that the magazine article hurt the company's sales, and that the tester must has misperceived the results. However, on cross-examination he was forced to admit that the reduced sales could have also resulted from the entry of new competitors into the market after the patents on Thermal Engineering's heating system expired. *See* Patent No. 4,321,857, "Infrared gas grill" (USPTO granted March 30, 1982) (patent expired March 30, 2002).

Thermal Engineering also called the magazine's chief financial officer as a witness, but she had not had anything to do with the writing or editing of the article.

After the plaintiff's half-day presentation, the defense moved for a directed verdict on the grounds that the plaintiff had not shown falsity or evidence of actual malice.

After adjourning for the day, the following day Judge Breeden granted the motion. There have been no post-trial motions or appeals.

Cook's Illustrated was represented by Jay Bender and Carmen Maye of Baker Ravenel Bender in Columbia, S.C. Michelle Proveaux Clayton and Curtis L. Ott of Turner, Padget, Graham, and Laney in Columbia, S.C. represented Thermal Engineering.

Oklahoma Supreme Court Denies Review of Reversal of Plaintiff's Libel and Privacy Verdict

On April 1, 2005, the Oklahoma Court of Civil Appeals reversed a $3.7 million plaintiff's verdict in a libel and false light invasion of privacy case against Oklahoma Publishing Company, Griffin Television OKC, L. L.C., and NewsOK, L.L.C. *Stewart v. The Oklahoma Publishing Co., et al.*, No. 100099 (Okla. Ct. Civ. App.). *See MLRC MediaLawLetter* April 2005 at 13. The plaintiff claimed that he had been injured by the online publication of data from the Oklahoma Department of Corrections regarding registered sex offenders. The Court of Civil Appeals held that NewsOK, a website operated jointly by *The Oklahoman* and KWTV News9, was privileged under state law and immune from liability under §230 of the Communications Decency Act for making the data available online.

The Oklahoma Supreme Court unanimously denied certiorari on June 27, 2005. However, the court (three judges dissenting) withdrew the Court of Civil Appeals' decision from publication. As a result, the opinion of the intermediate appellate court will represent the law of the case but will not have any persuasive effect or be precedent in future cases. The court did not state any reason for withdrawing the opinion from publication, but the defendants' counsel speculate that it did so because of the Court of Civil Appeals had decided a question of first impression (the §230 immunity issue) that the Oklahoma Supreme Court chose not to address.

The defendants were represented by Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City, Oklahoma.

Jury Awards $60,150 to Woman in "Girls Gone Wild" Video

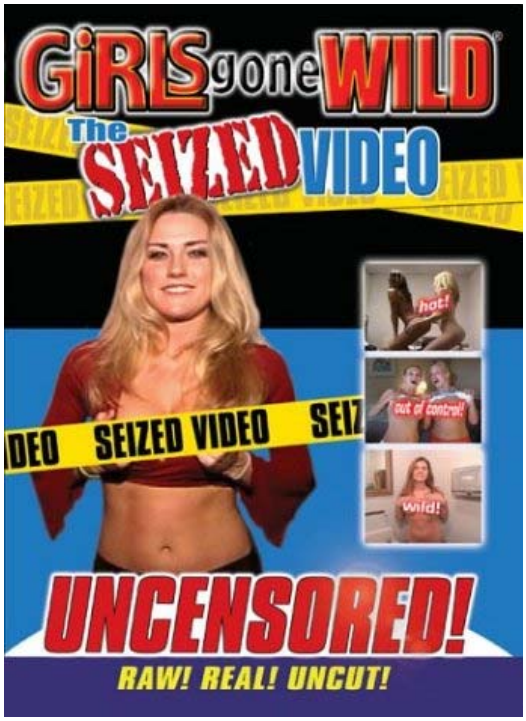
A Virginia Beach, Virginia jury last month awarded a young women $60,150 on a misappropriation claim against the makers of the "Girls Gone Wild" video series. *Aficial v. Mantra Films*, No. CL04003288-00 (Va. Cir. Ct., Virginia Beach jury verdict June 29, 2005).

Although there have been several defamation and privacy cases stemming from "Girls Gone Wild," and similar series *(see MLRC MediaLawLetter* March 2002 at 32; April 2002 at 24; June 2002 at 14; October 2002 at 28), this appears to be the first one to end with a jury damage award.

Background

The plaintiff, Debbie Aficial, was at a bar in Norfolk, Va. when she and her friend Aimee Davalle were approached by cameramen for Mantra Films, producer of the "Girls Gone Wild" series. Aficial gave verbal permission for them to film her and Davalle kissing, which ended up in the video "Girls Gone Wild: The Seized Video." Davalle is also shown in the video removing her top, and is pictured on the cover of one edition of the video, as well as in a television advertisement. Davelle's case against Mantra films is scheduled for trial in November. *See Davalle v. Mantra Films*, No. CL04003572-00 (Va. Cir. Ct., Virginia Beach trial order issued June 6, 2005).

Although there have been several defamation and privacy cases stemming from "Girls Gone Wild," this appears to be the first one to end with a jury damage award.



Mantra Films gave the episode the "Seized Video" subtitle after company founder Joseph Francis was arrested April 2, 2003 in Panama City, Fla. on charges including racketeering, several counts of promoting sexual performance by a child, procuring a person under 18 years of age for prostitution, and possession with intent to sell obscene material. The criminal proceeding is pending; Francis' attorney recently filed a motion for dismissal of several of the charges. *See State v. MRA Holding LLC*, No. 03-1036CFMA (Fla. Cir. Ct., 14th Cir. filed April 23, 2003).

Misappropriation Claim

Aficial and Davelle filed separate suits under Virginia's misappropriation statute, Va. Stat. § 8.01-40. The statute creates a cause of action for the unauthorized use of a person's name or likeness "for advertising purposes or for the purposes of trade." No cause of action exists where a person's name or likeness is used in connection with general newsgathering.

Last year Circuit Judge Frederick B. Lowe apparently ruled that the use of plaintiff's image was advertising within the meaning of the statute. Finding that Mantra had not obtained written permission from plaintiff, the judge ordered Mantra not to produce additional copies, although he did allow the company to sell its existing stock.

According to plaintiff's lawyer, while plaintiff gave verbal permission to be filmed she thought that the footage would not be used because she and her friend had not been asked for proof of their ages. Plaintiff testified that she was embarrassed and humiliated by the video. A Mantra official testified that the company had not known that it needed to obtain written permission and therefore had not intentionally violated the statute.

After a two-day trial and two hours of deliberation, the jury awarded plaintiff a very modest $150 in compensatory damages – and an additional $60,000 in punitive damages, one dollar for each copy of the video sold.

Mantra Films was represented by Shepard D. Wainger of Kaufman & Canoles in Norfolk. The plaintiff was represented by Kevin E. Martingayle of Stallings & Bischoff, P.C. in Virginia Beach.

Navy SEALs' Privacy Claims Against AP Dismissed

By David Schulz and Audrey Critchley

In a case that "pits the privacy interests of individuals against the freedom of the press," the United States District Court for the Southern District of California has dismissed claims brought by four Navy SEALs and one Jane Doe arising out of AP's publication of photographs depicting Navy SEALs subduing or detaining Iraqi prisoners. *Four Navy Seals v. Associated Press*, No. 05 CV 0555 (JMA) (S.D. Cal. July 12, 2005) (Miller, J.).

The photos were found by an AP reporter posted on a commercial photo sharing web site, and were disseminated by AP with a news report about a Navy investigation into the existence of the photos and the conduct they depicted. The article suggested that the photos might evidence abuse by the Navy SEALs pre-dating the earliest events at Abu Ghraib.

In an opinion issued on July 12, 2005, Judge Jeffrey Miller held that plaintiffs failed to state any claim for invasion of privacy, and that their privacy claims must in any event be stricken under California Code of Civil Procedure § 425.16, the "anti-SLAPP" statute. The court also dismissed without prejudice on Rule 8 grounds a copyright infringement claim arising from defendants' use of the photographs.

Background

In the wake of Abu Ghraib and other Iraqi prisoner abuse scandals of 2004, AP reporter Seth Hettena wrote several articles about the alleged abuse of Iraqi prisoners by members of the U.S. armed forces. While investigating one such story, he did a Google search on the internet for "Camp Jenny Pozzi," a Navy SEAL facility in Iraq.

One search result took him to a page on the "smugmug.com" website containing digital photos of Navy SEALS with Iraqi prisoners. Several of the photos showed SEALs sitting on hooded prisoners; others showed bloodied prisoners and prisoners with guns pointed at their heads.

Jane Doe, wife of one of the plaintiff SEALs, had uploaded the photos for storage and sharing with family members, thinking they could not be viewed by the general public. Unknown to Jane Doe, she had made the photos searchable on Google and available for downloading or purchasing by any member of the public without entering a password.

Hettena brought the photos to the attention of the Navy, which immediately launched an investigation into both the fact that the photos existed and the nature of the conduct depicted. On Dec. 3, 2004, Hettena wrote an article about the Navy's decision to investigate. The article quoted officials indicating that the taking of the photos violated Navy regulations and perhaps international law. AP disseminated about a dozen sample photos with the news report. The photos show the faces of some of the SEALs, although none were identified by name.

Several SEALs brought claims against both AP and its reporter for invasion of privacy under the California Constitution and common law, claiming their identities as SEALs engaged in covert operations to be confidential. They acknowledged the newsworthiness of the AP report, but asserted that it was outrageous for AP to have failed to conceal their identities. The wife who had uploaded the photos claimed intrusion upon seclusion, alleging the taking of the photos from a personal folder on the Internet was tantamount to breaking into a home and stealing a family photo from the mantle. One SEAL claimed to have a registered copyright in one of the photos disseminated by AP.

(Continued on page 27)

Navy SEALs' Privacy Claims Against AP Dismissed

(Continued from page 26)

Hettena and AP moved to dismiss the complaint for failure to state a claim, and also moved to strike the privacy claims pursuant to the anti-SLAPP statute. Finding no material factual disputes, and noting that neither side suggested that any discovery was necessary to rule on the motion to strike, the court granted both motions.

No Privacy Claim

The court had little trouble finding that plaintiffs had failed to state any privacy claim as a matter of law. In rejecting the state constitutional privacy claims, the court held that the SEALs lacked any reasonable expectation of privacy:

> *"The SEAL plaintiffs were active duty military members conducting wartime operations in full uniform who chose to allow their activities to be photographed and placed on the internet. In this context, it would not be reasonable for anyone to expect the images to remain private."* Mm. Op. at 5-6.

Moreover, neither "Hettena's act of downloading photos from a publicly-accessible website and writing an article about potential prisoner abuse by SEALs" nor AP's act of publishing the article with those lawfully-obtained photos constituted "an egregious breach of social norms underlying the state privacy right." *Id*. at 6.

The common law claims were found equally without merit. On the "disclosure of private facts" claim, Judge Miller concluded that no private facts had been disclosed, because the SEALs' identities were "in the public domain" once the photos were posted on the internet. *Id*. at 7.

The court distinguished *M.G. v. Time Warner*, 89 Cal. App. 4th 623 (2001), on its facts. In that case a Little League team photo used to illustrate a story about a pedophile coach was held to violate the privacy both of unnamed victims of molestation pictured in the photo, and of non-victims who were being tarred with a connection to the pedophile coach. In that case, showing the victims' faces unnecessarily intruded on privacy interests more than journalistic interests justified.

Here, by contrast, the photos were not merely illustrative but were the basis of the investigation opened by the Navy that was the focus of the AP report. Moreover, the plaintiffs are "adult members of the United States military in full uniform conducting wartime operations." Mem. Op. at 7.

Moreover, plaintiffs could not fairly draw a comparison between a team photo never intended for public dissemination and photos posted on a public website and searchable by Google and other search engines. "An objectively reasonable person could not expect such photos to remain private under these circumstances." *Id*. at 8.

The SEALs' faces were themselves newsworthy, even if they could have been obscured, because the SEALs' "expressions . . . form an integral part of the story about potential mistreatment of captives."

According to the court, plaintiffs also had no "private facts" claim because they could never demonstrate outrageous conduct as a matter of law. AP "merely distributed a truthful story, with photos that depict a topic of great public interest." *Id*. at 9.

Moreover, the AP report was plainly newsworthy and the "social value of the published facts is readily apparent." *Id*. at 10. The SEALs' faces were themselves newsworthy, even if they could have been obscured, because the SEALs' "expressions . . . form an integral part of the story about potential mistreatment of captives." *Id*.

The absence of allegations demonstrating any reasonable expectation of privacy or highly offensive conduct also defeated Jane Doe's intrusion claim. Jane Doe claimed she never intended her photos to be public but, under the circumstances set forth in the pleadings, the court held that she had failed even to allege an objectively reasonable expectation of privacy: "[O]ne cannot reasonably expect the internet posting of photos to be private." *Id*. at 11.

The court further found that any intrusion "was *de minimis* and thus not highly offensive to a reasonable person," and that the motive to gather news can negate the offensiveness element even where a journalist's conduct in gathering the news is offensive. *Id*.

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Navy SEALs' Privacy Claims Against AP Dismissed

(Continued from page 27)

Thus, "[e]ven if Defendants' actions had been offensive, which they were not, the pursuit of such a potentially important story in the manner alleged did not constitute highly offensive conduct by Hettena and the AP." *Id*.

Copyright Infringement Not Pleaded Properly

The court also rejected plaintiffs' effort to allege a claim for copyright infringement. The Complaint alleged only that one of the photos published by AP was copyrighted by one of the unnamed SEAL plaintiffs. Defendants moved to dismiss under Rule 8 for failure to identify the allegedly infringed material, and also asserted that a fair use defense existed as a matter of law on the facts alleged.

The court declined to reach the fair use defense, finding such an "affirmative defense" to be "inappropriate for determination in a 12(b)(6) motion." *Id*. at 13. However, the court did find the Complaint deficient in pleading a copyright claim. Construing defendants' Rule 8 argument as a motion for a more definite statement, the court granted the motion and required plaintiff to plead the claim more precisely within 30 days or it would be dismissed.

The State Law Claims Do Not Survive an Anti-SLAPP Motion to Strike

The court granted defendants' motion to strike the privacy claims pursuant to California's anti-SLAPP statute, concluding "[a]s a matter of law" that "locating photographs on the internet and distributing them along with an article addressing an issue of public concern is not offensive behavior." *Id*. at 16.

In an effort to avoid the motion to strike, plaintiffs had submitted declarations from a number of experts asserting that AP violated some well-established ethical rules by publishing the faces of the Navy SEALs before they had been accused of any crime. Notwithstanding these declarations, the Court found that the privacy claims should be stricken because plaintiffs failed to demonstrate a probability of ever succeeding: "Although some members of the media might not have chosen to publish the photographs, Defendants' publications violated no law and did not invade Plaintiffs' legally-protected privacy interests." *Id*. at 16.

Plaintiffs had submitted declarations from a number of experts asserting that AP violated some well-established ethical rules by publishing the faces of the Navy SEALs.

In reaching this conclusion, the court rejected plaintiffs' threshold argument that the anti-SLAPP act did not apply because plaintiffs sought only to protect the identities of Navy SEALs, and not to chill or punish an act in furtherance of free speech. Such an argument was rejected in *M.G. v. Time Warner*, *supra*, the court noted, where it was held that characterizing the public issue as the identities of molestation victims was too narrow, and that the broader issue of child molestation was of sufficient public interest to trigger protection under the statute.

In this case, "the broader topic of treatment of Iraqi captives by members of the United States military on this matter of public interest qualifies as a public issue," while the facial expressions of the SEALs "are relevant and probative" of that issue. Mem. Op. at 15.

Plaintiffs have publicly stated that they intend to appeal.

David Schulz, Seth Berlin and Audrey Critchley of Levine Sullivan Koch & Schulz, in New York, and Robert Steiner and Greg Roper of Luce Forward in San Diego, represented AP. Plaintiffs were represented by James Huston, David Doyle, Kristina Hoy, and Charles Evendorf of Morrison and Foerster in San Diego.

Any developments you think other MLRC members should know about?

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Summary Judgment for Financial Newsletter on Negligence Claims Affirmed on Appeal

By David H. Harper, Debbie McComas and Mary D. Newnam

A Texas appellate court recently analyzed and decided whether the First Amendment provides protection for financial advice distributed via a newsletter of general circulation. *Reynolds v. Murphy,* No. 2-03-294, 2005 WL 1654992 (Tex. App.—Fort Worth, July 14, 2005, no pet. h.).

In *Reynolds,* the plaintiff subscribed to *Technology Investing*, a newsletter of general circulation that provided financial opinions regarding various technology stocks, as well as special bulletins and Internet updates. Plaintiff allegedly relied on the advice but did not receive his expected return. He sued the author and publisher for breach of contract, negligence, negligent misrepresentation, fraud and misrepresentation, and violations of the Texas Deceptive Trade Practices Act (the "DTPA"). The trial court granted summary judgment for the defendants on all claims, and plaintiff appealed.

Appeals Court Decision

The Fort Worth court of appeals affirmed dismissal of the negligence and negligent misrepresentation claims based on the First Amendment, relying on three separate cases.

The court first discussed *Lowe v. Securities and Exchange Commission,* 472 U.S. 181, 211 (1985), where the U.S. Supreme Court held that a newsletter of general circulation was not a "financial advisor" under federal securities regulations; and therefore, prior restraints by the government could not be imposed on its publication. The Fort Worth court found that *Lowe,* was instructive, but not determinative, because the present matter concerned a "private litigant's attempt to impose liability on a publisher and author."

Finding no Texas cases on point, the court then turned to *Ginsburg v. Agora, Inc*., 915 F.Supp. 733, 739 (D.Md., 1995) and *Daniel v. Dow Jones & Co*., 520 N. Y.S.2d 334, 336-39 (N.Y.Civ.Ct. 1987). In *Ginsburg* and *Daniel,* the courts held that the First Amendment provided protection against negligence claims regarding financial advice of a general nature that is generally circulated.

After carefully reviewing the summary judgment evidence, the court found, as a matter of law, that *Technology Investing* was a publication of general circulation containing general investment advice. That the publication was not as widely available as many newspapers in libraries or on newsstands did not change "the generalized nature of the content of the publication" and therefore plaintiff's negligence and negligent misrepresentation claims were barred by the First Amendment.

As to the fraud and misrepresentation claims, the court upheld summary judgment against the plaintiff's assertion that the defendants' non-disclosure of the author's prior criminal record and history of drug use amounted to fraud. Specifically, the plaintiff provided summary judgment evidence that 30 years ago, the author of *Technology Investing* had been convicted, and then pardoned, of a federal crime and used an LSD analogue before LSD was illegal. The plaintiff argued that non-disclosure of these facts amounted to fraud. Recognizing the issue as "whether a reasonable person would decide to subscribe to a newsletter based on the personal history of the author from some 30 years ago," the court found that the author's "past indiscretions [were] not material to his current performance as a stock analyst."

However, the court remanded the issue of whether the defendants had misrepresented the author's talents and skills because it said the defendants had failed to move for summary judgment on this issue that were first raised in the plaintiff's summary judgment response.

Finally, the court also upheld dismissal of plaintiff's contract and claims, finding that plaintiff failed to raise a fact issue as to whether the defendants breached a promise to him. As to the DTPA claims, the court held that the plaintiff failed to raise a fact issue regarding the alleged misrepresentations and causation.

David H. Harper, Debbie McComas and Mary D. Newnam, with Haynes and Boone, LLP, in Dallas represented defendants in this case. Plaintiff was represented by Nathan Schatman and David Fielding.

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Texas High Court Adopts New Liability Test for Headlines

By David Bralow

Freedom Newspapers blazed a new trail in winning a public official libel case before the Texas Supreme Court last month. *Freedom Newspapers of Texas v. Cantu*, No. 04-0115, 2005 WL 1489924 (Tex. June 24, 2005) (Brister, J.), *reversing,*126 S.W.3d 185, 32 Media L. Rep. 1555 (Tex. App. 2003). *See also MediaLawLetter* June 2005 at 39.

The 7-0 decision announces a new test for measuring whether headlines in themselves can be evidence of actual malice and whether headlines, leads, and other summaries are actionable in the first instance. While the Court stopped short of raising the summary judgment bar for public official libel plaintiffs to the "clear and convincing" brand of evidence required in 48 other states, it reached out to protect newspaper-specific literary devices used to summarize statements made by politicians from attack by defamation suits. In the process, it entered summary judgment in favor of the Freedom defendants.

Background

The case arose from a *Brownsville Herald* report of the 2000 race for Sheriff of Cameron County (Rio Grande Valley), Texas. Under a headline, "Cantu: No Anglo Can Be Sheriff of Cameron County," the *Herald* described a public campaign debate between the plaintiff, Cantu, and his opponent, Terry Vinson.

In the lead paragraph of the story, the *Herald* gave readers the gist of what each candidate said at the debate. And in the body of the story, readers were supplied with direct quotations of the candidates. Cantu, who won the 2000 election, sued Freedom and the *Herald* under four tort theories, all of which aimed at recovery of defamation damages.

The plaintiff-candidate took the position that when the *Herald* used a colon in the headline, it signaled to readers that candidate Cantu used the precise words reported. When the *Herald* acknowledged that Cantu did not use the precise words reflected in the headline and lead – instead explaining that they were summaries of his actual words – Cantu tried to graft his position onto the U.S. Supreme Court's holding in *Masson v. New Yorker Magazine* and argued that the *Herald* had admitted knowingly falsifying the headline (and lead). Therefore, Cantu maintained, publication was made with actual malice.

Texas Supreme Court Decision

The 18-page opinion by Justice Scott Brister is notable in a number of ways beyond the historic protection it creates for headline-writing. It endorses the use of skeletal, editorial department affidavit testimony to establish that publication was made without actual malice, throws down the gauntlet for libel plaintiffs to produce clear evidence of deliberate falsification of headlines and leads, and defuses favorite weapons of the plaintiff's bar previously used to defeat libel defendants' summary judgment motions.

The Supreme Court took care to write at length about each of these protections against libel claims.

What the Texas Supreme Court had to say about the plaintiff's proof is historic. For starters, the Court blessed the *Herald's* use of simple affidavit testimony – that avoids unnecessary exposure of the editorial process to discovery. In the lore of Texas summary judgment procedure, that is significant because just enough testimony to establish that the defendants published truthfully and in good faith triggers the plaintiff's obligation to produce record evidence of the defendant's publishing motive.

The *Herald's* affidavit testimony put the ball in the plaintiff's court. And in a remarkable analysis, the seven justices of the Supreme Court who decided the case rejected Cantu's argument that failure to recite precisely the words used by a source, especially in a headline where no quotation marked are employed, makes the headline actionable or creates a triable issue of actual malice. (Justice Priscilla Owen was confirmed to a seat on the U.S. Court of Appeals for the Fifth Circuit after oral argument and neither she nor Justice Johnson participated in the decision.)

Instead, the Court embraced the argument made by John Bussian for the Freedom defendants that the actionability of headlines and leads has to be considered under

Texas High Court Adopts New Liability Test for Headlines

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the *Time v. Pape/Bose v. Consumers Union* "rational interpretation" standard.

Well-known to media libel defendants, the test until now has served only as a bright-line measure of actual malice. (If the headline is a rational interpretation of commentary or conduct, then it's not evidence of actual malice; if not a rational interpretation, then the wording of the headline alone could create a jury question on actual malice.)

Recognizing the need for special protection of headline and lead writing in print journalism, the Court went further to craft a first-ever rule for reviewing headlines and leads for evidence of actual malice. To create a triable issue, a Texas libel plaintiff must – in addition to showing that a headline or lead is not a "rational interpretation" of the conduct or commentary reported – offer record evidence that the defendant's misinterpretation was deliberate.

In effect, there is a double-barreled test for actual malice when considering publication of words the defendant admits are not a literal translation of the conduct or commentary.

No more will a Texas libel defendant face a jury's determination of liability when a headline summary is attacked. A finding that the headline and lead are a rational interpretation of ambiguous remarks renders that much of the publication unassailable. (Although a headline found not to be a rational interpretation may be subject to attack by a private figure plaintiff.)

No more will a Texas libel defendant face a jury's determination of liability when a headline summary is attacked.

The Supreme Court went on to dismantle the public official-plaintiff's remaining "evidence" of actual malice. Most significant are the Court's determination that the following do not create an inference that publication was made with actual malice:

- Post-publication conduct in the form of a follow-up story. (The *Herald* ran a story the day following publication of the principal piece attacked by the plaintiff, quoting the plaintiff as saying that he never said what the first headline suggests.)
- Ill will toward a public official plaintiff. (The *Herald* denied, in any event, having an axe to grind.)
- Expert testimony to the effect that a pattern of coverage shows a defendant's publishing motive.

All in all, the Texas Supreme Court's opinion was a ringing endorsement of free press rights. And it came down at a time the press needed a new "Sheriff" in the Rio Grande Valley, one with a clear understanding of news reporting and libel law. Just in time.

David S. Bralow is Assistant General Counsel with the Tribune Company. John A. Bussian, The Bussian Law Firm, Raleigh, North Carolina, and Jeffrey T. Nobles, Beirne, Maynard & Parsons LLP, Houston, Texas, represented Freedom Newspapers of Texas. Plaintiff was represented by Victor Quintanilla, Larry Zinn and Ernesto Gamez, Jr.

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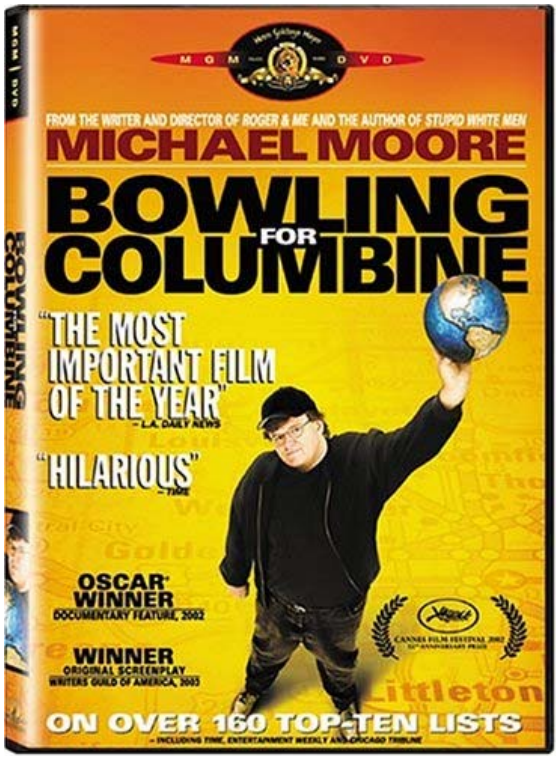
Michael Moore Bowls a Strike in 'Columbine' Film Libel Win

By Herschel P. Fink

This month a Michigan federal court granted summary judgment in favor of filmmaker Michael Moore, finding that statements about James Nichols, the brother of convicted Oklahoma City bomber Terry Nichols, were "factual and substantially true," as well as an accurate account of public records. *Nichols v. Moore,* 2005 U.S. Dist. LEXIS 1416, 2005 WL 1678670 (E.D. Mich. July 13, 2005) (Borman, J.).

For Moore, winning the libel suit was not the only issue. Having had the truth and accuracy of his Academy Award winning film, *Bowling for Columbine*, called into question by James Nichols, on whose Michigan farm Timothy McVeigh and Terry Nichols practiced bomb-making skills before attacking the Oklahoma City federal building, Moore wanted his own reputation vindicated. In the film, James Nichols describes explosive materials he kept on his farm, defends his gun ownership and states that "blood will run in the streets" when citizens turn against the tyrannical U. S. government. In his 2003 suit, James Nichols alleged that Moore's statements introducing that interview segment falsely implied that James himself was "complicit" in the bombing.

Moore's statements were "factual and substantially true," as well as an accurate account of public records.



In briefing and arguing Moore's summary judgment motion, defense counsel urged the court to go beyond the "easy" decision that Nichols was a public figure, and that there was no evidence, much less clear and convincing, that Moore entertained serious doubts as to the truth of the challenged statements. Instead, the court was encouraged to find that there simply were no false statements concerning Nichols, and that Moore had accurately reported 1995 explosives charges against Nichols, which were later dismissed, as the film states.

District Court Decision

In a 25 page opinion U.S. District Judge Paul D. Borman did exactly that, finding that Moore's statements about James Nichols in the 2002 film were "factual and substantially true," as well as an accurate account of public records. He went on to find that Nichols, who had given numerous media interviews and even self-published a book defending his brother, now serving a life sentence for murder, was a public figure, and had produced no evidence that Moore doubted the truth of any of the statements.

Indeed, Moore testified in a deposition that he even believed the truth of the alleged defamatory implication, that James Nichols had some advance knowledge of the bombing plot, while at the same time testifying that, although this was a personal belief, he never said, nor intended to say so in the film.

The summary judgment ruling was round two in the case. In September, 2004, Judge Borman granted partial summary judgment on statute of limitations grounds, 334 F.Supp. 2d 944 (E.D. Mich. 2004), holding that the action was served days late, and dismissing allegations relating to Moore's statements about Nichols made on the Oprah Winfrey show, as well as damage claims arising from the theatrical release of the film itself.

But, Judge Borman held that the release of the film on home video constituted a "republication," and the case would continue as to that republication. *See MLRC MediaLawLetter* September 2004 at. 13.

In the July, 2005 ruling, Judge Borman picked up where he left off the year before. He found that each of three challenged statements was "literally and substantially true": (1) That "McVeigh and the Nichols

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Michael Moore Bowls a Strike in 'Columbine' Film Libel Win

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brothers made practice bombs before Oklahoma City"; (2) That James Nichols "was arrested in connection to the Oklahoma City Bombing," and (3) that "the feds didn't have the goods on James, so the charges were dropped." Nichols had claimed that the last statement was "meant to and intended to convey that Plaintiff was involved in the Oklahoma City Bombing but got away with it, because the feds could not deliver the goods against Plaintiff as they had with his fellow co-conspirators."

On the "practice bombs" issue, Judge Borman noted that the 1995 Amended Criminal Complaint against Nichols "referenced several sources which describe Plaintiff making bombs" and that a U.S. Magistrate judge at a detention hearing for Nichols "found clear and convincing evidence that (Nichols) experimented with explosive materials."

Rejecting Nichols' claim that use by Moore of the word "practice" to describe his bomb-making "experiments" implied preparation for the Oklahoma City bombing, the court found "no meaningful difference between the words 'experiment' and 'practice,'" and found that "the assortment of public record sources were sufficient to draw the conclusion that Plaintiff, along with McVeigh and Terry Nichols made practice bombs on Nichols' farm 'before Oklahoma City.'"

The court also had little difficulty finding that Nichols' detention as a "material witness" and being briefly charged with the possession of bomb-making materials qualified as support for Moore's statement that "Nichols was arrested in connection to the Oklahoma City Bombing." The court noted that Moore "did not state that Plaintiff was charged or accused of participating in the bombing," and that Moore's "statement was similarly 'substantially true' based upon the circumstances surrounding (Nichols') arrest for the three 'explosive charges' and the fact that he was held as a material witness in the Oklahoma City bombing case."

The court similarly had no trouble disposing of the claim that Moore had a hidden meaning to the statement about the "feds" not "having the goods" on Nichols and having to "drop the charges." Judge Borman wrote that, "The Court finds that Defendant's statement was literally true and accurately reported the government's dismissal of the charges."

As to Nichols' "tagalong" claims of false light and intentional infliction of emotional distress, Judge Borman ruled that they too failed "because Defendant's statements were literally true."

For good measure, the court did go on to hold that, "Even if Defendant's statements were false, the Court still finds summary judgment appropriate because, as explained below, the Plaintiff is a public figure and he fails to meet the significant constitutional hurdle of actual malice."

Finally, the court rejected Nichols' claim that there is a factual issue as to whether Moore defamed him by implication:

> The Court notes that "claims of defamation by implication, which by nature present ambiguous evidence with respect to falsity, face a severe constitutional hurdle." *Locricchio v. Evening News Ass'n*, 438 Mich. 84 (1991).
>
> * * *
>
> In this case, even taking the facts in a light most favorable to Plaintiff, the Court finds that Plaintiff has failed to demonstrate that Defendant's publication contained false statements or omitted material factual statements. In fact, the film told its viewers that the charges against Plaintiff were dropped, and showed Plaintiff speaking to the press after his release and stating "I'm just glad to get on with my life…. The Court similarly finds that Defendant's statements contain no provable false implication that Plaintiff committed any crime.

In an interesting twist, Nichols' libel action was assigned by blind draw to Judge Borman, a 1994 appointee of President Clinton, who was the judge who found the government's evidence against James Nichols insufficient to hold him for trial in 1995.

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit, represented Michael Moore in this action. Nichols was represented by Stefani C. Godsey and Kenneth McIntyre, Lansing, Michigan.

Court Dismisses Federal Wiretapping and Fraud Claims Arising From *Inside Edition* Undercover Investigation

By Jeanette Melendez Bead

On June 28, a Florida federal district court granted partial summary judgment in favor of King World Productions, Inc.'s newsmagazine *Inside Edition*, holding that the plaintiff could not maintain its claims for violations of the Federal Wiretap Act and for fraud. *Pitts Sales, Inc. v. King World Productions, Inc., et al.*, No. 04-60664-CIV-COHN/SNOW, 2005 WL 1515316 (S.D. Fla. June 28, 2005). (Cohn, J.).

The court, however, denied the parties' cross-motions for summary judgment on the plaintiff's trespass claims, for which the plaintiff seeks only nominal damages, concluding that a genuine issue of material fact exists to warrant a trial.

Background

The plaintiff, Pitts Sales, Inc., is a national door-to-door magazine sales company based in Florida. The company's sales agents, many of whom are between 18 and 25 years old, travel across the country to sell magazine subscriptions door-to-door.

In February 2004, *Inside Edition* broadcast an investigative news report concerning the business practices of door-to-door magazine sales companies, including allegations of harsh and abusive treatment of young sales agents, inadequate supervision of sales agents who often engage in underage drinking and illegal drug use, and deceptive sales practices.

Three months later, *Inside Edition* broadcast a follow-up news report, which focused on the inadequacy of the background checks that some of the companies run on sales agents, and the horrific crimes (including rape and murder) that some sales agents committed after gaining entry into prospective customers' homes.

The February 2004 news report was based in part on hidden camera footage obtained by Matthew Yule, an associate producer for *Inside Edition*. Yule interviewed for a sales position with Pitts Sales in a hotel room in Minnesota and was hired on the spot. Yule worked with the company for nine days, during which he recorded the activities taking place in his presence using a hidden camera and microphone.

After the second news report aired, Pitts Sales sued King World, Yule and Lawrence W. Posner, a producer who supervised Yule's hidden camera assignment, for violations of the illegal "interception" and "use" provisions of 18 U.S.C. § 2511 and civil RICO, and for fraud, trespass and intentional interference with contractual relations. After defendants filed motions to dismiss, plaintiff voluntarily dismissed Yule and the civil RICO and tortious interference claims.

The Wiretap Claims

Because defendants had argued early in the case that plaintiff's federal wiretap claims were barred by section 2511(2)(d)'s "consent exception" – allowing the interception of oral communications where the interceptor is, or has the consent of, a party to the communication – plaintiff based its wiretap claims on 13 "video excerpts" of oral communications to which, plaintiff argued, Yule was not a party.

The key issue was whether Yule was a "party" to the oral communications he secretly recorded, but in which he was not, according to plaintiff, a "direct participant." First, however, the court addressed Pitts Sales' standing under the Wiretap Act.

Under the statute, a corporation has standing only if it has a possessory interest in the intercepted oral communications. The court concluded that Pitts Sales had standing to assert wiretap claims arising from only 4 of the 13 video excerpts. As to the remaining video excerpts, the court held that because the recorded oral communications were either incomprehensible or did not involve any discussion of Pitts Sales' business matters, the corporation lacked a possessory interest in the oral communications sufficient to confer standing.

It was undisputed that Yule was not acting under color of law when he made the recordings at issue and that he did not intercept the oral communications for the purpose of committing a criminal or tortious act. Thus, under section 2511(2)(d), Yule's interception of the oral communications could be actionable only if the court determined that Yule was not a party to them. Plaintiff

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Court Dismisses Federal Wiretapping and Fraud Claims Arising From *Inside Edition* Undercover Investigation

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argued that although Yule was present when the oral communications at issue were uttered, he was not speaking or being spoken to, and therefore was not a party to them.

The court rejected this argument and concluded that Yule was a party to the oral communications at issue, reasoning that "Yule was always present when the communications were uttered and had the hidden camera on his person."

The court also adopted defendants' argument that plaintiff's interpretation would cause practical problems not envisioned by the statute, stating: "If Yule's presence is not enough to make him a party to the communication, the Court would be stalled trying to determine the extent of Yule's participation, whether Yule spoke at any point during the communication, whether any of the oral communications were directed at Yule, whether a speaker made eye contact with Yule so as to include him in the conversation, etc."

Indeed, after reviewing the video footage at issue at the summary judgment hearing, the court declined plaintiff's invitation "to determine at which point in the conversation Yule ceased being a party and at which point he regained his status as a party to the communication."

Because Yule's interception of the oral communications was lawful, the court likewise granted summary judgment in favor of the defendants on plaintiff's claims that defendants violated the statute by "using" the oral communications.

The Fraud Claims

With respect to its fraud claims, Pitts Sales alleged that it hired Yule on the basis of various misrepresentations concerning his background and qualifications, and that it would not have done so had it known that Yule was working for *Inside Edition* and that he intended to obtain hidden camera footage of Pitts Sales' activities. Pitts Sales sought to recover the expenses it incurred to hire and train Yule.

Relying on *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), the court held that Pitts Sales' alleged damages were not proximately caused by its reasonable reliance on the misrepresentations Yule made to get hired, noting that Yule made no representation concerning how long he would work, that the company experienced "very high" turnover and that the company made no assumptions about how long a sales agent would stay with the company. The court also concluded Pitts Sales paid Yule because he submitted magazine orders for which he was due a commission, not because of the misrepresentations he made to get hired.

Relying on* Food Lion*, the court held that Pitts Sales' alleged damages were not proximately caused by its reasonable reliance on the misrepresentations Yule made to get hired.

The Trespass Claims

As to plaintiff's trespass claims, the court denied the parties' cross-motions for summary judgment, concluding that a genuine issue of material fact existed regarding whether Yule exceeded the scope of the consent given him to enter Pitts Sales' properties. In so ruling, the court emphasized that Pitts Sales was seeking only nominal damages in connection with its trespass claims. The trespass claims are set to be decided on the basis of supplemental briefs due at the end of July.

Jeanette Melendez Bead and Michael D. Sullivan of Levine Sullivan Koch & Schulz, L.L.P. represented the defendants in this case together with Ralph Goldberg and Michael Ludwig of the CBS Law Department, and Anthony M. Bongiorno of the Viacom Law Department. Plaintiff is represented by Cynthia H. Becker of Harrah, Oklahoma.

DID YOU GO TO TRIAL RECENTLY?

If you know of a libel, privacy, or case with related claims that went to trial recently, please let us know. It will be included in our annual report on trials, which is published each year. E-mail your information to erobinson@medialaw.org

Minnesota Court Dismisses Discrimination and Defamation Claims Against Newspapers and Broadcasters

By Leita Walker and John P. Borger

Four Minnesota news organizations won a fast and decisive victory this month when a federal judge dismissed allegations of racial discrimination and defamation in separate lawsuits. Plaintiffs had sought more than $500 million from each defendant. *Dr. R.C. Samanta Roy Inst. of Sci. and Tech. v. Star Tribune* and related cases, Nos. 05-735, 05-736, 05-737, 05-743 (D. Minn. July 15, 2005) (Magnuson, J.).

The decision applies well-established defamation principles, and may be particularly useful to other media defending against claims that their critical coverage of corporations constitutes unlawful racial discrimination simply because a corporate officer belongs to a racial or ethnic minority.

The decision may be particularly useful to other media defending against claims that their critical coverage of corporations constitutes unlawful racial discrimination.

Background

The plaintiffs were the Dr. R.C. Samanta Roy Institute of Science and Technology (SIST) and its subsidiary Midwest Oil. They sued the *Star Tribune*, *Pioneer Press*, *Duluth News Tribune*, and Twin Cities' ABC affiliate KSTP-TV (Hubbard Broadcasting) after each reported that SIST-owned stations might be selling gasoline below the state-regulated minimum price.

SIST and Midwest Oil alleged that the news articles: violated 42 U.S.C. § 1981, which prohibits denial of the right to make and enforce private contracts for racially discriminatory reasons; defamed the plaintiffs; and tortiously interfered with their business expectancies.

The complaint against the *Pioneer Press* also included claims for invasion of privacy by Naomi Isaacson, a SIST board member and an agent for both SIST and Midwest Oil. (Plaintiffs originally asserted claims under 42 U.S.C. § 1985, but omitted those claims in their amended complaints and did not address them in their responsive memoranda. The court therefore presumed the plaintiffs abandoned those claims and did not address them in its July 15 order.)

The plaintiffs claimed to be damaged not only by the reporting of the investigation of possibly unlawful gas prices but by the connections the news outlets made among the gas stations, the religious group, and Dr. Roy, founder of the religious group and president of SIST's board of directors. For example, they objected to the *Star Tribune*'s statements that Dr. Roy is a former "Hindu who for decades has preached a unique fusion of Christianity and Judaism that rejects mainstream religion" and that Dr. Roy, a native of India, "came to the United States to study nuclear engineering and underwent a dramatic conversion one afternoon when he said Jesus spoke to him."

They claimed the *Pioneer Press* published an article that was defamatory and discriminatory because it stated that the corporation "keeps a low profile but has been described in news reports as a religion that embraces parts of Christianity and Judaism." Likewise, they alleged the *Duluth News Tribune* discriminated against and defamed them by describing Dr. Roy's teachings and reporting that the corporation mistreated its members.

Finally, the plaintiffs alleged the ABC affiliate's broadcast was rendered defamatory and discriminatory by the inclusion of statements such as "it is a gas station that may be linked to a religious organization."

District Court Decision

Senior U.S. District Judge Paul Magnuson issued his decision less than a day after hearing oral arguments. He first disposed of the § 1981 claim that the defendants interfered "with the business contracts and business affairs of Plaintiffs by impairing their right to make contracts with the consuming public" and that the interference was "motivated by the racially and ethnically distinct background of Dr. Roy."

The court held that interference with prospective business opportunities did not amount to interference with the right to contract. It quoted *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1267 (10th Cir. 1989), in which

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Minnesota Court Dismisses Discrimination and Defamation Claims Against Newspapers and Broadcasters

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the Tenth Circuit stated that even if the defendant's allegedly defamatory statements made the plaintiff "less attractive to someone who otherwise might want to contract with him, the defamation does not deny him the basic *right* to contract."

Judge Magnuson also questioned the ability of plaintiffs that were corporations, rather than individuals, to pursue § 1981 claims alleging that they were victims of racial discrimination.

The plaintiff's defamation claims failed for a number of reasons, including that most of the allegedly defamatory statements were about Dr. Roy as an individual rather than about one of the corporate plaintiffs. The plaintiffs also failed to specifically indicate how the statements were false and at times implicitly conceded the truth of the statements by relying on them as facts in their pleadings. They also failed to allege facts showing either that they had been harmed or that the defendants acted with actual malice.

Because the defamation claims failed, the court also dismissed the tortious interference claim – which required plaintiffs to show an intentional, wrongful act – leaving only the state law claim of intrusion upon seclusion and publication of private facts claim against the *Pioneer Press*.

Isaacson asserted that the newspaper invaded the privacy of an SIST board member by publishing information that she (1) worked for a county judge, (2) lived in Minneapolis, and (3) signed a mortgage agreement with a county. Because the information was available through public records, the court held that the invasion of privacy claims could not be sustained.

The plaintiffs have a similar action pending in Minnesota against WCCO-TV, a CBS owned station. That case also is assigned to Judge Magnuson, but was served too late to be ripe for a consolidated motion hearing with the other cases.

Plaintiffs also brought similar actions against the *Shawano Leader* (Lee Enterprises) and WGBA-TV, NBC-26 (Journal Broadcast Group) in the United States District Court for the Eastern District of Wisconsin. Those actions remain pending, but their resolution likely will be influenced by Judge Magnuson's July 15 ruling.

On June 27, 2005, the Minnesota Department of Commerce ordered Midwest Oil to cease and desist from selling gasoline at unlawfully low prices, and ordered it to appear at an August 5 hearing to determine whether disciplinary action and civil penalties should be imposed.

John P. Borger, of Faegre & Benson LLP, represented the *Star Tribune* at the July 14 hearing before Judge Magnuson, and Eric Jorstad and Michelle Paninopoulos participated in the briefing; Paul R. Hannah, of Kelly & Berens, PA, represented the *Pioneer Press* and *Duluth News Tribune*; and B. Todd Jones and Stephen P. Safranski, of Robins, Kaplan, Miller & Ciresi LLP, represented ABC affiliate KSTP-TV, LLC. All three firms are in Minneapolis, Minnesota.

Rebekah M. Brown and Shushanie E. Aschemann, Westview Law Center P.A., Hastings, Minnesota, represented the plaintiffs.

John P. Borger is a partner at MLRC member Faegre & Benson LLP in Minneapolis, MN. Leita Walker is a summer associate at the firm and a student at the University of Kansas School of Law.

Criminal's Libel Suit Against National Geographic Dismissed

By Robert D. Lystad and Malena F. Barzilai

A federal court in Maryland recently dismissed a libel suit brought by a convicted enslaver against National Geographic, adding to the valuable case law on the substantial truth doctrine and fair report privilege. *Nanji v. National Geographic Society*, No. AW-04-2635 (D. Md. June 28, 2005).

The court held that a statement that the plaintiff received a nine-year sentence for, inter alia, "raping" a teenage girl was substantially true because National Geographic's text and numerous public record references demonstrate that rape was a factor the jury considered in convicting the plaintiff of several federal crimes.

Furthermore, the court found that even if the statement was not substantially true, it was privileged as a fair and accurate account of official government pronouncements.

Conviction for Involuntary Servitude

The plaintiff, Kevin Nanji, is in federal prison after being convicted in January 2002 of involuntary servitude, harboring an illegal alien, and conspiracy to harbor an illegal alien. The court noted that during his sentencing, the government provided abundant evidence that Nanji repeatedly sexual assaulted and molested his 14-year-old victim.

In issuing the maximum allowable sentences against Nanji and his wife, the court stated, "I can't minimize the sexual assaults that the jury accepted. That was the jury's decision that part and parcel of the enslavement was the sexual abuse and advances." Nanji was never charged with rape, a state-law offense over which the federal court would have lacked jurisdiction.

In its September 2003 issue, National Geographic published, as part of a feature story on global human trafficking, a "sidebar" article highlighting successful prosecutions of human trafficking in the United States. In its list of "prison sentences imposed on some convicted traffickers in the U.S. in 2002," the magazine listed Nanji and his wife as receiving "9 years each for luring a 14-year-old girl from Cameroon with promises of schooling, then isolating her in their Maryland home, raping her, and forcing her to work as their servant for three years."

Nanji sued National Geographic, alleging that the magazine defamed him because it falsely stated that he was convicted of rape.

Sidebar Was Substantially True

The court noted that when determining whether allegedly false statements are substantially accurate, the statements must be considered in their entirety. The plain language of the sidebar, the court found, did not state that Nanji was convicted of rape but rather stated that rape was one of the facts that underlay the sentence imposed upon him.

The abundance of sexual misconduct evidence in the public records made clear that Nanji's sexual assaults and advances upon his victim were part and parcel of the involuntary servitude for which he was convicted.

The court further stated that to the extent Nanji was contending he was harmed by National Geographic's use of the term "raping" instead of a more technically precise term such as "sexual assault" or "sexual abuse," that claim must fail because National Geographic's use of the term "rape" as shorthand for sexual misconduct did not render the article inaccurate.

The court noted a long line of cases refusing to recognize libel suits based on "technical errors in legal nomenclature in reports on matters involving violation of the law," and it found that in referring to Nanji's acts as "raping," National Geographic appeared to be converting an exact legalism into common parlance that could be understood by its national and international readership.

Finally, the court stated that because Nanji's conduct – though not technically "rape" under Maryland or federal law – could have been punishable as "rape" in a number of states and other countries, a more specific description of his acts as "sexual assault" or the like would not have had a differing effect on the reader than did the National Geographic text.

Fair Report Privilege

Even assuming National Geographic's statement is not substantially true, the court found that Nanji failed to state a claim for defamation because National Geographic

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Criminal's Libel Suit Against National Geographic Dismissed

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fairly and accurately published information based on government reports or actions.

The court recognized that under the modern view of Maryland law, a publication falls within the fair report privilege if the defendant demonstrates that the publication is a substantially fair and accurate report, regardless of whether actual malice is pled or shown (though in this case Nanji did not plead that National Geographic acted with actual malice).

National Geographic's reporting, the court noted, was based on a Department of Justice report stating that the victim was subject to "sexual assaults" and on two DOJ press releases recounting evidence that Nanji "sexually abused" the victim. National Geographic's statement that "raping" was one of the facts underlying the sentence imposed on Nanji was therefore a fair and accurate report of public records, and Nanji's claim must be dismissed.

Additionally, National Geographic argued that because Nanji has been convicted of various serious crimes, he is libel-proof and thus could not recover damages even if he could establish that the challenged language was actionable. The Court noted that National Geographic cited no case in which the Fourth Circuit or Maryland state courts had adopted the libel-proof doctrine, and absent such authority the Court refused to extend the doctrine to this case.

Bruce W. Sanford, Robert D. Lystad, and Malena F. Barzilai of Baker & Hostetler LLP, Washington, D.C. represented National Geographic together with Terrence B. Adamson, Angelo Grima, and Karen Kerley-Schwartz of the National Geographic Society. Plaintiff proceeded pro se.

Internet Posting Begins Statute of Limitations NJ Court Rules

By Bruce S. Rosen

New Jersey has joined the growing list of states whose courts hold that the single publication rule applies to an unchanged Internet posting. *Churchill v. State of New Jersey*, No. A 4808-03, 2005 WL 1468008 (N.J. Super. June 23, 2005) (Petrella, Parker, Yannotti, JJ.).

Churchill involves a lawsuit by two local volunteers for the ASPCA who allege that the New Jersey State Commission on Investigations website improperly accused them of dishonesty, secrecy and fiscal irresponsibility.

The case was dismissed by the trial court on statute of limitations grounds. A unanimous Appellate Division panel agreed that the complaint was time-barred and that the single publication rule should apply to unchanged Internet postings.

The Internet appears to be particularly suited to the application of the single publication rule.

The Court rejected arguments that Internet publishers were more akin to radio and television broadcasters and that they lack the internal controls and professionalism necessary to warrant the protection of the single publication rule.

> Plaintiffs provide no explanation as to what level of editorial control might suffice to warrant application of the single publication rule.... In any event, we prefer not to intrude in a debate over standards of editorial quality.

The Court also dismissed plaintiffs' contention that unscrupulous Internet publishers could withhold widespread distribution of libelous materials until after the limitations period has run, noting that traditional media would be subject to the potential for fraud and that in any case a defendant who committed that type of fraud may be estopped from asserting a statute of limitations defense.

In making its ruling the Court relied primarily on *Firth v. State*, 775 N.E.2d 463 (N.Y. 2002), but also noted that the Second Circuit and courts in Mississippi, Kentucky, Arizona, California, Georgia, Massachusetts and Oregon have also reached the same conclusion within the past two years.

The Court differentiated the facts in *Swafford v. Memphis Individual Practice Ass'n*, 1998 WL 281935 (Tenn. Ct. App. June 2, 1998) where a multiple publication rule was followed because the data provided by that website was by subscription and request only, rather than distributed at once to all who have access, much like the mass distribution of newspapers, books, and magazines.

"We find no principled basis in a situation like the one before us for treating the Internet differently than other forms of mass media. The Internet appears to be particularly suited to the application of the single publication rule because it is rapidly becoming (if it has not yet already become) the current standard for the mass production, distribution, and archival storage of print data and other forms of media," wrote Appellate Division Presiding Judge James J. Petrella for the panel.

The Court dismissed the plaintiffs' contention that updates to the website constituted republication; the court said that format changes that did not alter the substance or form of the report were technical in nature and should not defeat the single publication rule.

Bruce S. Rosen, of McCusker, Anselmi, Rosen, Carvelli & Walsh, P.C. in Chatham, N.J., is co-chair of the MLRC MediaLawLetter Committee. Plaintiffs in this case were represented by Gregory R. Mueller of Tenafly, N.J.; defendants, by Assistant Attorney General Patrick DeAlmeida and Deputy Attorney General Karen L. Jordan of Trenton, N.J.

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NJ Court Limits Litigation Privilege Involving Media Entity

By Bruce S. Rosen

The New Jersey Appellate Division has reinstated an *Asbury Park Press* reporter's defamation lawsuit against an attorney and her client for sending a letter to the newspaper's editors, ruling that the letter was more akin to a public relations campaign than correspondence related to an ongoing lawsuit. *Williams v. Kenney*, A4855-03, 2005 WL 1588253 (N.J. App. July 8, 2005). (Cuff, Hoens, King, JJ.).

The Appellate Division panel called the issue a "close question" because of New Jersey's broad absolute privilege protecting litigation-related communication from defamation claims, but ultimately decided that the communication was "rather salacious gossip not really germane to the pending litigation."

The court concluded the litigation privilege should not be applied to novel situations, and not for litigating in the press.

Background

Linda Kenney represented Robert Tarver, a public defender, in a discrimination suit against the state. Among other things, Tarver alleged that employees of the state Office of Public Defender ("OPD") were leaking information to *Asbury Park Press* reporter Carol Gorga Williams to defame him. Williams had published several articles discussing allegations of misconduct against Tarver.

At issue in the instant case is a letter Kenney faxed to the newspaper announcing that she was going to hold a press conference in connection with Tarver's discrimination suit. Kenney also faxed a transcript of a secretly taped telephone conversation between Tarver and the acting head of the Office of Public Defender, Peter Garcia. Garcia told Tarver that a lawyer who worked under him had leaked information to "Carol" at the Press, and that they had been having a longstanding affair. Both individuals were married at the time. Kenney suggested that the newspaper investigate the allegation.

Carol Gorga Williams then sued Kenney and Tarver for defamation, alleging she was interrogated by *Press* editors after they received the letter and suffered emotional distress as a result of the allegations. At least one of the editors testified that they never believed the allegation and that although Williams was taken off the story and removed as Ocean County court reporter, she was later promoted to a newly created general assignment criminal justice position. Williams has not yet been deposed in the case.

New Jersey's Litigation Privilege

New Jersey's litigation privilege is absolute and very broad, applying to any communication by litigants or other participants to achieve the object of the litigation that has some connection or logical relation to the litigation.

In an opinion written by Judge Michael King, the panel pointed out that communications to the news media would ordinarily not be immune from suit if there was no relation to the judicial proceeding and in this case, the attorney made admissions that "sound very much like an attorney who is opportunistically litigating her client's case to the press.

> Even if the relationship between [the OPD employee] and plaintiff was relevant in some way to the Tarver litigation, the extra-judicial communication of that information to plaintiff's employer did not appear to serve any purpose other than to encourage the newspaper to stop printing its allegedly biased stories about Tarver,

the Court said.

The court concluded by saying that the litigation privilege should not be applied to novel situations, and not for litigating in the press. Attorneys for the defendants said they would seek an appeal. Tarver's lawsuit against the state was ultimately settled.

Bruce S. Rosen of McCusker, Anselmi, Rosen Carvelli & Walsh, P.C., in Chatham N.J. represented defendant Robert Tarver in this matter. Defendant Linda Kenney was represented by Michael J. Canning of Giardano Halleran & Ciesla, Middletown, N.J. Plaintiff was represented by Richard A. Ragsdale of Carchman, Sochor Schwartz, Ragsdale & Cohen, Princeton, N.J.

BULLETIN 2005

The Twenty-First Century Anti-Indecency Crusades:
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(Bulletin 2005:2)

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Ohio Appeals Court Reinstates Private Figure Libel Action Against TV Station

A divided Ohio appeals court reinstated a school lunchroom monitor's libel claim against a television station and reporter who investigated and reported on allegations that plaintiff had "threatened and become physical with students." *Young v. Russ*, No. 2003 L 206, 2005 WL 1538103 (Ohio App. June 30, 2005) (Ford, Rice JJ.).

The court found that while there was no evidence that the reporter knew that the allegations were false or exaggerated, a jury could find the report negligent where a school official testified that prior to broadcast she informed the reporter that one child recanted his allegations.

(The court affirmed that summary judgment was properly granted to Gannett, the corporate parent corporation of WKYC; and to the station anchorman who merely introduced the story.)

Background

Plaintiff was employed by the Painesville City Board of Education as head custodian/lunchroom monitor at an elementary school. In February 2002, plaintiff was involved in breaking up two separate lunchroom disputes. A parent of one child called WKYC, alleging that plaintiff "was manhandling students."

A reporter was sent to investigate the accusation and he interviewed parents and several children who confirmed the allegations. For example, one child interviewed on camera claimed plaintiff "lifted him up by the neck and threw him on the stage."

The reporter then met with school officials and was told that they and the police were investigating the matter. Indeed, that same day a police officer interviewed one child. But that child recanted his story and admitted to the police officer that he made it up to avoid getting into trouble for his bad behavior.

That night WKYC broadcast the first of two reports on the matter. The report described the alleged incidents involving the children, stated that the school was investigating and included plaintiff's denial of the allegations. The next night WKYC aired another story that reported that one parent had filed a criminal complaint against plaintiff. The second report again included plaintiff's denial of the allegations.

During the next several days, the police concluded their investigation and determined that no charges would be filed against plaintiff. About one month later, the school completed its investigation and concluded that plaintiff had not engaged in unlawful or excessive behavior. Although it did not expressly factor in the decision, the appeals court pointedly noted that WKYC never broadcast an update that plaintiff was cleared of all charges.

Was Report Negligent?

The trial court granted summary judgment to defendants. It ruled that plaintiff was a private figure – a determination that apparently was not disputed on appeal.

Reinstating the libel claims, the appellate court found that an issue of fact existed over whether the reporter knew prior to broadcast that one child recanted his allegations against plaintiff. A school official testified that she told this to the reporter prior to broadcast and claimed in her deposition testimony that the reporter "wanted to believe the children" and "was not looking for the truth."

The trial court improperly discounted this mix of fact and opinion testimony on credibility and reliability grounds, according to the appeals court. The issue of negligence was "best suited for a jury's determination."

Plaintiff was represented by Don C. Iler, Cleveland. Defendants were represented by Steven A. Friedman and Maureen Sheridan Kenny, Squire, Sanders & Dempsey, L.L.P., Cleveland.

Any developments you think other MLRC members should know about?

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MLRC has made arrangements with two nearby hotels. The Howard is a business class hotel a 10 minute walk from Stationers Hall. Club Quarters is located on Ludgate Hill, adjacent to Stationers Hall. Conference rates will be held until **August 5, 2005** subject to availability. Delegates should contact these hotels directly.

The current Conference schedule is available online at www.medialaw.org

European Court of Human Rights Rejects Challenge to Irish Libel Award

By Michael Kealey

Supporters of Irish defamation law reform received a blow from The European Court of Human Rights last month when it rejected a claim by Independent Newspapers, a major Irish media player, that the limited guidance given to juries in defamation actions in Ireland infringed its right to freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland,* Application No. 55120/00 (June 16, 2005).

The decision came on the heels of news that the Irish cabinet had apparently delayed libel reform pending a review of privacy laws, even though legislation had been promised last year. There has been no statutory change since the Defamation Act 1961, which is modelled on the UK's 1952 Act.

The* Sunday Independent *sought to challenge the system under Irish constitutional and defamation law whereby juries determine the size of the award without any detailed guidance by the trial judge.

Background

The decision was the end of a long road, starting with a comment piece in the *Sunday Independent* published almost thirteen years ago in December 1992. In July 1997, a jury awarded former Government Minister, Proinsias de Rossa, damages of IR£300,000 (approx US $450,000) for libel over the article. Two years later, the Irish Supreme Court upheld the award.

Independent Newspapers appealed to the European Court and its case against Ireland was argued in October 2003. Ironically for an institution which has sat in judgment on allegations that domestic courts have failed to decide cases within a reasonable time, the European Court took almost two years to deliver its decision.

The jury had decided that the article falsely alleged that Mr de Rossa was involved in or tolerated serious paramilitary crime, was anti-Semitic and supported violent communist oppression. The timing of the article was significant. It appeared as Mr de Rossa was leading negotiations for the formation of a coalition government. All sides agreed the defamation was serious. Nonetheless, the newspaper argued that the award was excessive and disproportionate to any damage done to Mr de Rossa's reputation.

Importantly, the *Sunday Independent* sought to challenge the system under Irish constitutional and defamation law whereby juries determine the size of the award without any detailed guidance by the trial judge. They alleged that this procedure in practice leads to erratic and often excessive awards. In 1997, the Irish Supreme Court had held in *Dawson v Irish Brokers Association* (Unreported, Supreme Court, 27 February 1997) that:

> Unjustifiably large awards, as well as the costs attendant on long trials, deal a blow to the freedom of expression entitlement that is enshrined in the Constitution.

The newspaper also sought to rely on U.K. and European case law, including *Rantzen v Mirror Group Newspapers* [1993] 4 ALL ER 975 and *Tolstoy Miloslavsky v U.K.* [1995] 20 EHRR 442 – that addressed the issue of excessive libel damage awards.

Its arguments were as follows. In 1993, the Supreme Court had upheld an award given to a barrister, Mr Donagh McDonagh, against the *Sun* newspaper for a very grave defamation. In *McDonagh v News Group* (Unreported, Supreme Court, 23 November 1993) the Supreme Court had determined, however, that the award of IR£90,000 was at *"the top of the permissible range."* The newspaper argued that it was wholly illogical that a jury should determine the award in the *de Rossa* case without having the benefit of this information. Only if they were armed with knowledge of the Supreme Court's views as to an appropriate award for a serious libel could the jury properly determine the level of compensation to which Mr de Rossa was entitled.

Independent Newspapers said that juries should also be told the level of awards in personal injury actions so as to make appropriate comparisons with damage to reputation. If such guidelines and procedures were not in place, the Irish legal system did not adequately protect the defendant's right to freedom of expression. Such changes in procedure had been introduced in the UK after *Rantzen* and *John –v- MGN* [1996] 2 All E R 35.

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European Court of Human Rights Rejects Challenge to Irish Libel Award

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In its substantive defense, Ireland relied on the latitude given by the *'margin of appreciation,'* principle and stressed the significant difference in size between the award against Independent Newspapers and that made in *Tolstoy Miloslavsky* – £1,500,000.

It said that there were distinguishing features between the UK and Ireland in the guidelines given to the jury and in the roles of the appellate courts. As the Supreme Court in *De Rossa* had stressed that : "*the damages awarded by a jury must be fair and reasonable … and must not be disproportionate to the injury suffered"* Irish law had met its Convention obligations. The Court did however reiterate its long standing reticence to intervene, stating:

> (The) Court is only entitled to set aside an award if it is satisfied in all the circumstances the award is so disproportionate to the injury suffered and wrong that no reasonable jury would have made such an award.

Independent Newspapers argued that the circumstances of *de Rossa* could not realistically be separated from those in *Tolstoy Miloslavsky* and if the law in England at the time of that case was a breach of Article 10, then so must the law in Ireland under the present circumstances. The newspaper argued that in *Tolstoy Miloslavsky* the ECHR determined that a lack of adequate and effective safeguards against a disproportionately large award is a breach of rights under Article 10. A system which not only permits but requires the determining body to be deprived of information relating to matters that are acknowledged to be relevant can never be thought to provide adequate and effective safeguards against disproportionately large awards.

ECHR Decision

By a six to one majority (Judge Barreto of Portugal dissenting), the ECHR preferred Ireland's arguments. The Court stressed that a *"State remains free to choose the measures which it considers best adopted to address domestically the Convention matter at issue."*

As the trial judge in *de Rossa* had, among other things, given the jury an example of a relatively minor defamation case (without naming it or letting the jury know the size of the award), his charge could be distinguished from that in *Tolstoy Miloslavsky*.

Finally, "*the requirement of proportionality distinguishes the appellate review at issue in the present case (by the Irish Supreme Court) and Tolstoy Miloslavsky."*

As long ago as 1991, the Law Reform Commission said that Irish law failed in its two main aims: to protect persons from unjustified attacks on their good name and to allow for the publication of matters of public interest.

It proposed reform including giving guidance to juries. Its stance was supported by the Legal Advisory Group which was established by the Minister for Justice and which reported last year. Despite this, defamation law in Ireland remains unreformed. The European Court's decision is unlikely to act as an impetus for change.

Michael Kealey is a solicitor with William Fry, Dublin, Ireland.

EU Parliament's Last Minute Surprise Changes to "Rome II" Rescue Press Rights

An Opportunity for U.S. Press Organizations to Weigh in on Pending EU Legislation

By David S. Korzenik and Aaron Warshaw

The European Union is in the midst of developing its choice-of-law rules which will govern non-contractual cross-border causes of action. That project - part of the larger process of "harmonizing" the divergent laws of European states - is known as "Rome II." For many months the general expectation was that the press would fare poorly under the anticipated draft. But on July 6, 2005, the European Parliament unexpectedly modified the working draft of "Rome II" – making an exception to the EU's choice-of-law rules that would govern cross-border defamation and privacy claims.

The European Parliament rejected a troublesome "place of harm" rule that would have left journalists uncertain about what substantive law might apply to claims directed against their broadcasts and publications.

Target Audience or Place of Editorial Control

The new Rome II draft now carves out an exception for tort claims against media, so that choice-of-law would turn instead on the location of the *target audience* and, if that is not readily ascertainable, then, the place in which *editorial control* is exercised. Publishers and broadcasters would thus be in a far better position to anticipate the substantive law that would apply to potential defamation and privacy claims against them in EU courts.

Rome II now goes before the European Council as part of the co-decision process, but the changes made by the European Parliament are a positive and dramatic development in favor of the press. The European Parliament's action should receive active support and encouragement from U.S. and non-European media organizations so that the new draft can make its way into law.

The new legislation, if enacted, would likely apply to non-EU media defendants through the Rome II's principle of universal application of Article 2. But, at minimum, the precedent and model of Rome II would certainly inform future action by legislators and courts in this area. Hence, its ultimate importance to U.S. and other non-EU media caught in the cross-hairs of EU claimants.

Background

In the United States, we manage choice-of-law issues through a patchwork of forum state rules. And while the substantive laws of defamation and privacy surely vary from state to state, they do not vary so widely or so radically as do the defamation and privacy and press regulation laws of the different EU countries.

For example, the law of privacy in France can be unusually aggressive, while French libel law is milder. In the U.K. the picture is reversed: UK libel law is far more effective for plaintiffs while UK privacy law is still only beginning to develop and strengthen under pressure from the European Court of Human Rights.

Thus, it would be quite jarring for a French journalist to find his or her work in France to be controlled by UK press law; just as it would be nettlesome for a UK journalist to discover that his/her activities on a story in the UK was the proper subject of French privacy law. The unpredictability and lack of clarity of European choice of law rules, thus, make the practice of journalism all the more difficult.

Given the difficult press issues engaged by Rome II, various media groups in Europe have actively expressed their concerns to the European Parliament about the potential impact of Rome II on a free press. Their recent appeals to MEPs who are concerned about freedom of expression have met with some success for a variety of reasons.

As much as UK courts are quick to welcome and adjudicate cases against U.S. media under UK law, the UK is, nonetheless and understandably, more circumspect about submitting its citizens and its press to the media laws of other EU nations. It is interesting that, thus far, as the revised Rome II draft goes before the European Council, the UK, France and Sweden have emerged as the early supporters of the new draft.

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EU Parliament's Last Minute Surprise Changes to "Rome II" Rescue Press Rights

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ROUND 1

Place of Harm v. Place of Origin

The European Parliament (the European Union's legislative branch) and the European Commission (the European Union's executive branch) oversee the "harmonization" of procedural and substantive law.

The European Commission advanced the initial draft of Rome II on July 22, 2003. This draft made the governing law "the country or countries in which the harmful event occurred" unless "a substantially closer connection with another country" existed.

The international media community uniformly criticized this rule as lacking in any clarity. It would, they argued, lead to unpredictable legal results that could not be fairly anticipated by practicing journalists and it would expose the press and broadcasters to claims in multiple foreign jurisdictions and to forum shopping.

Among the press organizations expressing those concerns were the European Federation of Journalists, the Periodical Publishers Associations, the European Broadcasters Union, and Article 19. Initially, media groups offered and advocated a "place of origin" rule to govern choice of law in media torts, but their initial efforts before the European Parliament's Legal Affairs Committee did not go well.

Press Loses Round 1

The Legal Affairs Committee of the European Parliament took up Rome II beginning in 2004 as the regulation underwent a series of re-drafts. On March 14, 2005, the Committee's Rapporteur, Diana Wallis MEP of the UK, hosted a seminar of "experts in private international law" who were invited to submit position papers.

The media groups continued to press for a "place of origin" rule. The Legal Affairs Committee adopted its final report on June 21, 2005. It did little to accommodate the press' concerns. Its draft created a number of changes to the original, among them: 1) applying the law of the publisher or broadcaster's habitual residence for the *right of reply* and to any preventative or *injunctive measures*; 2) a three-year review period; and 3) creation of a European Media Code and/or European Media Council.

But, the Legal Affairs Committee's final draft still held fast to the "place of harm" rule for privacy and defamation claims. Specifically, it required that "the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable."

The only exception to the general rule was when a "manifestly closer connection with a forum country" existed in light of country of publication or broadcast, language, and audience size in light of "the need for certainty, predictability and uniformity of result."

MEP Wallis took the view that this new "flexible" element should be sufficient to address and protect the concerns express by the media. Faced with this setback, the media organizations monitoring the new legislation altered their strategy and turned to MEPs outside the Legal Affairs Committee.

ROUND 2

Informal MEP Media Committee

Before the European Parliament met in Strasbourg on July 6, 2005, the European Federation of Journalists and other groups representing journalists and media took their case to MEP's outside the Legal Affairs Committee and to an informal committee of MEP's who share a special interest in matters that pertain to freedom of expression and the press.

Among the members of this informal group were French MEP Jean-Marie Cavada, a former journalist and CEO of Radio France, and Italian MEP Lili Gruber, an author and former television news anchor.

MEP Cavada recommended a *target audience or place of editorial control rule* to accommodate the press' concerns – an adjustment that could also pass muster with MEP's who would not accept the "place of origin rule." The French solution prevailed as the European Parliament at the last minute adopted MEP Cavada's proposal.

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EU Parliament's Last Minute Surprise Changes to "Rome II" Rescue Press Rights

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The final draft provides that claims for harm "caused by the publication" will be governed by the law of "the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable.

The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors." Art. 6, Amendment 57.

The final European Parliament rule reflects "a communications environment operating increasingly on a continent-wide basis," where "the various forms of law relating to the personality and historically established press traditions in the European Union point to the need for more uniform prerequisites and rules for dispute resolution." Art. 26a, Amendment 54(3).

The final draft adopts one element advanced by the Legal Affairs Committee, the creation of "a self-obligating European Media Code and/or a European Media Council which can provide consolidating decision-[m]aking guidelines for the relevant courts as well." *Id.* This component, however, was criticized as "unnecessary and inappropriate" by the EFJ.

Pamela MoriniPre, of the European Federation of Journalists in Brussels, who has been actively monitoring developments in Rome II observed that it was initially difficult to get traction on press concerns in part because technical issues such as "choice of law" do not immediately engage public attention and because it takes time for Parliament members to appreciate how different constituencies will be affected by the new rules.

It will be important for the European Council participants to see that press and media groups follow and appreciate what they are doing in this important area.

For more information on Rome II's procedural history and drafts:

http://www.dianawallismep.org.uk/pages/rome2.html
http://www2.europarl.eu.int/oeil/file.jsp?id=235142

David S. Korzenik is a member and Aaron Warshaw is a summer associate at Miller Korzenik Sommers LLP in New York, NY.

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Second Circuit Rejects Trademark Claim Over Internet Pop Up Ads

By Celia Goldwag Barenholtz

Do advertisements which are generated when a computer user types a search term (*e.g.,* 1-800 Contacts) or a "URL" (*e.g.,* www.1800contacts.com) into his computer constitute trademark infringement when the search term or URL happens to incorporate a trademark?

On June 27, 2005, the United States Court of Appeals for the Second Circuit answered the question "no" with respect to the online advertising of WhenU.com, Inc. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 2005 WL 1524515 (2d Cir. 2005). (Walker, Straub, JJ.).

"Contextually Relevant" Internet Advertising

WhenU is a marketing company which has developed a software program called SaveNow which displays advertisements, including pop-up ads, on the computer screens of participating consumers.

The way in which WhenU used the 1-800 mark to generate targeted advertising does not constitute the "use" of a trademark.

Consumers download WhenU's software program from the Internet, generally as part of a package of revenue-generating software that supports a free software product. The software includes a directory comprised of over 40,000 web addresses, search terms and key word algorithms sorted into various categories (for example, eye-care) in much the same way as the Yellow Pages indexes businesses. The directory uses these elements to analyze SaveNow users' Internet activity.

WhenU includes web addresses in the directory solely as an indicator of a consumer's interest. Thus, if a user typed "www.1800contacts.com" into his browser window, or attempted to search for "1-800 Contacts," the software would detect that activity, determine that the consumer was interested in eye-care products, and might – depending on various timing and other internal limitations of the system – display an ad for a competing eye-care product. The 1-800 URL is just one of hundreds of elements in the eye-care category that gauge consumer interests.

The advertisements generated by WhenU's software are clearly labeled, contain the SaveNow logo and other distinctive branding features, and state on the face of the advertisement that they are a "WhenU.com" offer. They do not display anyone's marks other than those of WhenU and its advertisers.

The District Court's Decision

On October 9, 2002, 1-800 Contacts, which sells replacement contact lenses through its 1-800 telephone line and its website, filed a complaint and moved for a preliminary injunction against WhenU in the United States District Court for the Southern District of New York. 1-800 alleged that the display of WhenU ads on a SaveNow user's computer screen at the same time as a 1-800 webpage was displayed infringed 1-800's copyright in its website and its trademark, "1-800 Contacts."

The case was assigned to District Judge Deborah A. Batts. Judge Batts rejected 1-800's copyright claim, but found a likelihood of success as to its trademark infringement claim. *See 1-800 Contacts v. WhenU.com, Inc.*, 309 F.Supp.2d 467 (S.D.N.Y. 2003).

The district court gave short shrift to WhenU's argument that it was not using the 1-800 mark within the meaning of the Lanham Act because it did not use the mark in the advertising of goods or services.

Judge Batts held that by including the 1-800 URL in its directory and by displaying ads at the same time as web pages bearing plaintiff's marks were on display, WhenU was effectively using the 1-800 mark to sell its advertisers' goods and services.

The district court then turned to the initial interest confusion doctrine and, reading it expansively, applied it to WhenU ads even though they do not involve the actual diversion of computer users. Finally, the district court applied the "*Polaroid* factors" and concluded that a likelihood of confusion had been shown.

Second Circuit Reverses

In an opinion authored by Chief Judge John M. Walker, the Second Circuit held that the way in which WhenU used the 1-800 mark to generate targeted advertising does not constitute the "use" of a trademark within the meaning of 15 U.S.C. § 1127.

Section 1127 provides that "a mark shall be deemed to be in use in commerce ... on services when it is used or displayed in the sale or advertising of services ...."

"Use in commerce" is, in turn, an element of a trademark

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2nd Cir. Rejects Trademark Claim Over Internet Pop Up Ads

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infringement claim. *See* 15 U.S.C. § 1114(1)(a) (forbidding the "use in commerce" of a registered mark "in connection with" the sale, distribution or advertising of goods and services).

The Court of Appeals therefore reversed the preliminary injunction order and directed the district court to dismiss 1-800's trademark claims with prejudice. In so ruling, the Second Circuit agreed with two other district courts which had rejected similar claims against WhenU. *See U-Haul Intern., Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723 (E.D. Va. 2003) and *Wells Fargo & Co. v. WhenU.com*, 293 F. Supp. 2d 734 (E.D. Mich. 2003).

The Second Circuit first rejected the district court's conclusion that When U's use of 1-800's mark as an element in its software directory is a trademark use. The Court stressed that WhenU used 1-800's website address "precisely because it is a website address" and not to identify the source of its advertisers' products: "[a]lthough the directory resides in the [user's] computer, it is inaccessible to both the [user] and the general public."

The Second Circuit made clear that mark holders enjoy no greater rights in cyberspace than they do in the bricks and mortar world.

The Court analogized WhenU's use of a website address in its directory to generate contextually relevant advertising as akin to the thinking process of any marketer:

> A company's internal utilization of a trademark in a way that does not communicate it to the public is analogous to an individual's private thoughts about a trademark.

The Court added, "[s]uch conduct simply does not violate the Lanham Act."

Next, the Court disagreed with the district court's conclusion that the simultaneous displays of an ad on a computer user's screen with the 1-800's website is a "use" of the 1-800 mark. WhenU's ads "do not display" those trademarks (emphasis in the original), the Court explained, and WhenU has no control over whether 1-800's marks appear on 1-800's website. It was 1-800's decision to display its mark on its website, the Court emphasized, not WhenU's conduct, which produced the display of 1-800's mark.

Significantly, the Court rejected the notion that the Lanham Act grants a website owner exclusive access to a user's computer screen. WhenU's ads appear in a separate, branded window and have no effect on the appearance or functionality of the 1-800 site.

More importantly, the Lanham Act does not forbid the side-by-side juxtaposition of marks on a computer screen – even if the effect is to capitalize on the name recognition of the better known mark – any more than a drugstore would be forbidden from displaying a generic product next to a brand name product on its shelves. For the same reason, the Court rejected the notion that WhenU needed 1-800's permission to display an ad at the same time that a computer user accessed the 1-800 site: "WhenU does not need 1-800's authorization to display a separate window containing an ad any more then Corel would need authorization from Microsoft to display its WordPerfect word-processor in a window contemporaneously with a Word word-processing window."

Since the Court found that the element of trademark use could not be established as a matter of law, it did not reach the initial interest confusion doctrine or the *Polaroid* factors.

Trademark use is a "threshold matter" and to decide the question of trademark use on the basis of likelihood of consumer confusion would be putting the "cart before the horse." In a footnote, however, the Court expressed skepticism about the district court's findings, explaining that the likelihood of WhenU's ads causing confusion was "fairly incredulous given that [users] who have downloaded the SaveNow software receive numerous WhenU pop-up ads – each displaying the WhenU brand – in varying contexts and for a broad range of products."

The *1-800 Contacts* decision is an important one. Courts have struggled to apply the Lanham Act to the unseen use of marks on the Internet. The Second Circuit's decision establishes that to be a "use" within the meaning of the Lanham Act, the defendant must be using the mark as a mark, *i.e.,* to identify the source of goods or services. In so ruling, the Second Circuit made clear that mark holders enjoy no greater rights in cyberspace than they do in the bricks and mortar world.

Celia Goldwag Barenholtz is a partner of Kronish Lieb Weiner & Hellman LLP in New York, New York. Kronish Lieb represented WhenU in the appeal of the 1-800 decision.

Arizona Supreme Court Orders Dismissal Of Lawsuit Arising From "Holy War" Letter To Editor

By David J. Bodney

On July 1, 2005, the Arizona Supreme Court held that liability for intentional infliction of emotional distress could not be imposed against *The Tucson Citizen* "for printing a letter to the editor about the war in Iraq." *Citizen Publ'g Co. v. Miller*, No. CV-04-0280-PR 2005 WL 1538272 (Ariz. Sup. Ct. July 1, 2005), (Hurwitz, J.) at 2. In an unanimous 5-0 decision, Arizona's highest court accepted the newspaper's First Amendment defense, reversed the trial court's decision and remanded the case with instructions to dismiss the claim with prejudice.

Background

The case arose from the December 2, 2003 publication of a letter to the editor on the Op-Ed page of *The Tucson Citizen*. Written by Emory Metz Wright Jr., the letter stated:

> *We can stop the murders of American solders in Iraq by those who seek revenge or to regain their power. Whenever there is an assassination or another atrocity we should proceed to the closest mosque and execute five of the first Muslims we encounter.*
>
> *After all this is a "Holy War" and although such a procedure is not fair or just, it might end the horror.*
>
> *Machiavelli was correct. In war it is more effective to be feared than loved and the end result would be a more equitable solution for both giving us a chance to build a better Iraq for the Iraqis.*

As the supreme court noted, the letter triggered "immediate adverse reaction." *Id.* From Dec. 4 through 6, 2003, *The Citizen* published 21 letters from readers who criticized Wright's letter -- including one from Aly W. Elleithee, who sued the newspaper and Wright some five weeks later.

Specifically, on January 13, 2004, Elleithee and his co-plaintiff, Wali Yudeen S. Abdul Rahim -- two Islamic-American residents of Tucson, Arizona -- filed a complaint in Arizona Superior Court for assault and intentional infliction of emotional distress. They sought both monetary damages and injunctive relief, for themselves and on behalf of a putative class of "all Islamic-Americans who live in the area covered by the circulation of the *Tucson Citizen*, including the reach of the Internet website published by the *Tucson Citizen*." *Id.* at 3.

Lower Court Decisions

On February 3, 2004, *The Citizen* moved to dismiss the case, arguing that the plaintiffs had failed to state a viable cause of action for assault or emotional distress, and that the letter contained statements that were absolutely protected by the First Amendment. In response, plaintiffs contended that the letter "directly encourages, commands, and incites unlawful acts of violence." Focusing on the letter's second sentence, plaintiffs argued that the issue in this case was whether Wright's call to violence "constitutes the kind of outrageous behavior that a decent society should not tolerate."

The superior court found that plaintiffs had alleged sufficient facts to support a claim for intentional infliction of emotional distress.

On May 10, 2004, the superior court issued an order granting *The Citizen*'s motion to dismiss plaintiffs' assault cause of action, but denying the motion with respect to the emotional distress claim. In dismissing plaintiffs' assault claim, the superior court held that the letter at most "suggested causing future harm," and plaintiffs "have alleged…no facts to indicate that [*The Citizen*] acted with the intent to carry out the threat." Moreover, the superior court ruled that plaintiffs failed to meet the elements of assault, which require placing plaintiff "in reasonable apprehension of an imminent harmful or offensive contact."

Nevertheless, the superior court found that plaintiffs had alleged sufficient facts to support a claim for intentional infliction of emotional distress. "Clearly," the trial court wrote, "reasonable minds could differ in determining whether the publication of the letter rose to the level of extreme and outrageous conduct."

The court cited and relied upon the *Restatement (Second) of Torts* § 31 (1965) for the proposition that "[a]busive or insulting words that threaten serious future harm, or that cre-

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Arizona Supreme Court Orders Dismissal Of Lawsuit Arising From "Holy War" Letter To Editor

(Continued from page 55)

ate emotional distress, are remedied through an action for intentional infliction of emotional distress rather than assault." [Superior Court Order at 3] Moreover, the court dismissed *The Citizen*'s First Amendment defense, writing that "a public threat of violence directed at inciting or producing imminent lawlessness and likely to produce such lawlessness is not protected." *Id*.

On June 2, 2004, *The Citizen* filed a Petition for Special Action seeking interlocutory review of the superior court's order by the Arizona Court of Appeals. On July 15, 2004, the Court of Appeals declined to accept jurisdiction over the Special Action in a 2-1 decision. On August 10, 2004, *The Citizen* filed a Petition for Review in the Arizona Supreme Court, and the Petition was granted on January 4, 2005. Amicus briefs in support of *The Citizen*'s Petition were filed by The Thomas Jefferson Center for the Protection of Free Expression and the Reporters Committee for Freedom of the Press. On March 24, 2005, at the College of Law at Arizona State University, the Supreme Court heard oral argument in the case.

While the letter's suggested murder of innocent persons at a mosque was "no doubt reprehensible" and "offensive," the letter did not advocate "imminent lawless action."

Arizona Supreme Court Decision

In its July 1, 2005 Opinion, the Arizona Supreme Court established important protections, both procedural and substantive, for the media in Arizona. As for procedures, the supreme court recognized that there is "good reason" to review a lower court's refusal to grant case-dispositive motions whenever a lawsuit raises "serious First Amendment concerns." *Id*. at 5. While the supreme court rarely exercises its discretionary review of interlocutory appeals, it did so without hesitation in *The Citizen* case.

Indeed, the court ruled that "[i]n cases in which an appellate court can determine from the pleadings a case-dispositive First Amendment defense," such review may be appropriate to spare the parties and the court from "'a prolonged, costly and inevitably futile trial.'" *Id*. at 6 (citing *Scottsdale Publ'g, Inc. v. Superior Court*, 159 Ariz. 72, 74, 764 P.2d 1131, 1133, (App. 1988)). Of course, such interlocutory review also "protects First Amendment rights." *Id*.

As for the substantive safeguards, the Arizona Supreme Court ruled that the First Amendment absolutely protects newspapers from tort suits involving speech on matters of public concern unless the plaintiff can prove that the speech falls into one of the narrow exceptions to this general rule. Relying heavily on the Supreme Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988), the Arizona Supreme Court recognized the fundamental importance of protecting "'the free flow of ideas and opinions on matters of public interest and concern.'" Liability for "political speech," the court observed, can exist only upon proof that the utterance fits squarely into one of the few exceptional categories recognized by the U.S. Supreme Court.

The court began its First Amendment analysis by finding that the letter to the editor "involves a matter of undeniable public concern -- the war in Iraq." *Id*. at 10. It also identified only three possible exceptions to the general rule of First Amendment protection of political speech that might apply in *The Citizen* case. The court rejected each of these three arguments raised by the plaintiffs in turn.

First, the court analyzed a possible "incitement" exception under the Supreme Court's seminal decision in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Writing for the Arizona Supreme Court, Justice Andrew Hurwitz observed that speech can qualify as incitement under *Brandenburg* only if it is (a) aimed at producing "imminent lawless action," and (b) is "likely" to produce such action. *Id*. at 12. The court also paid close attention to *NAACP v. Claiborne Hardware Co.*, 458 U. S. 886 (1982), a case involving speech by NAACP official Charles Evers during a civil rights boycott of white merchants in Mississippi.

Measured against such precedent, the speech at issue in *The Citizen* case fell "far short of unprotected incitement." *Id*. at 13. While the letter's suggested murder of innocent persons at a mosque was "no doubt reprehensible" and "offensive," the letter did *not* advocate "imminent lawless action." *Id.* at 14.

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Arizona Supreme Court Orders Dismissal Of Lawsuit Arising From "Holy War" Letter To Editor

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The letter lacked the requisite imminence because it "was premised on the occurrence of some future 'assassination or another atrocity.'" *Id*. And it was not "likely" to produce imminent lawless action because "[t]he statement was made in a letter to the editor, not before an angry mob." *Id*. As Justice Hurwitz emphasized:

> *Indeed, the complaint was filed more than a month after the challenged statements were made and did not allege that a single act of violence had ensued from the publication nor that such violence was imminent. Rather, the only thing that appears to have resulted from the challenged speech was more speech, in the form of numerous critical letters to the editor, including one from one of the Plaintiffs. This is precisely what the First Amendment contemplates in matters of political concern -- vigorous public discourse, even when the impetus for such discourse is an outrageous statement.*

Id. (emphasis in original).

Second, the court made short shrift of plaintiffs' asserted application of the "fighting words" doctrine to this case. Relying on *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), plaintiffs had argued that the letter contained words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." But the court noted that fighting words must be addressed to the target of the remarks, and that the doctrine "has generally been limited to 'face-to-face' interactions." *Id.* at 15 (citing *Chaplinsky*, 315 U.S. at 573).

Here, Justice Hurwitz reiterated the importance of the statements' context -- in this case, statements of political opinion in a letter to the editor, not slurs in a face-to-face confrontation. "While the letter expresses controversial ideas, it contains no personally abusive words or epithets. The letter is neither directed toward any particular individual nor likely to provoke a violent reaction by the reader against the speaker." *Id*. at 16.

With that finding, the court moved to the third and final possible exception to the general First Amendment rule that protects such speech on matters of public concern. Turning again to an analysis of long-standing Supreme Court precedent, the court questioned whether the letter could constitute a "true threat" under *Watts v. United States*, 394 U.S. 705 (1969), and its progeny.

While *Watts* involved the interpretation of a federal statute (and the application of that statute to an antiwar protester's offensive statement about President Lyndon Johnson), the court nevertheless recognized the role of the First Amendment in compelling the reversal of a conviction for threatening the president's life. The Arizona Supreme Court drew not only on *Watts*, but also *Virginia v. Black*, 538 U.S. 343 (2003), and recent decisions of the Arizona Court of Appeals to conclude that *The Citizen* had published no true threat.

Both content and context of the statements at issue led the Arizona Supreme Court to reject plaintiffs' contention that the speech constituted a true threat.

Following the Supreme Court's lead in *Virginia v. Black*, the court defined a true threat as one "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id*. at 17 (citing *Virginia v. Black*, at 359-60).

The Arizona Supreme Court refined that definition by borrowing language from the Arizona Court of Appeals, which had interpreted true threats as statements made "'in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily harm upon or take the life of [a person].'" *Id*. at 18 (citing *In re Kyle M.*, 200 Ariz. 447, 451, 27 P.3d 804, 808 (App. 2001)).

Importantly, Justice Hurwitz again focused on the importance of *context* in determining whether an absolute First Amendment protection exists. "A difference in context may be critical in determining if speech is protected: there is a vast constitutional difference between falsely shouting fire in a crowded theatre and making precisely the same statement in a letter to the editor." *Id*. at 19.

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Arizona Supreme Court Orders Dismissal Of Lawsuit Arising From "Holy War" Letter To Editor

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Both the content and context of the statements at issue led the Arizona Supreme Court to reject plaintiffs' contention that the speech constituted a true threat.

First and foremost, the letter contained statements with a "plainly political message." *Id.* As the court reasoned: "Indeed, the comments arose in the context of a discussion about a central political issue of the day: the conduct of the war in Iraq. Such statements are far less likely to be true threats than statements directed purely at other individuals." *Id.*

But second, and central to the court's reasoning throughout its opinion, "this expression occurred in the letters to the editor section of a general circulation newspaper, hardly a traditional medium for making threats, and a public arena dedicated to political speech." *Id.*

Third and finally, the letter's "conditional nature and ambiguity" would prohibit a reasonable person from viewing the speech as a serious expression of unlawful violence to a particular individual or group. *Id.* at 20. As the court observed, the letter was unclear as to whom "we" referred -- the United States armed forces or the public at large. Nor could the court tell whether the letter advocated violence "against Muslims in Iraq, against Muslims worldwide, or against Muslims in Tucson." *Id.*

In concluding that *The Citizen* could not be held liable under Arizona tort law for publishing the letter, the supreme court did not address several of the newspaper's defenses. Because it found the newspaper protected by the First Amendment, the court did not analyze Article 2, Section 6 of the Arizona Constitution, which provides that "[e]very person may freely speak, write, and publish on all subjects being responsible for the abuse of that right." Nor did the court determine whether plaintiffs had stated a common law claim for intentional infliction of emotional distress. Rather, the court assumed "arguendo" that the superior court correctly held that all elements of the claim had been met. *Id.* at 17.

Conclusion

At bottom, *The Citizen* case demonstrates the vitality of First Amendment protections -- even, or perhaps especially, as applied to speech involving an issue of acute public concern such as the war in Iraq. By granting interlocutory review, the supreme court sent a powerful message to the lower courts on the importance of reviewing First Amendment defenses carefully at the earliest stages of a case.

And by embracing the First Amendment defense, the court recognized the centrality of "context" to any analysis of speech of public importance published on the pages of a newspaper -- or, for that matter, anywhere else. Though the speech at issue in this case may have been truly reprehensible, it was not a "true threat" to anyone: only an invitation to engage in more speech on one of the most controversial topics of our day.

By granting interlocutory review, the supreme court sent a powerful message to the lower courts on the importance of reviewing First Amendment defenses carefully at the earliest stages of a case.

David Bodney is a partner in the Phoenix, Arizona office of Steptoe & Johnson LLP, and argued the case for Petitioner Citizen Publishing Co. in the Arizona Supreme Court. The Citizen was also represented by Peter S. Kozinets and J. Chris Moeser of Steptoe & Johnson LLP.

LEGISLATIVE UPDATE

Open Government Act, FOIA

By Kevin M. Goldberg

The Open Government Act continues to fracture, which allows the possibility that some portions will eventually pass on their own. In addition, the incredible jailing of Judith Miller has led to renewed calls for a passage of the Free Flow of Information Act, on which a hearing was held on July 20 in the Senate Judiciary Committee.

However, early legislation affecting the USA Patriot Act offers encouragement that the law will not simply be extended via a rubber stamp. The House of Representatives has passed a bill as part of appropriations legislation that prevents government subpoenas for library and bookstore records.

Open Government Act of 2004 (S 394 and HR 867)

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.
- Among the changes proposed in this bill are:
  - A broader definition of the "news media" for purposes of fee waivers
  - An increase in the circumstances where "fee shifting" would occur to award attorney's fees to a litigant who must go to court to obtain documents from a federal agency
  - Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
  - Stricter enforcement of the 20 day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
  - Maintenance of accessibility of records that have been given to private contractors for storage and maintenance
  - The creation of a "FOIA Ombudsman" within a new Office of Government Information Services to oversee FOIA
- The subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee held a hearing on the topic of FOIA generally, concerning this bill and the FASTER FOIA Act (discussed below) on May 11, 2005.

Identification of Statutes that Would Affect FOIA (S 1181)

- Though the Open Government Act's momentum has slowed somewhat, discussion of the proliferation of the so-called "(b)(3)" exemptions to FOIA – when another statute exempts a specific class of information from disclosure upon request – led to Senators Cornyn and Leahy introducing S 1181, which simply consists of that section of the Open Government Act that would require any bill that seeks to exempt information from release under FOIA to specifically cite to 5 U.S.C. § 552 in order for that new exemption to become effective. This will allow those who track FOIA legislation to find all potential new exemptions that are often inserted as one paragraph of a much larger, non-FOIA specific, bill.
- S 1181 was introduced on June 7, 2005 and passed the Senate Judiciary Committee just two days later. It has now passed the full Senate but its House prospects are uncertain; House members have indicated that they would prefer passing one comprehensive FOIA bill, which may or may not be the Open Government Act, rather than enacting piecemeal legislation.

Faster FOIA Act

- Senators Cornyn and Leahy also introduced the "Faster FOIA" Act as S 589 on March 10, 2005. This bill is intended to support the Open Government Act by establishing an advisory commission on Freedom of Information Act processing delays. The bill was

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introduced in the House of Representatives on April 6, 2005 by Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX). It was given bill number HR 1620.

- The May 11, 2005 hearing touched on the importance of the Faster FOIA Act to proper FOIA functioning.
- The Faster FOIA act has passed the Senate Judiciary Committee but has not been brought to the Senate floor.

Free Flow of Information Act (HR 581 and S 340)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- A hearing was scheduled to be held in the House Judiciary Committee's Subcommittee on Courts, Internet, and Intellectual Property on May 12, 2005. However, that hearing has now been canceled. The Department of Justice is still reviewing the bill but the Senate Judiciary Committee scheduled a hearing for July 20, 2005.

Freedom to Read Protection Act

- This legislation was introduced on March 8, 2005 by Rep. Sanders (I-VT). It seeks to amend Section 215 of the USA Patriot Act, which allows use of the Foreign Intelligence Surveillance Act to increase the government's ability to subpoena records held by various private businesses.
- The Freedom to Read Protection Act seeks to exempt bookstores and libraries from these orders. Unfortunately, it will do nothing regarding the potential for a government subpoena of newsroom records. The Department of Justice has indicated that it believes that Section 215 of the USA Patriot Act would supersede the Privacy Protection Act of 1980 to allow for searches of newsrooms, as they are included in the definition of a business, and their records in the definition of business records, that are covered by this section of the USA Patriot Act.
- The bill was referred to Judiciary Committee, where it languished until it was attached to the Fiscal Year 2005 Appropriations Bill for the Departments of Justice, State and Commerce (HR 2862). That bill was passed by the House of Representatives on June 15, 2005.

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 Kevin.Goldberg@cohnmarks.com.

Senate Judiciary Committee Considers Federal Shield Law

By Randall Warden

Introduction

With *The New York Times*' reporter Judith Miller in jail for refusing to reveal confidential sources to a federal grand jury investigating the leak of a CIA agent's name to the press, the Senate Judiciary Committee is turning its attention to a federal shield law introduced by Senators Richard Lugar (R-IN), Chris Dodd (D-CT), Bill Nelson (D-FL), James Jeffords (I-VT), and Frank Lautenberg (D-NJ) on July 18, 2005. The Committee held a hearing on Wednesday, July 20, 2005, to investigate the issues and implications of the proposed Free Flow of Information Act (S. 1419). This July bill is a revised version of the bill originally introduced in February by Senator Lugar. The featured witnesses before the Committee included *Time* reporter Matthew Cooper, *Time* Editor-in-Chief Norman Pearlstine, *The New York Times* columnist William Safire, media lawyers Floyd Abrams and Lee Levine, and University of Chicago Law School Professor Geoffrey Stone. Deputy Attorney General James Comey, who submitted written testimony criticizing the proposed legislation, cancelled his appearance at the last minute to attend House meetings on the Patriot Act.

The hearing highlighted three fundamental justifications for the proposed bill: (1) the privilege is necessary to preserve a free, uninhibited press; (2) the proposed law could clear up confusion about the current state of the law; and (3) diplomatic and international concerns counsel against maintaining a legal system that is willing to send a journalist to jail for preserving the trust of a confidential source. Conversely, the hearing identified two basic criticisms of a federal shield law: (1) a reporter's privilege hinders law enforcement; and (2) the ease of conveying information over the internet could turn any individual into a "reporter" claiming protection under the law. This summary will provide an overview of the panelists' testimony on these issues.

JUSTIFICATIONS

Reporter's Privilege is Necessary to Preserve a Free Press

The main argument advanced for establishing a media shield law is that the protection is vital to the preservation of a free press. A free press, in turn, is essential to the maintenance of our democratic system of government.

The panelists at the Senate hearing testified that the absence of a federal shield law produced a "chilling effect" on sources: confidential sources, fearing that reporters will cave under the threat of imprisonment and reveal their identity, will simply refuse to provide information to reporters. At the hearing, William Safire testified that reporters receive newsworthy information that goes beyond prepared government press releases by cultivating relationships with sources and developing trust. He asserted that "we slam the door on that at great peril to our freedom."

Moreover, Lee Levine pointed out that *The Cleveland Plain Dealer* recently withheld publication of two news stories which relied on confidential sources because of the fear of a federal subpoena. So, the panelists argued, the recent wave of subpoenas aimed at journalists has resulted in the public being deprived of valuable news. Indeed, the supporters of the bill asserted that the privilege is not for the benefit of the reporter; rather, as Matthew Cooper testified, "this privilege is about the public's right to know."

A Federal Shield Law is Needed to Clarify Confusion

Currently, 49 states and the District of Columbia have some sort of media shield protection in place through either a codified statute or judicial decision. Federal courts interpreting the fractured Supreme Court decision *Branzburg v. Hayes*, 408 U.S. 665 (1972), are split on the issue.[1]

This confusion in the law breeds uncertainty. Matthew Cooper reported to the Committee that he cannot effectively do his job without knowing what promises he can legally make to sources and which ones he cannot. Without assurances of confidentiality, sources will choose not to divulge certain information to reporters. Professor Geoffrey Stone asserted that "the absence of a federal privilege directly undermines the policies of forty-nine states and the District of Columbia and wreaks havoc on the legitimate and good faith understandings and expectations of sources and reporters throughout the nation."

Floyd Abrams testified that "When *Branzburg* was decided, it was less than clear to many observers whether a federal shield law was needed. For most of the 33 years

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that followed, journalists were held to be protected by the First Amendment when they sought to protect their sources from being disclosed. But that has changed radically in recent years and even more so in recent days." As the Court itself noted in *Branzburg*, Congress has the ultimate authority to decide whether a reporter's privilege is necessary and desirable. In order to ensure that the decision of all but one state is not undermined, supporters argued that a federal shield law was necessary to reduce the confusion and uncertainty that leads sources to withhold information of public importance.

Diplomatic and International Concerns Counsel in Favor of a Privilege

In his testimony to the Committee, Senator Richard Lugar pointed out that any country that jails journalists is in bad company. He cited a report by Reporters Without Borders indicating that roughly half of the 107 journalists currently in jail are in China and Cuba. Such comparisons do not bode well for the United States' reputation in the international community. From Moscow to London, foreign media are criticizing the state of affairs in the United States. Senator Lugar reported that *The Guardian* in London concluded that "the American constitution no longer protects the unfettered freedom of the press."

Developing countries look to the United States as a model of freedom and democracy, a constitutional system that has withstood the test of time. Senator Lugar argued that the media shield law is important because it will demonstrate the importance of a free press to these developing nations as they work to build democracies that will last. Floyd Abrams asked, "How can the United States provide no protection when countries such as France, Germany and Austria provide full protection and nations ranging from Japan to Argentina and Mozambique to New Zealand provide a great deal of protection?"

CRITICISMS

A Reporter's Privilege Hinders Law Enforcement

The primary criticism of a federal shield law is that it impedes effective law enforcement. In his prepared testimony submitted to the Committee, Deputy Attorney General James Comey argued that the bill would make it difficult for the Justice Department to combat terrorism. However, this criticism was aimed at an earlier version of the bill. The bill introduced shortly before the hearing had been amended to provide an exception to the privilege "to prevent imminent and actual harm to national security." Comey's absence was noted with frustration by nearly all of the senators in attendance, as they were deprived of asking him whether the revised bill satisfied the Justice Department's concerns.

Some of the senators expressed concern over what would constitute "imminent and actual harm to national security" and questioned whether the bill should also include exceptions for when a crime, such as kidnapping, has been committed or when public safety is at stake. Professor Geoffrey Stone testified that a reporter should also be compelled to disclose a source when the source has committed a crime by leaking information to the reporter.

Supporters of the legislation argued that a confidential tip often brings a breaking story to the attention of law enforcement. If the tipster chose not to reveal the information to a reporter fearing exposure of his identity, law enforcement would actually be worse off without the privilege.

Moreover, William Safire argued that it is improper for the government to use the press essentially as investigatory agents. The government has powerful methods for gathering evidence, while the reporter only has the power of trust. Once sources stop trusting the reporter, information stops flowing to the public. Safire also pointed out that a majority of the States Attorneys General signed on to an amicus brief supporting the recognition of a reporter's privilege in the recent cases involving Judith Miller and Matthew Cooper. If law enforcement was noticeably hindered by the various state shield laws, these Attorneys General would certainly not advocate for a reporter's privilege.

The Problem of Defining Who is Protected

In the hearing, Senator John Cornyn expressed concern over the scope of protection of the proposed privilege. The basic fear is that a growing wave of individual reporters and internet "bloggers" might make it difficult to limit the privilege. Cornyn worried that the privilege might give protec-

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tion to individuals publishing inaccurate information. Senator Patrick Leahy also noted that previous efforts to codify a reporter's privilege have failed in part because of disagreement on who would be protected.

William Safire first responded that journalism is not a privileged profession – the "lonely pamphleteer" serves the same function as *The New York Times* reporter. Professor Stone advocated for a functional approach based on the perspective of the source: "The source should be protected whenever he makes a confidential disclosure to an individual, reasonably believing that that individual regularly disseminates information to the general public." The definition of the term "covered person" in the bill delineates who may claim protection under the bill, but the precise reach of the definition was not discussed in the hearing.

Conclusion

Senators Dianne Feinstein and Charles Schumer asked the Chairman of the Committee, Senator Arlen Specter, to schedule another hearing so that a representative of the Department of Justice may testify. But with the Senate Judiciary Committee now facing a Supreme Court nomination, it may have little time to address the matter in the near future.

Representative Mike Pence (R-IN) and Representative Rick Boucher (D-VA) introduced an identical bill in the House (H. R. 3323) on July 18, 2005.

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[1] Senator Lugar testified that the Eleventh, Ninth, and Fifth Circuits have recognized some form of a privilege.

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