

# MILRC Media Law Resource Center

## MEDIA LAW LETTER

Reporting Developments Through July 31, 2007

### SUPREME COURT

- U.S.**                    **Supreme Court Loosens Campaign Advertising Restrictions**                    **3**  
*Campaign Finance Law Unconstitutional as Applied to Issue Ads*  
Federal Election Commission v. Wisconsin Right to Life, Inc.

### LIBEL / PRIVACY

- Cal. Ct. App.**            **\$15 Million Misappropriation Award Reversed and Remanded**                    **7**  
*Single Publication Rule Applies; Insufficient Evidence for Award of Profits*  
Christoff v. Nestle USA, Inc.
- R.I.**                        **Rhode Island Supreme Court Affirms Directed Verdict for Newspaper**                    **9**  
*Police Blotter Item Protected by Fair Report Privilege*  
Trainor v. The Standard Times
- Pa.**                        **Pennsylvania “Rejects” Anderson v Liberty Lobby?**                    **11**  
*Republication To Be Relevant For Actual Malice*  
Weaver v. Lancaster Newspapers, Inc.
- 1st Cir.**                    **First Amendment Protects Disclosure of Illegally Recorded Tape**                    **15**  
*Bartnicki v. Vopper Applied to Web Posting of Police Search Video*  
Jean v Massachusetts State Police
- 10th Cir.**                    **Tenth Circuit Affirms Dismissal of Policemen’s Privacy Case Against Broadcaster**                    **17**  
*Disclosure of Undercover Status of Public Interest*  
Alvarado v. KOB-TV, LLC
- Tex. App.**                    **Texas Newspaper Wins Summary Judgment on Interlocutory Appeal**                    **19**  
*An “Accusation” by Any Other Name is Still the Same*  
DR Partners v. Floyd
- Pa.**                        **An Unfortunate Victory in Pennsylvania**                    **21**  
*Plaintiff-Friendly Standards Adopted for Corporate Public Figure Status, Conditional Privilege*  
American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania
- Cal. App.**                    **Court Affirms Dismissal of College Coach’s Defamation Claims**                    **23**  
*Reasons For Termination A Matter of Public Interest*  
McGarry v. University of San Diego
- Cal. Super.**                    **Court Dismisses Rodeo Spectator’s Claims Over “Borat” Movie**                    **26**  
*Plaintiff Made Political Statement by Displaying Confederate Flag on His Cap*  
Doe v. One America Productions
- Neb. Dist. Ct.**                    **Court Refuses Prior Restraint Against Publication of Allegedly Defamatory Book**                    **27**  
*Hospital Sought to Suppress Manuscript About Hepatitis C Outbreak*  
Freemont Area Medical Center v. McKnight

<b>E.D.Va.</b>	<b>Virginia Court Grants Preliminary Injunction in Libel Case</b> <i>Orders Fringe Author to Stop Libeling Patricia Cornwell</i> Cornwell v. Sachs	<b>28</b>
<b>Mass. Super.</b>	<b>Islamic Society of Boston Drops High Profile Libel Cases Against Media</b> <i>Facing Damaging Disclosures in Discovery, Three Cases Collapse</i> Abou-Allaban v. Fox Television Stations, Inc.; Kandil v. Boston Herald, Inc.; Islamic Society of Boston v. Boston Herald, Inc.	<b>29</b>
<b>Cal. Super.</b>	<b>Anti-SLAPP Statute Protects Reality Show About Former Kiss Rock Star</b> <i>Public Interest in the Lifestyles of the Rich and Famous</i> Greenstein v. Greif Company	<b>31</b>
<b>INTERNATIONAL</b>		
<b>England</b>	<b>Court of Appeal Recognizes Neutral Report Defense in Libel Cases</b> <i>Republication of Allegations Protected Under Umbrella of Reynolds Defense</i> Robert v. Gable, Silver, Searchlight Magazine	<b>33</b>
<b>COPYRIGHT / TRADEMARK</b>		
<b>W.D. Pa.</b>	<b>Court Rulings Limiting Recovery of Statutory Damages</b> <i>Two Rulings Make Use of Copyright Act and DMCA</i> McClatchey v. Associated Press	<b>37</b>
<b>D. Mass.</b>	<b>Use of Photograph in News Broadcast Held to Be Infringing</b> <i>Court Looks to Industry Practices To Find No Fair Use</i> Fitzgerald v. CBS	<b>39</b>
<b>3d Cir.</b>	<b>Circuit Affirms Dismissal of Copyright and Libel Claims Against Google</b> <i>Communications Decency Act Shields Internet Giant</i> Parker v. Google	<b>40</b>
<b>NEWSGATHERING</b>		
<b>Ga. Magis. Ct.</b>	<b>Court Denies Application for Arrest Warrants Sought Against Reporter &amp; Photographer</b> <i>Judge Finds Neither Possessed Requisite Criminal Intent for Criminal Trespass</i>	<b>41</b>
<b>7th Cir.</b>	<b>Circuit Affirms Retaliatory Discharge Judgment for Media Source</b> <i>Firing of Security Officer “violated a mandate of public policy”</i> Thomas v. Guardsmark, LLC	<b>42</b>
<b>COMMERCIAL SPEECH</b>		
<b>N.D.N.Y.</b>	<b>Federal Court Strikes Down Attorney Advertising Rules</b> <i>Evidence Supporting Need for Restrictions “Notably Lacking”</i> Alexander v. Cahill	<b>43</b>
<b>LEGISLATION</b>		
<b>Update</b>	<b>Media Issues Heat Up on Capitol Hill as the Legislative Summer Doldrums Approach</b> <i>Congress Addresses Prescription Drug Advertising and Federal Shield Law, among others</i>	<b>45</b>
<b>CYBER</b>		
<b>Update</b>	<b>The Net Neutrality Debate</b> <i>Why Government-Imposed Net Neutrality Would be Bad Policy</i>	<b>49</b>

## Supreme Court Loosens Campaign Advertising Restrictions

### *Campaign Finance Law Unconstitutional As Applied to Issue Ads*

By Jerianne Timmerman

Last month the Supreme Court substantially loosened restrictions on the television and radio advertisements that corporations and labor unions can finance prior to an election. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (June 25, 2007). In a splintered 5-4 decision, the Court found that Section 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) prohibiting corporate- and union- financed ads that refer to federal candidates was unconstitutional as applied to the specific ads of Wisconsin Right to Life, Inc. (WRTL) at issue.

By this decision, the Court has significantly loosened BCRA's political advertising limitations that it upheld against a facial First Amendment challenge in 2003. Moreover, it appears that the Court is moving closer to striking down Section 203's advertising restrictions in their entirety. At the very least, this decision is likely to slow further efforts to regulate the financing of political campaigns.

#### **Background**

Section 203 of BCRA prohibits corporations and labor organizations from making "electioneering communications" with the use of general corporate or treasury funds. Electioneering communications are broadcast, cable or satellite communications that (1) refer to a federal candidate; (2) are aired 60 days before a general or 30 days before a primary election; and (3) reach 50,000 or more persons. In 2003, the Supreme Court by a 5-4 vote, with former Justice O'Connor voting in the majority, upheld these restrictions against a facial First Amendment challenge. See *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

In July 2004, WRTL began broadcasting advertisements declaring that a group of Senators was filibustering to delay and block federal judicial nominees and telling voters to contact Wisconsin Senators Russell Feingold and Herbert Kohl to urge them to oppose the filibuster. WRTL planned to run the ads throughout August 2004 and finance them with its general treasury funds. However, as of

August 15, 30 days before the Wisconsin primary, the ads would be illegal electioneering communications under Section 203 of BCRA because Senator Feingold was a candidate.

WRTL filed suit against the Federal Election Commission seeking declaratory and injunctive relief and arguing that Section 203's prohibition was unconstitutional as applied to WRTL's three ads in question, as well as similar ads that WRTL might run in the future. Just before the BCRA blackout period began, a three-judge District Court panel denied a preliminary injunction, concluding that *McConnell's* reasoning that Section 203 was not facially overbroad left no room for such an as-applied challenge. As a result, WRTL did not run its ads during the blackout period, and the lower court dismissed the complaint.

The Supreme Court subsequently vacated that decision of the three-judge panel, holding that *McConnell* "did not purport to resolve future as-applied challenges" to Section 203. *Wisconsin Right to Life, Inc. v. Federal Election Commission*, 546 U.S. 410 (2006). On remand, the District Court granted WRTL summary judgment, holding Section 203 unconstitutional as applied to the three ads. It concluded that the ads were genuine issue ads, not express advocacy or its "functional equivalent" under *McConnell*, and found that no compelling interest justified BCRA's regulation of such ads.

#### **The Supreme Court's Decision**

The Supreme Court affirmed the District Court's decision in a fractured 5-4 vote. Chief Justice Roberts and Justice Alito concluded that BCRA Section 203 was unconstitutional as applied to WRTL's ads because these ads were not the "functional equivalent" of express campaign speech.

As an initial matter, Roberts and Alito found that the Federal Election Commission was wrong in arguing that WRTL had the burden of demonstrating that Section 203 was unconstitutional as applied to its ads. Rather, because Section 203 burdened political speech, it was subject to strict scrutiny. Thus, the government must prove that applying BCRA to WRTL's ads furthered a compelling governmental interest and was narrowly tailored to achieve that interest.

The Chief Justice and Justice Alito noted that *McConnell* had already ruled that BCRA survived strict scrutiny to the

(Continued on page 4)

## Supreme Court Loosens Campaign Advertising Restrictions

(Continued from page 3)

extent it regulated express advocacy of the election or defeat of a federal candidate, or its functional equivalent. However, because WRTL's ads could reasonably be interpreted as something other than an appeal to vote for or against a specific candidate, they were not the functional equivalent of express advocacy, and therefore fell outside *McConnell*'s scope. A court should find that an ad is the "functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Under this test, Roberts and Alito concluded that WRTL's ads were "plainly not the functional equivalent of express advocacy." First, their content was consistent with that of a genuine issue ad—they focused and took a position on a legislative issue and exhorted the public to adopt that position and to contact public officials with respect to the matter. Second, their content lacked indicia of express advocacy; specifically, they did not mention an election, candidacy, political party or challenger, and they took no position on a candidate's character, qualifications, or fitness for office.

The Chief Justice and Justice Alito found that none of the interests identified by the government, including the interest in preventing corruption or the appearance of corruption, were sufficiently compelling to justify burdening WRTL's speech. Thus, Section 203 was held unconstitutional as applied to WRTL's ads.

Chief Justice Roberts and Justice Alito concluded that this case did not present the occasion to revisit *McConnell*'s holding that a corporation's or union's express advocacy of a candidate shortly before an election may be prohibited, along with the functional equivalent of express advocacy. But they stressed that when it came to defining what speech qualified as the functional equivalent of express advocacy subject to such a ban, then the Court should "give the benefit of the doubt to speech, not censorship."

### ***Support for Overruling McConnell Outright***

Justices Scalia, Kennedy and Thomas concurred in the Court's judgment, but they would have overruled that part of

*McConnell* upholding Section 203. These Justices found that the test set forth for determining whether speech was the functional equivalent of express advocacy (the "susceptible of no other reasonable interpretation" standard) was impermissibly vague, and thus ineffective to vindicate the fundamental First Amendment rights at issue.

Beyond these three, Justice Alito indicated in a separate concurring opinion that he too would be open to reconsidering *McConnell*. Alito wrote that, if it turned out that the applied standard set forth in the principal opinion "impermissibly chills political speech," then the Court will "presumably be asked in a future case to reconsider" *McConnell*.

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***The WRTL decision will at least slow, and may well stop, the movement toward increased regulation of campaign finance.***

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### ***Views of the Dissenting Justices***

In a strongly worded dissent, Justices Souter, Breyer, Ginsburg and Stevens argued that the majority had already effectively overturned the decision in *McConnell* upholding Section 203. They also argued that the decision made it easy for corporations and unions to circumvent the limits placed on their candidate contributions and political spending. These Justices contended that the ban on contributions will mean little because companies and unions can save candidates the expense of advertising directly, simply by running "issue ads" without express advocacy.

### ***Implications for Upcoming Elections***

Many believe that the *WRTL* decision will substantially increase the number of corporate, interest group and union funded campaign ads in the 2008 election season. A number of politically disparate groups, ranging from the AFL-CIO to the Chamber of Commerce, the ACLU to the NRA, supported the loosening of BCRA's restrictions on ads prior to an election.

The upcoming campaign season will also be marked by uncertainty. The precise contours of the "no other reasonable interpretation" standard will need to be worked out. It remains unclear how the Federal Election Commission and the lower courts will interpret this standard. As a practical matter, corporations and unions may try to pattern their ads

(Continued on page 5)

## Supreme Court Loosens Campaign Advertising Restrictions

*(Continued from page 4)*

after the WRTL ads to ensure that they qualify as issue ads, rather than run the risk of their ads being banned as the functional equivalent of express advocacy.

### ***Implications for Future of Campaign Finance Regulation***

The *WRTL* decision will at least slow, and may well stop, the movement toward increased regulation of campaign finance that a number of observers expected after the Supreme Court upheld all the major provisions of BCRA in 2003. In fact, some observers have speculated that the Supreme Court may reconsider in the relatively near future its decision upholding the constitutionality of the entire law, including BCRA Title I which placed restrictions on the ability of parties to raise and spend soft money.

At the very least, many believe that the Court will soon agree to hear an appeal asking the Justices to strike down BCRA's remaining restrictions on advertising, including restrictions on express advocacy and its equivalent. Justice Alito's statement in his separate opinion may be viewed as inviting such a challenge.

Clearly, serious questions as to the constitutionality of restrictions on the financing of federal campaigns remain. It would be surprising if the 2008 campaign does not give rise to further challenges to BCRA.

*Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters.*

## MLRC Annual Dinner

Wednesday, November 7, 2007

[Grand Hyatt New York](#)

(109 East 42nd Street at Grand Central Station, New York)

*MLRC will present the William J. Brennan, Jr. Defense of Freedom Award to [David Fanning](#), the creative force behind and executive producer since its first season in 1983 of the PBS documentary series *FRONTLINE*.*

*The program for the Dinner will feature a panel discussion on documentaries moderated by Judy Woodruff, senior correspondent for PBS' NewsHour with Jim Lehrer and editor of the show's 2008 election coverage.*



## **MLRC London Conference September 17-18, 2007 International Developments in Libel, Privacy, Newsgathering and New Media Law**

MLRC's London Conference 2007 on September 17-18, 2007 is a two-day event for media lawyers and press experts to discuss the latest developments in media law and practice.

Delegates from around the world will gather to participate in a series of facilitated discussions on developments in media libel law, privacy law, newsgathering laws and the challenges posed by the new digital media environment.

Among the highlights of the London Conference are a roundtable discussion with UK libel judges on the challenges of press litigation in the 21<sup>st</sup> century. Justice Henric Nicholas of the Supreme Court of New South Wales will comment on the Asian media law landscape from a Commonwealth law perspective. And Alan Rusbridger, editor of *The Guardian*, and Richard Sambrook, Director BBC Global News, will discuss the impact of the new digital media environment on journalism and the business of journalism.

The closing session of the conference is an Oxford-style debate on privacy law, with English and American lawyers facing off on the difficult question of the boundary between freedom of expression and privacy: What should be private? Who should decide what is private?

The conference also includes a delegates dinner on Sunday night September 16<sup>th</sup> and a breakfast meeting on September 19<sup>th</sup> for in-house media counsel.

The London Conference is a unique opportunity to meet colleagues from around the world. Space is limited, so we urge you to register early to ensure a place. We hope you will join us!

**Contact [londonconference@medialaw.org](mailto:londonconference@medialaw.org) for more information.**

***The MLRC London Conference is presented with the support of:***

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## \$15 Million Misappropriation Award Reversed and Remanded

### *Single Publication Rule Applies; Insufficient Evidence for Award of Profits*

In an interesting non-media case, a California appellate court reversed and remanded a \$15,630,000 jury verdict on a misappropriation claim over the use of a model's image on labels and advertisements for Taster's Choice instant coffee. *Christoff v. Nestle USA, Inc.*, No. B182880, 2007 WL 1874240 (Cal. Ct. App. 2d. Dist. June 29, 2007) (Cooper, Rubin, Boland, JJ.).

The appellate court held that the single publication rule applied to plaintiff's action and remanded for further proceedings to determine whether any of the complained of uses by defendant were still actionable. In addition, the court held that there was insufficient evidence to support the jury's award of \$15,300,000 to plaintiff as profits derived from the commercial use of his image.

#### **Background**

The plaintiff Russell Christoff was a professional model. In 1986, he was paid \$250 by Nestle Canada for a photo shoot where he posed gazing at a cup of coffee, as if he enjoyed the aroma. The image was only for use on a coffee brick package in Canada and any other uses of the image were to be separately negotiated. In 1997, however, Nestle without authorization used plaintiff's photograph on its labels for Taster's Choice and in advertisements for the brand throughout the world.

Plaintiff discovered the use of his image on June 4, 2002 and brought suit in 2003—six years after the widespread use of his image—for statutory and common law misappropriation, quantum meruit and unjust enrichment. In a pretrial ruling, the court rejected Nestle's argument that the single publication rule applied to plaintiff's claims. Instead it applied a two-year statute of limitations to the claims, but ruled that plaintiff could recover for prior uses if the jury found he did not or should not have known that Nestle had been using his image prior to his actual discovery in June 2002.

In February 2005, a jury awarded plaintiff \$330,000 in actual damages on his misappropriation claim and \$15,300,000 in lost profits under the statute.

#### **Appeals Court Ruling**

Reversing and remanding, the appellate court first ruled that the single publication rule should have been applied to plaintiff's misappropriation claim. Although no published California case squarely addressed this issue, the court reasoned that its conclusion is supported by the broad language of the state's Uniform Single Publication Act, Cal. Civ. Code § 3425.3, the broad application of the statute in the case law, and the history of the right of publicity tort.



California's Single Publication statute applies *inter alia* to causes of action for "invasion of privacy" and "any other tort founded upon any single publication or exhibition or utterance." The court noted that even though the tort of appropriation is now more commonly referred to as a "right of publicity," its initial classification as a "right of privacy" places it squarely within the ambit of the statute. Moreover, plaintiff's claims fell within the "any other tort" language of the statute. "If the wrong arises out of a mass communication, then whether it sounds in defamation or statutory invasion of privacy, the same considerations should apply." Quoting *Khaury v. Playboy Publications, Inc.*, 430 F.Supp. 1342, 1346 (S.D.N.Y. 1977).

The policies underlying the single publication rule also squarely applied to plaintiff's claims.

Just as in a defamation case, the litigation would have become unwieldy and potentially endless with every coffee can, print, television, and electronic advertisement generating a separate cause of action. Indeed, Christoff alleges in his complaint, "Based upon the amount of product in the stream of commerce, the Use of Plaintiff's Picture is likely to continue indefinitely." With indefinite use, there could be indefinite litigation. That is exactly the scenario the single publication rule was designed to avoid.

*(Continued on page 8)*

## **\$15 Million Misappropriation Award Reversed and Remanded**

*(Continued from page 7)*

### ***Discovery Rule and Republication***

Having decided that the single publication rule applied, the court found that the case should be remanded for determination of whether the discovery rule applied and whether Nestle had republished plaintiff's image to restart the statute of limitations.

As to the discovery rule, the court noted that as in the defamation context, in very limited circumstances the discovery rule may be applied to toll the statute of limitations in misappropriation claims. *Quoting Shively v. Bozanich*, 31 Cal.4th 1230, 1248-49, 7 Cal.Rptr.3d 576, 80 P.3d 676 (2003). On remand, plaintiff would have to satisfy the standard articulated in *Shively*—that he had “no meaningful ability to discover the publication” within the first two years of when Nestle first published his image or republished his image.

Whether Nestle had republished plaintiff's image after 1997 posed additional issues for remand. Plaintiff argued that various uses constituted republication, among them: 1) the use of his image on different varieties and sizes of coffee; 2) on products in foreign markets; 3) on differently designed labels; and 3) in advertisements in print and online media.

Few cases, the court noted, discuss republication in the context of advertising. Most on point was the recent Illinois case *Blair v. Nevada Landing Partnership*. 859 N.E.2d 1188 (Ill. App. 2006). In this case plaintiff's photograph was used for nine years in all forms of advertisements for a casino restaurant, including use on brochures, signs, billboards, menus, calendars, postcards and websites.

The Illinois court applied the single publication rule to plaintiff's misappropriation claims, finding that the multiple uses of the photograph constituted a single act. Plaintiff's picture, the court reasoned, was used for a single purpose, to advertise the restaurant, it targeted a single audience, casino patrons; and the photograph was not altered.

The California court instructed the trial court to consider these issues on remand before letting the case get to a jury. For example, were the labels and ads with plaintiff's photograph part of one mass marketing campaign or part of incremental publications designed to appeal to different

audiences? Was plaintiff's image altered? In fact, plaintiff's image was altered on labels and advertisements in Latin America (Nestle darkened plaintiff's complexion and added sideburns).

### ***Statute of Limitations and Damages***

The appellate court affirmed the two year statute of limitations applied to misappropriation and right of publicity claims. It also rejected Nestle's argument that the misappropriation statute only applied to celebrity plaintiffs. Section 3344, the court held, applies whenever any person knowingly uses another's likeness for commercial purpose.

Finally, the court held that plaintiff failed to provide sufficient evidence that the \$15.3 million profit award was attributable to Nestle's use of his image. Plaintiff's expert witness had testified at trial about the iconic role of the Taster's Choice label and credited it with causing at least 5 to 15% of profits. But the expert relied on the iconic image of a “coffee taster” not on plaintiff's actual “identity or persona.” This raised another issue for remand. Even a fungible image could have provided Nestle with a commercial benefit, but “to recover profits on this basis, Christoff must present such evidence.”

Plaintiff was represented by Colin C. Claxon; Robert David Mayer, Eric G. Stockel; and David J. Franklyn. Nestle was represented by Horvitz & Levy; Heller & Edwards.

### **MLRC Acknowledges and Thanks its Summer Interns for their contributions to the *MediaLawLetter***

**Keith Harris,  
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**Joy Anastasia Thompson,  
William & Mary Law School**

**Stuart Youngs,  
Seton Hall University School of Law**



## Rhode Island Supreme Court Affirms Directed Verdict For Newspaper

The Rhode Island Supreme Court has affirmed a directed verdict issued in 2006 at the close of trial against *The Standard Times*, a weekly community newspaper in North Kingstown Rhode Island, holding that it was protected by the fair report privilege. *Trainor v. The Standard Times*, 924 A.2d 766 (R.I. June 20, 2007) (Williams, Goldberg, Flaherty, Suttell, Robinson, JJ.).

### Background

The case arose from a police blotter item that reported that the plaintiff, Kent Trainor, was: “arrested on a warrant from the Rhode Island State Police for failing to appear for a payment schedule, stemming from a prior charge of leaving the scene of an accident, death resulting.”

The police blotter item was based on a police report which stated in two places that plaintiff was charged with “leaving the scene of an accident, death resulting.” But a subsequent page of that same police report described the underlying charge as: “Leaving scene accident injury/death.”

Plaintiff sued *The Standard Times*, the state of Rhode Island and the state police for libel and negligent infliction of emotional distress, alleging the newspaper article falsely implied he had caused someone’s death. The trial court denied the newspaper’s motion for summary judgment, rejecting arguments that it was protected by the neutral report and fair report privileges, and the case against the newspaper went to trial in March 2006.

Plaintiff’s expert witness, Professor Jonathan Klarfeld, a former media critic for the *Boston Herald*, testified that the newspaper violated established journalism principles by omitting the “virgule,” or slash, in the phrase “injury/death resulting.”

The virgule is defined as “a short oblique stroke (/) between two words indicating that whichever is appropriate may be chosen to complete the sense of the text in which they occur.” Using it in the police blotter item would presumably have alerted readers to the possibility that no death occurred in connection with the accident.

At the close of plaintiff’s evidence, though, the trial judge Alan P. Rubine granted a directed verdict for the newspaper on the grounds that the article was covered by a qualified fair report privilege and that there was no evidence of ill will or malice. *Trainor v. State of Rhode Island*

*et al.*, C.A. No. WC/2003-295 (R.I. Super. 2006). See *MLRC MediaLawLetter* March 2006 at 16.

### State Supreme Court Decision

The Rhode Island Supreme Court affirmed in a thoughtful decision written by Justice William P. Robinson III, a former member of the Media Law Resource Center during his years as a partner at Edwards & Angell in Providence, Rhode Island. Justice Robinson concluded that the published news item was a fair abridgement of the contents of the police report, a document clearly within the scope of the privilege.

He rejected plaintiff’s argument that the failure to include the virgule between the words “injury” and “death” rendered the report inaccurate.

“With respect to the real-world application of the fair report privilege,” he wrote, “a certain amount of ‘breathing space’ is accorded to the publisher: the operative criterion is substantial accuracy, not perfect accuracy.”

Here it was uncontested that the police report stated in two separate places, that plaintiff had left “the scene of an accident death resulting,” while a third portion of that same report indicated that plaintiff had been charged with “leaving scene accident injury/death.” Therefore it was substantially accurate and fair for the reporter to use the phrase “death resulting” in summarizing the police report.

Finally, Justice Robinson also noted that while the Court need not decide the issue in this case, “we note that recognition of the fair report privilege may quite possibly be constitutionally required in light of the courts’ continually evolving understanding of the implications of the First Amendment.” Citing, *e.g.*, *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1299 (D.C.Cir.1988) (“Federal constitutional concerns are implicated ... when common law liability is asserted against a defendant for an accurate account of judicial proceedings.”); Restatement (Second) Torts § 611, cmt. b at 298 (1977) (“If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained, either for defamation or for invasion of the right of privacy.”).

The newspaper was represented by Michael F. Horan of Pawtucket, R.I. Plaintiff was represented by Arthur E. Chatfield III of Providence, R.I.

# MLRC Calendar

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## September 17-18, 2007

*London, England*  
MLRC London Conference

### **International Developments in Libel, Privacy, Newsgathering & New Media**

Stationers Hall, London.

## September 19, 2007

*London, England*  
MLRC London Conference

### **International In-House Counsel Breakfast**

Reynolds Porter Chamberlain  
Tower Bridge House  
St Katharine's Way  
London

## November 7, 2007

*New York City*  
**MLRC ANNUAL DINNER**

## November 9, 2007

*New York City*  
**Defense Counsel Section Breakfast**

## Pennsylvania “Rejects” Anderson v. Liberty Lobby? Court Also Holds Republication To Be Relevant For Actual Malice

By Amy B. Ginensky & Raphael Cunniff

The Pennsylvania Supreme Court’s recent opinion in *Weaver v. Lancaster Newspapers, Inc.*, 2007 WL 1858388 (Pa. June 28, 2007) (Cappy, C.J.) has dealt a blow to defendants’ motions for summary judgment in actual malice cases. How substantial is yet to be known. The Court held that republication subsequent to receiving a “complaint” is relevant to actual malice at the time of the first publication, and is sufficient evidence to send the case to a jury.

More significant is that in so ruling, and without acknowledging it, the Court appears to have rejected *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986), which held that the plaintiff and not the defendant bears the burden to present evidence on actual malice in a summary judgment motion, and that “the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.”

The Pennsylvania Court’s decision is especially confusing given the similarity of Pennsylvania’s summary judgment statute with Federal Rule 56, the Pennsylvania Supreme Court’s prior opinion in *Ertel v. Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996), which adopted at least parts of *Liberty Lobby*, and its decision in *Tucker v. Philadelphia Daily News*, 848 A.2d 113 (Pa. 2004), which applied the substantive standard critically in ruling on preliminary objections (a motion to dismiss). Most incredibly, the *Weaver* court did all of this without ever citing to *Liberty Lobby*, *Ertel*, or *Tucker*.

### Background

The underlying lawsuit has its roots in the controversial conviction of Lisa Michelle Lambert for the brutal murder of sixteen-year-old Laurie Show. Lambert successfully petitioned the Eastern District of Pennsylvania for *habeas corpus*. Among other things, Lambert said that three police officers raped her during her arrest. In

granting the petition, Judge Dalzell accused several police officers of perjuring themselves. (The Third Circuit later reversed Judge Dalzell’s decision.)

One of these officers, Robin Weaver, was the subject of a letter to the editor written by Oscar Lee Brownstein and published by the *Lancaster Intelligencer Journal*. Brownstein wrote, regarding Ms. Lambert’s rape accusation, “[o]f course, maybe Lambert just made up the whole story, knowing that five years later [officer] Weaver would be arraigned for the sexual abuse of women and children. Sure.” Weaver filed suit against Brownstein and the newspaper soon after the initial publication.

In fact, not Weaver, but another of the officers, was “arraigned for the sexual abuse of women and children.”

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***The Pennsylvania Supreme Court’s recent opinion has dealt a blow to defendants’ motions for summary judgment in actual malice cases.***

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Brownstein testified that at some point after the letter’s publication, he learned that he mixed up the officers’ names, but it is unclear from the court opinions when he discovered this. Approximately a year after the libel suit was filed,

the letter was published again on the “Free Lisa Lambert” website. In the web posting, the site administrator said Brownstein gave permission for the reprint. At one point Brownstein admitted giving permission, but then said he did not remember doing so. (Though it is not explicitly stated in the opinions, Weaver did not sue for the web publication.)

The trial court granted summary judgment to all defendants and the Superior Court affirmed, finding no evidence of actual malice. The Superior Court noted that mere failure to investigate could not be evidence of actual malice and that Brownstein’s alleged republication could not be evidence of his state of mind at the time of the initial publication.

### *Pennsylvania Supreme Court Decision*

The Pennsylvania Supreme Court granted review only of the decision relating to Brownstein and limited to the question of “whether the republication of a statement, after the defendant receives a complaint alleging that the state-

*(Continued on page 12)*

## Pennsylvania “Rejects” *Anderson v. Liberty Lobby*?

(Continued from page 11)

ment is defamatory, is relevant to the presence of actual malice in the initial publication.” The Supreme Court reversed and remanded, relying primarily on *O'Donnell v. Philadelphia Record Co.*, 51 A.2d 775, (Pa. 1947). This hoary, pre-*Times v. Sullivan* case held that republication of a libelous statement after a suit commenced was relevant to whether the publication was conditionally privileged.

The Court also cited to the Restatement (Second) § 580A, comment d, which states that “[r]epublication of a statement after the defendant has been notified that the plaintiff contends that it is false and defamatory may be treated as evidence of reckless disregard,” and quoted *Herbert v. Lando*, 441 U.S. 153, 164 n. 12 (1979), for the proposition that “subsequent defamations” and “subsequent statements of the defendant” are relevant to actual malice.

Having determined that republication after a complaint is *relevant*, the Court could have stopped there and remanded to the trial court for further consideration. The Court, however, went on to rule that while the court acts as a gatekeeper in a summary judgment posture, “this function is purely intended to prevent issues from reaching the fact finder when there are no material facts in dispute” and in this case, because there was a material issue of fact, the case must be sent to the jury. As to “constitutional” gatekeeping and the determination of whether the “record establishes actual malice with convincing clarity,” the Court reserved that for appellate judges after the jury has made findings of fact.

So then, is Pennsylvania in “unconstitutional” contravention of *Liberty Lobby*? Probably not. Many states have decided that *Liberty Lobby*'s holding (requiring judges to consider the applicable substantive evidentiary standard at the summary judgment stage) is limited to federal courts applying Rule 56.

The better questions are: (1) why didn't the Court consider the *reasoning* of *Liberty Lobby* when previously, in *Ertel v. Patriot-News Co.*, 674 A.2d 1038 (Pa. 1996), the Court found Pennsylvania's summary judgment statute to be so similar to Rule 56 that it explicitly adopted *Liberty Lobby*; and (2) what arguments, if any, can effectively be made at the summary judgment stage after *Weaver*?

Finding it “instructive to reference the United States Supreme Court's interpretations of Fed.R.Civ.P. 56, a pro-

vision which [Pennsylvania's] Rule 1035 closely tracks,” *Ertel* held “that a non-moving party must adduce *sufficient* evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor” (emphasis added). “Failure to adduce this evidence establishes that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” The *Ertel* court found the plaintiff presented no evidence of actual malice.

*Weaver*, on the other hand, cited to no Rule 56 cases, and to predominantly pre-*Ertel* Pennsylvania decisions. It ignored *Tucker* as well as several Superior Court opinions that have affirmed summary judgment for the defense despite contested evidence of ill-will or failure to investigate (both of which are relevant to the actual malice inquiry, at least according to the *Herbert v. Lando* footnote that *Weaver* cites).

In the end, given *Weaver*'s complete disregard of *Ertel* and *Tucker*, the answer as to why the court did what it did may be profoundly unsatisfying. Certainly, as the opinion does not address the issue, it does not provide an answer. The explanation may be in the parties' briefs. Neither side cited *Liberty Lobby*, *Ertel*, or *Tucker* and neither side fully discussed the role of a trial judge in applying the clear and convincing evidence standard.

What then can be argued to blunt *Weaver*'s impact? One answer is to argue that *Weaver* is not a sharp break with the past but in conformity with prior opinions, especially *Tucker v. Philadelphia Daily News*, 848 A.2d 113 (Pa. 2004). In *Tucker*, the Pennsylvania Supreme Court upheld a trial court's dismissal prior to any discovery even though the plaintiffs alleged defendants failed to investigate and did not read contrary press releases. Citing *Ertel*, the court explicitly determined that these accusations, even if proven true, were not sufficient to meet the clear and convincing evidence standard *as a matter of law for the trial court*.

The *Tucker* court, quoting *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), said: “The meaning of terms such as actual malice – and, more particularly, reckless disregard – however, is not readily captured in one infallible definition. Rather, only through the course of case-by-case adjudication can we give con-

(Continued on page 13)

## Pennsylvania “Rejects” Anderson v. Liberty Lobby?

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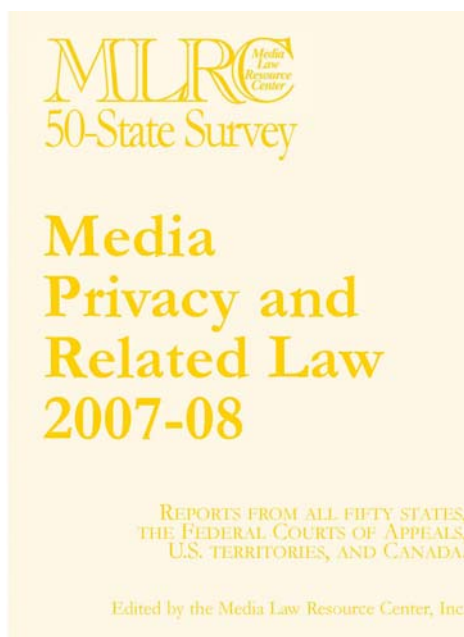
tent to these otherwise elusive constitutional standards.” This could be taken to mean that the precise kinds of facts that are genuine and material for actual malice purposes must be defined by courts over time. Following this reasoning, while *Tucker* determined that failure to investigate or consult all sources is not a material indicia of actual malice, *Weaver* decided repetition of a defamatory statement after receiving a libel complaint is one, thus, sufficient to go to a jury. After all *Weaver* did hold that only material facts need to be decided by the jury. Of course, reconciling the opinions in this way leaves the definition of what is material for actual malice purposes unsettled and quite malleable. As unpredictable as it seems, this theory may have to serve until the court realizes *Weaver* was in error.

Whatever *Weaver*’s impact or potential limitations, it is certain that the Pennsylvania Supreme Court has not been friendly to defamation defendants as of late. This opinion, as well *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 2007 WL 1585169 (Pa. May 31, 2007), treated elsewhere in this MediaLawLetter, are strong warnings against speaking ill of Pennsylvanians. For the sake of a free press, we hope that the Pennsylvania Supreme Court ignores *Weaver* as easily as it seems to have forgotten *Ertel* and *Tucker*.

*Amy B. Ginensky is a partner, and Raphael Cunniff an associate, with Pepper Hamilton LLP in Philadelphia. Appellant Robin Weaver was represented by Jeffrey Philip Paul, a solo practitioner. Appellee Oscar Lee Brownstein was represented by Harry D. McMunigal of the law firm Bingaman, Hess, Coblentz & Bell.*



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We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

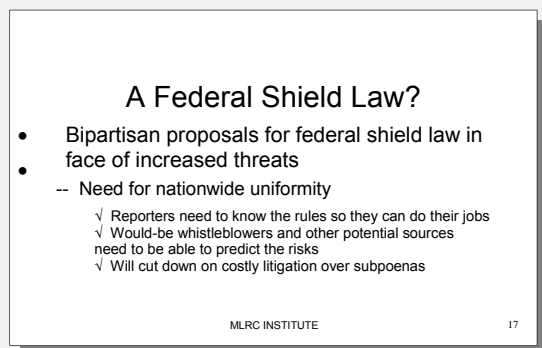
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Maherin Gangat  
Staff Attorney  
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**Suggestion for background reading:**  
**Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.**

**Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.**



## First Amendment Protects Disclosure of Illegally Recorded Tape

### *Bartnicki v. Vopper Applied to Web Posting of Police Search Video*

The First Circuit last month affirmed a preliminary injunction barring Massachusetts from threatening a local political activist with prosecution under the state's wiretap statute for posting an allegedly illegally recorded tape on her website. *Jean v. Massachusetts State Police*, No. 06-1775, 2007 WL 1793126 (1st Cir. June 22, 2007) (Boudin, Campbell, Lipez, JJ.).

The panel unanimously found that plaintiff's action was "materially indistinguishable" from the conduct at issue in *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

#### Background

The plaintiff Mary T. Jean, is a local political activist in Worcester, Massachusetts. She maintains the website [www.conte2006.com](http://www.conte2006.com) which displays articles and other information critical of former Worcester County District Attorney John Conte. Jean was contacted through her website by Paul Pechonis, who told her that he had been arrested by Massachusetts state police at his house on a misdemeanor charge and that the police had conducted a warrantless search of his residence. Pechonis had an audio and videotape of the incident, thanks to a "nanny-cam" that was set up in the house. Pechonis gave a copy of the tape to Jean, who posted it on her website and added editorial comment criticizing the District Attorney.

About two weeks after she posted the videotape, Massachusetts State Police wrote Jean a "cease and desist" letter, explaining that she was in

**Publication of the recording on her website was entitled to the same First Amendment protection as in *Bartnicki*.**

violation of the state's wiretap statute. Mass. Gen. Laws. ch. 272 § 99. Massachusetts requires both parties consent for taping and the recording allegedly violated the rights of the police officers conducting the search. Jean was told to remove the tape or the police would contact the District Attorney's office. A second letter followed, in which the police stated that Jean would not be in violation of the wiretap statute if she deleted the audio portion of the tape, since the statute is limited to interceptions of "wire or oral communications."

Jean filed a complaint in federal court seeking a temporary restraining order and preliminary and permanent injunctive relief against state and local law enforcement officials. The district court held that the case was controlled by *Bartnicki* since Jean played no part in the recording of the video, had obtained the tape lawfully, and the videotape related to a matter of public concern. Concluding that Jean demonstrated a likelihood of success, the district court granted the preliminary injunction.

#### First Circuit Decision

Following a lengthy analysis of *Bartnicki*, the Court affirmed the preliminary injunction, holding that Jean's publication of the recording on her website was entitled to the same First Amendment protection as in *Bartnicki*.

The police defendants conceded that the events depicted on the recording – a warrantless and potentially unlawful search of a private residence – was a

(Continued on page 16)

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Disclosure of Illegally Recorded Tape**

*(Continued from page 15)*

matter of public concern. While Jean played no part in the allegedly illegal interception, the police defendants tried to argue that Jean did not obtain the recording lawfully. They argued that *Bartnicki* could be distinguished because Jean’s “active collaboration” with Pechonis was the essential “first link” in the chain of dissemination; and Jean “had the opportunity to prevent the dissemination.” But this was a “distinction without a difference” since the defendants in *Bartnicki* also disclosed an intercepted tape knowing that it was illegally intercepted, “yet the Supreme Court held in *Bartnicki* that such a knowing disclosure is protected by the First Amendment.”

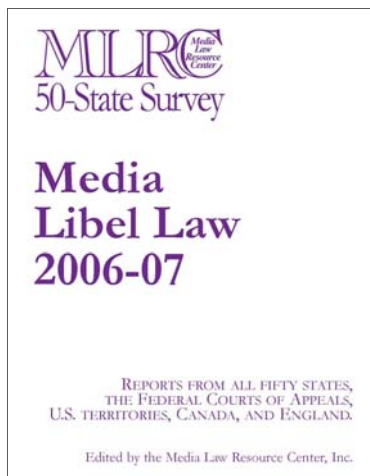
The First Circuit found further support for its holding in the D.C. Circuit’s recent decision in *Boehner v. McDermott*, 2007 WL 1246438 (D.C. Cir. May 1, 2007) where in an en banc ruling the court affirmed that the defendant congressman had violated the wiretap statute due to his special obligations imposed on him as a member of the House Ethics Committee. Had McDermott been a private citizen, like Jean, “his disclosure of the tape was subject to First Amendment protection *regardless of* the fact that he received the tape directly from the Martins and thus served as the ‘first link’ in the chain leading to publication.”

Mary T. Jean was represented by Eric B. Hermanson and Sarah E. Solfanelli of Choat, Hall & Stewart, LLP, and by John Reinstein and the American Civil Liberties Union of Massachusetts.



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## Tenth Circuit Affirms Dismissal of Policemen's Privacy Case Against Broadcaster

### *Disclosure of Undercover Status of Public Interest*

This month, the Tenth Circuit affirmed the dismissal of a case brought by two undercover police officers whose identities—and more importantly, whose undercover status—were broadcast by a New Mexico television station. *Alvarado v. KOB-TV, L.L.C.*, No. 06-2001, 2007 WL 2019752 (10th Cir. July 13, 2007) (Kelly, Ebel, Gorsuch, JJ.).

The Court held that the dismissal of the officers' action, brought under theories of invasion of privacy and intentional infliction of emotional distress, could be affirmed without reaching the First Amendment defenses raised by the broadcaster.

#### **Background**

In 2004, the Albuquerque Police Department responded to allegations that two of its undercover officers had committed sexual assault. As part of that investigation, warrants were issued authorizing searches of the plaintiff officers' homes. Citing potential endangerment to the officers, the warrants were sealed as to their names and addresses.

KOB-TV included details of the allegations in two news broadcasts. The station named both officers and ran footage of each man refusing comment on the story outside of their respective homes. However, when the station subsequently learned of their undercover status, the footage was re-broadcast with their faces blurred but with their names and police rank.

In addition to a suit against the city, the officers sued KOB-TV alleging invasion of privacy and intentional infliction of emotional distress. The district court dismissed the plaintiff's case noting that, their allegations were not sufficient to sustain either of their privacy claims and that the station's First Amendment defenses would have otherwise barred relief.

#### **Tenth Circuit Decision**

Affirming, the Tenth Circuit declined to reach the broadcaster's First Amendment defenses. Instead the court analyzed the officers' invasion of privacy claim more spe-

cifically under a theory of public disclosure of private facts. Drawing on *Fernandez-Wells v. Beauvais*, 983 P.2d 1006 (N.M. Ct. App. 1999), the Court defined the tort as "disclosure [of facts] which would be objectionable to a reasonable person, and a lack of legitimate public interest in the information."

In this context, the Court then asked whether KOB-TV's broadcast—containing the officers' names, personal appearance and undercover status alongside footage of their homes—would be objectionable to a reasonable person and devoid of legitimate public interest. The Court answered that it would not.

The Court agreed that an individual's address is not a private fact since the information is readily available in numerous public records. However, the Court did find that the disclosure of a police officer's undercover status is "objectionable to a reasonable person," on account of the special risks that the revelation creates. But because there was a legitimate public concern in reporting the allegations against the officers, their case was properly dismissed.

The Court noted that it was "among a number of courts that have found that police misconduct allegations ... are a matter of public interest in First Amendment analyses." And, to the extent that allegations of sexual assault bear upon an officer's qualifications and fitness to serve in that role, the Court found no reason to carve out an exception to this rule on the basis of the officer's undercover status.

The court acknowledged the safety concerns that such a revelation creates, but concluded that a rule exempting undercover officers' identities from public concern analysis, if constitutionally possible, was a job better suited to the legislature. "To be sure, any rule of law adopted in this area would implicate core and vital First Amendment values, and it is far from clear whether and how such a law might coexist with the freedom of the press. But any foray into these thickets is, in the first instance, for the instruments of government in the State of New Mexico, not us, and therefore are not issues we need reach today."

KOB-TV was represented by Geoffrey D. Rieder, Foster & Rieder, P.C., Albuquerque, NM. Plaintiffs were represented by Jason Bowles, Bowles & Crow, Albuquerque, NM.

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## Texas Newspaper Wins Summary Judgment on Interlocutory Appeal An “Accusation” By Any Other Name Is Still The Same

By Jason P. Reinsch

A Texas appellate court was recently presented with the question of whether courts should serve as newspapers’ “super editors” to determine how words with multiple meanings must be used. The court’s ruling implicitly decides that Texas courts should not entertain such an invitation. *DR Partners v. Floyd*, No. 06-07-00001-CV, 2007 WL 1930414 (Tex.App.—Texarkana July 5, 2007) (Morris, C.J., Carter and Moseley, JJ.)

The Texas Court of Appeals for the Sixth District at Texarkana reversed the denial of summary judgment and rendered a take-nothing judgment in favor of a newspaper in a defamation action based on a story reporting on accusations against a local politician. The underlying dispute centered on the meaning and use of the terms “charges” and “charged.” In reversing the trial court’s denial of summary judgment, the appellate court refused to consider as evidence of actual malice a story correction and subsequently published articles wherein the newspaper used the terms in question.

### Background

On Election Day in 2005, plaintiff Roy V. Floyd, a city commissioner in Bonham, Texas and leader of the Fannin County Democratic Party, was accused of stealing Republican campaign signs by two witnesses associated with the Republican Party, who reported what they witnessed to the police.

Upon learning of the accusations, the *Herald Democrat*, a newspaper owned by defendant DR Partners, investigated the incident and published an article reporting the allegations and ensuing police investigation. On November 4, 2005, the *Herald Democrat* published an article titled “Bonham Official Charged.” In that article the *Herald Democrat* reported on the accusation while alerting readers to the fact that no formal criminal charges were levied against Floyd. The article stated: “The Fannin County Republican party filed charges on election day at the Bonham Police Department against Bonham City Commissioner Roy Floyd.”

The day after this article was published, the *Herald Democrat* published two additional, related stories. First, it published a correction headlined “The Herald Democrat corrects story about Bonham official.” In this correction the newspaper stated

that the previous day’s story was in error and clarified that no criminal charges had been filed against Floyd. Immediately below the correction, it published a second story that described competing allegations that each of the political parties’ campaign posters were stolen.

Floyd subsequently brought a defamation action against various defendants including the *Herald Democrat*. Floyd anchored his defamation claims to the theory that the newspaper misused the terms “charges” and “charged.” Floyd alleged that these terms have specific meanings and both are commonly understood to refer to formal criminal charges. Under this limited interpretation of these terms, Floyd attempted to show that the articles lacked substantial truth. The newspaper countered that the terms “charged” and “charges” can be synonymous with the terms “accused” and “accusation”, which is how the purportedly offending terms were used in the article. Therefore, the article was not false.

With regard to the issue of actual malice, Floyd attempted to demonstrate that the author entertained serious doubt about the accuracy of the allegedly offending article. Floyd juxtaposed statements in the offending article with statements in the second, subsequently published article in an effort to provide some evidence of actual malice. For example, Floyd argued that the first article’s title, “Bonham official charged”, was irreconcilable with the assertion in the subsequent article that before the allegedly defamatory article was published the police chief stated that “no charges have been filed.” The *Herald Democrat* countered this argument with affidavits from the articles’ author and editor, describing how they intended the words to be used, and stating that they never entertained serious doubt as to the truth of the article at issue.

### Trial Court’s Denial of Summary Judgment

Following sufficient time for discovery, the *Herald Democrat* filed a motion for summary judgment. The newspaper argued, *inter alia*, that Floyd could not meet his burden to prove that the article in question was published with actual malice. To counter the motion, Floyd presented a collection of 154 articles from the paper’s website wherein the newspaper used the terms in question as well as the November 5th correction and article. As to the 154 online articles, Floyd contended that

(Continued on page 20)

### Texas Newspaper Wins Summary Judgment on Interlocutory Appeal

(Continued from page 19)

these articles demonstrate that the newspaper nearly always uses the terms “charged” and “charges” in the context of formal criminal charges.

The trial court ruled that these articles, all of which were published after the allegedly defamatory November 4th article, demonstrated the context in which the newspaper uses the offending terms and were at least some evidence of actual malice and falsity. The trial court denied the newspaper’s motion for summary judgment. The trial court warned the newspaper, “you are not permitted to be sloppy in the way you report [the news]” and “[y]ou need to be a little bit more cautious about the way you use the words.”

Thereafter, the *Herald Democrat* appealed the trial court’s interlocutory ruling under a unique Texas statute that permits members of the media to appeal denials of summary judgment that implicate the free speech and free press clauses to the First Amendment of the United States Constitution. See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon Supp. 2006).

#### Court of Appeals Reverses

Without considering the *Herald Democrat*’s other summary judgment arguments, the Sixth Court of Appeals reversed and rendered on the trial court’s denial of summary judgment on actual malice grounds. The court based its ruling on Floyd’s failure to produce more than a scintilla of evidence as to the

newspaper’s actual malice. In so holding, the court carefully considered the effect of Floyd’s summary judgment evidence and declined a ruling that could significantly affect a newspaper’s ability to report on important local issues.

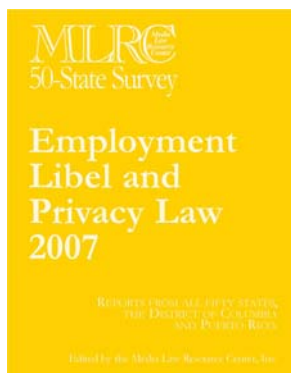
First, the appellate court refused to recognize the 154 online articles as evidence of actual malice. In considering these articles the court noted, “[a]t best, the online articles merely establish an industry standard for the use of the word ‘charged.’” Such a holding precludes a newspaper from being boxed in with regard to the meaning a newspaper frequently affixes to potentially inflammatory words that have other less pointed synonyms and meanings.

Of equal importance, the appellate court avoided the potentially dangerous precedent of allowing subsequent corrections and follow-up articles to be used as evidence of actual malice. The court noted that such subsequent articles only evidence the editor’s frame of mind *after* the alleged defamatory publication. To hold otherwise would have significantly impaired a newspaper’s ability to remediate the effects of potentially harmful statements without exposing itself to further liability.

*Alan N. Greenspan and Jason P. Reinsch Jackson Walker L.L.P. in Dallas represented the newspaper defendants. Plaintiff Roy V. Floyd was represented by Roger D. Sanders and J. Michael Young of Sanders, O’Hanlon, and Motley, P.L.L.C. in Sherman, Texas and James R. Rogers of the Moore Law Firm in Paris, Texas.*



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## An Unfortunate Victory in Pennsylvania

### *Plaintiff-friendly Standards Adopted for Corporate Public Figure Status, Conditional Privilege*

By Michael E. Baughman and Raphael Cunniff

In what appears to be a pyrrhic victory for defamation defendants, the Pennsylvania Supreme Court recently held that a publisher of subscription newsletters sold to “business executives” over the telephone was a public figure for the purposes of an unfavorable report on its sales practices by the Better Business Bureau. *American Future Systems, Inc. v. Better Business Bureau of Eastern Pennsylvania*, 2007 WL 1585169 (Pa. May 31, 2007) (Saylor, J.).

In so doing, however, the Court rejected the lower court’s holding that the defendant’s conditional privilege could only be overcome by a showing of actual malice and it adopted a particularly strict test for when a court may rule a corporation is a limited purpose public figure. While these standards are clearly less favorable than the previously muddled mix of contradictory holdings, their application remains uncertain.

#### **Background**

Plaintiff, doing business as Progressive Business Publications (“Progressive”), employs a sales force of approximately 500 telemarketers to solicit 15,000 new subscriptions to its newsletters each week. The subscriptions are marketed directly to corporate employees who are promised a “no-risk” free trial. The invoices for every issue after the second, however, are sent to the employer, who may not be aware of the subscription.

Citing an “unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise,” the Better Business Bureau (“the Bureau”) issued a report concerning Progressive’s sales practices. Progressive’s owner wrote the Bureau to ask for a retraction, arguing that the number of complaints received were small compared to Progressive’s volume of business.

The Bureau then updated its report to include the details of Progressive’s cancellation policy and the owner’s contentions. Dissatisfied with the revisions, Progressive filed the instant suit.

#### **Libel Trial**

At trial, the jury was instructed that the Bureau “enjoyed a conditional privilege in connection with the issuance of reports of consumer complaints,” and that to overcome this privilege the plaintiff must prove actual malice. The trial court did not instruct the jury that the plaintiff was a public figure.

After the jury returned a verdict for the Bureau, Progressive moved for post-trial relief. The court denied plaintiff’s motion, citing to Restatement Second of Torts Section 600 official cmt. b, for the proposition that one consequence of the holding in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) is that “mere negligence as to falsity... is no longer treated as sufficient to amount to abuse of a conditional privilege.”

A unanimous Superior Court panel affirmed, holding that while abuse of a conditional privilege may be demonstrated by proof of negligence in cases that do not involve matters of public concern, for statements that are on matters of public concern, demonstrating abuse of a conditional privilege requires proof of actual malice.

#### **Pennsylvania Supreme Court Decision**

Writing for five of the six participating Justices, Justice Saylor affirmed the Superior Court on other grounds. First, the Court noted that Pennsylvania’s Constitution gives reputational interests the same importance as the rights to life, liberty and property.

The Court then reviewed Pennsylvania’s pre-*New York Times* precedent on conditional privilege, finding it to be unclear whether several different conditional privileges were shown to be abused through negligence or “legal malice” (variously defined by Pennsylvania courts as everything from “ill-will” to recklessness as to truth or falsity).

The Court determined that the particular privilege applied by the trial court, however, was historically breached by negligence. Describing the privilege here as a “defeasible immunity,” the court noted that it was applicable where the speaker has a moral duty to speak and the

*(Continued on page 22)*

## An Unfortunate Victory in Pennsylvania

(Continued from page 21)

listener has a similar interest. In a sixty-seven year-old case, *Williams v. Kroger Grocery & Baking Co.* 10 A.2d 8 (1940), this privilege was shown to be abused through negligence.

Because *Gertz* had forced every defamation plaintiff to prove at least negligence, “the former concept of a conditionally privileged occasion embodying the negligence standard [is] superfluous in the present era.”

In keeping with the Pennsylvania Supreme Court’s decision in *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004), where the Court held that Pennsylvania would not find a neutral reportage privilege if one was not guaranteed by the First Amendment, the Court opined that, “Pennsylvania courts will not strengthen – for post-*Gertz* purposes – conditional privileges previously defined by reference to negligence principles so that, now, they may only be defeated by proving actual malice.”

The defendant then argued that because its speech was on a matter of public concern the plaintiff was obligated to prove actual malice. The Court summarily rejected this assertion, citing *Gertz* as holding that only private or public figure status is of importance in defamation cases. Pennsylvania can now be definitively placed on the list of states declining to adopt the holding of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971) as a matter of state law.

Justice Saylor then turned to the question of whether the trial court erred in failing to instruct the jury as to the plaintiff’s public figure status, an affirmative answer to which would render harmless the court’s erroneous instruction on privilege. After summarizing *Gertz*’s two-part test for limited purpose public figure status (“access to the channels of communication” and “voluntary exposure to controversy”), the Court recognized a number of decisions holding that a corporation was a public figure due to its extensive advertising. But the court deemed advertising alone to be insufficient.

Rather, Justice Saylor adopted the reasoning of *Blue Ridge Bank v. Veribanc, Inc.*, 866 F.2d 681 (4th Cir. 1989) and held that advertising, no matter how pervasive, only causes a corporation to be a limited purpose public figure for the purposes of statements related to the topics mentioned in the advertising. (*Blue Ridge Bank* held that one of two financial institutions in a county, that had engaged in a great deal of public promotion, was not a public figure

for the purpose of statements related to its financial solvency when this was not a topic mentioned in its advertising).

In the instant case, the Court found the plaintiff had thrust itself into a controversy surrounding its cancellation policies and the lack of risk in ordering a subscription. By including these topics in its telephone sales pitches, the plaintiff had opened itself up to the criticism contained in the Bureau’s report. Thus, because the plaintiff was required to prove actual malice by virtue of its limited purpose public figure status, the trial court’s decision was sustained as harmless error.

While the standards the Pennsylvania Courts will now apply in defamation cases involving conditional privileges and corporations have been (unfortunately) clarified, the application of these rules remains uncertain.

Any claim of conditional privilege will now certainly demand an excursus on pre-*New York Times* precedent to determine what standard should be applied for abuse of that privilege, but which conditional privileges will survive is unknown. Given the haphazard standards courts have articulated in prior cases involving various similar conditional privileges, the question for the defamation defendant then becomes how to frame and phrase its claimed privilege to best make the case that this particular privilege was historically breached by something more serious than mere negligence.

Similarly, media outlets can be relatively sure that when a store widely advertises that “Our prices are the lowest!,” speech about the store’s prices not being low will be protected by an actual malice standard. But news stories rarely narrowly restrict themselves to the topics promoted in corporate advertising, nor should we want them to. Not only that, as evidenced by the courts’ decisions here and in *Blue Ridge Bank*, this standard is highly manipulable by clever lawyers and result oriented courts. Thus, the rules have been tilted against the media, but the practical effect of these standards remains to be seen.

Plaintiff American Future Systems, Inc. d/b/a Progressive Business Publications was represented by James Howard Steigerwald and Wayne A. Mack, Jr., of Duane Morris, L.L.P., Philadelphia. Defendants Better Business Bureau of Eastern Pennsylvania, et al. were represented by Paul D. Weller and Jennifer Beth Jordan of Morgan Lewis & Bockius, L.L.P., Philadelphia.

*Michael E. Baughman is a partner, and Raphael Cunniff, an associate, with Pepper Hamilton LLP in Philadelphia.*

## California Court Affirms Dismissal of College Coach's Defamation Claims

### *Reasons For Termination A Matter of Public Interest*

By Richard Spirra

In a decision that turned on an analysis of the public interest prong of California's anti-SLAPP statute, the California Court Of Appeal held that the statute applies to claims that university officials made defamatory statements to newspaper reporters and students' parents concerning the reasons for terminating the employment of the school's head football coach. *McGarry v. University of San Diego, et al.*, No. D048103, 2007 WL 2040578 (Cal. App. 4th Dist, Div. 1, July 17, 2007) (McDonald, Nares, Irion, JJ.).

The appellate court also concluded that the coach's defamation claims were properly dismissed pursuant to the statute because: (1) a statement that allegedly implied the coach engaged in unspecified conduct that was "immoral" is not provably false; and (2) the coach was a limited purpose public figure, and, therefore, he was required to demonstrate the allegedly defamatory statements were made with actual malice, but there was no evidence that any university officials believed any of the statements they made were false.

The Court avoided resolving another interesting issue: whether California's shield law precluded the trial court from compelling two reporters to testify for the limited purpose of confirming that university "officials" or "sources" made the allegedly defamatory statements attributed to them in a newspaper article. The Court concluded it was not necessary to resolve that issue because, even with that testimony, the evidence would not have been sufficient to meet the coach's burden of establishing a probability that he would prevail on his defamation claims.

#### **Background**

In the middle of the 2003 football season, the University of San Diego terminated the employment of its head football coach. An article in the San Diego Union-Tribune reported that "several university officials, speaking on the condition of anonymity, outlined a 'culmination of events'" that led to the termination. The article later stated that "sources said three incidents in particular led to [the coach's] immediate termination just hours before the team

left for [an important game]." The article cited allegations that the coach had kicked a football at the team's trainers, engaged in a verbal argument with an assistant coach, and been involved in a verbal dispute over a cheerleading camp's use of the team's practice field.

Approximately a week after the article was published, the university's president and its vice-president for student affairs met with the players' parents. At that meeting, a parent asked whether the reason for the termination was criminal or immoral conduct. The university's president responded that she could not comment on the reasons for the termination, but she was not aware of any criminal conduct.

The coach filed a lawsuit containing wrongful termination and defamation claims against the university, its president and its vice-president for student affairs. The newspaper was not named as a defendant. The complaint alleged that: (1) university officials inaccurately described to the reporters the three incidents reported in the newspaper article; and (2) the university president's statement that she was not aware of any criminal conduct implied that the coach had engaged in some unspecified immoral conduct.

#### **Anti-SLAPP Motion**

The university filed a motion to dismiss the defamation claims pursuant to California's anti-SLAPP statute. That statute provides that claims based on the defendants' exercise of their First Amendment rights "in connection with a public issue" must be dismissed unless the plaintiff establishes a probability that he will prevail on the claims.

The university argued that, even if the university president's statement that the coach had not engaged in any criminal conduct could be interpreted as implying that he had engaged in conduct that was "immoral," that statement or implication is not actionable because whether conduct is "immoral" is highly subjective. Therefore, a jury could not determine whether the alleged implication was false. The university also argued that the coach was a limited purpose public figure, so he was required to submit evidence of actual malice, but there was no evidence that the school's president believed her statement or implication was false or that she had serious concerns as to its truth.

(Continued on page 24)



## California Court Affirms Dismissal of College Coach's Defamation Claims

*(Continued from page 23)*

The university argued that the coach could not prevail on his claim that statements attributed in the newspaper article to unnamed university "officials" or "sources" were defamatory because there was no admissible evidence that either of the individual defendants or any other "official" authorized to speak on behalf of the university made any of the statements, and there was no evidence that any defendant or university employee believed any statements they made were false.

In response to the motion, the coach conceded that the newspaper article itself was inadmissible hearsay, and he filed a motion to compel the reporters who wrote the article to submit to a deposition to confirm that university officials had, in fact, made the statements reported in the article. The newspaper opposed the motion to compel on the ground that California's shield law precluded the court from compelling reporters to provide the testimony the coach sought. The coach argued that the shield law was not applicable because he was not asking the reporters to disclose unpublished information or confidential sources; he was only asking the reporters to confirm facts published in the article. The trial court concluded that the shield law precluded the court from compelling the reporters to provide the testimony the coach sought. Therefore, the motion to compel the reporters to testify was denied.

In his subsequent opposition to the anti-SLAPP motion, the coach argued that the anti-SLAPP statute did not apply to the defamation claims because the allegedly defamatory statements were not made "in connection with a public issue," as required by the statute. He asserted that the grounds for terminating an employee are a private matter between the employee and his employer, and that the statements were not protected First Amendment activity because disclosing the grounds for termination was a violation of state and federal privacy laws.

### ***Court of Appeal Decision***

The Court of Appeal held that the anti-SLAPP statute was applicable to the defamation claims. The court agreed with the university's contention that the allegedly defamatory

statements were made "in connection with a public issue" because the coach "occupied a high-profile position in San Diego's athletic community, and the abrupt termination of his employment, coming in the middle of a successful season and on the eve of an important game, was an issue of import to a substantial segment of the public.... including the players, the players' parents...those who follow the team's fortunes, including ...current students, ...alumni and boosters, potential recruits... and competitor schools."

The court noted that the allegedly defamatory statements were made to the parents of the football team members and the newspaper reporters in response to widespread public interest and conjecture concerning the reasons for the coach's termination. The court also observed that there was no authority supporting the coach's arguments that the grounds for an employee's termination are inherently private and that state or federal law prohibits the disclosure of those reasons.

The Court of Appeal then held that the defamation claims were properly dismissed pursuant to the anti-SLAPP statute because the coach could not demonstrate a probability of prevailing on those claims. The court found he could not prevail on his claim that the university president falsely implied that he engaged in conduct that was "immoral" for two reasons. First, the question of whether conduct is moral or immoral is inherently subjective. Therefore, it would be impossible for a jury to objectively determine whether an assertion that the coach engaged in conduct that was "immoral" was false.

In addition, the court found that, by voluntarily accepting the role of head football coach and spokesman for the football team, the coach had assumed the role of a limited purpose public figure for purposes of statements concerning his performance and conduct as the university's football coach. Because he was a limited purpose public figure, the coach was required to establish that the alleged implication that the coach engaged in immoral conduct was made with actual malice. The court noted that there was no evidence whatsoever that the university president

*(Continued on page 25)*

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***There was no authority supporting the coach's arguments that the grounds for an employee's termination are inherently private.***

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### California Court Affirms Dismissal of College Coach's Defamation Claims

*(Continued from page 24)*

subjectively believed her statement or implication was false, or that she had serious concerns as to whether it was true.

The court then held that the facts reported in the newspaper article were not sufficient to support a prima facie defamation claim because, even if the hearsay rule did not apply, and the article itself or the statements quoted in the article were admissible, the article did not identify who made any particular statement reported in the article, and there was no evidence from which the jury could reasonably infer that either the university's president or the university's vice president for student affairs made any of the allegedly defamatory statements reported in the article, or that any other unidentified university "source" or "official" who may have made the statements was authorized to speak on behalf of the university.

Moreover, in the absence of any evidence identifying which statements were made by which university employees, the coach could not establish that the person who made any

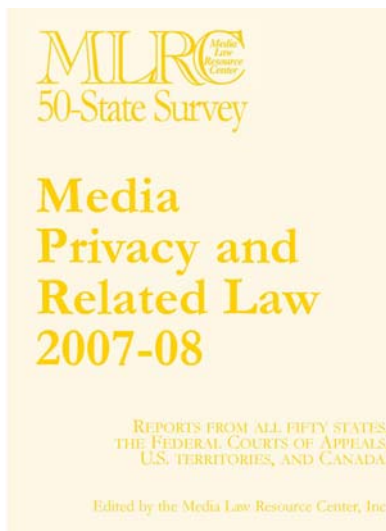
particular statement believed the statement was false or had serious concerns as to the truth of the statement.

Finally, the court concluded that it was not necessary to determine whether the trial court should have granted the coach's motion to compel the reporters to testify that the statements cited in the article were, in fact, made to the reporters by university officials or sources because, for the reasons set forth above, even if there were admissible evidence that unidentified university officials or sources made those statements, that evidence would not be sufficient to establish a probability of prevailing on the defamation claims.

*The University of San Diego was represented by Richard Spirra, now a partner at Gordon & Rees, LLP, and by Greg Roper and Phil Kossy, partners at Luce, Forward, Hamilton & Scripps, LLP. The newspaper was represented by Guylyn Cummins, a partner at Sheppard, Mullin, Richter & Hampton, LLP. The plaintiff was represented by Robert Hocker.*



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## California Court Dismisses Rodeo Spectator's Claims Over "Borat" Movie

By Walter Sadler

In another legal victory for the makers of "Borat," a Los Angeles judge last month ruled that a rodeo spectator who appeared briefly in the hit "mocumentary" made a political statement by displaying the Confederate flag on his cap. *John Doe 3 v. One America Productions, et al.*, SCO 92103 (Cal. Super. Ct. June 21, 2007) (Biderman, J.).

The court granted the defendants' anti-SLAPP motion and dismissed the plaintiff's complaint, which was based on a scene from "Borat" in which the title character, played by Sacha Baron Cohen, proclaimed his support for the "war of terror" at a rodeo in Roanoke, Virginia.

### Background

While Borat sang his national anthem to the tune of the Star Spangled Banner, the film panned across the audience and shot a burley, bearded man in the crowd for approximately two seconds. This spectator (dubbed the "Rodeo Man"), was not identified in the movie or the lawsuit, but nevertheless claimed that the film violated his statutory right of publicity and placed him in a false light by falsely portraying him as "uneducated, racist, sexist, and bigoted."

The defendants, who had earlier prevailed on another anti-SLAPP motion filed in another case involving two "Frat Boys" (see *MediaLawLetter* March 2007 at 9), had applied before that case was dismissed to have the "Rodeo Man" case deemed a "related case" under local rules so that they would not have to re-educate another judge about the facts or law of the case.

The defendants' application was approved approximately two weeks before the "Frat Boys" SLAPP motion was granted and the "Rodeo Man" case was transferred to Los Angeles Superior Court Judge Joseph S. Biderman., who already had the "Frat Boy" case.

In granting the "Rodeo Man" SLAPP motion, Judge Biderman ruled that he did not need to repeat the points made

at the February 14, 2007 hearing in the "Frat Boys" SLAPP motion because "the issues in this action are nearly identical to those considered at length by the court in the related action and counsel on both sides of this action previously litigated the related action."

Nevertheless, he specifically rejected the plaintiff's argument that the defendants had not carried their burden under "the first prong" of California's SLAPP statute, which requires the defendant to prove that he has been sued in "connection with an issue of public interest." In the Rodeo Man's opposition, he argued that there was no "public interest" in the Rodeo Man because he "made no statements at all in the movie." However, Judge Biderman ruled that "in determining whether the moving party has carried its burden on the first prong of the anti-SLAPP statute, the question is whether the plaintiff's claims are based on an act in furtherance of the defendant's exercise of free speech rights, i.e., the focus is on the defendant's speech activity . . . there is no requirement that the plaintiff has engaged in speech activity."

In any event, the judge also found that "while there is no requirement that the plaintiff has engaged in speech activity, the rodeo spectator did make a statement with his attire – a dark baseball cap adorned with the Confederate flag." Specifically, Judge Biderman ruled that "clothing may constitute speech particularly where there is printed language."

His Minute Order stated:

"The movie makes its own statement about issues intended by the display of the Confederate flag to plaintiffs own statement, specifically, his public display of the flag."

With respect to the second prong of § 425.16, which requires the plaintiff to prove a probability of prevailing, Judge Biderman ruled that the plaintiff failed to establish a probability of prevailing for the same reasons the "Frat Boys" lost. Although Judge Biderman did not specifically identify what those reasons were, he did indicate in oral argument that the plaintiff had failed to prove damages and, in any event, the plaintiff's claims were barred by the First Amendment, because Borat was an "expressive work."

*Walter Sadler of Leopold Petrich & Smith in Los Angeles represented the defendants in this case. Plaintiff was represented by Olivier A. Tailleau, Beverly Hills, Ca.*



## Nebraska Court Refuses to Issue Prior Restraint Against Publication of Allegedly Defamatory Book

By Henry R. Kaufman and Michael K. Cantwell

On July 6, 2007, a District Court judge in Dodge County, Nebraska denied a motion for a temporary injunction sought by a local hospital to enjoin publication of a book concerning an outbreak of Hepatitis C that infected more than 100 patients at its cancer center during 2000-2001. *Freemont Area Medical Center v. Evelyn Vinduska McKnight and Travis Thorne Bennington* (Neb. Dist. Ct. (Dodge County), July 6, 2007, C.V. No. C107-366) (unpublished order) (Sampson, J.).

After the widely-publicized outbreak, nearly ninety of the Hepatitis victims brought legal actions against the Freemont Area Medical Center ("FAMC") and Freemont Cancer Center. All but one of the cases settled. Among the victims was defendant Evelyn McKnight, a co-author of the book sought to be enjoined, along with her co-defendant and co-author, Travis Bennington, an attorney who had represented a number of the victims in the original actions.

Claiming that the book was defamatory and that it painted the hospital in a false light, FAMC commenced the action and then sought – and was granted – a temporary restraining order, *ex parte*, which order also temporarily sealed the record.

Remarkably, the purported basis for the underlying lawsuit – and for plaintiff's extraordinary effort to obtain a prior restraint – was an unpublished draft of the manuscript that was in process of being checked and vetted. The draft had been obtained without the permission or consent of the defendants. Plaintiff claimed that it received a copy of the manuscript from a source to whom the authors had provided relevant chapters for purposes of checking the manuscript for accuracy. However the alleged source, who had never been given the entire manuscript, submitted an affidavit denying that she had provided the manuscript, or any part of it, to the plaintiff or anyone else.

On the motion, defendants argued that under both common law and constitutional principles plaintiff's request for injunctive relief was overreaching. Under Nebraska

common law, an injunction is an extraordinary remedy, to be granted only where the plaintiff has established a clear right, irreparable damage, and no adequate remedy at law. Moreover, the U.S. Supreme Court has held that where the injunction seeks to silence a party's free speech rights prior to publication it is not only "one of the most extraordinary remedies known to our jurisprudence," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976), but also the "most serious infringement and least tolerable on First Amendment rights." *Id.* at 559. (Fittingly, Dodge County is located in Nebraska.)

Defendants argued that the justifications offered by plaintiff for an injunction – the allegedly libelous nature of the work and an alleged breach by defendant McKnight of the terms of her settlement agreement with FAMC – failed even to approach the exceptional circumstances that the

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### ***The purported basis for the underlying lawsuit was an unpublished draft of the manuscript.***

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Supreme Court has theorized could potentially support a prior restraint, namely, an imminent threat to national security or to a criminal defendant's Sixth Amendment right to a fair trial.

As to the alleged defamation, as defendants noted, it is hornbook law – absent extraordinary circumstances – that equity will not restrain a libel. Indeed, under Nebraska law it is clear that only a prior adversarial determination of defamation could ever justify injunctive relief – and even then only where the statements found libelous are likely to be repeated absent an injunction – unless the allegedly defamatory statement was published in violation of a trust or contract or in aid of another tort or unlawful act, or injunctive relief is essential for the preservation of a property right.

As to plaintiff's argument that McKnight had breached her settlement agreement, defendants argued that precatory language in the agreement cited by plaintiff did not constitute an enforceable promise not to publish defamatory material about FAMC. Even if it had, however, the same constitutional considerations that require a judicial determination of defamation before issuance of injunctive relief would surely also require the same finding before entering a prior restraint based on a mere promise not to publish a defamation.

(Continued on page 28)



## Nebraska Court Refuses to Issue Prior Restraint Against Publication of Allegedly Defamatory Book

(Continued from page 27)

In the order holding that injunctive relief was unwarranted, District Court Judge John E. Sampson accepted defendants' arguments that injunctive relief was unwarranted under both Nebraska common law and the constitutional principles against prior restraints set forth in *Nebraska Press Association*. The Court also vacated its prior ex parte sealing and restraining orders.

*Defendants were represented by Henry R. Kaufman, P.C., of New York City (Henry R. Kaufman and Michael K. Cantwell, of counsel) and Koley Jessen, P.C., L.L.O., of Omaha, Nebraska (Michael C. Cox and Daniel J. Fischer, of counsel). Plaintiff was represented by Lamson, Dugan & Murray, LLC, of Omaha (Mark Novotny, of counsel).*

## Virginia Court Grants Preliminary Injunction in Libel Case

A Virginia federal district court last month granted best-selling author Patricia Cornwell a preliminary injunction in her libel case against fringe author Leslie Raymond Sachs, ordering Sachs to cease posting defamatory statements about Cornwell on the Internet, among other things. *Cornwell v. Sachs*, No. 3:07cv00236 (E.D. Va. June 2007) (Moon, J.).

The dispute between Cornwell and Sachs began in the late 1990s. In 1998, Sachs self-published a mystery novel called *The Virginia Ghost Murders*. In late 1999, he saw an advertisement for a forthcoming book from Cornwell entitled *The Last Precinct*. Based on a one sentence plot description, Sachs alleged that Cornwell's book plagiarized his book. Among other things, he accused Cornwell of plagiarism on his website and added a sticker to copies of his book stating "The book that famous PATRICIA CORNWELL threatened to destroy."

Cornwell sued Sachs for libel, trademark infringement and related claims in 2000. See *LDRC LibelLetter* June 2000 at 29. The parties agreed to a consent decree under which Sachs was to remove all references to Cornwell from the marketing materials for his book. The consent decree did not, however, conclude the dispute.

In April 2007, Cornwell filed another complaint against Sachs for libel and for violation of the prior consent decree. Sachs, now living in Belgium, has allegedly been publishing statements on the web accusing Cornwell of plagiarism, anti-Semitism, and a vast array of crimes.

Cornwell asked the court to hold Sachs in contempt of the earlier consent decree, and to enter a new, broader injunction. The court granted an ex parte temporary restraining order in May 2007, followed by the instant grant of a preliminary injunction.

The court acknowledged the general rule that "equity will not enjoin a libel" but reasoned that "such is not the case for statements that are found" after a preliminary injunction hearing "to be libelous." Plaintiff did not appear in court and stated he would not return to the US to defend the action.

The court listed 45 statements Sachs had posted about Cornwell that it found to be false. The Court categorized the statements into groups that included: "Statements Alleging Plaintiff Committed Various Crimes," "Statements Alleging Threats of Murder and Attempted Murder," "Statements Advocating Book Burning" and "Statements Alleging Hatred of and Desire to Murder Jews."

These statements were all defamatory and deliberately false. And Cornwell would suffer injury to her reputation unless Sachs was compelled to both remove the defamatory statements from his Web site and be "enjoined from making future libelous statements."

Specifically, the court ordered Sachs to remove these statements from all websites and enjoined him for republishing them. The court also ordered that Sachs remove "from all Internet websites" any references to his book *The Virginia Ghost Murders* or hyperlinks to any sites where the book can be bought.



## Islamic Society of Boston Drops High Profile Libel Cases Against Media

By Elizabeth A. Ritvo and Jeffrey P. Hermes

On May 29, 2007, the Islamic Society of Boston (“ISB”), Chairman of the ISB Board of Trustees Dr. Osama Kandil, and ISB President Dr. Yousef Abou-Allaban agreed to abandon all claims in three parallel defamation suits pending in Massachusetts Superior Court: *Abou-Allaban v. Fox Television Stations, Inc., et al.*, Suffolk County Superior Court Civil Action No. 05-0701; *Kandil v. Boston Herald, Inc., et al.*, Suffolk County Superior Court Civil Action No. 05-1867; and *Islamic Society of Boston, et al. v. Boston Herald, Inc., et al.*, Suffolk County Superior Court Civil Action No. 05-4637.

With the ISB facing damaging disclosures in ongoing discovery, the three cases (the “defamation cases”) collapsed.

### Background

Taken together, the defamation cases involved claims that the ISB, Dr. Kandil and Dr. Abou-Allaban had been defamed by: (1) a series of articles published by the *Boston Herald* newspaper between October 2003 and October 2004; (2) a series of news segments that aired on the Boston Fox Television affiliate following the *Herald* articles; and (3) statements made by other individuals and organizations, including journalist and terrorism expert Steven Emerson, who allegedly conspired with the media defendants to defame the plaintiffs.

The news stories in question related to reports that the ISB had purchased real estate on which it was building a new mosque in Roxbury, Massachusetts, from the City of Boston for a price far below its market value; the stories also discussed the backgrounds of certain past and present officers and directors of the ISB.

The plaintiffs identified more than one hundred separate statements that they claimed were defamatory by seventeen separate defendants (including Fox Television and three of its employees, and the *Boston Herald* and six of its current and former employees). Many of the allegedly defamatory statements related to the ISB’s general allegation that the ISB and its officers and members had been portrayed (through explicit statements or through innuendo) as terrorists and supporters of terrorism, impairing

the ISB’s ability to complete its new mosque. The plaintiffs also asserted parallel claims for civil rights violations under the Massachusetts Civil Rights Act and claims for civil conspiracy.

In addition to the defamation cases, two separate suits related to the ISB were also pending in Massachusetts courts. The first, *Policastro v. City of Boston, et al.*, Suffolk County Superior Court Civil Action No. 04-4279, involved an Establishment Clause challenge to the legitimacy of the City of Boston’s sale of real estate to the ISB. This case was ultimately dismissed at the trial court level on limitations grounds, and was appealed to the Massachusetts Appeals Court.

The second, *David Project, Inc., et al. v. Boston Redevelopment Authority*, Suffolk County Superior Court Civil Action No. 06-4167, was a challenge brought by The David Project, one of the defendants in the defamation cases, to the alleged refusal of the Boston Redevelopment Authority (an agency of the City of Boston) to turn over all requested records related to the sale of the ISB real estate pursuant to Massachusetts’ public records law.

The three defamation cases were specially assigned to Judge Janet Sanders of the Massachusetts Superior Court. Following the denial of motions to dismiss filed by all defendants pursuant to Rule 12(b)(6), and petitions filed by the non-media defendants pursuant to Massachusetts’ anti-SLAPP law, the defamation cases were consolidated for discovery purposes only.

Notably, Judge Sanders denied a blanket protective order requested by the plaintiffs that would have allowed the parties to designate discovery materials as “attorneys’ eyes only,” and that would have placed the burden on the receiving parties to challenge that designation. Instead, the judge allowed a narrow protective order proposed by the defendants that allowed the parties to claim temporary and limited confidentiality for documents: parties were permitted to see confidential materials, and any confidentiality designation would evaporate within a short time period unless the designating party either obtained the consent of the other parties or filed a motion explaining why the designation was necessary.

The judge also implemented a proposal by the parties to sequence depositions in the defamation cases. Non-

(Continued on page 30)

## Islamic Society of Boston Drops High Profile Libel Cases Against Media

*(Continued from page 29)*

party keeper of the records depositions were scheduled to proceed first for a period of several months, during which time the parties were also allowed to move forward with written discovery; thereafter, when the court estimated that at least initial document discovery was complete, the parties would be allowed to begin general fact depositions. The date set for the beginning of fact depositions was July 2, 2007.

Further discovery issues in the case were directed to a special discovery master appointed by the court. The discovery master, a well-regarded Boston area trial attorney, received a mandate from the court to ensure that discovery proceeded in an organized and expeditious fashion in order to be completed within a one-year discovery period established by the court. The discovery master was specifically instructed not to make rulings on the underlying merits of the parties' claims. He was unmoved by plaintiffs' arguments that they were unduly burdened by discovery served on them by seventeen separate defendants, finding that the plaintiffs had elected to structure their case with multiple claims, multiple defendants and broad factual allegations.

The defendants conducted aggressive discovery, serving separate sets of interrogatories and document requests for each of the defendants, and scheduling more than eighty keeper of the records depositions. The defendants obtained financial records from several of the ISB's banks and accountants, obtained financial and construction records from the ISB's contractors and architects, and sought materials from government entities through both depositions and public records requests.

Much of the material thus obtained countered the ISB's claims that it had been financially harmed by the publications at issue; other discovery material originating from within the ISB revealed contacts between the ISB and certain figures associated with radical Islam, which contacts the ISB had disavowed in its pleadings. Because of the limited nature of the confidentiality order issued by the court, this information was not restricted from public dissemination.

With fact depositions scheduled to begin in little more than a month, the ISB, Abou-Allaban and Kandil elected

to abandon their claims entirely. Their only requirements for complete dismissal of claims against all defendants (including the media) were an exchange of mutual releases and the dismissal of the pending appeal in the *Policastro* suit. No monetary compensation was provided by any defendant, no apologies of any sort were required, and the public records lawsuit initiated by The David Project was permitted to continue. Furthermore, the scope of the releases obtained by the defendants protected them and their counsel from liability for repetition of the statements that the plaintiffs had alleged were defamatory.

*Elizabeth A. Ritvo and Jeffrey P. Hermes are partners in the Boston office of Brown Rudnick Berlack Israels LLP, and represented Boston Herald, Inc., and its employ-*

### **Revealed contacts between the ISB and certain figures associated with radical Islam.**

*ees in the above case. Other media counsel in the case included Joseph Steinfield of Prince Lobel Glovsky & Tye LLP, Boston, MA, representing Fox Television and its employees, and Floyd Abrams of Cahill Gordon & Reindel LLP, New York, NY, and Richard Batchelder of Ropes & Gray LLP, Boston, MA, representing Steven Emerson and The Investigative Project. Non-media defendants were represented by Jeffrey S. Robbins of Mintz, Levin, Cohn, Ferris, Glovsky & Popeo for The David Project, Anna Kolodner, the Citizens for Peace and Tolerance and Dennis Hale, David Bunis of Dwyer & Collora, LLP for Ahmed Mansour, and John Gilmore of DLA Piper Rudnick Gray Cary US LLP and Mark Darling of Litchfield Cavo, LLP for William Sapers. Howard Cooper and David Rich of Todd & Weld represented the Islamic Society of Boston, Yousef Abou-Allaban and Osama Kandil.*

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## Anti-SLAPP Statute Protects Reality Show About Former Kiss Rock Star *Sufficient Public Interest in the Lifestyles of the Rich and Famous*

By Walter Sadler

On May 23, 2007, the Los Angeles Superior Court granted a Special Motion to Strike the complaint of a Mardi Gras organizer and television segment producer who claimed that the producers and broadcasters of the cable television show “Gene Simmons Family Jewels” violated his common law and statutory right of publicity. *Greenstein v. Greif Company, et al.*, No. 364279 (Cal. Super. ) (Fromholz, J.).

### Background

“Family Jewels” is a “reality” television show that focuses on the professional and family life of rock star, Gene Simmons, who is the long time base guitar, vocalist and most visible performer in the popular rock band “Kiss.” Using a “hand held” camera style, the “Family Jewels” film crew followed Simmons as he went about his daily activities to provide the audience with “an intimate look” into his lifestyle.

In the Family Jewels episode at issue, Simmons served as a pre-Katrina Grand Marshall for the 1995 New Orleans Mardi Gras parade and several affiliated events. The plaintiff was a local raconteur who was responsible for inviting Simmons to New Orleans and chaperoning him around the city with two escorts/models that the plaintiff had hired to act as “arm candy” for Simmons.

During the episode, the plaintiff was seen picking up Simmons at the airport, arranging for a police escort into town, showing Simmons his hotel room, attending receptions at the Super Dome, and berating caterers who failed to set up the sandwich table to his expectations. The plaintiff was paid for his time as a “segment producer” and reimbursed for some of his expenses.

In plaintiff’s complaint, he alleged that he was “featured” in the episode for the “defendant’s gain and profit” and that defendant’s use of his persona in the episode “implied he endorsed the episode and the defendant’s work.” Additionally, he alleged that he was not paid for his time as “an actor” and that prior to the broadcast he had no-

tified the defendants that he would not sign a release which authorized the use of his persona on the television show.

### *Anti-SLAPP Motion*

The California anti-SLAPP statute codified in Code of Civil Procedure § 425.16 is a two prong procedural device that was enacted to weed out meritless lawsuits “arising from any act . . . of speech” where (1) the defendants carry their initial burden of proving that the plaintiff’s complaint is based upon speech that is “of public interest,” and (2) the plaintiff cannot carry their reciprocal burden of pleading a “probability of prevailing” on any cause of action with competent, admissible evidence.

At first glance, Family Jewels may not seem the like the kind of “significant” speech that the California Legislature indicated in the preamble of §425.16 it was trying to protect from being “chilled” from the abuse of the judicial process,” when it enacted the SLAPP statute in 1992. After all, KISS’ biggest claim to fame was their outlandish make-up and outfits which resemble the costume of a Klingon warrior from the television show “Star Trek.”

In fact, the plaintiffs argued that Family Jewels “is not a news program in any way, shape or form. It is a contrived piece of film making that seeks to trade on whatever remains of former rock icon Gene Simmons’ celebrity by putting his face on screens as he spouts generally dull-witted comments. It is on A&E Television Network, a network that does not have a news department. The show is first and last an entertainment show, designed to appear to the voyeuristic impulses of Simmons’ fan base.”

However, the court found that there was a sufficient “public interest” in the “lifestyles of the rich and famous” to satisfy the first prong of C.C.P. § 425.16. In particular, the Court adopted the defendant’s argument that “Family Jewels” not only “satisfied the public curiosity about what it is like to be a rock star, but also let them see that famous people can have problems getting along just like regular people.” The Court opined that “while a celebrity’s life-

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***There was a sufficient  
“public interest” in the  
“lifestyles of the rich and  
famous” to satisfy the first  
prong of C.C.P. § 425.16.***

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(Continued on page 32)

## Anti-SLAPP Statute Protects Reality Show About Former Kiss Rock Star

(Continued from page 31)

style might be at the outer bound of what can be considered a public issue,” it nevertheless found that “the subject matter, as described by defendants, involves an issue of sufficient public interest to overcome the first prong anti-SLAPP analysis.”

As for the second prong, the court also agreed with the defendants’ argument that the plaintiff could not carry his burden of proving a probability of prevailing primarily because he had impliedly consented to the use of his persona by voluntarily and knowingly interacting with Simmons while a camera crew conspicuously filmed them in New Orleans. The Court acknowledged that there was conflicting evidence about whether the plaintiff had signed a release as part of his agreement to shepherd Simmons around New Orleans. And, the Court also acknowledged that the plaintiff never said the words “I consent.” However, the Court noted that the plaintiff admitted that he knew there was a sign stating that “anyone in the area consented to be filmed” and found that this was sufficient to “constitute consent by conduct.”

The Court also gave a “brief analysis” of the further issues raised in the defendants’ motion. Paradoxically, the Court found while there was a sufficient “public interest” in the television show to satisfy the first prong of the anti-SLAPP statute, there was insufficient “public interest” in the plaintiff to qualify for the “newsworthy” exemption set forth in California’s Right of Publicity statute. Civil Code § 3344(d) provides that: “For purposes of this section, a use of a name, place, signature, photograph or a likeness in connection with any news, public affairs, or sports broad-

casts or account for any political campaign, shall not constitute a use for which intent is required under subdivision (a).” The Court reasoned that “it does not appear that the broadcast of plaintiff’s image is a matter in the public interest, even though it may be ‘in connection’ with an issue in the public interest under § 425.16.”

Second, the Court found that the plaintiff had carried his burden of proving “a direct connection” between the use of his persona and a commercial purpose because the Court believed that the plaintiff “need only show that the unauthorized use

was on or in products, merchandise or goods.” The Court ruled that “this threshold was undoubtedly satisfied by plaintiff’s appearance in the show.”

But the Court found that defendants’ work was protected by the First Amendment because it is “an expressive work and therefore deserves First Amendment protection under *Daly v. Viacom, Inc.*, 238 F.Supp2d 1118 (N.D. Cal. 2003).” In making this ruling, the Court found that the arguments that plaintiff made in opposition to defendant’s “public interest” arguments in the first prong of C.C.P. § 425.16 actually supported the defendants’ position in the second prong analysis. Specifically, the Court found that since the plaintiff argues that the “show falls on the fictional side of the fact fiction continuum,” the television show

was *ipso facto* an expressive work. The Court also found that since plaintiff “argued emphatically that he is not a celebrity,” the show cannot derive its value primarily from his fame which was one of the factors enunciated in the *Daly* case.

*Walter Sadler, a partner with Leopold Petrich & Smith in Los Angeles, represented the defendants. Plaintiff was represented by Joseph Hart, Donaldson & Hart in Los Angeles.*





## English Court of Appeal Recognizes Neutral Report Defense in Libel Cases

### *Republication of Allegations Protected Under Umbrella of Reynolds Defense*

In what may prove to be a landmark decision, the Court of Appeal of England & Wales this month expressly recognized a neutral report defense in libel cases. *Roberts v. Gable*, [2007] EWCA Civ 721 (July 12, 2007).

Building on a number of prior cases that had considered the neutral report principle, the Court expressly held that a neutral report defense exists for the publication of defamatory allegations in circumstances where the public has a right to know that such allegations are being made and the journalist does not adopt or endorse the allegations. In this circumstance, there is no need for the press to take steps to ensure the accuracy of the published information.

#### **Background**

The claimants in the case, brothers Christopher and Barry Roberts, are active members of the far right British National Party (“BNP”). They sued over an October 2003 article published in Searchlight magazine reporting on an internecine dispute among far right factions. Searchlight is an organization that reports on, and actively opposes, the activities of far-right organizations in Britain.

The article at issue, entitled “BNP London Row Rumbles on” appeared in a section of the magazine called “News from the Sewers.” The article reads as follows:

The two rival camps in the British National Party seem to have set their feud aside during the campaign that won the party a council seat in Gray’s, Essex, last month. Even people who should not be in the party at all, such as the old hard line Nazi and Searchlight informant, Keith Thompson, were out plodding the streets for the BNP.

In May this column reported a BNP rally in London at which John Tyndall, the party’s founder, was the main speaker and several of his supporters were present. It now seems that this was an attempt to bring them together with their rivals, the supporters of Nick Griffin, the party’s present leader.

Since then Tyndall has been expelled from the party and has announced that he is resorting to the courts to challenge the decision.

We described the London rally as the Night of the Short Knives. Soon afterwards the BNP’s March bulletin accused two members of stealing the collection from the meeting. The story that was put around was that Dave Hill and Robert Jeffries, who is better known in the party as Bob James, stole the money from the house of Chris Roberts, the London and Essex organiser. It appears that the police investigated but decided not to act.

Perhaps the police are now more interested in Roberts and his brother Barry. Hill and Jeffries recently issued a long letter attacking Griffin and his supporters, including Chris Roberts. It explains that it was Roberts who stole the money from the rally and that although it went against the grain, Hill and Jeffries

r e l u c t a n t l y threatened to report him to the police. After Roberts angrily returned the money, the letter alleges, he and his brother Barry threatened to “kneecap, torture and kill” Hill, Jeffries, and their respective families.

(Continued on page 34)

**Searchlight**

Against Racism and Fascism  
This month's magazine  
July 2007

Chris Hanin murder  
Completed

> Home <  
> Editorial <  
> Contents <  
> Story archive <  
> Features <  
> Trade Unions <  
> Links <

Searchlight's new campaign website  
**HOPEnothate.org.uk**  
Follow our Hope not Hate tour.  
Find out how you can get involved in activities in your area.  
Discover the true face of the BNP

July 2007  
Author: Taz in Paris for | Date: July 2007

**A strange election campaign**  
The French presidential election and Jean-Marie Le Pen's crushing defeat add up to a nightmare for Front National activists, exacerbated by the fact that Le Pen's pet issues of immigration >>

Author: Gerry Gable | Date: July 2007

**South African intelligence officer makes failed attempt to entrap Searchlight**  
Eleven years ago, when Searchlight first exposed the existence of a rat line of killers and saboteurs that ran from mainland Europe via Britain to the newly democratised South Africa, >>

June 2007  
Author: Nick Lowles | Date: June 2007

**STOP THE BNP**  
Stan the BNP was set up to counter racism and fascism at the election polls and beyond

**SHUT DOWN**  
the peddlers of hate  
Join Searchlight's campaign to close down REDWATCH

What are you watching?  
Shut Down REDWATCH  
**SHUT DOWN**



## English Court of Appeal Recognizes Neutral Report Defense in Libel Cases

(Continued from page 33)

The letter complains that the Griffin leadership described Roberts as a self-made millionaire who was leaving the city to devote his time and fortune to the BNP, but he turned out to be a disappointment. “It was now quite obvious that a little village somewhere, was missing its idiot!”

The Claimants alleged the article was defamatory in that it accused them of stealing money and threatening their rivals with harm; and that they might be subject to police investigation.

The defendants raised the *Reynolds* qualified privilege defense. Mr. Justice Eady ruled in favor of the defendants. Although the defendants did not attempt to verify the allegations or contact the claimants before publication, the judge ruled that under the circumstances publication was privileged. Mr. Justice Eady found that the case raised matters of “reportage”—i.e., that the subject was of serious public interest and readers would understand that the magazine was not endorsing the allegations, but was simply reporting that such allegations were made.

### Court of Appeal Decision

The Court of Appeal affirmed with a lengthy consideration of the qualified privilege defense as applied to reporting of allegations, as well as European and American case law. These authorities supported the proposition that:

the journalist has a good defense to a claim for libel if what he publishes, even without an attempt to verify its truth, amounts to reportage, the best description of which gleaned from these cases is that it is the neutral reporting without adoption or embellishment or subscribing to any belief in its truth of attributed allegations of both sides of a political and possibly some other kind of dispute.

*Roberts v. Gable* at ¶ 53

The court explained that the neutral report defense was not an abandonment of the traditional rule against repetition. In fact, the “repetition rule and reportage are not in conflict with each other” because the neutral report of an allegation is not the same as an allegation asserted to be true.

Doctrinally, the neutral report defense falls under the umbrella of qualified privilege. And all the circumstances of the case and the 10 factors listed in *Reynolds* by Lord Nicholls “adjusted as may be necessary for the special nature of reportage” must be considered.

In particular, the Court emphasized the following:

- The information must be in the public interest. With respect to public interest, the Court quoted from the House of Lords judgment in *Jameel* stating: “The fact that the material was of public interest does not allow the newspaper to drag in damaging allegations which serve no public purpose. They must be part of the story. And the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article.” *Jameel v. Dow Jones* ¶ 51.
- It is for the judge to rule on the defense in a way analogous to a ruling on meaning. The test is objective, not subjective. All the circumstances surrounding the gathering in of the information, the manner of its reporting and the purpose to be served will be material.
- This protection will be lost if the journalist adopts the report and makes it his own or if he fails to report the story in a fair, disinterested and neutral way. But even if the report is not neutral, the journalist can still attempt to show that it was a piece of responsible journalism even though he did not check accuracy of his report.
- All the circumstances of the case are brought into play to find the answer but if it is affirmative, then reportage must be allowed to protect the journalist who, not having adopted the allegation, takes no steps to verify his story.
- The relevant factors properly applied will embrace the significance of the protagonists in public life and there is no need for insistence as pre-conditions for reportage on the defendant being a responsible prominent person or the claimant being a public figure as may be required in the U.S.A.
- The urgency is relevant, see factor 5, in the sense that fine editorial judgments taken as the presses are about

(Continued on page 35)

### English Court of Appeal Recognizes Neutral Report Defense in Libel Cases

(Continued from page 34)

to roll may command a more sympathetic review than decisions to publish with the luxury of time to reflect and public interest can wane with the passage of time.

*Roberts v. Gable* at ¶ 61.

#### ***Neutral Report Defense Applied***

Applying these considerations, the Court concluded that the defendants were protected by the neutral report defense. 1) The article involved a matter of public interest; 2) it reported that allegations had been made, not that

they were true; and 3) defendants did not adopt the allegations or take sides.

With respect to whether an article adopts the allegations, the Court cited both the House of Lords decision in *Jameel* and the European Court of Human Rights decision in *Radio France v. France*, 40 E.H.R.R. 706 (2005), for the proposition that judges must give allowance for editorial judgment.

Gavin Millar QC and Guy Vassall-Adams, Doughty Street Chambers, and solicitors firm Kosky Seal, represented Robert Gable, Steve Silver and Searchlight Magazine Ltd. Hugh Tomlinson QC and solicitors firm Osmond & Osmond represented the claimants.

## MLRC London Conference September 17-18, 2007

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## Court Rulings Limit Recovery of Statutory Damages Under the Copyright Act and the Digital Millennium Copyright Act

By Michael Berry

Last month, in a copyright case pending in Pennsylvania, Judge Terrence McVerry made two noteworthy damages rulings of interest to media entities. *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1630261 (W.D. Pa. June 4, 2007). First, Judge McVerry ruled that a plaintiff pursuing statutory damages under the Copyright Act can seek only one statutory award against an allegedly infringing defendant, even if the defendants' infringing act caused other, separate downstream infringements.

Second, in addressing an issue of first impression, the judge ruled that a plaintiff seeking statutory damages under the Digital Millennium Copyright Act ("DMCA") may recover only one statutory award when a defendant distributes allegedly false copyright management information to many recipients. Judge McVerry certified the second ruling for interlocutory appeal, see *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1720080 (W.D. Pa. June 8, 2007), and the U.S. Court of Appeals for the Third Circuit is now considering whether to permit the appeal.

### Background

Valencia McClatchey snapped a well-known photograph of the aftermath of the tragic crash of Flight 93 in Shanksville, Pennsylvania on September 11, 2001. As part of The Associated Press's coverage of the one year anniversary of September 11, it distributed a report about Ms. McClatchey and her photograph which included a copy of the photo as part of the report.

Ms. McClatchey subsequently filed suit against AP claiming that it had infringed her copyright by distributing the photo to its members, some of whom allegedly republished the photo in their own newspapers. She also claimed that AP violated the DMCA by removing a copyright notice that allegedly appeared on the photograph and by distributing a copy of the photograph without the notice. After discovery, several material facts remained in dispute—for example, whether Ms. McClatchey consented to AP's distribution of the photo and whether the photo contained any copyright notice—and the case was scheduled for trial.

Ms. McClatchey declined to seek actual damages, but elected to pursue statutory awards for each of her claims. With respect to her copyright claims, Ms. McClatchey sought to collect separate awards for AP's alleged direct infringement and each of the alleged resulting downstream infringements committed by AP members who subsequently published the photo. Likewise, Ms. McClatchey sought separate statutory awards under the DMCA for each of the 1,147 AP subscribers who allegedly received from AP a copy of the photo without proper copyright management information.

AP filed motions in limine on both damages issues, arguing that Ms. McClatchey should be limited to a single statutory award under the Copyright Act and to a single award for "each violation" of the DMCA. The difference in the two sides' positions was substantial: Ms. McClatchey claimed an entitlement to statutory awards totaling nearly \$30 million, while AP countered that, even assuming willful infringement as alleged in the complaint, Ms. McClatchey's total maximum award could be \$200,000 (i.e., \$150,000 for the copyright claims and \$50,000 for the two DMCA claims). On June 4, 2007, Judge McVerry granted both of AP's motions.

### Damages Under the Copyright Act

The Copyright Act provides that a plaintiff may seek "an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally." 17 U.S.C. § 504(c)(1). Courts have interpreted this provision to permit a single award per work regardless of the number of infringements. Relying on a passage in *Nimmer*, however, Ms. McClatchey argued that she could recover multiple awards against AP under the statute because the various downstream publishers are not jointly and severally liable with each other, even though each might be jointly and severally liable with AP.

The court rejected this "strained" argument, concluding that the statute "authorizes a single award when there is any joint and several liability, even if there is not complete

(Continued on page 38)

## Court Rulings Limiting Recovery of Statutory Damages Under the Copyright Act and the Digital Millennium Copyright Act

*(Continued from page 37)*

joint and several liability amongst all potential infringers.” As Judge McVerry explained, “this ‘partial’ joint and several liability triggers the statutory limit to a single award.” Accordingly, if she prevails at trial, Ms. McClatchey can collect only one award from AP, notwithstanding the alleged downstream infringements by its members.

### ***Damages Under the DMCA***

The DMCA provides that a plaintiff can elect to “recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.” 17 U.S.C. § 1203(c)(3)(B). In her complaint, Ms. McClatchey alleged two § 1202 claims—one for AP’s alleged removal of copyright management information and one for AP’s alleged distribution of her photograph without her copyright management information. Ms. McClatchey argued that the DMCA permits her to collect a separate award for AP’s distribution of the photo to 1,147 subscribers “on the basis that each is a separate violation of the DMCA.” Judge McVerry rejected this argument, explaining that “where one act by Defendant results in mass infringement, it is more likely that actual damages will yield the more favorable recovery,” and that a plaintiff electing a statutory award necessarily receives a windfall. Judge McVerry reasoned that the DMCA “focus[es] on the defendants’ conduct” and therefore “the term ‘each violation’ is best understood to mean ‘each violative act performed by Defendant.’”

In this instance, “AP committed only one alleged violative act by distributing” the photograph to all of its subscribers, and, if Ms. McClatchey proves her DMCA claims, she is entitled to only one award for the distribution and one award for the alleged removal of her copyright notice.

### ***Petition for Interlocutory Appeal***

Ms. McClatchey then filed a motion asking Judge McVerry to reconsider his ruling on the DMCA damages issue or, in the alternative, to certify the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The following day, before AP filed a response, Judge McVerry denied Ms. McClatchey’s motion for reconsideration, but agreed to certify the order for appeal.

Ms. McClatchey subsequently filed a petition asking the Third Circuit to permit her to appeal the DMCA damages order, to which AP submitted a response in opposition. As of the writing of this article, the Court of Appeals has not ruled on Ms. McClatchey’s petition.

*Robert Penchina, Gayle C. Sproul, and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. represent The Associated Press. Valencia McClatchey is represented by Paul K. Vickrey, Douglas M. Hall, Kara L. Szpondowski of Niro, Scavone, Haller & Niro and by John E. Hall of Eckert Seamans Cherin & Mellott, LLC.*

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## Use of Photograph in News Broadcast Held to Be Infringing

### Court Looks to Industry Practices To Find No Fair Use

Last month, a Massachusetts federal district court held that CBS-owned television stations in Boston infringed a photographer's copyright in an arrest photo by using it in news broadcasts. *Fitzgerald v. CBS Broadcasting, Inc.*, Nos. 04cv12138-NG, 06cv11302-NG, 2007 WL 1793551 (D. Mass. June 22, 2007). The court rejected CBS's fair use defense, finding that the use of the photo in the news broadcasts was not transformative and violated general industry practices.

#### Background

In 1995, freelance photographer Christopher Fitzgerald, obtained the only arrest photographs of mobster Stephen Flemmi, a member of Boston's notorious "Winter Hill Gang." The photographs were published by media outlets a number of times, and Fitzgerald collected license fees totaling \$4,350 for their use. He has also threatened and filed copyright infringement suits over unauthorized use of his photographs, securing settlements worth \$58,600.

Fitzgerald had previously sued CBS in 1998 over the use of his photographs in a local news broadcast and as part of a *60 Minutes* segment. The parties settled and CBS without admitting infringement agreed to take precautions against unauthorized use of his photographs by reviewing its archive tapes and destroying all copies of plaintiff's photos.

About six years later, in 2004, CBS-4 in Boston was preparing a news report on the sentencing of John Martorano, another member of the Winter Hill Gang. A reporter and editor found a copy of Fitzgerald's photograph of Flemmi on a "pitch reel" (a tape of material organized by subject matter for later reference). They cropped the photo and included it in their report on Martorano's sentencing. The report was rebroadcast on UPN-38, another CBS-owned station in Boston.

#### Fair Use Rejected

On cross motions for summary judgment on Fitzgerald's copyright complaint, the District Court rejected CBS's fair use defense and held that it had infringed plaintiff's copyright. In examining the four fair use factors, the court focused on whether the use of photograph was transformative and the effect of the use on the market for the photograph.

CBS had argued that its use was transformative because it had cropped the photo to focus on Flemmi and used it in a narrative report on the criminal sentencing of one of Flemmi's former gang associates. The court rejected the claim, stating that if such use was "transformative" then "it is hard to imagine any use of archived imagery in news reporting that would not be fair use." *Id.* at \*7 n.2.

Interestingly, the court also took notice of the regular business practices of photojournalists. If CBS's could make these changes to a photograph and call it "transformative," then the fair use doctrine would be contradicting "the regular and long-running practices and assumptions of photojournalists, media outlets, and intermediary agencies[ ]" which regularly pursue and grant licenses for use of photographs. *Id.*

While noting that a court is not required to follow industry practices, "where the Court is called on to make a pragmatic ruling about where to draw lines so as to best 'promote the progress of science and the useful arts,' it is appropriate to consider how those useful arts actually progress." *Id.*

Similarly, the effect of the use on the market for plaintiff's photo weighed against fair use. "It is hard to imagine that freelance photojournalists would continue to seek out and capture difficult to achieve pictures if they could not expect to collect any licensing fees. ... In short, a finding of fair use would destroy the expected market for Fitzgerald's photographs and fly in the face of the practical experience of the freelance photojournalism industry." *Id.* at \*10.

Plaintiff was also seeking increased statutory damages for willful infringement arguing that CBS was on notice regarding the use of his photographs. The court declined to rule on the issue on summary judgment finding that it involved disputed issues of fact about the reporter's state of mind. "A defendant's good faith belief that its use of copyrighted material is fair use is enough to defeat a finding of willfulness," the court noted. But "the belief in fair use must have existed at the time of the use, not merely at the time of the litigation."

CBS Broadcasting, Inc., was represented by Jonathan M. Albano of Bingham McCutchen, LLP, Boston, Massachusetts. Plaintiff was represented by Andrew D. Epstein of Barker, Epstein & Loscocco, Boston, Massachusetts.

## Third Circuit Affirms Dismissal of Copyright and Libel Claims Against Google

A pro se plaintiff upset over postings about him on the Internet launched a multifaceted attack against Google. In the end, Google emerged unscathed, shielded in large part by the Communications Decency Act. *Parker v. Google*, No. 06-3074, 2007 WL 1989660 (3d Cir. July 10, 2007) (Barry, Chagares and Roth, JJ.).

Gordon Roy Parker, who described himself as an Internet publisher, claimed that a third party copied part of his copyrighted work, “29 Reasons Not to be a Nice Guy,” and posted it on USENET, Google’s system of online bulletin boards, without his permission. Parker also claimed that Google allowed users to access websites that portray him negatively.

Representing himself, Parker’s first complaint against Google was dismissed. Parker filed an amended complaint, accusing Google of direct copyright infringement, contributory copyright infringement, vicarious copyright infringement, defamation, invasion of privacy, negligence, Lanham Act violations, racketeering, abuse of process, and civil conspiracy.

The District Court dismissed all of the claims, and Parker filed motions for reconsideration and leave to file a second amended complaint. The District Court denied the motions, and Parker appealed. The Third Circuit, in a per curiam decision, held that the district court properly dismissed Parker’s complaint.

Citing *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004), the Third Circuit endorsed the analogy the Fourth Circuit drew “between an internet service provider (‘ISP’) and the owner of a traditional copy machine.... ‘[A] copy machine owner who makes the machine available to the public to use for copying is not, without more, strictly liable under [the Copyright Act] for illegal copying by a customer.’ 373 F.3d at 550.”

Since Parker failed to establish that Google was a direct infringer, he had failed to state a copyright claim, the court held. The Third Circuit went on to affirm the dismissal of the claims of contributory and vicarious copyright infringement, racketeering and civil conspiracy, and the Lanham Act violations of unfair competition and trade disparagement.

Parker’s defamation, privacy and negligence claims were based on negative USENET comments about him

that could be accessed via Google’s search engine. Moreover, Google invaded his privacy by “creating an unauthorized biography of him whenever someone ‘googled’ his name into the search engine.” Google was negligent, he said, because even after Parker notified Google, it continued to archive the website containing the negative comments about Parker.

The Third Circuit affirmed the District Court’s holding that the Communications Decency Act (CDA) disposed of those claims. 47 U.S.C. § 230. The CDA bars claims against “interactive computer services” for content provided by another “information content provider.” Parker failed to establish that Google was the “information content provider” of the negative statements, the Third Circuit held. The Third Circuit went on to affirm the District Court’s denial of Parker’s motion for leave to file a second amended complaint because such a filing would not cure the defects of the first amended complaint.

Bart Volkmer and David Kramer, Wilson, Sonsini, Goodrich & Rosati, Palo Alto, CA; and John E. Riley, Vaira & Riley, Philadelphia, PA, represented Google.

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### **Bulletin 2007 No. 1 (Feb. 2007 ): MLRC 2007 REPORT ON TRIALS AND DAMAGES**

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## Georgia Court Denies Application for Arrest Warrants Sought Against Reporter and Photographer

By Jeremy J. Ches

In a victory for the First Amendment, a Georgia state court magistrate recently thwarted a local sheriff's attempt to charge a reporter and photographer with criminal trespass. A local resident applied for warrants to arrest the journalists after they investigated whether the sheriff was improperly using prison laborers called "trusties" to build an addition to his private residence. Following a lengthy probable cause hearing, Judge Harvey Fry held neither the reporter nor the photographer possessed the requisite criminal intent to satisfy the elements of criminal trespass and denied the warrant application.

### Background

On June 20, 2007, Gordon Jackson and Chris Viola of *The Florida Times-Union* traveled to Cumberland Island, Georgia to follow up on questions raised by residents there about whether trusties should be permitted to work on private property. Jackson and Viola, accompanied by a friend and local attorney, walked along a public road to the property line of a private residence—and, according to the sheriff, entered the property—where trusties were believed to be building an addition to the residence.

Jackson's research showed no building permits for the new construction were recorded with the county. He also determined that although the residence was located on national park property under an agreement with the National Park Service, no park approval had ever been given for the new construction.

Two days after the reporters' visit, the property's owner filed the application for warrants for their arrest.

### Probable Cause Hearing

At the June 28 probable cause hearing, the burden under Georgia law was on the property owner, not a prosecutor, to demonstrate there was sufficient probable cause to issue an arrest warrant. As testimony was being elicited, it became evident that the sheriff's office was seeking these trespass warrants more than the property owner.

The owner testified that he did not observe the journalists on his property, the journalists did not damage his

property, and he does not care if people walk around in the woods on his property. He testified that he only learned of the incident when a law enforcement officer told him that he'd seen two individuals on the property.

The officer testified that he observed one of the journalists and the lawyer who accompanied him—both of whom the officer knows personally—on the property, beyond a clearly marked sign that read, "Private Residence Beyond - No Entry." The officer further testified that he spoke with the men but did not advise them they were on private property or that they were trespassing.

A detective also testified that when he interviewed the lawyer during his investigation of the incident, he never read the lawyer his rights and secretly recorded the interview. Finally, testimony was elicited that sheriff's officers picked up the property owner and drove him to the courthouse, and filled out the warrant applications for him.

Despite the unsuccessful effort to have its journalists prosecuted, the *Times-Union* published the article about their investigation—and continues to follow the story. During his testimony, the officer admitted that he was assigned to supervise the trusty laborers, and the owner testified that he was paying the sheriff's office supervisors money for the work completed by the trusties.

*Robert J. Beckham and Jeremy J. Ches, of Holland & Knight LLP in Jacksonville, FL, represented the Times-Union, its reporter, and its photographer in this matter.*

### **SAVE THE DATE**

**November 9, 2007**

*New York City*

**Defense Counsel Section Breakfast**

## Seventh Circuit Affirms Retaliatory Discharge Judgment for Media Source

The Seventh Circuit affirmed a damage award for a employee fired after speaking to the media. *Thomas v. Guardsmark, LLC*, 2007 WL 1598105 (7th Cir. June 5, 2007) (Easterbrook, Ripple, Rovner, JJ.).

Plaintiff Carl E. Thomas was a security officer working for Guardsmark, LLC. after the terrorist attacks of September 11, 2001. He appeared as an on air source in a news broadcast about lax regulation of security guards in Illinois. Thomas claimed that he once worked with a security guard at an oil refinery “who boasted of having a criminal record.”

Thomas had sought permission from his supervisor before the interview. After the interview aired, Guardsmark fired him for speaking to the media. Thomas sued for retaliatory discharge and won.

On appeal, Guardsmark argued that Illinois’ common law claim for retaliatory discharge had been superseded by the subsequent enactment in 2004 of the Illinois Whistleblower Act. Guardsmark argued that the Whistleblower Act should be applied retroactively and that it was the sole avenue for relief for plaintiff. If so, Guardsmark argued it should prevail as a matter of law because the Whistleblower Act applies to employee disclosures of information “to a government or law enforcement agency,” not disclosures to the media. *See* 740 Ill. Comp. Stat. 174/1-35.

Under Illinois law, “procedural changes to statutes may be applied retroactively while substantive ones may not.” Guardsmark tried to argue that the Illinois Whistleblower Act was merely procedural. The Seventh Circuit rejected this claim as “stupefying.”

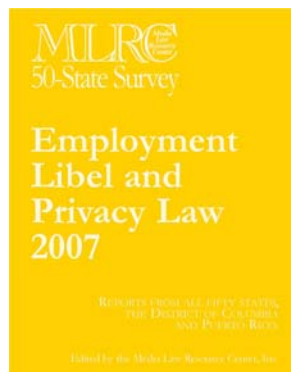
“The substantive nature of the Whistleblower Act could not be more clear. It does not regulate the behavior of lawyers and judges in order to make the process of litigation fair and efficient. It instructs employers to abstain from certain activities such as retaliating against employees who blow the whistle.”

Since the Whistleblower Act did not apply retroactively there was no need for the Seventh Circuit to decide whether it replaced the common law tort of retaliatory discharge. The Court went on to affirm the judgment for retaliatory discharge. Plaintiff was fired for “speaking to the media about security breaches at an oil refinery,” and thus the firing violated a mandate of public policy: the right of the public to be informed about issues that “could affect public health and safety.”

Plaintiff was represented by Timothy Huizenga, Legal Assistance Foundation of Metropolitan Chicago, Chicago, IL. Defendant was represented by Arthur J. Howe, Schopf & Weiss, Chicago, IL.



## 50-STATE SURVEYS



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## New York Federal Court Strikes Down Attorney Advertising Rules *Evidence Supporting Need for Restrictions “Notably Lacking”*

A New York federal district court struck down as unconstitutional several new state restrictions on attorney advertising. *Alexander v. Cahill*, No. 5:07-CV-117 (N.D.N.Y. July 23, 2007) (Scullin, J.). The court granted an injunction in favor of a personal injury lawyer, his firm and a non-profit legal services group that challenged the advertising restrictions.

New attorney disciplinary rules governing attorney advertising had taken effect in New York on February 1, 2007. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6(c).

The restrictions included a ban on portrayals of judges, a ban on the portrayal of lawyers “exhibiting characteristics clearly unrelated to legal competence,” and a ban on the use of nicknames or mottos implying the ability to succeed in a case. The new rules also placed restrictions on internet advertising, including a ban on pop-up ads that are not on the attorney’s home page and specific regulations on attorney domain names. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.6(g) and § 1200.7.

James L. Alexander, of the upstate New York personal injury firm Alexander & Catalano, LLC, together with Public Citizen, Inc., a national non-profit legal services group, challenged the restrictions arguing they improperly restricted commercial and non-commercial speech.

Alexander’s firm which describes itself in advertising as “the heavy hitters,” used fictional scenes, jingles and special effects. For example, the firms two lead partners were depicted in ads as “giants towering above local buildings, running to a client’s house so fast they appear as blurs, jumping onto rooftops, and providing legal assistance to aliens.”

Public Citizen alleged that portions of the new restrictions violated the First Amendment by interfering with its ability to contact or solicit potential clients with non-commercial information.

The state defendants argued that New York has a substantial interest in protecting consumers from misleading attorney advertisements.

### *District Court Decision*

After reviewing the new rules adopted by the state’s attorney disciplinary committee, Senior District Court

Judge Frederick Scullin analyzed each of the challenged provisions under *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

Interestingly, the defendants had argued that New York could ban attorney advertising that was “irrelevant, unverifiable, [and] non-informational” without reference to the *Central Hudson* test, but the Judge Scullin dismissed this argument in a footnote, finding “no legal support for this proposition.”

Under *Central Hudson* the state can restrict commercial speech (1) where there is a substantial State interest to be achieved by the restriction; (2) the state demonstrates the restriction materially advances the state interest; and (3) the state establish that the restriction is narrowly drawn. *See Central Hudson*, 447 U.S. at 564-66.

Judge Scullin agreed that the state has a substantial interest to ensure that attorney advertisements are not misleading, but found with respect to many of the restrictions a notable lack of evidence that the restrictions advanced the state’s interest. The following restrictions were struck down on that basis:

- § 1200.6(c)(1) prohibiting endorsements and testimonials from a client about a pending matter;
- the portions of § 1200.6(c)(3) prohibiting the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated in a firm, or otherwise implying that lawyers are associated in a firm if that is not the case;
- § 1200.6(c)(5) prohibiting the use of techniques to obtain attention that demonstrate a clear and intentional lack of relevance to the selection of counsel, including the portrayal of lawyers exhibiting characteristics clearly unrelated to legal competence; and
- the portions of § 1200.6(c)(7) prohibiting the use of a nickname, moniker, or motto that implies an ability to obtain results.

The state satisfied the second prong of the *Central Hudson* test regarding restrictions concerning the portrayal of judges in advertising, § 1200.6(c)(3), and the use of trade names that imply an ability to obtain results, §

*(Continued on page 44)*



### New York Federal Court Strikes Down Attorney Advertising Rules

(Continued from page 43)

1200.6(c)(7). But these provisions were not narrowly tailored to meet the address the state's interest because they are "categorical bans" and the state had not offered any evidence that a more narrowly tailored approach could have prevented misleading advertising. The court found "nothing in the record to suggest that a disclaimer would have been ineffective."

As to the restriction on pop up web advertisements, the court found that the defendants failed to meet any of *Central Hudson's* prongs. The defendants simply argued that a categorical ban on pop-up advertisements was necessary "because their fleeting nature is such that the State could not enforce lesser restrictions." The court found this argument "contrary to common sense" since there was no evidence that such ads presented any greater regulatory difficulty than ads on television, radio, or web pages.

#### Some Restrictions Pass Muster

The court rejected a challenge to a regulations on attorney domain names that do not include the name of the lawyer or law firm (e.g. [www.vioxxattorney.com](http://www.vioxxattorney.com)). In such cases, the rules require that all pages of the web site "include the actual name of the lawyer or law firm; the lawyer or law firm in no way attempts to engage in the

practice of law using the domain name; and the domain name does not imply an ability to obtain results in a matter."

The court also rejected a challenge to a 30 day moratorium imposed on contacting victims of personal injury or wrongful death events. This restriction was narrowly tailored to meet the state's interest and it did not otherwise interfere with lawyers advertising their services to consumers.

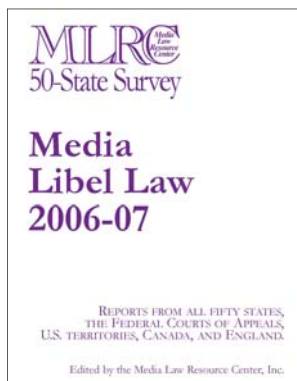
Finally, the court ruled that the term advertising as used in the rules could be judicially construed to apply only to commercial advertising soliciting clients, thereby making it unnecessary to address Public Citizen's complaint that the rules interfered with First Amendment rights of political expression and association.

In a concluding footnote, Judge Scullin noted that "Without question there has been a proliferation of tasteless, and at times obnoxious, methods of attorney advertising in recent years." So while the efforts to control such ads was commendable, the state had to "be mindful of the protections such advertising has been afforded and take the necessary steps to see that the regulation of such advertising is accomplished in a manner consistent with established First Amendment jurisprudence."

Plaintiffs were represented by Brian Wolfman, Gregory A. Beck and Scott Nelson of Public Citizen. Bridget E. Holohan, of the New York State Attorney General's Office, represented the defendants.



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## LEGISLATIVE UPDATE

**Media Issues Heat Up on Capitol Hill**

By Kathleen A. Kirby and Shawn A. Bone

With little time left before Congress leaves on its annual month-long August recess, several media issues have taken on a higher profile on Capitol Hill. One issue in particular, the question of what, if any, power the Food and Drug Administration should have to regulate direct-to-consumer drug advertisements, has been the subject of legislative action in recent weeks. Other issues, like family-friendly television programming, reporter shield legislation, FOIA reform and additional taxes on television and radio have been in the Congressional spotlight. As the long hot days of summer fade into fall, these issues will continue to be scrutinized by the House and Senate.

***Direct-to-Consumer Drug Advertising***

Both the Senate and the House in recent weeks have taken up comprehensive legislation to renew the FDA's prescription drug fee, and tacked onto that legislation other measures geared toward enhancing drug safety in America. One of these drug safety proposals would have given the FDA the power to pre-clear drug advertisements before they air, and another would have authorized the FDA to place a moratorium on drug ads for a particular pharmaceutical for several years after the drug had been approved. Proponents of these measures argued that the regulations would help to protect consumers from another Vioxx-like situation. In their mind, without the massive marketing campaign surrounding that drug, far fewer consumers would have been exposed to the risk of heart attack and stroke that was discovered years after the drug was approved.

Responding to arguments that these regulations would violate the First Amendment with respect to commercial speech and prior restraint, and that they would restrict the flow of truthful and accurate information about consumer drugs to the public, both the House and Senate compromised by adopting language giving the FDA the authority to fine a drug company for disseminating a false or misleading advertisement for a prescription drug. This new power would be coupled with a process where the FDA may pre-review certain direct-to-consumer drug adver-

tisements and offer comments on their content. If a drug company heeds those comments and incorporates any recommendations into the ad before it is released to the public, the company would be insulated from liability.

The Senate version of this legislation, the "Food and Drug Administration Revitalization Act" (S. 1082), passed with overwhelming bipartisan support in May once these changes to the advertising language had been made. The House Energy and Commerce Committee's Subcommittee on Health took up a series of discussion drafts paralleling the Senate bill on June 19. An amendment offered during consideration of these drafts, replacing the more stringent advertising restrictions with a civil fine structure like the one developed in the Senate, passed on a vote of 23-9 against the opposition of the Subcommittee's Chairman, Representative Frank Pallone, Jr. (D-NJ). The full House Energy and Commerce Committee approved the amended legislation on June 21, and the House passed the bill (now H.R. 2900) on July 11 by a vote of 403-16. Both pieces of legislation are now headed to conference for reconciliation, a process which must be completed within a few weeks as a final bill must be approved by Congress and signed by the President by September 30.

***Family-Friendly Television Programming***

With the recent release of the FCC's report on violence on television, media content issues have become a hot-button issue on Capitol Hill. On June 15, 2007, the House of Representatives responded to the violence report with the introduction of the "Family and Consumer Choice Act of 2007" (H.R. 2738), championed by Representatives Lipinski (D-IL), Fortenberry (R-NE), Shuler (D-NC), and Aderholt (R-AL). The bill, as introduced, would require MVPDs to do one of the following:

1. Apply the FCC's indecency and profanity standards to their expanded basic tier between the hours of 6 a.m. and 10 p.m. (5 a.m. and 9 p.m. in the Central and Mountain Time Zones).
2. Offer consumers the option to subscribe to a family tier of programming. This family tier must include all

*(Continued on page 46)*

## Media Issues Heat Up on Capitol Hill as the Legislative Summer Doldrums Approach

*(Continued from page 45)*

channels offered on the expanded basic tier of the MVPD and must not include channels on that expanded basic tier that carry programs rated TV-14 or TV-MA between the hours of 6 a.m. and 10 p.m. (5 a.m. and 9 p.m. in the Central and Mountain Time Zones). Subscribers must be able to obtain a family tier of programming on one or more TVs, while also having access to an MVPD's full range of programming on other TVs in the same household.

3. (3) Offer an opt-out a la carte programming option allowing consumers to choose what, if any, channels they would like to block without charge by the MVPD. Consumers would be entitled to a refund on their bill for the blocked channels. Channels that must be part of an MVPD's basic tier pursuant to Section 623 of the Communications Act of 1933 are not eligible for blocking, nor is programming offered on a per-channel or per-program basis and programming on a themed tier of programming, if a consumer subscribes to that themed tier.

The MVPD would have to notify the Commission of the option it has elected, and it must also inform consumers annually of the amount of credit a subscriber would receive if he or she elected to block a certain channel.

The Family and Consumer Choice Act has already drawn the support of the FCC Chairman Kevin Martin. As part of the press conference held concerning the introduction of the bill, the Chairman offered words of encouragement to the Members of Congress who have sponsored the legislation. He stated that the media industry has not done enough to help parents limit the exposure of children to "violent and sexual content they believe is inappropriate." "[P]arents must have meaningful choices," according to Chairman Martin and, "their choices must have meaningful consequences [on the media industry]. If a family must continue to pay for programming even when they object to it, there is little or no incentive for programmers to respond." According to the Chairman, "Our message . . . is very simple: no consumer should have to pay for content they do not wish to receive. Period."

Beyond H.R. 2738, the House and Senate have begun to examine media content issues in a series of hearings that

may foreshadow additional legislative action. Two recent hearings on content issues are of note:

- The House Energy and Commerce Committee's Subcommittee on Telecommunications and the Internet, chaired by Representative Ed Markey (D-MA), held a hearing on June 21, 2007, entitled "Images Kids See on the Screen." The hearing explored the impact smoking in movies, violence on television, and advertisements for unhealthy foods have on children. Notably, Chairman Markey indicated that he is considering asking the FCC to regulate ads for unhealthy foods during children's programming under the Commission's authority pursuant to the Kids Television Act.
- The Senate Commerce Committee, chaired by Senator Daniel Inouye, held a hearing on June 26, 2007, entitled the "Impact of Media Violence on Children." The hearing explored the recent FCC report on media violence and the recommendations made in that report.

### ***Federal Reporter Shield Legislation***

News organizations have been pressing for a qualified federal reporter privilege in criminal and civil cases for several years. On May 2, 2007, Representative Rick Boucher (D-VA), along with several of his colleagues (including Representative John Conyers (D-MI), the Chairman of the House Judiciary Committee), introduced the "Free Flow of Information Act of 2007" (H.R. 2102). On the same day, companion legislation was introduced in the Senate by Senators Richard Lugar (R-IN) and Christopher Dodd (D-CT) (S. 1267). Both bills would provide journalists with a qualified privilege from disclosing confidential sources and information, which may only be overcome based upon a showing by a prosecutor, defendant, or party to a civil case that they meet certain tests for compelled disclosure of sources. This privilege would extend to information held by telephone companies, Internet service providers and other communications providers, if such information could be used to reveal a journalist's confidential source. A confidential source's identity can be compelled, however, if disclosure is necessary to prevent "imminent and actual harm" to national security, to

*(Continued on page 47)*

## Media Issues Heat Up on Capitol Hill as the Legislative Summer Doldrums Approach

*(Continued from page 46)*

prevent “imminent death or significant bodily harm,” or to identify a person who has disclosed significant trade secrets or certain financial or medical information in violation of current law.

H.R. 2102 was the subject of a House Judiciary Committee legislative hearing on June 14, 2007. The Committee heard from a number of parties on the proposed reporter shield legislation, including representatives from the Bush Administration and members of the press. Rachel Brand, with the Department of Justice, and Professor Randall Eliason of the George Washington University Law School, both opposed the creation of a federal reporter privilege. Lee Levine of Levine, Sullivan, Koch & Schulze; Pulitzer Prize-winning journalist William Safire; and investigative reporter Jim Taricani spoke in favor of the creation of the privilege, with Mr. Taricani speaking at length of his imprisonment for contempt for refusing to reveal a confidential source in the Buddy Cianci investigation in Rhode Island. Several Committee members in attendance at the hearing expressed support for H.R. 2102, although others had reservations about the creation of a federal reporter privilege. It is unclear at present when the bill will advance in the Committee, although it is expected to move forward in the future.

### ***Taxes on Radio and Television***

Another recent Senate hearing focused on an issue of importance to media outlets – political advertisements. The hearing, held by the Senate Committee on Rules and Administration, explored S. 1265, the “Fair Elections Now Act,” which addresses the funding of primary and general election campaigns for Senate offices. A portion of that bill, introduced by Senators Richard Durbin (D-IL) and Arlen Specter (R-PA), deals with the purchase of broadcast advertisements by Senate candidates.

The bill, if passed, would establish a political advertisement voucher program. This program would distribute advertising vouchers to candidates to be used for the purchase of ad time on local television and radio stations during a general election for the Senate. These vouchers would be funded through a tax on the revenue raised by a broadcaster through the sale of advertising time on their broadcast outlet, set at 2% of the outlet’s advertising revenue for the year in question. The tax would be assessed every year, with any

amounts not needed for the ad vouchers being deposited in an account to be used for other purposes. According to Senator Durbin, the tax is meant to pull some of the money broadcasters earn every two years from political advertising back into the election system to help defray the cost of political advertising time. The proposal is opposed by broadcasters and the NAB, and it appears unlikely that the bill will advance in the near future.

### ***Open Government Act***

By a 308 to 116 vote, the House in March passed important legislation to strengthen the way agencies respond to requests for information under the Freedom of Information Act (FOIA). The bipartisan legislation, H.R. 1309 (Freedom of Information Act Amendments of 2007), is sponsored by Reps. William Lacey Clay (D-MO), Henry Waxman (D-CA) and Todd Platts (R-PA). Under Chairman Waxman’s leadership, the bill was favorably reported out of the full House Oversight and Government Reform Committee on March 8. The bill contains common sense reforms to update and strengthen FOIA, such as creating a tracking system and hotline for requesters. It would also create an ombudsman to help requesters navigate the FOIA process and impose consequences on agencies for missing statutory response deadlines.

Sens. Patrick Leahy (D-VT) and John Cornyn (R-TX) re-introduced the OPEN Government Act of 2007 (S. 849), a bill similar to H.R. 1309. The Senate Judiciary Committee passed the legislation in April, at which time it was poised for consideration by the full Senate.

At the end of May, however, a “secret hold” was placed on FOIA reform legislation, stalling its advancement through the Senate. It since has come to light that the source of the hold is Senator Jon Kyl (R-AZ). Senator Kyl is championing the Justice Department’s opposition to the FOIA bill, and in particular Section 4, dealing with the recovery of legal fees for those who get requested records only after suing. He also opposed Section 6, which creates a penalty for agencies who fail to meet the 20-day response deadline, but the primary sponsor, Sen. Patrick Leahy (D-VT) appears to have resolved that through a manager’s amendment which adopts the lesser penalty provisions of the House bill. Efforts continue to bring the bill for vote on the Senate floor.

## Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat  
Staff Attorney  
Media Law Resource Center  
(212) 337-0200, ext. 214  
mgangat@medialaw.org

### The Reporter's Privilege

#### Protecting the Sources of Our News

This Presentation has been made possible by a grant from  
the McCormick Tribune Foundation

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1

**Suggestion for background reading:**  
**Custodians of Conscience by James S. Ettema and  
Theodore Glasser. Great source re: nature of  
investigative journalism and its role in society as  
force for moral and social inquiry.**

**Presentation note: During the weeks leading up to  
your presentation, consider pulling articles from local  
papers quoting anonymous sources -- circle the  
references to these sources as an illustration for the  
audience of how valuable they are for reporters.**

### A Federal Shield Law?

- Bipartisan proposals for federal shield law in face of increased threats
- -- Need for nationwide uniformity
  - √ Reporters need to know the rules so they can do their jobs
  - √ Would-be whistleblowers and other potential sources need to be able to predict the risks
  - √ Will cut down on costly litigation over subpoenas

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17

### What is the "Reporter's Privilege"?

Various rules protecting journalists from being forced, in legal and governmental proceedings, to reveal confidential and other sources.

- Sometimes also protects unpublished notes and other journalistic materials

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3



## The Net Neutrality Debate

By Marc Lawrence-Apfelbaum

*“When new technology is changing everything, the only certain outlook is for a future entirely different from what anyone could have foreseen.”<sup>1</sup>*

### ***I. Views of Net Neutrality Proponents***

“Net Neutrality” is a catchphrase used by a number of individuals and groups to embody their view of how broadband network providers (such as cable modem and DSL companies) should be regulated. Although it can mean different things to different people, it is centered on a few core beliefs and proposed regulations.

The principal core belief is that the Internet has become the robust force it is today because it has always been operated in a neutral manner whereby no content, websites or applications are given priority over any others. According to this view, this openness and neutrality exist today because of government regulation that required it, and this system of government regulation has only recently been undone through decisions of federal courts and agencies. Also according to this view, if regulations requiring such openness and neutrality are not reinstated and broadband providers are now allowed to give preferences to particular content, other content and sites will be disadvantaged, and the vitality of the Internet will be threatened.

Net Neutrality proponents are particularly concerned that, if broadband providers are allowed to charge websites for preferences in the quality of delivery they can obtain, the Internet will devolve into haves and have-nots, fast lanes and slow lanes, and that only well-financed content providers will be able to survive and prosper. Net Neutrality proponents are also concerned that, without regulation, broadband providers will favor their own services over others and that this will result in foreclosure of non-affiliated services. Net Neutrality proponents say that they are concerned that, if action isn't taken now, “entrepreneurs in the garage” will be unable to continue to thrive, innovate and create new breakthroughs the way the founders of Google and other startups have done.

Net Neutrality proponents claim that they are only trying to preserve the status quo, and that the regulatory proposals they advocate will serve only to ensure that openness and neutrality that has always characterized the Internet is maintained. In terms of charges to providers of websites, proponents argue

that end users have already paid network providers for their connections, and network providers shouldn't be permitted to “charge twice” by also imposing fees on web site providers.

In addition to self-proclaimed consumer advocates and a number of academics and regulators, there are also some major corporate backers of Net Neutrality. Most notably, these include Google, Microsoft and Amazon. These corporate backers generally echo the sentiments of other proponents but, in particular, they decry the prospect of any fees imposed on web site providers or potential quality preferences granted by broadband network operators to particular web site providers.

Although Net Neutrality proponents have advanced a number of different regulatory proposals and ones that sometimes are inconsistent with one another, the main regulatory conditions they would impose include prohibiting broadband providers from:

- blocking or interfering with users' access to any lawful Internet content;
- offering or imposing any quality of service, bandwidth limitations or speed tiers except on terms that are “reasonable and nondiscriminatory” and that are at least equivalent to those provided to its affiliated Internet-based services;
- imposing any charges for any permitted prioritization on anyone other than consumers; and
- preventing end users from attaching any devices to the network unless they would cause physical damage to the network or degrade others' use of the network.

Most Net Neutrality proposals would also authorize a new or existing agency, like the FCC, to promulgate rules to define more precise contours of these principles and to adjudicate alleged violations. Most proponents argue that this would be regulation with a “light touch,” because they believe the principles above would be very straightforward in application and merely preserve the status quo.

### ***II. Why Government-Imposed Net Neutrality Would be Bad Policy***

The principal argument against Net Neutrality is that all of the core beliefs behind it are unfounded.

*(Continued on page 50)*

## The Net Neutrality Debate

*(Continued from page 49)*

### **A. MARKET FORCES, NOT REGULATION, CREATED TODAY'S ROBUST INTERNET**

It is simply untrue that the Internet became the robust force it is today because of government regulations that required broadband providers to operate their networks in an open and nondiscriminatory manner. Rather, consumer broadband service was first broadly deployed commercially by cable operators, who were never subjected to intrusive government regulation in the operation of their broadband services. On the phone side, telecommunications providers had been subject to common carrier regulation, but phone companies refrained from deploying their own lower-cost broadband technology, DSL, apparently because they were concerned that it would cannibalize their sales of higher priced T1 type services. It was only after unregulated cable operators successfully deployed lower priced broadband services that the phone companies began to commercially deploy DSL in response. Following that deployment, the U.S. Supreme Court upheld the FCC's classification of cable broadband services as a minimally regulated "information service,"<sup>2</sup> and the FCC subsequently extended that same regulatory treatment to DSL and other broadband technologies, including Broadband Over Powerline.

So, contrary to the belief of Net Neutrality proponents, consumer broadband service was deployed by the companies that were not subjected to intrusive government regulation, while the heavily-regulated companies stood on the sidelines. Therefore, to the extent the Internet is characterized by openness and neutrality, this is the result of market forces, not regulation, and a fundamental basis of the proponents' call for regulation is unfounded.

### **B. INCREASING BANDWIDTH USAGE MEANS THERE IS NO STATUS QUO TO BE PRESERVED**

Net Neutrality proponents are also incorrect in their assumption that there's a status quo in Internet technologies and business and pricing models that can simply be preserved without further changes. Rather, from its beginnings, the Internet has been marked by breathtaking changes in technology and business models, and has developed in ways no one, including regulators, could have foreseen. Such rapid and unforeseeable development are likely to continue, provided regulators don't attempt to write inflexible laws that will prevent market forces and changing consumer uses from

continuing to develop. Indeed, the transition from dial up to broadband was itself largely unseen and, as explained above, resulted from market forces, not regulation.

One of the most important, and also unforeseen developments, has been the exponential growth in the use of bandwidth since broadband was launched commercially a little more than 10 years ago. In the dial-up era, and when broadband was first launched, the amount of bandwidth needed to view most web sites was very limited. In addition, usage was mainly downstream, not upstream, and use of bandwidth tended to be in bursts, rather than constant, as users spent most of their time looking at particular websites or pages and only used additional bandwidth to periodically change page views. In the years since broadband was launched, bandwidth usage has increased as web site pages have generally become graphically richer. In addition, bandwidth usage has grown further as uses that require more constant bandwidth, like streaming and downloaded video, have increased. In addition, upstream and downstream usage has become more symmetrical, both as more user-generated content is developed (another largely unforeseen development) and as there is increasing usage of peer-to-peer type applications, whereby these applications set up users' computers (often without their knowledge) as "super nodes," which engage largely in machine to machine communications. Bandwidth usage will most likely continue to grow exponentially. Indeed, many analysts believe that much of the video from traditional platforms, including cable and broadcast, will move to the Internet in the coming years.

Neither the Internet itself, nor the facilities of broadband providers, were built with these kinds, or these levels of use, in mind. Without significant upgrades, and significant increases in ongoing operational spending, the existing infrastructure cannot handle such uses. If broadband providers are going to be able to make the necessary investments, and are going to be able to continue to provide high quality services at affordable prices, they will need flexibility to develop new business and pricing models and new technologies. Without such flexibility, some combination of all or some of the following will occur: needed investments won't be made, quality will deteriorate for all users, prices will rise, and innovation will be stifled. Yet Net Neutrality would ensure just such inflexibility because it would severely restrict allowable business and pricing models.

*(Continued on page 51)*

## The Net Neutrality Debate

*(Continued from page 50)*

### **C. NET NEUTRALITY WOULD PERMIT ONLY A SINGLE BUSINESS MODEL**

In particular, Net Neutrality proposals, as explained above, would require that all bits be treated the same or, at the very least, not permit any “unreasonable discrimination” between them. In addition, Net Neutrality would not allow any business arrangements whereby anyone other than consumers could help shoulder the costs of needed upgrades and enhancements. As of today, these restrictions would limit consumers’ choices and increase costs for all users. As to the future, there’s no telling what mischief such rules would cause.

For example, another implicit (and sometimes explicit) assumption behind Net Neutrality is that innovation can occur only on the Internet itself, and not on the facilities of so-called “last mile” providers like cable and telephone companies. But that assumption is also plainly wrong; it was the innovation of developing and deploying broadband on those facilities that made possible or facilitated all or most of the other Internet innovations that are occurring today, such as the deployment of graphically rich content and applications. Additional innovation is certainly possible and probable at the broadband-facilities level and some (but far from all) of it can even be glimpsed today. Some examples include speed bursts for applications like online games, where enhanced speed can make play more challenging and enjoyable, providing family-friendly online services that would allow access only to certain websites and content for customers who chose such services, and innovative business arrangements, whereby businesses would pay to subsidize the costs for retail users. Under Net Neutrality, however, the ability to offer such innovations would be severely restricted.

Moreover, it’s particularly ironic that some self-styled consumer advocates see prohibiting any recovery of rising costs from any parties other than consumers as being in consumers’ interests. This is especially so since such practices are permitted even on the common carrier side, where offerings like 800 numbers result in win/win/win outcomes for consumers, telecommunications providers and business users. It is also ironic that many corporate supporters of Net Neutrality would categorically bar any cost subsidization by business users when many such proponents have

themselves built their businesses around a commercial-user subsidy model. In particular, rather than charging fees to consumers for its search services, Google completely subsidizes those costs by charging fees to businesses to prioritize their listings in its search results.

For similar reasons, the concern of Net Neutrality proponents that charges to commercial entities would result in paying twice for the same connectivity is unfounded. Such a concern might be valid if costs and bandwidth usage were constant. But that view is fundamentally flawed where the very problem to be confronted is exponentially rising costs and usage.

### **D. NET NEUTRALITY REGULATION WOULD BE HEAVY, NOT LIGHT**

The view of Net Neutrality proponents that such regulation could be accomplished with a “light touch” is also misguided. First, most of the prohibitions aren’t subject to one clear meaning, especially in the complex context of broadband and the Internet. What is undue discrimination to one person might be entirely reasonable to another. Broadband proponents recognize this inherent amorphousness when they also propose establishing or authorizing a federal agency to promulgate implementing rules to provide greater specificity. The problem is that no agency has expertise to spell out precisely what conduct today will enhance consumer welfare and what conduct will harm it. And since this is an area where consumer uses and preferences will continue to evolve at a breakneck pace and in ways that cannot be foreseen, the impact and costs of premature regulation that locks in one business model will be extremely heavy, not light.

The history of telecommunications and other regulatory attempts in areas marked by rapid change in technology and potential consumer preferences helps to demonstrate this point. In telecommunications regulation, policy makers employed a system for many decades that subsidized local service through high prices for long-distance calls. It was only when entrepreneurs broke through this regulatory system that long distance became affordable for most users. Telecommunications is still burdened today by the badly flawed Universal Service Fund system, which has little actual relation to subsidizing the costs of telecommunications services for poor and rural customers, but

*(Continued on page 52)*

### The Net Neutrality Debate

*(Continued from page 51)*

which greatly distorts competition on the merits among alternative providers. Cable television provides another compelling example, where the government's initial policy of severely limiting the amount of original programming available on cable to protect broadcasters was only dismantled after the courts struck it down.<sup>3</sup> As a result of this judicial dismantling, the number and sources of programming channels expanded for most Americans from three or four to the almost countless number of programming choices available today.

The debate over so-called Open Access at the beginning of this century provides the most instructive example of all. In that debate, many of the same parties that now claim the Internet as we know it won't survive without Net Neutrality made the same predictions about Open Access. They argued that it was urgent for the government to require that broadband providers offer access to their facilities

to any requesting ISP on common carrier terms. Policy makers and regulators, however, wisely resisted such calls for intervention and, since then, the Internet and broadband have undergone the greatest growth and innovation in their histories.

### E. THE MARKETPLACE IS WORKING

Calls for government intervention should be rejected here too. The marketplace has worked well, bringing about continuing improvements in services, features, speed and pricing. In addition, competition is robust among existing competitors and new entrants are poised for entry, including new wireless and Broadband over Power Line providers. Furthermore, Net Neutrality proponents have failed to point to any actual examples of improper blocking of content or business practices by broadband providers that have improperly diminished consumer welfare. The system is working well without government intervention. Policy makers and regulators would, therefore, best serve the interests of consumers by continuing to resist pleas for intervention unless and until there is clear evidence of problems that the marketplace cannot solve.

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<sup>1</sup> Russell Baker, *Goodbye to Newspapers?*, The New York Review of Books (August 16, 2007).

<sup>2</sup> *National Cable and Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005).

<sup>3</sup> *Home Box Office, Inc. v. Federal Communications Commission*, 567 F.2d 9 (D.C. Cir. 1977).

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