

MLRC Media
Law
Resource
Center
MEDIA LAW LETTER

Reporting Developments Through July 25, 2008

FCC

- 3d Cir.** **Third Circuit Rejects FCC's "Fleeting Images" Policy** **3**
Reverses Super Bowl Fine
CBS Corporation v. FCC
- U.S.** **Update: Supreme To Hear Appeal on FCC "Fleeting Expletives" Policy** **4**
Government Brief Filed in June; Media Briefs Due in August
FCC v. Fox Television Stations Inc.

LIBEL & PRIVACY

- 4th Cir.** **Court Affirms Summary Judgment for NY Times in Lawsuit Over Anthrax Columns** **5**
No Evidence of Actual Malice Despite Refusal to Reveal Sources
Hatfill v. The New York Times Company
- Ga. App.** **Station Can't Beat the Rap for Statements Alleging Murder** **8**
Appeals Court Restores Higher Award, Saying Retrial was Improper
Riddle v. Golden Isles Broadcasting
- E.D. Mich.** **Detroit Federal Judge Makes 'Magic' Libel Case Disappear** **10**
Magazine Panned Plaintiff's Card Trick
Nagler v. Henderson and Stagewrite Publishing, Inc.
- Tex. App.** **Chinese-Language Newspaper Wins Summary Judgment** **11**
Libel Suit over Report of "Japanese Devils" Comment Dismissed
Wang and Yellow Emperor Communications d/b/a Houston Chinese Press v. Tang
- Wis. App.** **Newspaper Wins Summary Judgment in Former DA's Defamation Suit** **13**
Destruction of Notes Did Not Raise Issue of Actual Malice
Biskupic v. Cicero
- S.D.N.Y.** **Court Dismisses Gary Condit's Libel Suit against Dominick Dunne** **15**
Statements Were Protected Opinion
Condit v. Dunne
- E.D. Mich.** **Summary Judgment Denied on Libel Claims Over TV News Report** **17**
Reporter's Pre-Broadcast Interview and Observations Could Show Actual Malice
LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV)
- N.D. Ga.** **Federal Court Dismisses Defamation and Emotional** **21**
Distress Claims Against
CBS Radio
Statements on Radio Show Were Hyperbole
O'Jays Gigs, Inc. v. Smith

INTERNET		
N.Y. Sup. Ct.	Court Applies <i>Dendrite</i> Standard: Orders Disclosure of Identifying Information <i>Pseudonymous Posters Allegedly Defamed Ex-Congressman</i> Ottinger v. The Journal News	19
INTERNATIONAL		
Canada	Supreme Court of Canada Revives “Fair Comment” Defense WIC Radio Ltd. v. Simpson	23
Switzerland	Swiss Courts Refuse Prior Restraint of AP Article Decafin v. The Associated Press	26
COPYRIGHT		
11th Cir.	Eleventh Circuit Rules for National Geographic in CD-ROM Copyright Case <i>Compilation of Magazine Issues a Permitted Revision</i> Greenberg v. Nat’l Geographic Soc’y	27
1st Cir.	Court Affirms Dismissal of Copyright / Trade Secrets Case Against Oprah, ABC <i>Plaintiff Claimed Show Was Based on Her Idea</i> Tracy v. Winfrey	28
C.D. Cal.	Court Dismisses Copyright Claim Over 1980s Parody Film <i>Use of Three Words from Song was De Minimus and Fair Use</i> Wixen Music Publishing Inc. v. 20th Century Fox Home Entertainment LLC	29
FOIA / ACCESS		
Me.	Advisory Group Report Not a Public Record Under Maine’s Freedom of Access Act <i>Defendants Acted as Private Citizens in Giving Advice</i> Moore v. Abbott	34
NEWS & UPDATES		
1st Cir.	Court Reinstates Journalists’ Fourth Amendment Claim Over Alleged FBI Assault <i>Qualified Immunity Was Granted Prematurely</i> Asociación de Periodistas de Puerto Rico v. Mueller	35
3d Cir.	Court Strikes Down Federal Law Criminalizing Depictions of Animal Cruelty <i>Court Declines to Create New Category of Unprotected Speech</i> United States v. Stevens	37
ETHICS		
	Legal Ethics For Media Lawyers From Conflicts to Confidentiality to Lawyer Advertising <i>MLRC Publishes Compendium of Recent Ethics Articles</i>	39

Third Circuit Rejects FCC's "Fleeting Images" Policy

Reverses Super Bowl Fine

By Robert Corn-Revere, Ronald G. London and Amber Husbands

On July 21, 2008, the United States Court of Appeals for the Third Circuit unanimously rejected the \$550,000 forfeiture penalty and finding of indecency violation levied against CBS for the 2004 Super Bowl halftime show featuring Janet Jackson and Justin Timberlake. *CBS Corporation v. FCC*, No. No. 06-3575 (3d Cir.) (Scirica, Rendell, Fuentes, JJ.).

The appeal involved the live broadcast of the show, which culminated in an unscripted nine-sixteenth-second exposure of Janet Jackson's breast. The court held that the FCC arbitrarily and capriciously departed from its prior policy of excepting fleeting broadcast material from the scope of actionable indecency. It also determined the FCC could not impose strict liability on CBS, or hold it liable for the conduct of Jackson and Timberlake because they were independent contractors and not CBS employees.

FCC's Decision Was Arbitrary and Capricious

In the court's opinion, authored by Judge Scirica, the Third Circuit found that at the time of the 2004 Super Bowl halftime show, the FCC's policy was to exempt fleeting or isolated material — both images and words — from the scope of actionable indecency. "During a span of three decades," the court observed, "the Commission frequently declined to find broadcast programming indecent, its restraint punctuated by only a few occasions where programming contained indecent material so pervasive as to amount to 'shock treatment' for the audience." Contrary to the FCC's argument that it always treated fleeting images differently from fleeting expletives, the Third Circuit found that the agency's indecency enforcement history proved otherwise.

Moreover, regardless of whether the Super Bowl fine was unprecedented because the FCC had previously treated fleeting images and fleeting words the same, or because it never had had a specific policy on how it would treat fleeting images, the court held that the FCC's current policy of including fleeting images within the scope of actionable indecency is a departure from prior policy, for which the FCC failed to provide a rational explanation, and that it unfairly applied to CBS retroactively. Therefore, the fine against

CBS was arbitrary and capricious under the Administrative Procedure Act and was invalid as to CBS.

No Liability for Acts of Independent Contractors

The Third Circuit also explained that, even if the departure from precedent did not invalidate the Super Bowl forfeiture, the FCC could not impose liability on CBS for the actions of Jackson and Timberlake because they were independent contractors and not CBS employees. The court also rejected the FCC's argument that CBS had a nondelegable duty to comply with the indecency policy, because the First Amendment precludes punishing a speaker for

the content of expression absent a showing of scienter, *i.e.*, a knowing or reckless violation of indecency law.

Noting that "the scienter element of the indecency provisions — as a constitutional requirement — is paramount," the court explained that "when a broadcaster endeavors to exercise proper control, but ultimately fails, to prevent unscripted indecency, it will not have acted with scienter if its actions were negligent rather than reckless," such that "when unscripted indecent material occurs during a live or spontaneous broadcast, as it did here, the FCC

should show that the broadcaster was, at minimum, reckless in causing the indecent material to be transmitted."

No Decision on FCC's "Willful" Conduct Argument

Finally, the Third Circuit did not reach a decision on FCC's alternative argument — that CBS was directly liable because its own conduct was "willful." The court determined that it would need further clarification on the FCC's interpretation of relevant provisions of the Communications Act to decide the matter. However, even if the FCC's interpretation of the statute were permissible, and CBS's conduct were held to be willful, the outcome would be the same because the court rejected the forfeiture order under

(Continued on page 4)



Third Circuit Rejects FCC's "Fleeting Images" Policy

(Continued from page 3)

the Administrative Procedure Act.

Accordingly, the court vacated the Super Bowl order and invalidated the imposition of a fine against CBS. In addition, although it cautioned that any further FCC action would be declaratory in nature, as the agency may not retroactively penalize CBS, the court remanded the case for further proceedings consistent with its opinion.

On this point, Judge Rendell dissented. Although she agreed

entirely with the holding that the FCC's action unlawfully constituted an unexplained departure from precedent, she dissented on the need for a remand. Judge Rendell noted that the FCC could explain any change in policy in future orders or declaratory rulings without involving CBS as a direct party in the proceedings.

Robert Corn-Revere, Ronald G. London, Amber Husbands and David Shapiro with Davis Wright Tremaine in Washington, D.C. represented CBS in this matter.

Update: Supreme Court To Hear Appeal on FCC "Fleeting Expletives" Policy

Government Brief Filed in June; Media Briefs Due in August

This Fall the U.S. Supreme Court will hear an appeal from a divided Second Circuit decision holding that the FCC's similar "fleeting expletive" policy violates the Administrative Procedure Act. *FCC v. Fox Television Stations Inc.*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (U.S. Mar. 17, 2008) (No. 07-582). It will be the Court's first review of the broadcast indecency issue since *FCC v. Pacifica*, 438 U.S. 726 (1978), which held that the FCC could regulate indecent material on public airwaves.

Last year a divided Second Circuit panel vacated fines against FOX for the unscripted use of the "F-Word" during the 2002 and 2003 Billboard Music Awards show. The majority held that the FCC failed to provide a reasoned basis for the new enforcement policy, noting that "for decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent." 489 F.3d at 461.

The majority decision also touched on the broader constitutional issue of regulating broadcast indecency in the current media environment an issue briefed and argued by Fox and other media interveners. While saying it was not necessary to decide this broader issue, the majority decision found that "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television." *Id.* at 464.

In March 2008, the Supreme Court granted the government's petition for certiorari with the following question: "Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated."

In its [brief filed last month](#), the government argues that the Second Circuit decision amounted to "inappropriate second-guessing of policy judgments committed to the agency by Congress." The brief also argues that while the Second Circuit made various constitutional "observations" it explicitly refrained from deciding the constitutional challenges and therefore there is no need for the Supreme Court to reach those issues.

The media briefs are due to be filed on August 1.

Fourth Circuit Affirms Summary Judgment for The New York Times in Lawsuit Over Anthrax Columns

No Evidence of Actual Malice Despite Refusal to Reveal Sources

By Chad R. Bowman

A unanimous Fourth Circuit Court of Appeals ruled in July that a hard-fought libel case against The New York Times was properly dismissed because the plaintiff, a prominent bioterrorism expert, was indeed a limited purpose public figure, and he failed to produce sufficient evidence of actual malice after the completion of discovery. *Hatfill v. The New York Times Company*, 2008 WL 2720696 (4th Cir. July 14, 2008) (affirming 488 F.Supp.2d 522 (E.D. Va. 2007)).

The appellate court also rejected plaintiff Steven J. Hatfill's claim for intentional infliction of emotional distress and a defamation claim arising from discrete statements apart from the general alleged implication of guilt.

In a discussion likely to be cited by media defendants in future cases, the Fourth Circuit also found no error in the district court's decision to award a defense judgment on the absence of actual malice despite a refusal by the Times to identify two of its confidential news sources.

The underlying lawsuit arose from a series of 2002 columns by Pulitzer Prize-winning columnist Nicholas Kristof about what he deemed a lackluster initial FBI investigation of the deadly 2001 anthrax mailings. On appeal from summary judgment, the Fourth Circuit did not revisit an earlier ruling by a divided appellate panel that a reasonable jury could find the columns defamatory – *i.e.*, that they might reasonably be viewed as implying that Dr. Hatfill committed the crime – and therefore had reversed an initial district court dismissal. *Hatfill v. The New York Times Company*, 2004 WL 3023003, 33 Media L. Rep. 1129 (E.D. Va. Nov. 24, 2004), *rev'd* by 416 F.3d 320 (4th Cir.), *reh'g en banc denied* 427 F.3d 253 (4th Cir. 2005), *cert. denied* 126 S. Ct. 1619 (March 27, 2006)).

If Dr. Hatfill opts not to seek further review of the latest ruling either through a petition for rehearing *en banc* or a petition for *certiorari* for high court review, the decision would bring an apparent end to a series of claims he has brought against or implicating the press arising from his high-profile status as a one-time “person of interest” to the FBI's investigation into the anthrax mailings. Most recently, Dr. Hatfill settled a Privacy Act lawsuit against the U.S. Department of Justice arising from allegedly improper press disclosures, a case that

involved subpoenas being issued to more than 20 reporters and news organizations.

Background

In several columns in summer 2002, Mr. Kristof profiled a man many bioterrorism and biodefense insiders believed to be a prime suspect in the anthrax attacks – a “Mr. Z,” based on information provided by these experts and other sources – as an example of the FBI's apparent investigative failures. After the FBI conducted two well-publicized searches of Dr. Hatfill's properties during the summer of 2002, then-Attorney General John Ashcroft publicly described Dr. Hatfill as a “person of interest” to the investigation, and Dr. Hatfill held a press conference addressing his status as a suspect, Mr. Kristof confirmed that “Mr. Z” was Dr. Hatfill and called on investigators “to end this unseemly limbo by either exculpating Dr. Hatfill or arresting him.”

Dr. Hatfill has never been charged in the anthrax attacks, nor formally exculpated by the FBI. In his lawsuit against the Times, he alleged that the op-ed columns falsely implied that he was responsible for the anthrax mailings, that eleven “discrete factual misstatements” in the columns were separately actionable because they “would tend to incriminate Dr. Hatfill in the anthrax mailings,” and that the columns further supported a claim for intentional infliction of emotional distress.

Following the disposition of the first appeal, the parties engaged in extensive discovery and motions practice, including litigation over confidential sources. While three of five relevant confidential sources ultimately came forward voluntarily, the Times declined to identify two confidential FBI sources despite a district court order to do so. As a resulting sanction, the district court barred the Times from relying on these sources.

Public Figure Status

Writing for the panel, Circuit Judge Niemeyer applied settled Fourth Circuit precedent to conclude that Dr. Hatfill “voluntarily thrust himself into the controversy surrounding the threat of bioterrorism and the nation's lack of preparedness for

(Continued on page 6)

Fourth Circuit Affirms Summary Judgment for The New York Times in Lawsuit Over Anthrax Columns

(Continued from page 5)

a bioterrorism attack,” and therefore qualified as a limited purpose public figure on these topics.

In a careful recitation of the established facts, Judge Niemeyer cited the numerous lectures, briefings, and public speeches through which Dr. Hatfill “became a respected figure in the U.S. bioterrorism community,” and was indeed touted by his one-time employer, SAIC, as “‘a national subject matter expert, whose opinions and technical advice [were] widely sought’ in the area of bioterrorism.”

Dr. Hatfill also authored articles, gave interviews to the press, and even “posed for a picture demonstrating how a determined terrorist could create biological weapons by ‘cooking up’ plague in his own kitchen,” which appeared in *Insight* magazine. Judge Niemeyer noted that Dr. Hatfill’s access to media far exceeded those of the plaintiff in *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703 (4th Cir.1990), concluding that “[i]f Reuber’s access to channels of communication was sufficient, so too is Dr. Hatfill’s.”

One apparent purpose for the plaintiff’s publicity efforts was to serve as “a vocal critic of the government’s unpreparedness for a bioterrorist attack,” according to the court. As such, “Dr. Hatfill voluntarily thrust himself into the debate. He cannot remove himself now to assume a favorable litigation posture.”

Judge Niemeyer found the facts of the case “strikingly similar” to the circumstances of *Fitzgerald v. Penthouse International, Ltd.*, 691 F.2d 666 (1982), which similarly involved an expert plaintiff who claimed to have been defamed by implications that he committed crimes related to his area of expertise – which the court found to be a subset of the larger area of controversy for purposes of evaluating public figure status. Following this *Fitzgerald* reasoning, Judge Niemeyer concluded that “the particular public controversy is the threat from bioterrorism and the nation’s preparedness to handle that threat, with the anthrax attacks as the specific example that opened the debate to greater discussion.”

As Dr. Hatfill had access to the media, was a vocal critic of biodefense preparedness, and voluntarily assumed a role and sought to influence policy in this debate, a controversy that pre-dated the columns and was expressly addressed by the columns, the panel concluded that he qualified as a limited purpose public figure. In light of this conclusion, the court did not consider the district court’s alternate holdings that Dr. Hat-

fill also qualified as a public official and involuntary public figure.

No Evidence of Malice

On the question of fault, Judge Niemeyer found nothing akin to the necessary evidence that Mr. Kristof published his columns with a “‘high degree of awareness of [their] probable falsity.’” Rather, a careful review of the record revealed that “the record contains substantial evidence to support The New York Times’ contention that Kristof *actually believed* that Dr. Hatfill was the prime suspect.”

Nor was this belief unreasonable. The decision noted that, at the time of the columns, Mr. Kristof knew that Dr. Hatfill fit the FBI profile of the anthrax mailer; that he had been identified to the FBI as a suspect and had been questioned more than once; that he had access to labs where anthrax was stored and had been vaccinated for anthrax; that he had knowledge about the use of anthrax as a weapon; that he had “strong views about the bioterrorism threat” and had spoken frequently about this threat; and that his security clearance had been suspended just before the anthrax mailings after he failed a polygraph test. “With these undisputed facts, no reasonable jury could find that Kristof had a ‘high degree of awareness ‘ that Dr. Hatfill was *not* the anthrax mailer,” Judge Niemeyer wrote.

The court rejected the plaintiff’s principal “evidence” of malice – that he had been warned that one of his many sources was “untrustworthy” – as unpersuasive. The source at issue “was considered an expert in the field of biological weapons and had been called upon by the FBI to discuss the anthrax investigation.” That there was “the expressed disagreement of others with regard to her opinions” simply did not create “‘obvious reasons to doubt the veracity of the informant.’”

Claims for Subsidiary Statements, IIED Barred

In a short discussion, Judge Niemeyer held that the plaintiff’s separate claim for defamation based on “discrete statements alleged to be false ... do not improve Dr. Hatfill’s arguments, because at bottom, Dr. Hatfill still maintains that the discrete false statements in the columns constituted defamation because they ‘*tend[ed] to incriminate Dr. Hatfill in the anthrax mailings.*’” Because this is the same defamatory message allegedly conveyed by the columns as a whole, these claims were

(Continued on page 7)

Fourth Circuit Affirms Summary Judgment for The New York Times in Lawsuit Over Anthrax Columns

(Continued from page 6)

insufficient for the same reason as the principal claim.

As such, the court applied the “subsidiary meaning doctrine” adopted by the Second Circuit in *Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986), holding that where a plaintiff cannot prove an alleged overall defamatory implication, liability cannot be premised separately on individual statements the plaintiff alleges support that alleged implication. Judge Niemeyer did not reach the district court’s alternate holding that the Times proved that the discrete statements properly at issue were substantially true.

Judge Niemeyer also agreed with the district court’s dismissal of the claim for intentional infliction of emotional distress. He reasoned that, because Dr. Hatfill failed to demonstrate that the Times acted with actual malice in publishing the columns, he also failed to produce enough evidence to convince a reasonable jury that Mr. Kristof intentionally or recklessly caused severe emotional distress or engaged in conduct that was “sufficiently outrageous.”

Source Sanction Adequate

The Fourth Circuit turned finally to Dr. Hatfill’s “overarching claim” that, because the Times had violated a discovery order and declined to reveal the identity of two confidential sources, it should be barred from being awarded summary judgment.

Judge Niemeyer found that argument “unpersuasive” and “based on a non sequitur” because the district court, in its discretion, sanctioned the Times for its noncompliance by prohib-

iting the newspaper from “referring to, relying on, or entering into evidence the existence of the two confidential sources that were not disclosed or the information they provided to Kristof.” In moving for summary judgment, the Times fully complied with this order – and Dr. Hatfill did contend otherwise. As such, Judge Niemeyer reasoned, “Dr. Hatfill can only be challenging the adequacy of the sanction itself,” a matter reviewed for abuse of discretion. Because “the district court exercised its discretion to impose a penalty that would ‘ameliorate [the] prejudice’ to Dr. Hatfill ‘without resorting to overly drastic measures given the nature of this case,’” the sanction was proper.

In light of the court’s decision to affirm summary judgment, the panel did not address a conditional cross-appeal by the Times of the district court’s order to disclose confidential sources. The Times had argued both that the district court erred in finding the reporter’s conditional constitutional privilege overcome and that the court erred in its choice-of-law analysis to apply Virginia law despite the fact that neither the plaintiff nor the defendant were citizens of that state when the columns were published.

Chad Bowman is an associate with Levine Sullivan Koch & Schulz, L.L.P. The New York Times Company was represented by David McCraw, Vice President and Assistant General Counsel of The New York Times, and by Levine Sullivan Koch & Schulz, L.L.P. of New York and Washington, D.C. Dr. Steven Hatfill was represented by Harris, Grannis & Wiltshire, P.C. of Washington, D.C.

MLRC’s Summer 2008 Interns Contributed to This Issue of the MediaLawLetter

Tashmin Ali, The University of Illinois College of Law

Brittney Pescatore, Columbia University Law School

Ava McAlpin, Princeton University

Station Can't Beat the Rap for Statements Alleging Murder

Appeals Court Restores Higher Award, Saying Retrial was Improper

The Georgia Court of Appeals this month reinstated a \$100,000 jury verdict in a libel suit brought by an up-and-coming rap artist who sued a radio station over comments by a caller and radio deejay that the artist had killed his girlfriend. *Riddle v. Golden Isles Broadcasting, LLC*, No. A08A0024, 2008 WL 2600009 (Ga. App. July 2, 2008) (Ellington, Miller, Blackburn, JJ.).

Background

In 2002, the plaintiff Travis "Slim" Riddle had moved to Atlanta from his hometown of Brunswick, Georgia. Although he was working part-time at a catering hall, Riddle was beginning to get some recognition for his rapping, and had performed in several concerts in the area, appeared on MTV's "Say What Karaoke," and sold enough copies of his self-published CD to have made a \$10,000 profit. His song "Daddy's Little Boy," was played on Brunswick radio station WSEG-FM, then known as "Hot 104.1," as often as 42 times a week.

In August 2002, Riddle's girlfriend Josephine Howard, with whom he has a child, disappeared for several days. On or about August 15, 2002, several callers during a WSEG show hosted by deejay Antonio "Tone" Warrick told him off the air that Riddle had killed her. After receiving several of these calls, Warrick put one, an unidentified woman, on the air and she asked whether the allegations were true. Warrick said he did not know, but did not refute the claim. The airing of the phone call was recorded, but subsequently erased.

Later, Riddle called and was put on the air, and said that the rumor was the result of a misunderstanding. Howard was alive, he said, explaining that the rumor started when she did not show up for work and her mother filed a missing persons report.

In 2003, Riddle sued the owner of the station, Golden Isles Broadcasting, for defamation. He also expressed his grievances against the station in his song, "Whatcha Know."

I'm 24-karat; I ain't lying in my rhymes.
One-oh-four-one made a n-gg-r prime time.
Said I murdered this and that, but that ain't true.

Tried to murder this track while I'm still in the groove.

In the video for the song, these lyrics are accompanied with an apparently fake cover of the local Brunswick, Ga. newspaper, *The Brunswick News*, with the headline "Rapper Slim Riddle Accused of Murder."

Golden Isles moved for summary judgment in the lawsuit, arguing that Riddle was a public figure because he had "expressed his desire to be a recording artist, he had performed regularly in that capacity, and he believed his music conveyed an important message to society." As a public figure, the court continued, he could not show that the station acted with actual malice. Superior Court Judge Amanda F. Williams agreed, and granted the motion on December 29, 2004.

Nine months later, the Georgia Court of Appeals reversed, holding that Riddle was neither a general nor a limited purpose public figure. *Riddle v. Golden Isles Broadcasting*, 621 S.E.2d 822, 34 Media L. Rep. 1026 (Ga. App. Oct. 4, 2005). "While Riddle may have been gaining some popularity in local music circles, the evidence does not demonstrate that he had achieved the degree of celebrity and influence typical of a general purpose public figure," the court concluded. 621 S.E.2d at 828. Also, "[b]ecause there was no public controversy [over Howard's temporary disappearance], the record does not support a finding that Riddle was a limited purpose public figure." *Id.* at 829.

The appeals court also held that the trial court had improperly concluded that Golden Isles had exercised due care, the standard in Georgia law for a broadcaster to be immune from liability for defamatory statements. Ga. Code Sec. 51-50-10(a) provides that

The owner, licensee, or operator of a visual or sound broadcasting station or network of stations and the agents or employees of any owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast by one other than the owner, licensee, or operator or an agent or

(Continued on page 9)

Station Can't Beat the Rap for Statements Alleging Murder

(Continued from page 8)

employee thereof, unless it is alleged and proved by the complaining party that the owner, licensee, operator or the agent or employee has failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

On remand, the case went to trial before a jury in 2006.

Riddle presented six witnesses who said that they had heard the deejay state that Riddle had killed the mother of his child, that the police were looking him, or that he had been charged with murder. Two of the witnesses said that although they did not believe the allegations at the time, they did think that his reputation in the community suffered. Witnesses also testified that after the allegations were aired several local radio stations stopped playing Riddle's songs and that his budding career stalled.

One of Riddle's other witnesses was his girlfriend Josephine Howard who was very much alive.

During the defendant's case, deejay Warrick denied making the statements. The defendants also argued that Riddle had no documentation of his alleged lost income, and that his career setbacks came when he moved from Brunswick to Atlanta.

The jury found that Warren had made the statement, and that defendant Golden Isles Broadcasting was liable for it. The jury was instructed that since the statement alleged that Riddle had committed a crime, it constituted libel per se. The jury awarded \$100,000 in compensatory damages.

The trial judge, Circuit Court Judge Jere F. White, found that the award was, as he stated in his order,

"excessive in that it was contrary to the preponderance of evidence." White granted a defense motion for a new trial unless Riddle agreed to remittitur of the award to \$60,000. Riddle refused the remittitur, and White ordered a new trial on damages. Under Georgia law, this decision was not appealable. The retrial was held in January 2007 and resulted in a new jury award of \$25,000 in compensatory damages. Riddle appealed, arguing that the trial court abused its discretion by rejecting the initial jury award.

Appeals Court Restores Original Award

The Georgia Court of Appeals, in a decision by Judge John J. Ellington, agreed. "We have reviewed the transcript of the first trial," he wrote, "and we cannot say that the jury's award of \$100,000 in general damages for slander per se was clearly so excessive as to be inconsistent with the preponderance of the evidence presented." The appeals court also found that Riddle had a generally positive image before the statements were made, and that the decline in his career was due, at least in part, to the defamatory allegations.

The appeals court thus reversed the trial court's grant of the new trial motion, restoring the original award of \$100,000.

Defendant Golden Isles Broadcasting was represented by E. Michael Ruberti of Saint Simons Island, Ga. Plaintiff Travis "Slim" Riddle was represented by Vincent D. Sow-erby of Brunswick, Ga.

RECENTLY PUBLISHED FROM MLRC

**Bulletin 2008 No. 2:
Digital Media Articles & Comments on New Frontiers in Internet Law**

Click this ad for more

Detroit Federal Judge Makes ‘Magic’ Libel Case Disappear

Magazine Panned Plaintiff’s Card Trick

By Herschel P. Fink

District Court Decision

It may not have been as difficult as pulling a rabbit from a hat, or sawing a lady in half, but U.S. District Judge Bernard A. Friedman, Chief Judge of the Eastern District of Michigan, made a libel suit over a critical review of a magic trick disappear in a recent opinion granting dismissal under FRCP 12(b)(6). *Nagler v. Henderson and Stagemrite Publishing, Inc.*, No. 08-10493 (E.D. Mich. July 2, 2008).

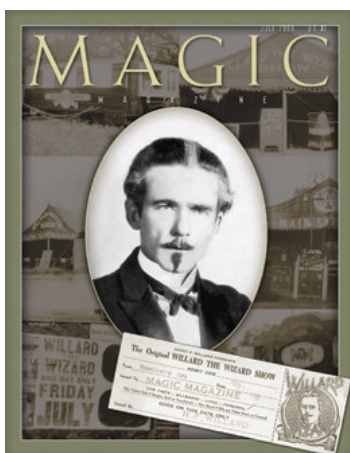
Background

The critical review appeared in the January 2007 issue of “Magic,” a magic industry trade publication published by defendant Stagemrite Publishing, and written by defendant Brad Henderson. The magic trick, “Any Card at Any Number,” was created and marketed by plaintiff William Nagler, a suburban Detroit physician, self-described as “well-known in magic circles.”

Nagler’s card trick was panned by Henderson, who said the trick “falls short” in some respects, “cannot be done,” the cards “cannot be handled,” it has “inconsistencies” in its instructions, and “opens up potential pitfalls.” Nagler’s suit claimed the review also inferred that his trick was “garbage.”

Ironically, Nagler himself has a website, www.25offmagic.com, in which he also reviews the magic tricks of others, often employing colorful and invective-laden criticisms under the Yiddish term “dreck” (garbage):

poorly presented. . . horrid advice...awful beyond belief.
Save your money. . . . Would not, could not fool anyone.
. . . terrible gimmick. . . total crap. . . you look like an epileptic. . . unconscionable. . . flatulent rewrite. . . looks awful. . . lousy undeceptive handling. . . Doesn’t work. . . horrible looking. . . Wouldn’t fool a squirrel . . . useless. . . perfect example of how not to do magic. . . impossible to do. . . total rip-off. . . would not fool a flea. . . totally fraudulent ad. . . absolutely vomitorious. . . stupid. . . nondeceptive and boring. . . would not fool a chipmunk. . . awful.



Arguing that the review was clearly opinion, criticism and rhetorical hyperbole, *Magic* moved to dismiss based on, among other cases, *Moldea v New York Times Co.*, 22 F.3d 310 (D.C. Cir.), *cert. denied*, 513 U.S. 875 (1994). But in making the argument, the magazine also invited the Court’s attention to the irony – “chutzpah,” if you will – of the plaintiff calling the tricks of other magicians “dreck,” while suing for libel when his own was criticized. To avoid turning the Rule 12(b)(6) motion into a Rule 56 summary judgment motion, the magazine cited authority that a court can take judicial notice of the existence and content of a website, much as a newspaper article is self-authenticating under FRE 902(6).

Judge Friedman sidestepped the issue, however, noting that Nagler’s own website printout, attached to the motion as an exhibit, was stricken by the court. The Court, nevertheless, went on to agree “that none of the (six) challenged statements are defamatory,” two “are rhetorical hyperbole and protected as such under the First Amendment,” and the remaining four “are unverifiable ‘supported interpretation’ and therefore cannot serve as the basis for a defamation claim consistent with the First Amendment.” *Nagler*, No. 08-10493 at *7.

The Court went on to note that “[t]he context of the publication is . . . crucial in determining whether it may be deemed to convey facts and, thus, possibly defamatory.” *Nagler*, No. 08-10493 at *10 (quoting *DuPuis II v. City of Hamtramck*, 502 F. Supp. 2d 654, 658 (E.D. Mich. 2007)). The Court looked to *Moldea*, which involved a *New York Times* book review, as an example. “Indeed, ‘criticism’s long and impressive pedigree persuades us that, while a critic’s latitude is not unlimited, he or she must be given the constitutional “breathing space” appropriate to the genre.’” *Nagler*, No. 08-10493 at *10 (quoting *Moldea*, 22 F.3d at 315).

Applying that principle, the court concluded that “in the context of a product review published in a trade magazine . . . the challenged statements ‘appear in a forum in which readers expect to find such evaluations,’” and, “[t]he Constitution therefore mandates that Defendant Henderson be given significant ‘breathing space.’” *Nagler*, No. 08-10493 at *11-12.

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit represented Magic magazine and its reviewer. Nagler was represented by Marvin Berris of Southfield, Michigan.

Chinese-Language Newspaper Wins Summary Judgment *Libel Suit over Report of “Japanese Devils” Comment Dismissed*

By David P. Lein

A Texas appellate court rendered summary judgment for a Houston Chinese-language newspaper in a libel suit brought by a subject of the paper’s commentary. *Jianguang Wang and Yellow Emperor Communications, Inc. d/b/a Houston Chinese Press v. David Tang*, Case No. 01-08-00009-CV (Tex. App. Houston (1st Dist.) June 5, 2008) (Radack, C.J., Keyes, Higley, JJ.).

The court held that the plaintiff, an admitted limited purpose public figure, failed to present sufficient evidence of actual malice to raise a genuine issue of material fact. It rejected the plaintiff’s argument that the court could infer actual malice either because the defendant had knowingly omitted a portion of the plaintiff’s statement at a press conference, or because a purported “expert” editor opined that the defendant could only have omitted a portion of the statement in order to defame the plaintiff.

Plaintiff Vows to “Fight to the Death”

Plaintiff David Tang is Vice-Chairman of Houston’s Chinese Civic Center (“CCC”), a non-profit cultural center for Houston’s Chinese community. Tang presided over a 2006 press conference convened to introduce new board members and to address a simmering controversy over the group’s finances. At the end of the tense press conference, Tang stood at the podium and invoked a Chinese slogan from WWII variously translated as “fight to the death against the Japanese Devils” or “as long as we are alive, we shall not lose one inch of ground.”

A local Chinese-language newspaper, the *Houston Chinese Press*, criticized Tang for using this inflammatory remark, interpreting it as a comparison of the CCC’s critics to the Japanese “Guizi” (literally, “Devils” or “Invaders”). Tang sued the *Houston Chinese Press* for libel, claiming that by failing to publish all of his remarks, it substantially altered the meaning of his comments, which he said were meant to be inclusive, not divisive. After the trial court denied the newspaper’s motion for summary judgment, it immediately appealed under Texas’ unique procedural device, Tex. Civ. Prac. & Rem. Code § 51.014(a)(6), which provides members of the media and their sources with an

accelerated, interlocutory appeal from the denial of a motion for summary judgment in libel cases.

Defendants Negate Actual Malice

The Court of Appeals was satisfied that the *Houston Chinese Press* sufficiently negated actual malice by submitting the publisher’s affidavit confirming his belief that the article was accurate, that he believed Tang was, in fact, referring to the CCC’s critics in his inflammatory statement, and that the publisher had a “plausible basis for his belief that the allegedly defamatory statements were true.” Under Texas summary judgment practice in libel cases, this shifted the burden to the plaintiff to raise a genuine issue of material fact regarding actual malice.

The Court of Appeals recognized that when a libel suit is brought claiming that a newspaper’s quotation of a public figure’s statements was inaccurate or distorted, to prove actual malice the plaintiff must show not just that the quote was materially inaccurate, but that the publisher *knew* the article conveyed a false and defamatory impression of the public figure’s statements, or had substantial doubts as to its truth. That is, the newspaper has to know it is materially misquoting the public figure or have actual, serious doubts that its quote accurately captures the gist of the person’s statement.

Tang admitted he had no direct evidence of actual malice, but asked the Court to infer actual malice from the nature of the omission itself and from purported expert testimony. First, Tang argued that the knowing omission by the *Houston Chinese Press* of these concluding words permitted the inference that the newspaper knew his reference to “Japanese Devils” was benign, not divisive:

So long as the new board of directors are serving, so long as we get the support from our warm-hearted friends in the community, we, the Chinese Civic Center, for sure, for sure, who already have ten years of brilliant service and for sure, will have ten more years of brilliant service. I thank everybody. The conference is ended. Thank you all.

(Continued on page 12)

Chinese-Language Newspaper Wins Summary Judgment

(Continued from page 11)

The court disagreed, holding that the editorial decision of how much to quote of Tang's statement could not raise a fact issue in the face of Wang's uncontroverted testimony that he understood Tang to be referring to the CCC's critics. While recognizing that in some cases an omission alone could be sufficient evidence from which to infer actual malice, such was not the case here, where Wang offered a plausible interpretation of a quote that was ambiguous. "At most, the Houston Chinese Press's decision to include only the first part of Tang's statement was an error in judgment arising from Wang's interpretation of Tang's comments. Errors in judgment are not evidence of actual malice," the court wrote, citing the U.S. Supreme Court's decision in *Time v. Pape*, 401 U.S. 279 (1971).

"Expert" Testimony Rejected

The court also rejected as evidence of actual malice proffered "expert" testimony of John Robbins, whom the plaintiff claimed was "an editor for the largest Chinese press in Houston." Robbins opined that "the only reason for publishing only a select portion of Mr. Tang's statement appears to have been to intentionally misrepresent

what Mr. Tang actually said, and then to proceed with the publishing of an article based on that misrepresentation."

The court disregarded Robbins's testimony entirely. Without addressing Robbins's dubious qualifications to give any expert testimony at all, the court held that his affidavit was no proof of actual malice because it related, at most, "to a reckless disregard for a standard of objectivity, not for the truth." Moreover, the court reasoned, even assuming that Robbins could competently testify on proper standards of objectivity, such testimony was not evidence of actual malice because it had nothing to do with the defendants' mental state as to whether the quote materially altered the meaning of Tang's "Japanese Devils" statement.

Wang v. Tang joins a long line of cases in Texas where appellate courts have reversed the denial of summary judgment on interlocutory appeal, saving media defendants untold expense and disruption defending meritless libel claims at trial.

Pete Kennedy and David Lein, Graves Dougherty Hearon & Moody P.C. in Austin represented defendants James Wang and the Houston Chinese Press. Plaintiff David Tang was represented by Michael and David Sydow, Sydow & McDonald LLP in Houston.



NOW AVAILABLE!

**MLRC 50-State Survey:
Employment Libel and Privacy Law 2008**

TOPICS INCLUDE:

Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

[Click here to access an order form](#)

Newspaper Wins Summary Judgment in Former District Attorney's Defamation Suit

Destruction of Notes Did Not Raise Issue of Actual Malice

A Wisconsin appellate court recently affirmed summary judgment for a local newspaper and source in a libel suit brought by a former district attorney over an erroneous report stating that plaintiff had been convicted of accepting bribes. *Biskupic v. Cicero, et.al*, No. 2007AP2314, 2008 WL 2468684 (Wis. App. June 17, 2008) (Hoover, Peterson, Brunner, JJ.).

The court affirmed that the public figure plaintiff provided insufficient evidence of actual malice to support his defamation claim. The court rejected plaintiff's argument that the reporter's destruction of his notes was sufficient evidence of actual malice. The court also denied plaintiff's request to sanction the newspaper for the loss of the notes, finding that the destruction of the notes did not amount to a "conscious attempt to affect the outcome of litigation or a flagrant knowing disregard of the judicial process."

Background

Plaintiff Vincent Biskupic was the District Attorney of Wisconsin's Outagamie County from 1994 until 2003. During that time, Biskupic ran unsuccessfully for Wisconsin Attorney General. During the campaign, in 2002, it was revealed that Biskupic had allowed criminal suspects to make payments to a crime prevention fund he controlled as an alternative to criminal prosecution. Following an investigation, an Ethics Board expressed concern regarding Biskupic's "deals" with criminal suspects, but decided not to impose sanctions since Biskupic did not profit personally from any of the payments.

Prior to his tenure as the elected District Attorney of Outagamie County, Biskupic worked under District Attorney Joe Paulus in adjacent Winnebago County. Paulus was voted out of office in 2002 amid bribery allegations, and was later convicted for taking money to fix cases. The record in the instant case included 56 news articles and editorials from 2002 through 2005 that mentioned both Paulus

and Biskupic, including numerous articles referencing allegations against both men as a reason to make changes in the criminal justice system.

In July 2004, the circuit court judges in the Ninth Judicial Administrative District – which does not include either Outagamie or Winnebago counties, but does include nearby Shawano County – voted to stop the practice of judges ordering convicted defendants to donate to nonprofit organizations.

That August, a local newspaper the *Shawano Leader* ("Leader") ran an article covering this decision under the headline: "Agencies to lose thousands if fee on criminals ends." The article included an interview with Stacey Cicero, the executive director of a domestic abuse prevention organization that had been receiving money, who was quoted as saying: "I believe it [the vote to eliminate the fees] was done in response to bribery and graft cases involving former Winnebago County District Attorney Vince Biskupic."

The article further stated: "Biskupic was convicted of accepting bribes to dismiss cases. Some of the money that defendants paid to have their cases dismissed went to organizations he [Biskupic] was involved in or into his own pocket."

The next day, the *Leader* published a lengthy correction of the article, stating that "A story in Monday's edition incorrectly referred to Vince Buskupic as a former Winnebago County District attorney [sic] accused of bribery and graft. The name of that official is Joe Paulus...".

The *Leader* subsequently ran a second correction on its front page in response to a demand letter from Biskupic.

In August 2005, Biskupic filed a defamation suit against the *Leader* and Stacey Cicero. During her deposition, Cicero stated she had a "brain lapse" and inadvertently confused Biskupic with Paulus. Joe Vandel – the reporter covering the story – acknowledged that he "probably should have" verified Cicero's information, but noted that he had no reason to doubt Cicero since she had provided him with

(Continued on page 14)

The court rejected plaintiff's argument that the reporter's destruction of his notes was sufficient evidence of actual malice.

Newspaper Wins Summary Judgment in Former District Attorney's Defamation Suit

(Continued from page 13)

accurate information on dozens of previous occasions.

After the second correction was printed Vandel discarded his notes from the interview, stating he believed the matter was “taken care of,” and citing his standard practice of discarding interview notes once they reached the bottom of his drawer.

The *Leader* and Cicero moved for summary judgment, while Biskupic moved for judgment as a sanction for the destruction of the interview notes. The trial court granted summary judgment in favor of all defendants, concluding that Biskupic – as a limited purpose public figure – was unable to prove actual malice since the defamation “occurred as a result of confusion and negligence, not malice.” The court also denied Biskupic’s motion for sanctions against the newspaper.

Public Figure Status

On appeal, the court first addressed whether Biskupic is a public figure. The court noted that because of the ongoing publicity surrounding corruption allegations in the District Attorney’s office, Biskupic was “in the public spotlight in August 2004 to at least the same degree as when he left office.” Citing *Lewis v. Coursolle Broadcasting*, 377 N.W.2d 166 (Wis. 1985). Like the plaintiff in *Lewis* – an ex-state legislator who unsuccessfully sued a local radio station for libel – Biskupic’s activities after leaving office were still in the public spotlight due to his highly-publicized crime prevention fund practices, which resulted in extensive statewide news coverage. In addition, a 2003 Election Board found that Biskupic violated a number of finance rules during his Attorney General campaign, which led to further media coverage. The court concluded that these events extended Biskupic’s status as a public figure for all purposes, even after his resignation from office.

Evidence of Actual Malice

Since Biskupic’s public figure status required him to meet the actual malice standard, the court next evaluated whether Biskupic had presented sufficient evidence to show that Cicero or the *Leader* acted with actual malice by making the disputed statements. Emphasizing the potential chilling effect that defamation cases have on free speech,

the court noted that in order to withstand summary judgment, a plaintiff’s evidence must establish subjective doubt, rather than a breach of journalistic standards.

The court concluded that the reporter – who had received accurate information from Cicero in the past – did not have any “obvious reasons” to doubt the veracity of Cicero’s statements. As for Cicero’s mistake, the court pointed out the absence of evidence that her mistake was anything more than a “failure to double-check” the District Attorney’s name. As a result, the court held that both defendants’ actions fell within the general rule that “failure to verify information, without more, is not evidence of actual malice.”

Destruction of Notes

With regard to the reporter’s destruction of his interview notes, the court noted that “in general, the destruction of notes allows an inference that the notes would have provided evidence of actual malice” to defeat summary judgment. However, the court added, “this rule is not absolute” where the possibility the notes might establish actual malice is remote. Citing *Torgerson v. Journal/Sentinel, Inc.*, 210 Wis. 2d 524, 539-40, 563 N.W.2d 472 (1997).

Here there was no factual dispute that the news article was based on statements made by Cicero. Biskupic, therefore, failed to show how the notes might show actual malice and the destruction of the notes did not create a material factual dispute preventing summary judgment.

Finally, the court considered and rejected Biskupic’s argument that he was entitled to judgment against the *Leader* as a sanction for the destruction of evidence. The trial court rejected this claim without discussion. The appellate court reasoned that a sanction would only have been appropriate if the *Leader* destroyed the notes in a “conscious attempt to affect the outcome of litigation or a flagrant, knowing disregard of the judicial process.”

Here there was no dispute that the notes were destroyed by the reporter as part of his usual course of practice and they were destroyed before this suit was filed. Moreover, because Biskupic failed to show how the interview notes would have established actual malice, the record simply did not support a finding that the reporter intentionally destroyed the notes in an attempt to eliminate evidence. Absent such evidence or other “egregious conduct,” a judgment for the plaintiff as a sanction is not possible.

New York Court Dismisses Gary Condit's Libel Suit against Dominick Dunne

Statements Were Protected Opinion

A New York federal court this month dismissed for failure to state a claim a libel complaint filed by former California Congressman Gary Condit against writer Dominick Dunne over statements Dunne made during a television interview about the Chandra Levy case and the parties' earlier, settled libel suit involving the case. *Condit v. Dunne*, 06 Civ. 13126 (S.D.N.Y. July 8, 2008) ("Condit II") (Leisure, J.).

The court found that the Dunne had not made any false statements of fact, but rather had expressed his opinion about the extent of Condit's involvement in the matter and that he corrected mischaracterizations made by the television host Bob Costas.

Background

Dominick Dunne is a writer for *Vanity Fair* magazine, as well as an author and television commentator. Dunne has specialized in covering high profile criminal cases. Gary Condit is a former Democratic member of the U.S. House of Representatives from California. Condit was the subject of intense media coverage when his former office intern, Chandra Levy, disappeared and was later found murdered. News reports began to emerge of an affair between Condit and Levy, and speculation grew as to whether Condit was involved in her murder.

Dunne had previously recounted a story on various talk shows, including *Larry King Live*, as well as at dinner parties and in newspapers, about a "horse whisperer" who had contacted him to say he had heard from a Middle Eastern procurer that Levy had been kidnapped, drugged, and put on a plane. Dunne also said that the horse whisperer linked Condit to the procurer, who provided sexual services of young foreign women in Washington, D.C.

In 2004, Condit sued Dunne for defamation over these statements and the New York district court denied Dunne's motion to dismiss. *Condit v. Dunne*, 317 F.Supp.2d 344 (S.D.N.Y. 2004) ("Condit I"). The district court rejected Dunne's argument that, in the "media frenzy," his statements were opinions and hypotheses rather than actual assertions of fact. The court also rejected applying the neutral

report privilege, finding that Dunne "concurred" in the allegations, "making clear in each publication that he believed that plaintiff was criminally involved in Levy's disappearance." Dunne subsequently settled the lawsuit.

On November 16, 2005, Dunne again appeared on *Larry King Live*; with Bob Costas as a substitute host. In a lengthy interview, Costas mentioned the horse whisperer story and prior libel suit. Dunne corrected Costas's version of the story, emphasizing that he had not named Condit in connection with the horse whisperer's account of what happened to Levy; but he did acknowledge his belief that Condit knew "more than he has ever told about" Levy's case. When Costas asked Dunne about the settlement of the 2004 libel case, Dunne declined comment.

Condit filed a second defamation suit over these statements, including Dunne's retelling of the horse whisperer story and his statement that he thinks Condit knows more than he has told about what happened to Levy. Dunne moved to dismiss for failure to state a claim.

No Defamation Claim

Applying California defamation law, the court found that the facts did not support a claim for slander and dismissed the complaint.

Turning first to the horse whisperer story, the court determined that "the threshold question is whether a reasonable viewer of the broadcast could conclude that Dunne's statements about the Horse Whisperer story imply an assertion of objective fact." *Condit II* at 13.

The court found that no reasonable viewer could come to such a conclusion: "Both the context in which Dunne's statements were made and the statements themselves negate the statements' factual connotation." *Id.* at 14. In considering the context of Dunne's statements, the court noted that they were part of a broader discussion about media speculation. In the course of the same broadcast, Dunne had discussed several high-profile murders and Costas had pointed out that media speculation about such murders was not always careful.

(Continued on page 16)

New York Court Dismisses Gary Condit’s Libel Suit against Dominick Dunne

(Continued from page 15)

The court also stressed that the story was retold for purposes of correcting the host’s mischaracterization and that Dunne had explicitly denied claiming that Condit was aware of the kidnapping described by the horse whisperer.

The court rejected Condit’s argument that Dunne’s statements could be reasonably understood as being based on the false horse whisperer story or implying the existence of undisclosed facts. Dunne was simply “weighing in” on

the controversy surrounding the crime, the court held. Such statements of opinion are protected and do not support a claim for defamation.

Gary Condit was represented by Barry Langberg of Stroock & Stroock & Lavan LLP in New York. Dominick Dunne was represented by Paul V. LiCalsi of Mitchell Silberberg & Knupp LLP in New York.

MLRC INSTITUTE

FIRST AMENDMENT SPEAKERS BUREAU

The MLRC Institute’s First Amendment Speakers Bureau is a program to educate the public about First Amendment issues and values. Members throughout the country have facilitated presentations to discuss reporters privilege law and policy and online publishing.

MLRC members and friends are invited to attend the following upcoming events

- Manchester, VT, August 13, 2008
- Emporia, KS, August 25, 2008
- Cleveland, OH, September 4, 2008
- Salem, MA, September 5, 2008

[For more information click here](#)



Seen here: Kathleen Conkey of Jacobs DeBrauwer, LLP and film maker Norman Green at the Drama Book Shop in NYC July 22.



Bruce Johnson, Davis Wright Tremaine, speaking at an MLRC Institute Panel “Shining a Light on Reporters and the Law” held on July 18 in Seattle. Available online [here](#).

Summary Judgment Denied on Libel Claims Over TV News Report Reporter's Pre-Broadcast Interview and Observations Could Show Actual Malice

In an interesting libel and privacy case over an investigative news broadcast, a federal district court recently denied summary judgment to NBC Universal finding sufficient evidence of actual malice for the libel claims to go to a jury. *LL NJ, Inc. v. NBC-Subsidiary (WCAU-TV)*, 2008 WL 1923261 (E.D. Mich. Apr. 28, 2008) (Lawson, J.).

At issue was a news report about a cosmetic surgery company and a particular face lift procedure offered by the company. Prior to broadcast the reporter had interviewed the president of the company and observed a face lift procedure. The district court found that the plaintiff provided sufficient evidence of actual malice based on differences between the broadcast report and the reporter's pre-publication interview and research.

The plaintiff also sued the station for trespass for engaging in undercover recording in one of its facilities in New Jersey, but the court abstained from deciding the claim, finding insufficient guidance under New Jersey law to determine the issue.

This month the parties agreed to participate in non-binding mediation to attempt to settle the case.

Background

The plaintiff, Michigan-based Lifestyle Lift, performs face lifts and other cosmetic surgery procedures in facilities in 16 states around the country. The company's business model is built on heavy television advertising. The company has been featured in approximately 100 media broadcasts, including discussion of the pros and cons of its face lift procedure.

After broadcasting a favorable report on the facelift procedure, WCAU-TV, an NBC affiliate station in Michigan, was contacted by three viewers who had complaints about the company's sales tactics and the results of their

"Lifestyle Lift" procedures.

Lu Ann Cahn, a WCAU-TV reporter, decided to investigate further and sent two agents to a Lifestyle Lift facility in Little Falls, New Jersey. The agents, posing as patients, were asked to sign an anti-recording contract. The agents did sign the contract but one proceeded to surreptitiously record her visit.

Cahn then interviewed the company's president, Dr. David Kent, and informed him that she had sent some agents into a Lifestyle Lift clinic. During a follow-up interview, Kent asked if the agents had recorded material during their visit and when Cahn responded that they had, Kent told her that he planned to sue.

Cahn also interviewed Dr. Louis Bucky, who criticized the procedure and suggested that it was not supported by most of the medical community.

The screenshot shows the Lifestyle Lift website. At the top, it says "Lifestyle Lift" with the tagline "Do something for yourself... for a change!" and a phone number "1.800.940.9971". It also mentions "Over 100,000 Clients Nationwide! Call To See If You Are A Candidate". Below this, there are several bullet points: "SEE THE DIFFERENCE IMMEDIATELY", "GO BACK TO ACTIVITIES QUICKLY", "AFFORDABLE FOR MOST EVERYONE", "TAKES ONLY ABOUT AN HOUR", and "NO POTENTIALLY DANGEROUS IV OR GENERAL ANESTHESIA REQUIRED". There are also logos for ABC, NBC, CBS, and FOX. A navigation bar includes links for HOME, OUR STORY, FREE CONSULTATION, BEFORE & AFTER, LOCATIONS, DOCTORS, and IN THE NEWS. The main content area features two side-by-side photos of a woman's face, labeled "BEFORE" and "AFTER". To the right of these photos is a video player with a "Play" button and the text "Scroll Over Above Video & Click Play to View" and "Requires Flash".

On October 10, 2006, WCAU-TV aired an investigative report, "conveying that the Lifestyle Lift procedure was not all it was cracked up to be." *L.L., Inc.* 2008 WL 1923261 at *1. The broadcast did not include any of the recorded material from the undercover visit to the New Jersey clinic. The report featured quotes from the Bucky interview, four of which the plaintiffs allege to be defamatory. The plaintiffs also took issue with statements made by Cahn and one of the unsatisfied Lifestyle Lift patients.

(Continued on page 18)

Summary Judgment Denied on Libel Claims Over TV News Report

(Continued from page 17)

In addition to defamation, plaintiffs claimed that the undercover reporters' recording on Lifestyle Lift premises after signing an anti-recording contract constituted trespass. The defendants moved for summary judgment on both the defamation and trespass claims. Plaintiffs moved for summary judgment on the trespass claim and moved to seal certain filed documents.

Trespass Claim

The court applied New Jersey law to the trespass claim. New Jersey, the court reasoned, had a more significant interest in the claim because it was the site of the conduct and the alleged injury. But the court dismissed the claim without prejudice, finding insufficient guidance under New Jersey law to decide whether an alleged fraud can vitiate consent to enter a person's land. The court discussed Judge Posner's decision in *Desnick v. ABC, Inc.*, 44 F.3d 1345, 1351-53 (7th Cir. 1995), but could not determine if New Jersey would apply the decision here where the defendants signed a form saying they would not record.

Defamation Claims

Lifestyle Lift identified six allegedly defamatory statements made during the WCAU-TV broadcast; the court found that all six could be found defamatory by a jury and denied defendants' motion for summary judgment.

After determining Lifestyle Lift to be a limited purpose public figure, the court considered each statement in turn, noting the defamatory implications and possible basis for finding actual malice.

The first statement was from Cahn, who stated that the "former patients say they did not sign consent forms about the risks, but insist that they were sold and what they were sold they didn't get." The court asserted that the "clear implication" of this statement was that the plaintiff misrepresented the risks, benefits, and results of the procedure to its patients.

Noting that the informed consent form which patients must sign indicates that the procedure does not fully halt the aging process and warns that patients will have scars, swell-

ing and bruising, the court held that the statement could be considered substantially false. The court also held that a jury could find evidence of actual malice if it were to credit the testimony of Dr. Kent, who claimed he told Cahn that both consultants and physicians review the risks and benefits of the procedure with patients.

The next statement alleged to be defamatory came from a former patient, who erroneously described the procedure as one where physicians "take your skin and roll it up and stick it behind your ear." The court noted that there is "no rule that a layperson's description of a technical procedure is non-defamatory as a matter of law" and found the statement to imply that the plaintiffs' procedure is a "form of quackery." *Id.* at *22. Because Cahn had witnessed the procedure and Kent had explained the way it actually works, the court held that a jury could find actual malice.

Four quotes from Dr. Bucky were alleged to be defamatory. The court found that Bucky's statements accused the plaintiffs of performing an obsolete, frowned upon procedure that does not produce lasting results. Bucky also suggested that Lifestyle Lift physicians were unqualified, that the procedure would not work on most patients, and that its doctors engaged in substandard practice. Because Kent and, in some cases, other doctors interviewed had contradicted nearly all of these claims when speaking with Cahn, the court found that actual malice could be found.

Document Seal Request

Finally the court rejected in most part plaintiff's request to seal numerous documents filed in connection with the motions for summary judgment. Noting that the filings are presumptively open to the public, the court held that information about plaintiff's sales and marketing practices included in the motions were not trade secrets. Moreover, patients' interest in privacy could be protected by redacting any identifying information.

Plaintiff is represented by Draper & Rubin, the Weintraub Group, the Zorn Law Firm, and Robert A. Dunn, all in Michigan. NBC Universal is represented by James E. Stewart and Laurie Michelson, Butzel Long, Michigan and Julie Rikelman, NBC Universal, Inc., New York.

NY Court Applies *Dendrite* Standard: Orders Disclosure of Identifying Information

Pseudonymous Posters Allegedly Defamed Ex-Congressman

By Mark Fowler

A judge in Westchester County New York adopted the four-part test set forth in *Dendrite v. Doe* in ruling on a case involving a subpoena to compel disclosure of information that might lead to the identification of individuals who posted pseudonymous commentary on an online forum. *Ottinger v. The Journal News*, No. 08-03892 (NY Sup. Ct. July 1, 2008) (Bellantoni, J.).

Background

Former U.S. Representative Richard Ottinger (who also served as Dean of Pace University Law School during the 1990s) and his wife filed a John Doe lawsuit alleging defamation arising out of series of pseudonymous comments on a forum appearing on the LoHud.com website, maintained by *The Journal News*, a daily newspaper owned by Gannett.

The comments alleged a series of improprieties relating to the Ottingers' renovations of their house in Mamaroneck, New York. For example, according to the complaint, a poster using the screen name "SAVE 10543" stated that "it now appears that it has been proven that the Ottinger's [sic] . . . have presented a FRAUDULENT deed in order to claim that they own land under water . . ." and that "[t]hey paid the right people off" and "have been very generous in greasing the wheels of corruption" (emphasis in original).

According to court documents, a second poster, using the screen name "hadenough," wrote about the "Ottingers [sic] criminal behavior" and "their illegal scam." A third poster (the complaint says), using the screen name "aoxomoxoa," contended that a local town official "took the juice from Richard and June Ottinger to the tune of \$25,000 so they could build their starter Taj Mahal on a substandard lot" and that "[t]heir money bought [another town official]."

The complaint also specified several other allegedly false and defamatory statements. The plaintiffs issued a subpoena to *The Journal News* seeking email addresses and IP addresses relating to the three screen names.

The newspaper moved to quash the subpoena, arguing that the Ottingers should have proceeded instead by a special proceeding seeking pre-action discovery and that, in any event, the information requested need not be disclosed unless the Ottingers could meet the four-part test set forth in *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), and its progeny. Pre-action discovery in New York requires, among other things, evidence that the party seeking discovery has a meritorious cause of action and a showing that the information being sought is material and necessary to the actionable wrong.

The First Hearing

At an initial hearing on May 28, 2008, Acting Supreme Court Justice Rory Bellantoni converted the case to a special proceeding, as the newspaper had advocated. He agreed that the First Amendment "protects the right of a person to speak anonymously," while noting that such protection is not absolute. He also indicated that he would follow the *Dendrite* approach in analyzing the respective rights of the Ottingers and the posters. As an initial step, he ordered counsel for the Ottingers to post a notice on two relevant LoHud.com forums indicating that the Ottingers were seeking identifying information relating to the three screen names and making clear that posters could intervene in the proceeding on or before June 25, 2008, "individually or by counsel," "anonymously or otherwise." The notices themselves provoked spirited online commentary.

The Second Hearing

At the continuation of the hearing on June 25, no posters appeared. Judge Bellantoni then proceeded to apply the remaining three steps in the *Dendrite* analysis. He found that the Ottingers had identified the exact statements they were complaining about, as *Dendrite* and New York pleading rules require. He found that at least some of the statements could be deemed defamatory, noted that the Ottingers had come forward with factual evidence on the merits in

(Continued on page 20)

NY Court Applies *Dendrite* Standard: Orders Disclosure of Identifying Information

(Continued from page 19)

affidavit form supporting each element of the cause of action -- except one.

The newspaper had argued that Richard Ottinger – and perhaps his wife as well – would qualify as public figures and therefore would be required to prove actual malice. As to this element, the judge adopted the approach set forth in *Doe v. Cahill*, 884 A.D.2d 451 (Del. 2005), holding that the Ottingers were not required to make a showing on actual malice because such information could not reasonably be expected to be in their possession at this early stage in the proceedings, given the anonymity of the potential defendants.

The judge indicated that he had also balanced the First Amendment right of anonymous speech against the strength of the case presented by the Ottingers, as the *Dendrite* standard requires.

First NY Case to Apply Full Dendrite Test

The court held that, because the Ottingers had made the requisite showings under the *Dendrite* standard, *The Journal News* should disclose any potentially identifying information that it had collected concerning the pseudonymous posters. The case appears to be the first in New York to apply the *Dendrite* standard across the board. An earlier case, *Greenbaum v. Google, Inc.*, 18 Misc.3d 185 (Sup. Ct. N.Y. County 2007), cited *Dendrite* with approval, but did not have occasion to apply all elements of the test because the court found that the statements at issue were not defamatory.

Mark Fowler and Glenn Edwards of Satterlee Stephens Burke & Burke LLP of New York City represented The Journal News. Russell Ippolito of Tarrytown, New York, represented the Ottingers.

©2008

MEDIA LAW RESOURCE CENTER, INC.
520 Eighth Ave., North Tower, 20 Fl.
New York, NY 10018

BOARD OF DIRECTORS

Ralph P. Huber (Chair)
 Dean Ringel
 Dale Cohen
 Stephen Fuzesi, Jr.
 Henry S. Hoberman
 Marc Lawrence-Apfelbaum
 Karole Morgan-Prager
 Kenneth A. Richieri
 Elisa Rivlin
 Susan E. Weiner
 Kurt Wimmer

STAFF

Executive Director: Sandra Baron
 Staff Attorney: David Heller
 Staff Attorney: Eric Robinson
 Staff Attorney: Maherin Gangat
 MLRC Fellow: Carolyn Conway
 MLRC Institute Fellow: Jennifer Liebman
 MLRC Administrator: Debra Danis Seiden
 MLRC Publications Assistant: Philip J. Heijmans

Georgia Federal Court Dismisses Defamation and Emotional Distress Claims Against CBS Radio

Statements on Radio Show Were Hyperbole

By Michael Berry

On July 15, 2008, Judge Orinda D. Evans of the Northern District of Georgia dismissed a suit brought by the legendary music group The O'Jays and one of its lead singers, Walter Williams, Sr., against CBS Radio East Inc. and the two hosts of Atlanta's most popular morning radio show. *O'Jays Gigs, Inc. v. Smith*, No. 1:08-CV-0110-ODE (N.D. Ga. July 15, 2008).

The suit arose from comments the two hosts allegedly made on CBS's V-103 station about an incident involving Williams and one of the hosts before a recent O'Jays concert. The host allegedly told listeners that Williams was "rude" and "abusive," and Williams claimed the host's statements were false and defamatory. He also claimed that the radio host's conduct during the broadcast incited the station's audience against him and inflicted emotional distress.

Judge Evans disagreed, holding that the hosts' statements were opinion and that the emotional distress claim could not stand under the First Amendment.

Background

According to plaintiffs' complaint, in September 2007, Williams was scheduled to be interviewed on the V-103 Morning Show about the group's upcoming concert in Atlanta. When Williams called the station for the interview, however, the employee who answered the phone did not transfer the call, and the interview did not take place.

On the night of the concert, Wanda Smith, one of the Morning Show's hosts went to the O'Jays' dressing room to apologize to Williams. The plaintiffs alleged that the apology "turned out to be a hostile explanation." When Williams "refused to entertain" Smith's explanation for the cancelled interview, Smith allegedly threatened to "roast his ass" on the Morning Show and purportedly "created such a ruckus that she was asked by several individuals to leave" the dressing room.

On the next Morning Show, Smith discussed the incident, purportedly telling listeners that she tried "to offer a sincere apology" and that Williams "not only refused to accept her heartfelt apology, but that he was so rude to her that he was on

the verge of physically attacking her." According to the complaint, Smith also said that Williams has "an abusive personality" and "made her cry."

After Smith explained what happened, her co-host, Frank "Ski" Rodriguez allegedly said that "he and 'his boys from Baltimore' were willing" to hurt Williams. The two hosts then played O'Jays' music that allegedly had been "edited . . . to include sounds of 'gun cocking,'" which the complaint described as a "mock assassination."

After "learning of the broadcast," Williams allegedly was "forced to seek medical treatment," and the O'Jays were "compelled" to hire a bodyguard. They subsequently filed suit against CBS Radio and the two hosts, seeking to recover compensatory and punitive damages. In their complaint, plaintiffs claimed that the hosts' statements were defamatory and that their on-air conduct was negligent and intentionally inflicted emotional distress. Plaintiffs also asserted claims for conspiracy, negligent hiring and retention, and negligent training and supervision. CBS Radio and the two hosts moved to dismiss each of the claims at the outset, arguing that the plaintiffs had failed to state any claim as a matter of law.

District Court's Opinion

The district court granted the defendants' motion and dismissed each of plaintiffs' claims with prejudice. First, in evaluating the defamation claim, the court considered the context in which the statements were made – here, a morning radio talk show. Based on this context, Judge Evans quickly disposed of plaintiffs' defamation claim. She held that Smith's on-air statements merely reflected her personal opinion of Williams' personality and that no reasonable listener would believe that she was accusing the singer of committing a crime, as plaintiffs had alleged in their complaint. Judge Evans emphasized that "Smith's statements are precisely the type of subjective opinion and rhetorical hyperbole commonly expressed on radio talk shows and are not actionable because a reasonable listener would not understand the statements to convey actual facts in this context."

It is worth noting that in making this determination, Judge

(Continued on page 22)

Georgia Federal Court Dismisses Defamation and Emotional Distress Claims Against CBS Radio

(Continued from page 21)

Evans considered only the pleadings and not the broadcast itself, which neither party had submitted to the court. Indeed, although plaintiffs' had argued that the court could not dismiss their complaint without considering the actual broadcast, Judge Evans pointed out that on a motion to dismiss the court could determine whether plaintiffs had stated a viable claim based solely on the sufficiency of their pleadings.

Negligence & IIED Claims

The court then turned its attention to the negligence and emotional distress claims, which were based on the "gun-cocking sounds" edited into the O'Jays' songs and the hosts' alleged comments that "this is what the O'Jays would sound like without" Williams. Judge Evans began her discussion of the two claims by recognizing that "[t]ort claims based on expressive activity are subject to the strict limits of the First Amendment."

In this case, defendants' alleged activity was constitutionally protected because they had not incited imminent lawlessness. Moreover, plaintiffs failed to state an emotional distress claim under Georgia law, which holds that such a claim cannot be based on conduct that is not directed toward the plaintiff and instead rests on statements broadcast to the public through mass media. Likewise, plaintiffs could not state a negligence claim because (1) it was simply an impermissible effort to disguise a defeated defamation claim, and (2) broadcasters and publishers do not owe a duty to their listeners and readers and therefore no duty was breached.

Judge Evans dismissed the remaining claims because, among other things, each requires an underlying tort to be viable, and plaintiffs had failed to state any cognizable claim.

Plaintiff's have filed a notice of appeal to the Eleventh Circuit.

Defendants Wanda Smith, Frank "Ski" Rodriguez, and CBS Radio East Inc. are represented by Anthony Bongiorno and Hazel-Ann Mayers of CBS, Michael D. Sullivan and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. in its Washington and Philadelphia offices, and Bruce P. Brown and Jeremy T. Berry of McKenna Long & Aldridge LLP in Atlanta. Plaintiffs O'Jays Gigs, Inc. d/b/a The O'Jays and Walter Williams, Sr. are represented by Regina Sledge Molden and Oni A. Holley of Molden Holley Fergusson & Thompson, LLC.

MLRC MediaLawLetter Committee

Jay Ward Brown (Chair)

David Tomlin (Chair)

Dave Heller (Editor)

Robert D. Balin

Katherine M. Bolger

Thomas M. Clyde

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

S. Russell Headrick

Russell T. Hickey

David Hooper

Jonathan Katz

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

Supreme Court of Canada Revives “Fair Comment” Defence

By Brian MacLeod Rogers

The Supreme Court of Canada took Canada’s libel law a step toward greater protection for free expression in its first ruling on the common law defence of fair comment in nearly 30 years in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (June 27, 2008) (www.canlii.org). As Justice Binnie put it:

We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones. ... Public controversy can be a rough trade, and the law needs to accommodate its requirements.

The Court allowed the appeal unanimously (9-0, with two concurring justices writing separate reasons) and restored the trial judgment in favour of the defendants that had been reversed by the British Columbia Court of Appeal. The Court also signalled its interest in the defences of qualified privilege and public interest responsible journalism, which are the subject of another media libel appeal that is pending before it, *Cusson v. Quan*, [2007] 87 O.R. (3d) 241 (C.A.); 2008 CanLII 18972 (SCC) (now scheduled to be heard February 16, 2009).

The Court’s ruling, written by Justice Binnie for seven members of the Court, came after a 15-day trial and three day appeal over a four-minute radio commentary by Rafe Mair, “a well-known and sometimes controversial commentator on matters of public interest in British Columbia” who “has a reputation for provoking controversy.” In the October 1999 broadcast, he criticized a “family values” social activist, Kari Simpson, who opposed the public school system being used to teach tolerance towards homosexuals, and he compared her to the likes of Adolf Hitler, George Wallace and Orval Faubus. At trial, the judge found the words meant not just that she was a “dangerous bigot”, as Mair intended, but that she “would condone violence toward gay people”. Mair had made it clear he did not view Simpson as violent herself and disavowed the latter meaning. This raised a central issue of whether a subjective honest belief in the defamatory meaning must be held by someone relying on the fair comment defence, as had been held by the Supreme Court of Canada in its last case concerning the defence, *Chernesky v. Armadale Publishers Ltd.*, [1979] 1

S.C.R. 1067. That ruling had led to legislative amendments in almost every province to undo the decision’s adverse effects.

As illustrated by the *WIC Radio* case itself, the fair comment defence had proven increasingly problematic for libel defendants in Canadian jurisdictions, with courts holding that statements were ones of fact where opinions were too blunt or that, in effect, comments were “unfair” and “unsupportable” in light of all the available facts. There were divergent approaches to what was meant by “honest belief” and whether a defendant had to believe every meaning of the words complained of. All this meant the defence could not be counted on, leading to adverse trial results and impetus to settle cases prior to trial.

Thirty years later, the Court sided with the dissenting minority in *Chernesky* and set out this test for the defence:

the comment must be on a matter of public interest;

the comment must be based on fact;

the comment, though it can include inferences of fact, must be recognizable as comment;

the comment must satisfy the following objective test: Could any [person] honestly express that opinion on the proven facts?

even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

This is no more than the traditional test for fair comment accepted elsewhere by common law courts. However, the Court went on to elaborate on this test and made it clear that it should be applied robustly to protect free expression, undoing damage of various lower court rulings after *Chernesky*.

On the first three factors, the Court emphasized that a generous approach should be taken. With respect to what should be regarded as comment and matters of public inter-

(Continued on page 24)

Supreme Court of Canada Revives “Fair Comment” Defence

(Continued from page 23)

est, it observed: “The onus on these two issues is relatively easy to discharge. The public interest is a broad concept. The cases establish that the notion of ‘comment’ is generously interpreted.” A broad approach should also be taken to what is required by way of a factual foundation. “The comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made”; it is enough that facts may be sufficiently “notorious” that the audience already understands them. However, the onus still lies with the defendants to prove the facts are true. “If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available.”

Although it refused to eliminate entirely any need for an “honest belief,” the Court at least restored it to an objective test, following the approach taken elsewhere under the common law. Further, the Court clearly rejected the notion that the facts had to “support” the opinion: “The addition of a qualitative standard such as “fair-minded” should be resisted. “Fair-mindedness” often lies in the eye of the beholder...the trier of fact is not required to assess whether the comment is a reasonable and proportional response to the stated or understood facts.” In fact, all that is required is “the existence of a *nexus* or relationship between the comment and the underlying facts....” This almost matches the Media Coalition’s position on the appeal that a defendant need only establish that the opinion relates to the proven facts. The Court confirmed that the critical question should be: “Could any man honestly express that opinion on the proved facts...however prejudiced he may be, however exaggerated or obstinate his views?”; “the operative concept was ‘honest’ rather than ‘fair’ lest some suggestion of reasonableness instead of honesty should be read in.”

Two members of the Court would have gone even further and eliminated any need for “honest belief,” except possibly with respect to the issue of malice. As one of them put it:

If objective honest belief means the honest belief of anyone, no matter how “prejudiced... exaggerated or obstinate” in his or her views, I cannot think of an example in which the test of objective honest belief could not be met once it is demonstrated that the comment has a basis in true

facts. In my respectful view, the test of objective honest belief adds only an unnecessary complexity to the analysis of fair comment. (Rothstein J.)

With respect to malice – “An indirect or improper motive not connected with the purpose for which the defence exists” – the onus remains on the plaintiff, and in the Court’s view, “proof of malice on the part of the media is generally very difficult.” This requires the plaintiff to prove “subjective malice” on the defendant’s part as “the dominant motive of the particular comment”.

Throughout his analysis on behalf of seven members of the Court, Justice Binnie made the commitment to protecting reputation very clear, treating it as a fundamental value, and holding that the law of defamation must balance “the respect for individuals and protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the ‘very life blood of our freedom and free institutions.’” “An individual’s reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to ‘chill’ freewheeling debate on matters of public interest.”

However, the Court included a number of comments specifically favouring free expression and the need to strengthen the libel defences available, especially to the media, recognizing “their importance in our public life”. Indeed, Justice Binnie briefly reviewed the developing law of qualified privilege and the “responsible journalism” defence in other common law jurisdictions. While noting resolution of the issues would await another appeal, he referred to important cases in England, Australia and New Zealand and stated:

the Canadian law of qualified privilege will necessarily evolve in ways that are consistent with *Charter* values. At issue will be both the scope of the qualified privilege (*Reynolds* is broader) and whether the burden of proof of responsible journalism should lie on the defendant (*Reynolds*) or irresponsible journalism on the plaintiff (*Lange v. Atkinson*).

(Continued on page 25)

Supreme Court of Canada Revives “Fair Comment” Defence

(Continued from page 24)

Perhaps the most important signal for future cases is contained in the following passage:

The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get “spiked”, the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but on actions launched simply for the purpose of intimidation. Of course “chilling” false and defamatory speech is not a bad thing in itself,

but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.

Brian MacLeod Rogers (Toronto) was counsel for intervenor, Media Coalition (Canadian Newspaper Association, Ad IDEM/Canadian Media Lawyers Association, British Columbia Association of Broadcasters, RTNDA Canada/The Association of Electronic Journalists, Canadian Publishers’ Council, Magazines Canada, Canadian Association of Journalists and Canadian Journalists for Free Expression). Dan Burnett of Owen Bird (Vancouver) was counsel for the Appellants, WIC Radio Ltd. and Rafe Mair. Lianne Potters acted for the plaintiff Kari Simpson. Robert Holmes of Holmes & King (Vancouver) represented intervenor, British Columbia Civil Liberties Association, and Professor Jamie Cameron (Osgoode Hall Law School of York University) with John McCamus and Matthew Milne-Smith of David Ward Phillips & Vineberg LLP (Toronto) acted for the Canadian Civil Liberties Association.

Now Available: Basic Guide to Employment Defamation and Privacy Law

This pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

ORDER FORM

QUANTITY	TITLE	PRICE	TOTAL
	Basic Guide to Employment Defamation and Privacy Law	\$ 3 each	
		Sales Tax (New York State orders only)	
		Total	

Name: _____

Firm/Organization: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____ E-mail: _____

Make check payable and send order to:
Media Law Resource Center
 520 Eighth Ave., North Twr. 20th Fl.
 New York, NY 10018

Swiss Courts Refuse Prior Restraint of AP Article

By Dave Tomlin

A Swiss appeals court has upheld a trial court's refusal to order The Associated Press not to name a Swiss commodities importer in an upcoming article about the use of child labor in African gold mines.

The court agreed with the trial court's conclusion ([ruling here](#)) that it could not censor or suppress an article in advance without violating laws protecting media freedom and free expression.

AP reporters had contacted the import company, Decafin SA of Geneva, as they attempted to trace the path of gold from the tiny "bush mines," where the reporters observed young children working in deplorable conditions, to European gold markets and onward to manufacturers of jewelry and other consumer products.

The reporters watched as a trader's representative bought the bush gold at the mines in Senegal, then tracked it to the offices of an exporter in Mali whose Swiss trading partners included Decafin.

Decafin told AP it did not import any gold from mines worked by children. The company sued AP and the Geneva-based reporter working on the article, arguing that

under Swiss libel law and unfair competition law it was entitled to protection from the damage its reputation would suffer from any article linking Decafin to child-mined gold.

Decafin's court filings included assertions by both Decafin and the Malian exporter that Decafin's gold purchases from the exporter came from mines in Guinea, not Senegal.

The trial court ruled against Decafin in March, and Decafin appealed. The appeals court decision in June concluded that the court could not legally presume that the news agency would link Decafin to child labor without supporting facts.

The court held that "before the appearance of the litigious article, it cannot be established with sufficient probability, except by violating arts 16 and 17 Cst. (freedom of opinion and information and media freedom, respectively), that the journalists will present the facts in such a way that the unforewarned average reader will be obliged to make this connection, if they have no formal proof of the connection."

Dave Tomlin is Associate General Counsel for The Associated Press.

MLRC Calendar

PLEASE VISIT **WWW.MEDIALAW.ORG** FOR MORE INFORMATION

September 17-19, 2008
NAA/NAB/MLRC Media Law Conference
Chantilly, VA

November 12, 2008
MLRC ANNUAL DINNER
New York City

November 13, 2008

*MLRC Defense Counsel Section Annual Meeting and LUNCH

Eleventh Circuit Rules for National Geographic in CD-ROM Copyright Case

Compilation of Magazine Issues a Permitted Revision

By a 7-5 vote, the Eleventh Circuit Court of Appeals ruled in favor of the National Geographic Society on a copyright infringement claim, holding that a CD-ROM set containing over a hundred years of magazine issues was a permitted revision of a collective work under Section 201(c) of the Copyright Act. *Greenberg v. Nat'l Geographic Soc'y*, No. 05-16964, 2008 WL 2571333 (11th Cir. June 30, 2008).

In related litigations, the Second Circuit Court of Appeals also ruled in favor of the National Geographic, affirming summary judgment on state law breach of contract claims brought by freelance contributors who had also sued and lost copyright claims against the publisher for the CD-ROM set. See *Auscape Int'l v. Nat'l Geographic Soc'y*, 2008 WL 2595191 (2d Cir. June 27, 2008) and *Ward v. Nat'l Geographic Soc'y*, 2008 WL 259518 (2d Cir. June 27, 2008) (Cabranes, Katzman, Parker, JJ.).

Some of the plaintiffs in the Second Circuit cases have filed a petition for rehearing. The *MediaLawLetter* will publish a more detailed article by defense counsel after these petitions are resolved.

Background

In 1998, National Geographic released "The Complete National Geographic" on CD-ROM – an exact image-based reproduction of every National Geographic Magazine published between 1888 and 1996. Freelance photographer Jerry Greenberg, who had contributed photos to the magazine, sued for copyright infringement. An Eleventh Circuit panel had previously ruled in his favor, *Greenberg v. Nat'l Geographic Society (Greenberg I)*, 244 F.3d 1267 (11th Cir. 2001), but later reversed in light of the U.S. Supreme Court's decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). See *Greenberg v. Nat'l Geographic Soc'y (Greenberg II)*, 488 F.3d 1331, vacated upon grant of plaintiff's petition for rehearing en banc, 497 F.3d 1213 (11th Cir. 2007).

Eleventh Circuit's En Banc Decision

Writing for the majority, Judge Rosemary Barkett reasoned that the Supreme Court in *Tasini* gave "tacit approval" to microform-type compilations. Emphasizing that "contextual fidelity to the original print publication is the bedrock of any 201(c) analysis," the court observed that what the user of the set sees on

his or her computer screen is a reproduction that differs from the original only in the size and resolution of the photographs. Every article, advertisement, and photograph appears as it did in the original paper copy of the magazine.

Moreover, new elements in the CD-ROM set, including an introductory montage, a search function and other software functionality, did not create a "new collective work" outside the scope of § 201(c). These new elements, the court stated, "are no different than microform's "new" elements, such as a zoom lens or the ability to print only a portion of a document. These additional features do not destroy the original context of the collective works."

The very sharp dissenting opinion stressed that freelance contributors should be allowed to "share in the publisher's profits," and stated that the publisher's arguments were "bereft of logic, legal merit, and...totally disingenuous."

Second Circuit Rejects Contract Claims

Several freelancers had also sued over the CD-ROM set in the Second Circuit. The federal district court and Second Circuit held that the CD-ROM set was a privileged under Section 201(c) of the Copyright Act. See *Faulkner v. Nat'l Geographic Soc'y*, 294 F. Supp.2d 523 (S.D.N.Y. 2003), *aff'd*, 409 F.3d 26, (2nd Cir. 2005).

This month the Second Circuit resolved remaining state law contractual claims brought by the *Faulkner* plaintiffs and other freelance contributors against National Geographic. The freelancers argued that they were contractually entitled to payments for use of their photos in the CD-ROM set. In both the *Auscape* and *Ward* cases, the Second Circuit affirmed the district court's grant of summary judgment in favor of National Geographic, finding no triable issue of fact. The court noted that the contract language providing for payments for "further use" referred to use outside of the original context in which the contribution was published. Citing the absence of any explicit contractual provisions in combination with the parties' previous "course of dealings," the Second Circuit concluded that National Geographic did not breach its contractual obligations by reproducing freelancers' contributions in CD-ROM set.

Plaintiff Greenberg was represented by Norman Davis, Squire, Sanders & Dempsey, LLP, Miami. National Geographic was represented by Robert G. Sugarman, Weil, Gotshal & Manges, LLP, New York; Kenneth Starr, Kirkland & Ellis, LLP, Washington, DC; and Stephen N. Zack, Boies, Schiller & Flexner, LLP, Miami.

First Circuit Affirms Dismissal of Copyright / Misappropriation of Trade Secrets Case Against Oprah and ABC

Plaintiff Claimed Show Was Based on Her Idea

By Chip Babcock

A \$500 million copyright infringement and misappropriation of trade secrets case against Oprah Winfrey, Harpo Productions, Inc. and ABC, Inc. was recently dismissed for failure to state a claim as to the corporate defendants and for lack of personal jurisdiction as to Oprah, and that dismissal has now been affirmed by the United States Court of Appeals for the First Circuit in an unanimous *per curiam* opinion. *Tracy v. Winfrey*, No. 07-1630, 2008 WL 2357943 (1st Cir. June 11, 2008) (Boudin, Torruella, Lynch, JJ.).



Background

The plaintiff, Darlene Tracy, filed a pro se complaint arguing that the then-upcoming ABC network program “Oprah’s Big Give” violated her intellectual property rights. Plaintiff alleged that she had forwarded to Harpo a copy of her “intellectual property” titled “The Philanthropist,” and that she subsequently sent a business proposal for the program to the company. Her argument was that “Big Give” had been copied from “The Philanthropist,” and she sought an *ex parte* temporary restraining order against the network program. The TRO was denied.

Harpo and ABC responded to the suit with a motion to dismiss for failure to state a claim, arguing that under Massachusetts law plaintiff’s admitted voluntary submission of the material to Harpo removed any claim of misappropriation. The corporate defendants also argued that the plaintiff had not plead a sufficient claim of copyright infringement. Winfrey moved to dismiss for lack of personal jurisdiction and, in the alternative, for failure to state a claim.

The trial judge granted the motions and plaintiff, now with the benefit of counsel, appealed the dismissal for failure

to state a claim. She did not appeal Winfrey’s jurisdictional ruling.

First Circuit Decision

Plaintiff’s counsel initially moved to dismiss the appeal, arguing that no final judgment had been entered by the trial court. In a written order last October, the First Circuit rejected this contention. On the merits, the Court held that Ms. Tracy had “voluntarily and without reservation submitted her material to defendants,” and this therefore precluded her claim. It added that counsel’s claim for a “statutory attorney’s lien” was without merit because the “statute requires that a judgment have entered in the client’s favor and no such judgment has entered in this case.”

Chip Babcock and Nancy Hamilton of Jackson Walker, L.L.P. in Dallas and Robert Bertsche of Prince, Lobel, Glosky & Tye, LLP in Boston represented the defendants. The plaintiff was represented on appeal by Craig Tiedemann of the Tiedemann Law Firm in Boston.

Court Dismisses Copyright Claim Over 1980s Parody Film

Use of Three Words from Song was De Minimus and Fair Use

By Lincoln D. Bandlow

Any fan of music from the 1980s worth his or her salt knows the cheesy song “Mr. Roboto” (the “Song”) from the group Styx. On July 7, 2008, Judge Real of the United States District Court for the Central District of California, on a motion to dismiss, held that the use of three words from the Song in the 2007 film “Kickin’ It Old Skool” (the “Film”), a comedy that parodies icons of the 1980s, did not give rise to copyright infringement liability. *Wixen Music Publishing Inc. v. 20th Century Fox Home Entertainment LLC et al.*, No. CV-08-112-R (C.D. Cal. July 7, 2008).

The Court held that such a *de minimis* use was insufficient to establish liability, that the use was protected by the fair use doctrine and that the plaintiff, which had merely alleged that it was the administrator that represented the entity that owned the copyright in the Song, lacked standing to bring the action. Defendants, the producers and distributors of the Film, are now seeking to recover the attorneys’ fees incurred in the matter.

Background

The Film, which stars actor/comedian Jamie Kennedy, is a comedy that takes aim at the styles, trends, icons, catchphrases, popular music and other cultural symbols associated with the 1980s. The plot centers around Justin, who falls into a coma in the year 1986 and awakes in 2006. Once awoken, Justin attempts to raise money to pay for his medical bills by reassembling his old breakdancing group, *The Funky Fresh Boys*, for a competition. One of the members of his breakdancing group is Aki, who sometimes speaks Japanese, and is the brunt of many jokes about his Asian heritage. He is known for his dance move specialty being the “robot.” The Film includes a seven second exchange of dialogue between Justin and Aki that formed the basis for the claim.

In a scene about forty-five minutes into the Film, *The Funky Fresh Boys* are practicing their dance moves for the competition. Justin asks Aki to do the dance move the “robot” like he did when they were kids. Aki attempts to do so, but his efforts are,

in a word, pathetic. Justin implores Aki to stop what he is doing and, in a very serious tone, Justin says “Aki, it’s time to say *domo arigato* and find your inner roboto.” He then says “*domo*” to Aki, who responds “*domo*” and they both repeat “*domo*” again (hereinafter the “Film Dialogue”). The characters do not “sing” any of these words and there is no music playing in the background during the scene. The entire Film Dialogue amounted to less than 1 percent of the 109 minute long film and the entire scene that includes the seven seconds of Film Dialogue lasted one minute and twenty-three seconds, or 1.3 percent of the Film.

In addition to appearing in the Film, the scene with the Film Dialogue was one of a number of scenes that was featured in the two minute, twenty-nine second long trailer (the “Trailer”) for the Film. The Trailer consisted of rapid-fire scenes from the Film that highlight its *raison d’être*: skewering cultural icons from the 1980s. The seven seconds of Film Dialogue, exactly as it is shown in the Film, appeared a bit more than halfway through the Trailer.

The Claim

domo arigatodomo arigatodomo arigatodomo arigatodomo arigato

Wixen Music Publishing, Inc. (“Wixen”) asserted a single copyright infringement claim, alleging that Defendants wrongfully copied the lyrics “*domo arigato*, Mr. Roboto.” In fact, as set forth above, the Film never used the line “*domo arigato*, Mr. Roboto.” Rather, the line from the Film was “Aki, it’s time to say *domo arigato* and find your inner roboto.” That line appears nowhere in the

Song. Indeed, the Song never referred to “inner roboto” or even

to “roboto” standing alone. Moreover, Wixen focused particularly on the fact that the three words from the Song also appeared in the Trailer for the Film. Defendants filed a motion to dismiss.

Use Was De Minimus

It is a well-established principle in copyright law that trivial copying will not give rise to liability. *Newton v. Diamond*, 388 F.3d 1189, 1192 (9th Cir. 2004). This principle is based on the maxim *de minimis non curat lex*, *i.e.*, “the law does not concern itself with trifles.” *Id.* Thus, a use that is *de minimis* and falls be-

(Continued on page 30)

Any fan of music from the 1980s worth his or her salt knows the cheesy song “Mr. Roboto”

Court Dismisses Copyright Claim Over 1980s Parody Film

(Continued from page 29)

low the quantitative threshold of substantial similarity required to maintain a copyright action will not be subject to liability. *Sandoval v. New Line Cinema Corp.*, 147 F.3d 215, 217 (2d Cir. 1998). To determine this threshold, courts look to the amount of material that was copied, the length of time the work appears in the allegedly infringing work and its prominence in that work. *Id.*

Plaintiff argued that it was not the amount of material copied, but rather the “scale on which such copying takes place.” Such an argument, however, ignored the controlling Ninth Circuit decision in *Newton*. In *Newton*, defendants used in one of their songs a six second, three note segment of plaintiff’s song which was “looped” throughout so that this six second, three note segment appeared

over forty separate times in defendant’s song. *Newton*, 388 F.3d at 1192. Moreover, defendants included this sample on two other remixes. *Id.* Despite the fact that the allegedly infringing portion was used in three different songs and released worldwide, the Court found that “the limited scope of copying” was *de minimis* and thus an infringement claim failed as a matter of law. *Id.* at 1195-96.

Just like in *Newton* where the defendants used only a six second, three note segment from plaintiff’s composition, Defendants in this case used only *three* words from the Song which appeared in the Film for only seven seconds. Defendants did not even use a verbatim quote from Plaintiff’s Song. Thus, Defendants’ release of the Film had no bearing on whether Defendants’ use of three words was *de minimis* as a matter of law. Accordingly, the court concluded the use here was *de minimis* and did not rise to the level of substantial similarity to support a copyright infringement claim.

Claim Barred by Doctrine of Fair Use

Even though the Court determined that use of three words from the Song was *de minimis*, the Court also found that Plaintiff’s claim failed under the fair use doctrine, which “permits the use of copyrighted works without the copyright owner’s consent under certain situations.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 719 (9th Cir. 2007). The Copyright Act provides the framework for determining when the fair use of a work is

protected from liability, stating that a use “for purposes such as criticism [or] comment... is not an infringement of copyright.” 17 U.S.C. § 107. In particular, in the legislative notes that accompanied the fair use provision, Congress listed examples of the “sort of activities the courts might regard as fair use” and “named parody as one of these activities.” *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986).

In determining whether a fair use has been made, courts consider four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the

potential market for or value of the copyrighted work. 17 U.S.C. § 107. The four factors are not

treated in isolation, but must be weighed together in light of the policy to encourage “the development and evolution of new works.” *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 799-800 (9th Cir. 2003) (citing *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 577 (1994)).

“Purpose and Character of the Use”

The most important inquiry in reviewing the first factor is determining whether the use is “transformative.” *Perfect 10*, 487 F.3d at 720 (“central purpose” of first factor is determining “whether and to what extent the new work is transformative”). A work is transformative when the new work does not “merely supersede the objects of the original creation” but rather “adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message” (*Campbell*, 510 U.S. at 579) or where the defendant “changes a plaintiff’s copyrighted work or uses the plaintiff’s copyrighted work in a different context such that the plaintiff’s work is transformed into a new creation.” *Perfect 10*, 487 F.3d at 721; *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006) (use of concert posters in biography about Grateful Dead transformative). Even the making of an exact copy of a work “may be transformative so long as the copy serves a different function than the original work.” *Perfect 10*, 487 F.3d at 721-22. When, as here, the copyrighted work was used as raw material to further distinct, creative

(Continued on page 31)

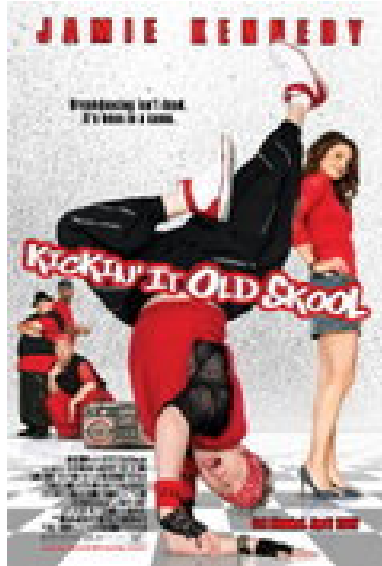
...the use here was de minimis and did not rise to the level of substantial similarity to support a copyright infringement claim

Court Dismisses Copyright Claim Over 1980s Parody Film

(Continued from page 30)

or communicative objectives, the use was transformative. *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006) (use of photograph in a collage painting was transformative).

In particular, parody, like other forms of comment or criticism, is a form of transformative fair use because it creates a new work by shedding light on an earlier work in a humorous way. *Campbell*, 510 U.S. at 579; *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 967 (C.D. Cal. 2007) (“Among the various forms of ‘transformative use’ is that of parody”). A parody “imitates the characteristic style of an author or a work for comic effect or ridicule,” or takes the “characteristic turns of thought and phrase in an author or class of authors” and “imitate[s them] in such a way as to make them appear ridiculous.” *Campbell*, 510 U.S. at 580 (footnotes omitted). Parody uses elements of a prior author’s work to “conjure up” the original as a known facet of modern culture and adds something new for humorous effect or commentary.



Elsmere Music, Inc. v. National Broadcasting Co., 623 F.2d 252, n.1 (2d Cir. 1980) (use of tune *I Love New York* for a Saturday Night Live comedy sketch *I Love Sodom* was fair use).

Here, Plaintiff, after conceding that parody is “protected as legitimate appropriation,” simply concluded without elaboration or support that “Defendants’ use [did] *not* constitute parody, so this factor is in plaintiff’s favor.” The Court found this argument unavailing. Instead it found that the Film Dialogue “conjured up” the 1983 song *Mr. Roboto* for the purpose of parodying it and other cultural icons from the 1980s. Plaintiff’s Song, a melodramatic social commentary on the threat of future technology, was clearly parodied in the Film, which used three words from the Song to poke fun at the absurdity of the Song’s frightening warning by, in fact, suggesting that robots are better equipped to advance the goals of the Film’s protagonists to find their “inner robot” and win a dance contest. Moreover, the Film’s Dialogue parodied the Song’s noted use of the common Japanese phrase “*domo arigato*” by having a character in the

Film speak that phrase to another character in the Film – an American of Japanese decent who was clearly annoyed by his friends’ constant references to his Asian heritage.

Thus, the purpose and character of the use factor favored Defendants because the use was transformative. Indeed, even though Defendants did not need to show that the use was a “parody” for it to be protected under this factor; the undisputed evidence demonstrates that the use was just such a parody. See *Fisher*, 794 F.2d at 437 (29 second song “When Sonny Sniffs Glue” in a 40 minute comedy album that parodied the ballad “When Sunny Gets Blue” deemed a fair use). Thus, the first factor favored Defendants.

“Nature of the Copyrighted Work”

The second factor looks at the nature of the work that was copied, particularly at whether the work was creative or factual/historical and whether the copied work was previously published. *Perfect 10*, 487 F.3d at 723. Here, Plaintiff conceded that the three words used from the Song – “*domo arigato*” and “*roboto*” – were not particularly creative. Moreover, Plaintiff conceded that the Song was long ago published to the world. Finally, Plaintiff did not dispute that the second factor is “of limited usefulness where the creative work of art is being used for a transformative purpose” (*Bill Graham Archives*, 448 F.3d at 612) and thus the second factor “is not much help” in resolving a parody case “since parodies almost invariably copy publicly known, expressive works.” *Campbell*, 510 U.S. at 586 (fact that copied work was a creative song mattered little in the fair use analysis where defendant’s work was a parody).

Rather, Plaintiff simply asserted that the Song, in its *entirety*, was creative. The Film, of course, did not use the Song in its *entirety*. The insignificant manner in which Plaintiff addressed this factor comported with the manner in which this factor has been addressed by the courts in the context of parody/transformative uses. See 2 *Nimmer on Copyright*, 13.05(A)(2)(a) (2002) (“second factor more typically recedes into insignificance in the greater fair use calculus”). Accordingly, because the use was for the purpose of a transformative parody, the second factor favored Defendants.

“Amount and Substantiality of the Use”

The third factor asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole was “reasonable in relation to the purpose of the copying.” *Campbell*,

(Continued on page 32)

Court Dismisses Copyright Claim Over 1980s Parody Film

(Continued from page 31)

510 U.S. at 586. “[T]he enquiry will harken back to the first of the statutory factors, for ... the extent of permissible copying varies with the purpose and character of the use.” *Id.* “Parody’s humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.” *Campbell*, 510 U.S. at 588 (citing *Elsmere*, 623 F.2d at 253 n.1). “What makes for this recognition is quotation of the original’s most distinctive and memorable features, which the parodist can be sure the audience will know.” *Id.* Defendants may take the “heart” of the work to conjure up the Song for parody. *Id.*

Plaintiff conceded, as it had to, that only three words were used from the Song. Moreover, Plaintiff conceded that even those three words were not copied exactly. The only stab that Plaintiff took at this factor was to simply state that Defendants copied the most important words of the Song. Opp. at 8. Glaringly absent from Plaintiff’s Opposition was any discussion of the fact that a parody *must* use enough of the original work – in fact, often the “heart” of the work or “most distinctive and memorable features” of the original – to ‘conjure up’ at least enough of that original to make the object of its critical wit recognizable.” *Campbell*, 510 U.S. at 588 (citing *Elsmere*, 623 F.2d at 253 n.1). Thus, of course, the Film used some portions of the Song – even if they were considered the “heart” of the work – to conjure up the Song for commentary. See *Burnett*, 491 F. Supp. 2d at 970 (“there is no requirement that ‘parodists take the *bare minimum* amount of copyright material necessary to conjure up the original work’”) (original emphasis).

Plaintiff’s analysis also completely ignored the fact that Defendants used only *three* words from the Song that lasted all of seven seconds in the Film (less than .01 percent of the entire film). In fact, the barest reference to “*domo arigato*” and “*roboto*” was used to conjure up recognition of the Song. Accordingly, the third factor strongly favored Defendants.

“Effect of the Use on the Potential Market”

The fourth factor looks at the effect of the use on the market for the plaintiff’s work. This factor reflects the copyright law’s condemnation of the “copier who attempts to *usurp the demand* for the original work.” *Consumer Union of United States, Inc. v.*

General Signal Corp., 724 F.2d 1044, 1050 (2d Cir. 1983) (emphasis added). As stated by the Second Circuit, “[t]he theory behind the copyright laws is that creation will be discouraged if demand can be undercut by copiers. Where the copy does not compete with the original, this concern is absent.” *Id.* at 1051. Moreover, when analyzing the fourth factor, courts look at “the impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.” *Bill Graham Archives*, 448 F.3d at 614. “The economic effect of a parody ... is not its potential to destroy or diminish the market of the original – any bad review can have that effect – but rather whether it fulfills the demand for the original.” *Fisher*, 794 F.2d at 438. Infringement only occurs when a parody “supplants the original in markets the original is aimed at, or in which the original is, or has reasonable potential to become, commercially valuable.” *Id.*

When, as here, the use was a parody, “it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it. This is so because the parody and the original usually serve different market functions.” *Campbell*, 510 U.S. at 591 (citations omitted). “The unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market.” *Id.* at 592.

The Ninth Circuit addressed this issue in *Fisher* when it determined that the fourth fair use factor weighed in defendant’s favor because an original song and the parody served different potential markets. *Fisher*, 794 F.2d at 438. The same analysis applied here: nobody who had any interest in purchasing the Song was going to have that interest satiated by watching the Film and seeing a seven-second exchange of dialogue about a breakdancer finding his “inner roboto” to regain his dancing skills. In fact, the opposite was likely to happen: those watching the Film will be reminded of the iconic Song and will go out and purchase it. See *Hofheinz v. AMC Prods., Inc.*, 147 F. Supp. 2d 127, 140 (E.D.N.Y. 2001). Plaintiff argued that others have paid to license words from the Song for use in movies and television so this factor favored plaintiff. The simple assertion that plaintiff may have been deprived of a licensing fee, however, does not stave off a finding of fair use: “a copyright holder cannot prevent others from entering fair use markets merely by developing or licensing a market for parody, news reporting, educational or other transformative uses of its own creative work ... Copyright owners may not preempt exploitation of transformative markets.” *Bill Graham Archives*, 448 F.3d at 614-

(Continued on page 33)

Court Dismisses Copyright Claim Over 1980s Parody Film

(Continued from page 32)

15. Accordingly, because the Film does not supplant the Song in any market and Plaintiff's licensing practice is irrelevant to this factor, the fourth factor weighed in favor of Defendants.

Effect of the Trailer

In addition to the four factors, Plaintiff's allegations that Song fragments were incorporated into the Trailer as well as the Film itself did not change the fair use analysis. In this regard, *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109 (2d Cir. 1998) was directly on point. In *Leibovitz*, an advertisement (for a movie) that was a parody of a well known Annie Leibovitz photograph was protected as fair use.

Liebovitz argued that "even if the advertisement is appropriately considered a parody of her photograph, it should fail the fair use test because it was employed for commercial purposes and because it replicated more of her original than was necessary." *Id.* at 112. The Court rejected those arguments. Rather, the Court held that, despite the fact that the "Naked Gun" ad was a promotion for that film (and, indeed, despite the fact that the image in the "Naked Gun" ad never itself appeared in the film), the use was a protected fair use.

That reasoning applied with much greater force in this case. Unlike in the *Liebovitz* case, the Trailer did not consist of some entirely separate creation that includes images and references that are not, themselves, a part of the Film. Rather, the Trailer was simply a synopsis of various different scenes that are actually in the Film. Thus, the Trailer did not merely "reinforce the kidding comments" made in the Film: the Trailer *was* the kidding comments made in the Film. Thus, the Trailer was equally protected by the fair use doctrine as is the Film. See *Mastercard Intern. Inc. v. Nader 2000 Primary Committee, Inc.*, 2004 WL 434404 (S.D.N.Y. 2004) (holding that an "advertisement which uses elements of a copyrighted work 'does not necessarily ... [infringe] the copyright, if the product that it advertises constitutes a fair use of the copyrighted work'" (quoting *Steinberg v. Columbia-Delphi Productions*, 663 F. Supp. 706, 714 (S.D.N.Y. 1987))).

Defendants Sought a License for the Song

Plaintiff alleged that the producers sought a license from Plaintiff to use the Song in the Film but did not obtain such a

license. Those facts could have been disputed, but even assuming such permission had been sought, this did not stop a finding of fair use. "If the use is otherwise fair, then no permission need be sought or granted. Thus being denied permission to use a work does not weigh against a finding of fair use." *Campbell*, 510 U.S. at 585, n.18. "Parodists will seldom get permission from those whose works are parodied." *Fisher*, 794 F.2d at 437. "The parody defense to copyright infringement exists precisely to make possible a use that generally cannot be bought." *Id.* (court refused to penalize defendant for fair use of song after plaintiff expressly refused permission).

Indeed, in *Bill Graham Archives*, which involved the use of images of various Grateful Dead posters in a coffee table book about the band, the publisher had conducted substantial negotiations with the plaintiff to license the images for the book, including exchanging fee information, but the publisher ultimately decided to use the images without a license. The Court found that it was a protected fair use and disregarded any argument to the contrary based on the prior licensing negotiations: "a publisher's willingness to pay license fees for reproduction of images does not establish that the publisher may not, in the alternative, make fair use of those images." *Bill Graham Archives*, 448 F. 3d at 615. Therefore, whether defendants sought but did not obtain permission to use the Song was irrelevant in the fair use analysis.

Plaintiff's Standing to Bring the Claim

In addition to finding the use *de minimis* and a fair use, the Court found that Plaintiff lacked standing to bring this action. The complaint averred simply that Plaintiff "represents" Stygian, the author of Song. Plaintiff argued that this exclusive representation gave it standing to bring a copyright claim. A copyright holder's representative does not, without more, have standing to bring an action under the Copyright Act. Under Section 501(b), only the "legal or beneficial owner" of a copyrighted work can bring a claim for infringement. 17 U.S.C. § 501(b). That provision is exclusive: parties that lack a legal or beneficial ownership right in the registered work cannot bring claims under the Act.

Lincoln D. Bandlow, of Spillane Shaeffer Aronoff Bandlow LLP in Century City, Cal., represented the defendants in this matter. Plaintiffs were represented by Evan S. Cohen and S. Martin Keleti of Cohen and Cohen in Los Angeles, Cal.

Advisory Group Report Not a Public Record Under Maine's Freedom of Access Act

Defendants Acted as Private Citizens in Giving Advice

By John M.R. Paterson

In 1989, Dennis Dechaine was convicted of murdering a 12-year-old girl. Since then his conviction has been a continuing controversy, with both Dechaine and a large group of friends and supporters insisting that he is innocent and that the conviction was achieved through investigative bungling and a cover up.

In 2004, Maine Attorney General G. Steven Rowe – who was not involved in the original prosecution – became concerned that continuing public controversy could erode confidence in the integrity of his department. Although Rowe believed the accusations against the investigators and prosecutors were unjustified, and although Dechaine's motion for a new trial based on newly-discovered evidence had been denied, Rowe decided to address the ongoing criticism by requesting three experienced attorneys to independently review the investigation and prosecution and report their conclusions to him.

He appointed a retired state judge and two other experienced attorneys to conduct an independent review of the validity of the allegations of improprieties. The attorneys received no compensation, and their work was supported by the staff of the law firm of one of the attorneys, not the staff of the Attorney General. Interviews were conducted at the Attorney General's Department, and the Attorney General cooperated by making present and former staff and state investigators available.

The attorneys undertook their review over a roughly one-year period, and in 2006 the panel issued its report and concluded that there had been no impropriety. The report itself was made public.

Shortly thereafter, James Moore, a supporter of Dechaine, made a request for copies of the files, records and reports compiled and reviewed by the panel during the course of its work.

The panel refused, and Moore filed suit under Maine's Freedom of Access Act (FOAA), 1 Me.Rev.Stat. Ann. § 409(1), arguing that the requested documents constituted "public records." The trial court held that the requested records did not qualify as public records, and Moore appealed.

A divided Maine Supreme Judicial Court affirmed the judgment in *James Moore v. Charles Abbott, et al.*, 2008 ME 100, 2008 WL 2421489 (June 17, 2008) (Alexander, Silver, Gorman, JJ.).

Maine FOAA defines a "public record" as

any written, printed or graphic matter . . . that is in the possession or custody of an agency or public official of this State . . . and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business.

The question on appeal was whether the individuals appointed by the Attorney General qualified as "an agency or public official." The court applied the four part test of *Town of Burlington v. Hospital Admin. Dist. No. 1*, 2001 ME 59, 769 A. 2d 857 (2001) which sets out four factors for making that determination:

Whether the entity is performing a governmental function;

Whether the funding of the entity is governmental;

The extent of governmental involvement or control; and

Whether the entity was created by private or legislative action.

The court concluded that, because the three individuals involved "were like many other individuals and groups who provide solicited advice to State officials that is nonbinding and without legislative authorization or State payment for the value of services or expenses," they did not qualify as an "agency or public official" and, therefore, their records were not "public records" with the meaning of the FOAA.

John Paterson is a Shareholder in Bernstein Shur in Portland, Maine and Chair of its Litigation Practice Group. Plaintiff in the case acted pro se. Defendants were represented by Skelton, Taintor & Abbott, P.A., Auburn, ME; and Vafiades, Broutas & Kominsky, LLP, Bangor, ME.

First Circuit Reinstates Journalists' Fourth Amendment Claim Over Alleged FBI Assault

Qualified Immunity Was Granted Prematurely

The First Circuit Court of Appeals affirmed summary judgment against journalists' and press organizations' First Amendment claims over a confrontation with FBI agents, but reinstated their Fourth Amendment excessive force claims. *Asociación de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52 (1st Cir. June 18, 2008) (Lynch, C.J., Torruella, Selya, JJ.). The court found that plaintiffs' allegations of excessive force stated a claim for a Fourth Amendment violation and at this stage in the litigation, the government defendants failed to establish that qualified immunity applied.

Background

Plaintiffs Asociación de Periodistas de Puerto Rico and the Overseas Press Club of Puerto Rico, along with several journalists, brought suit against the director of the FBI and unknown FBI agents. The suit concerned a search warrant executed by the FBI on February 10, 2006 in San Juan, Puerto Rico against a local political activist, Liliana Laboy-Rodríguez.

The local media attempted to cover the FBI agents' search. Laboy-Rodríguez, who gained prominence through her association with the movement for Puerto Rican independence, lives in a multi-unit condominium complex with a metal fence and concrete wall around the perimeter. FBI agents sought to restrict access to her apartment by prohibiting media from entering the private property and relegating them to a location beyond the metal fence.

At midday, a Department of Homeland Security helicopter landed in a field near the condominium. More FBI agents approached the Laboy-Rodríguez residence. Journalists attempted to speak with these agents and were allegedly physically prevented. According to the journalists, agents pushed away their microphones, cameras and one pointed a rifle at them. After their failed attempt to communicate with the agents, the journalists returned to standing outside the metal fence of the condominium.

As the day progressed, a large crowd of both journalists and the general public had gathered in the area. Laboy-Rodríguez's daughter appeared outside the apartment and journalists entered the complex after they allegedly received a "wave" from her. FBI agents immediately ordered the journalists to leave, and according to the journalists, began responding with physical

force, through batons and pepper spray, without giving them opportunity to exit.

Qualified Immunity Defense

Plaintiffs asserted that the FBI agents had violated their First and Fourth Amendment rights. The lower court granted defendants' summary judgment motion, based on qualified immunity, on both claims. The First Circuit, in reviewing the qualified immunity defense, applied a three part test to determine if such a defense exists. The test first asks whether a constitutional right has been violated. Next, the "constitutional right [must be] clearly established at the time." Finally, the tests asks "whether a 'reasonable officer, similarly situated, would understand that the challenged conduct violated' the clearly established right at issue." *Asociación de Periodistas*, 529 F.3d at 57 (quoting *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55, 59-61 (1st Cir. 2004); *Suboh v. Dist. Attorney's Office*, 298 F.3d 81, 90 (1st Cir. 2002)).

First Amendment Claims

Plaintiffs' First Amendment claim was based on the agents denying them access both within the condominium property and also the field where the helicopter had landed. Before analyzing whether qualified immunity exists, the court held that the claim failed. Plaintiffs did not demonstrate that they had a right beyond the public to be within the condominium (despite the claim that Laboy-Rodríguez's daughter gave them access through a "wave") or in the field where the helicopter landed.

Because plaintiffs failed to meet the burden of showing a constitutional right existed, they failed the first part of the qualified immunity test: if no right existed, then none could have been violated.

Fourth Amendment Claims

Plaintiffs' second claim was for violation of their Fourth Amendment right to be free from excessive force. The basis for the claim was the FBI agents' alleged use of pepper spray

(Continued on page 36)

First Circuit Reinstates Journalists' Fourth Amendment Claim Over Alleged FBI Assault

(Continued from page 35)

and batons resulting in injuries. The plaintiffs allege the force was used when the agents expelled them from the condominium.

The lower court had ruled in favor of defendants, finding they “reasonably could have believed that it was necessary to use physical force against members of the crowd.” *Asociación de Periodistas de Puerto Rico v. Mueller*, No. 06-1931, *13 (D.P.R. June 12, 2007). The appeals court disagreed, finding that the lower court had failed to view the evidence in a light most favorable to the plaintiffs, the summary judgment motion standard.

The court analyzed the three part test for qualified immunity. First, it found that the journalists' Fourth Amendment right to be free from excessive force was violated. Plaintiffs had offered evidence of multiple instances of the use of excessive force, while defendants only made “conclusory statements” that the force was necessary. Defendants also failed to address any of the specific allegations made by plaintiffs.

Next, the court addressed whether the constitutional right

had been “clearly established.” The issue was narrowed to the specific inquiry of whether prior case law established that the force used “against a group of non-threatening individuals was excessive.” The court cited cases giving examples of what type of force was deemed excessive. Focusing on the plaintiffs allegation that they were given no opportunity to leave the premises before force was used, the court found that the type of force used was established as excessive.

The final question was “whether an objectively reasonable officer *would have believed* the conduct was unreasonable.” *Asociación de Periodistas*, 529 F.3d at 61 (quoting *Jennings v. Jones*, 499 F.3d 2, 19 (1st Cir. 2007) (emphasis added)). Again, the court pointed out that defendants failed to address specific allegations of force. For example, an agent was alleged to have sprayed pepper spray directly “into the face of an unthreatening journalist lying on the ground.” Allegations like this need to be addressed in further detail beyond the summary judgment stage. Furthermore, defendants failed to adequately develop their general claim that they reasonably believed force was necessary to control the crowd.

New Mexico Cameraman Arrested at Crime Scene *Police Chief Acknowledges Mistakes were Made*

On May 29, 2008, an Albuquerque police officer attacked a cameraman attempting to film a crime scene. The reporter was arrested, but charges were dismissed this month. The attack has prompted city police to promise new policies to deal with the media.

Rick Foley, a veteran cameraman for KOB-TV, was on a public street outside the crime scene perimeter. Police officer Daniel Guzman told Rick Foley to leave the area, allegedly to join a media staging area several blocks away. Foley refused and instead remained filming.

After a back and forth, the officer lunged at the cameraman. With the camera still rolling, the two scuffled, with another police officer telling the cameraman that he refused to obey a lawful order. Foley was arrested on that charge.

The video was aired on both television and the Internet and can be found on YouTube at <http://www.youtube.com/watch?v=eS97Cylw9Lo>. On July 1, Metro Court Judge Benjamin Chavez dismissed the charge, finding that the cameraman was arrested on a traffic citation that did not include probable cause for the arrest citation.

The Albuquerque Police department has promised changes in media relations, including requiring officers in media disputes to call in a supervisor or public information officer. Officer Guzman was put on leave and faces a disciplinary hearing.

Third Circuit Strikes Down Federal Law Criminalizing Depictions of Animal Cruelty

Court Declines to Create New Category of Unprotected Speech

By a 10-3 vote, the Third Circuit declared unconstitutional a federal law criminalizing depictions of animal cruelty. *United States v. Stevens*, No. 05-2497, 2008 WL 2779529 (3d Cir. July 18, 2008) (en banc). While noting that some of the material targeted by the law might be considered obscene, the court held that the statute also applied to protected speech and there was no compelling government interest for such a restriction. The government, the majority reasoned, was essentially inviting the court to create a new category of unprotected speech – a step the court refused to take.

Background

The defendant, Robert J. Stevens, was convicted in March of 2004. His case was the first prosecution under 18 U.S.C. section 48 to come to trial. Stevens had been arrested after law enforcement agents arranged to buy three videotapes from him. Two of the tapes show 1960s and 70s era footage of dog fights involving pit bulls and more recent footage of such fights in Japan. A third video shows dogs hunting and attacking wild boar.

18 U.S.C. section 48 was signed into law by President Clinton in 1999. Section 48(a) provides that “Whoever knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain, shall be fined under this title or imprisoned not more than 5 years, or both.”

18 U.S.C. section 48(b) contains an exception for “any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value.”

18 U.S.C. section 48(c) defines depictions of animal cruelty to include “any visual or auditory depiction ... in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the [jurisdiction] in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the [jurisdiction].” Under this provision of the statute, material legal in one jurisdiction could presumably be subject to prosecution elsewhere in the country.

Third Circuit Decision

Judge D. Brooks Smith began his opinion for the majority by noting that the government’s position would require the court to create a new category of unprotected speech, something that has not been done by the Supreme Court since its 1982 decision in *New York v. Ferber*, 458 U.S. 747 (1982) (holding that child pornography is not protected speech).

The court first looked to the legislative history of section 48, noting that the primary target of the statute was so-called “crush videos,” which typically feature women using their bare or stiletto-clad foot to inflict torture on animals, usually to appeal to a specific sexual fetish. In a footnote, the decision left open the idea that a more narrowly-tailored statute designed specifically to regulate such “crush videos” may fall under the existing unprotected speech category of obscenity. *Stevens*, 2008 WL 2779529, at *4 n.5. However, because the statute was written more broadly to cover all depictions of animal cruelty, the court was compelled to consider whether such depictions should constitute a new category of speech undeserving of First Amendment protection.

To determine whether a new category should be created, Judge Smith looked to the factors laid out by the Supreme Court in *New York v. Ferber*. The first factor the court deemed the “most important”: does the government have a compelling interest? The court was not persuaded that preventing animal cruelty met the high standard required by *Ferber*: “No matter how appealing the cause of animal protection is to our sensibilities, we hesitate – in the First Amendment context – to elevate it to the status of a *compelling* interest.” *Id.* at *6. “And even more fatal to the Government’s position,” was that “the statute does not regulate the underlying act of animal cruelty.” *Id.*

The second factor considered in *Ferber*, the intrinsic relationship between child pornography and the sexual abuse of children, was also found to be inapplicable. “While animals are sentient creatures worthy of human kindness and human care, one cannot seriously contend

(Continued on page 38)

Third Circuit Strikes Down Federal Law Criminalizing Depictions of Animal Cruelty

(Continued from page 37)

that the animals themselves suffer continuing harm by having their images out in the marketplace.” *Id.* at *9.

The third factor considered in *Ferber*, the “drying-up-the-market theory,” was found to be potentially apt in the animal cruelty context. However, the majority found no evidence in the record to confirm that the theory is valid in this circumstance.

Finally, considering the value of the speech, the court noted the exception in the statute for depictions with “serious” value, but stressed that speech does not generally need “serious” value to be deserving of First Amendment protection.

Considering all of the factors, the court declined to categorize visual depictions of animal cruelty as unprotected speech. Judge Smith also noted that the majority’s reluctance to do so stemmed in part from the lack of precedent from the U.S. Supreme Court: “Without guidance from the Supreme Court, a lower federal court should hesitate before extending the logic of *Ferber* to other types of speech.” *Id.* at *5.

Because the speech was protected, the court applied a standard of strict scrutiny, which the statute failed. The court also held that the statute was over-inclusive because it prosecutes depictions of animal cruelty that may have been

filmed in locations where there may be no law prohibiting such activity or filmed prior to the passage of any such law. In a footnote, the court suggested that the law might also be unconstitutionally overbroad, but declined to decide the case on overbreadth grounds, noting that such an approach should be turned to as a last resort.

Dissent

Judges Cowan, Fuentes and Fisher dissented, agreeing with the government that preventing animal cruelty provided a compelling interest for the statute. The dissent pointed to the laws prohibiting animal cruelty in every state as evidence of a national interest in eliminating such abuse. The dissent also asserted that the material covered by the statute offers little social value, adding that “the depictions outlawed by section 48, by and large, can only have value to those with a morbid fascination with suffering.” *Id.* at *19.

The government was represented by Robert Eberhardt and Laura Irwin of the U.S. Attorneys Office in Pittsburgh. Defendant was represented by Karen S. Gerlach, Office of the Federal Public Defender, Pittsburgh.

ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

CALL US, OR SEND US A NOTE.

MEDIA LAW RESOURCE CENTER, INC.
80 EIGHTH AVE., STE. 200
NEW YORK, NY 10011

PH: 212.337.0200,
MEDIALAW@MEDIALAW.ORG

Legal Ethics For Media Lawyers: From Conflicts to Confidentiality to Lawyer Advertising

For six years, members of MLRC's Ethics Committee have been contributing regular articles to the *MediaLawLetter* on a wide range of important ethics issues for members. As Committee Chair Lucian Pera has explained: "[S]ome of America's best media lawyers and their ethics partners have produced a series of thoughtful, practical articles for the *MediaLawLetter* on all sorts of legal ethics and other issues related to how lawyers practice – all with a special emphasis on what media lawyers do every day for their clients."

In lieu of an article in this month's issue, we are highlighting MLRC's recently published compendium of "Ethics Corner" articles written over the last two years. These thought-provoking articles cover a variety of topics, including lawyer advertising rules, conflict issues, attorney-client privilege within law firms, new English rules on conflicts of interest, and the ethical issues raised when news organizations report on terrorism.

Lawyer's Speech & Advertising

What can you say on the courthouse steps? And what can you say in your advertising and on your firm's website? Four articles look at the issues under the ABA Model Rules and state equivalents.

Len Niehoff of Butzel Long in Michigan discusses ethical issues arising from the republication or circulation of news articles in direct mail solicitations.

Kip Purcell of Rodey, Dickason, Sloan, Akin & Robb, P.A. in New Mexico looks at rules governing lawyer's extrajudicial statements.

Patricia Foster of Frost Brown Todd LLC in Ohio looks at the ABA Model Rules and State Ethics Opinions on lawyer websites.

And David M. Snyder, of David M. Snyder, P.A. in Florida, reports on the Florida Bar's new rules governing lawyer websites.

Representing the Media

What are a media lawyer's obligations to a corporate entity or client? What about representing an unpopular client? And what are the range of issues media clients will seek your advice on?

David J. Bodney and Peter S. Kozinets of Steptoe & Johnson LLP in Arizona analyze the duties of outside counsel when they learn or suspect during pre-publication review that an employee or officer of a media client intends to violate the law or otherwise create a material risk of liability for the client.

David A. Strassburger and Gretchen Moore of Strassburger McKenna Gutnick & Potter, P.C. in Pennsylvania discuss Model Rule 1.2(b) on "professional detachment" and how it relates to representing an unpopular media client.

Luther Munford of Phelps Dunbar LLP in Mississippi looks at Model Rule 5.6(b) and the limitations it imposes if a publisher seeks to impose future restrictions on plaintiff's counsel by way of settlement.

Peter Barlett of Minter Ellison in Australia has a thought provoking piece on the ethical issues that arise in covering international terrorism.

Jon L. Fleischaker and Jeremy S. Rogers of Dinsmore & Shohl LLP in Kentucky survey a wide range of ethics issues that arise when advising media clients, including being called on as a source by your clients.

Conflict Issues

Conflicts issues can present a host of thorny challenges to lawyers and law firms. These set of nine articles provide discuss issues ranging from judicial conflicts, waiver letters to advising a prospective client.

Patricia Foster, Frost Brown & Todd, looks at the standards for judicial recusal and a constitutional challenge to the traditional rule allowing judges to decide whether they are conflicted or biased.

Gary Bostwick, Bostwick & Jassy in California, discusses conflict waiver letters and the Model Rule's requirements for obtaining a client's informed consent.

Marcy G. Glenn and Jonathan P. Martin, both with Holland & Hart LLP in Denver, look at the interesting issue of imputed conflicts that can arise with lateral hires.

Samuel Fifer and Wendy N. Enerson of Sonnenschein Nath & Rosenthal LLP in Chicago take on the same subject of imputed conflicts with a detailed review of the ethical rules in California, Illinois and New York.

(Continued on page 40)

Legal Ethics For Media Lawyers: From Conflicts to Confidentiality to Lawyer Advertising

(Continued from page 39)

Brian S. Faughnan, of Adams and Reese LLP in Tennessee looks at new rules from the Law Society of England & Wales on client conflicts.

In separate articles Bradley H. Ellis with Sidley Austin LLP in Los Angeles and Marcy G. Glenn of Holland & Hart look at the whether the attorney-client privilege can protect a law firm's own ethics consultations if litigation with a client ensues.

Ronald C. Minkoff of Frankfurt Kurnit Klein & Selz, P.C. in New York discusses the legacy of the Second Circuit's decision in *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977) and its conflicts of interest analysis.

William Chapman, Orr & Reno, P.A., in New Hampshire, discusses ABA Model Rule 1.18 and the implications of giving advice to a prospective client.

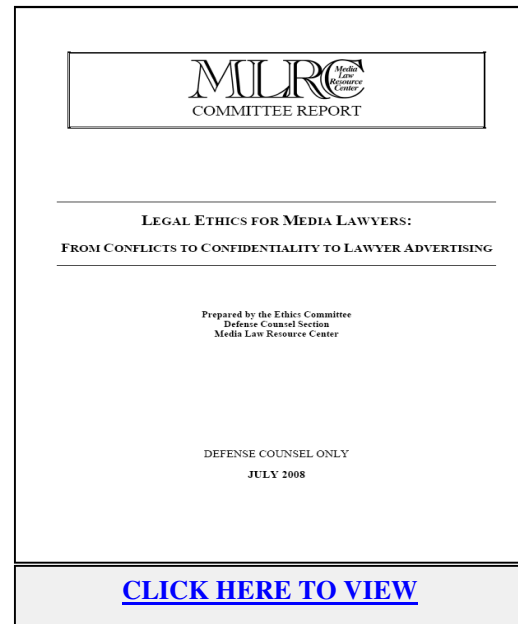
Communication Issues

Timothy J. Connor of Holland & Knight LLP in Florida looks the ethical rules that apply if opposing counsel communicates directly with your client's in-house counsel.

Mark L. Tuft of Cooper, White & Cooper LLP in California analyzes whether the litigation privilege apply to a constitutionally based privacy cause of action and, if so, under what circumstances.

MLRC's Ethics Committee

MLRC extends its thanks to Ethics Committee Chair Lucian Pera and all the members of the committee for their dedication in keeping us informed about these important issues.



Members of the MLRC Ethics Committee

Chair: Lucian T. Pera, Adams and Reese LLP
 Peter G. Banta, Winne Banta Hetherington Basralian & Kahn, P.C.
 Peter Bartlett, Minter Ellison
 Roberta R. Brackman, Esq.
 William L. Chapman, Orr & Reno, P.A.
 Timothy J. Conner, Holland & Knight LLP
 Steven G. Contopoulos, Sidley Austin LLP
 Andrew I. Dilworth, Cooper, White & Cooper LLP
 Bradley H. Ellis, Sidley Austin LLP
 Brian S. Faughnan, Adams and Reese LLP
 Samuel Fifer, Sonnenschein, Nath & Rosenthal LLP
 Jon L. Fleischaker, Dinsmore & Shohl LLP
 Sue C. Friedberg, Buchanan Ingersoll & Rooney PC
 Marcy G. Glenn, Holland & Hart LLP
 Richard R. Goehler, Frost Brown Todd LLC
 Mark R. Hornak, Buchanan Ingersoll & Rooney PC
 Bruce E. H. Johnson, Davis Wright Tremaine LLP

Robert M. Langer, Wiggin and Dana LLP
 John R. Leathers, Buchanan Ingersoll & Rooney PC
 Tom Marinis, Vinson & Elkins
 Alan L. Marx, King & Ballow
 Khory McCormick, Minter Ellison
 Ronald C. Minkoff, Frankfurt Kurnit Klein & Selz, P.C.
 Luther T. Munford, Phelps Dunbar LLP
 Richard Murphy, Minter Ellison
 Leonard M. Niehoff, Butzel Long
 Sarah K. Oberndorfer, Hall, Estill, Hardwick, Gable, Golden & Nelson
 David M. Powell, Williams & Anderson PLC
 Mark J. Prak, Brooks, Pierce, McLendon, Humphrey & Leonard
 Charles K. Purcell, Rodey, Dickason, Sloan, Akin & Robb, P.A.
 Steven M. Ribiat, Butzel Long
 David M. Snyder, P.A.
 Mark Stephens, Finers Stephens Innocent
 David Strassburger, Strassburger McKenna Gutnick & Potter