

**MULRC** Media Law Resource Center  
**MEDIA LAW LETTER**

Reporting Developments Through July 31, 2009

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## Federal Court Enjoins U.S. Publication of “60 Years Later: Coming Through The Rye”

### Second Circuit to Hear Expedited Appeal in Copyright Infringement Case

By Maura J. Wogan and Marisa Sarig

The tension between copyright protection for a work of fiction and the right of a subsequent author to use elements of that work for purposes of parody, commentary and criticism is at the heart of *Salinger v. Colting, et al.*, 09 Civ. 5095 (S.D.N.Y.) (DAB), a case currently pending before the Second Circuit Court of Appeals.

Defendants Fredrik Colting, Windupbird Publishing Ltd., Nicotext A.B., and SCB Distributors Inc. have appealed from a lower court order banning the publication and distribution of *60 Years Later: Coming Through The Rye* (“60YL”), a novel written by Colting (writing under the pseudonym J.D. California).

#### Background

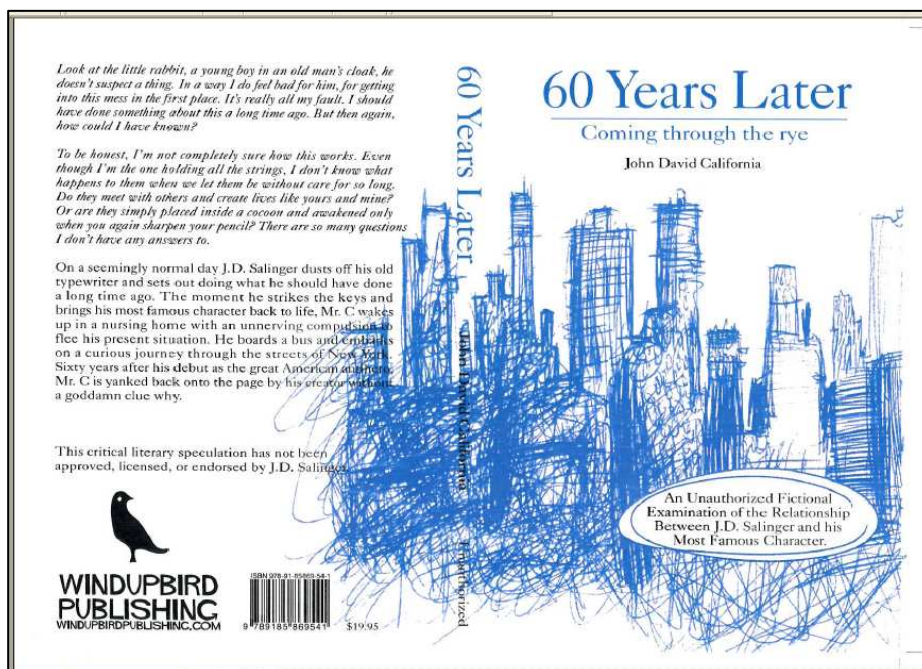
*60YL* has been published in the United Kingdom and was scheduled for publication in the United States in September 2009. Apparently upon learning of *60YL*, J.D. Salinger initiated a suit in the Southern District of New York, alleging copyright infringement of the book *The Catcher in the Rye* (“*CITR*”) and the character Holden Caulfield, as well as a claim for common law unfair competition. Salinger simultaneously moved for a preliminary injunction to enjoin the publication *60YL*.

Defendants opposed Salinger’s motion, denying that there had been any infringement of *CITR* or *Holden* and argued that, to the extent that *60YL* incorporated any copyrightable material from *CITR*, such use was protected by the fair use doctrine. They also asserted *60YL* is a highly

transformative work of commentary and criticism that explores the relationship between Salinger and Holden, his most famous character.

Defendants argued that *60YL* is not a sequel to *CITR* – it is not a continuation or retelling of *CITR*, nor could it possibly satisfy the public interest in what happened to Holden or any of Salinger’s other characters. Rather, *60YL* examines the widely-held impression of Holden as a free and independent hero, by juxtaposing it against the one (based on reality) that the reclusive Salinger is an author imprisoned by writer’s block and fear of failure. In

***Colting creates an imaginary world where Mr. C (the 76-year-old Holden) and the 90-year-old Salinger meet face-to-face...***



*60YL*, Colting creates an imaginary world where Mr. C (the 76-year-old Holden) and the 90-year-old Salinger meet face-to-face sixty years after the events in *CITR* took place, and Salinger tries to kill Mr. C so that he too can be free.

Defendants also argued that, in *60YL*, the character Mr. C is entirely transformed and has little resemblance to Holden. Mr. C (who is never referred to as Holden) has the

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## Federal Court Enjoins U.S. Publication of “60 Years Later: Coming Through The Rye”

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physical attributes and concerns of a 76-year-old man, not a sixteen-year-old boy. Mr. C is not even a real person (in the sense that Holden was portrayed as a real person in *CITR*). Rather, he is a cardboard fictional character under the control (to greater and, then, lesser degrees as the story proceeds) of Colting’s Salinger character. Mr. C exists only to serve Salinger’s own purposes, and Colting’s as well.

Finally, defendants argued that an injunction would constitute an unconstitutional prior restraint and was otherwise inappropriate because there was no evidence of irreparable harm. Defendants also submitted evidence establishing that, in fact, no harm would result from the publication of *60YL*.

### The District Court Opinion

By order entered July 1, 2009, Judge Deborah A. Batts granted a preliminary injunction barring the defendants from publishing, advertising or otherwise distributing *60YL* in the United States during the pendency of the suit. The District Court held that *60YL* constituted an unauthorized infringement of *CITR*. Central to this holding was the court’s determination that both *CITR* and the literary character of Holden Caulfield deserved copyright protection, and that, based upon the court’s comparison of *CITR* and *60YL*, there was substantial similarity between the two works.

The District Court also held that *60YL* did not qualify for protection under the fair use doctrine, finding that *60YL* “contains no reasonably perceived parodic character as to *CITR* and Holden Caulfield” because “[Colting’s commentary was] thoroughly depicted and apparent in Salinger’s own narrative about Caulfield.” The District Court also found that *60YL* was not transformative because Colting used *60YL* as a “tool with which to criticize and comment on the author, J.D. Salinger and his supposed idiosyncrasies,” rather than “direct[ing] criticism toward [*CITR*] and Caulfield themselves.”

While recognizing that the publication of *60YL* would not harm the market for *CITR*, the Court held that allowing

works like *60YL* to be published would likely harm the market for any authorized derivative works. Concluding that Salinger had established a *prima facie* case of copyright infringement, the District Court, without further analysis, held that irreparable harm may be presumed. The District Court did not address whether the balance of hardships between the parties warranted the injunction nor did it consider the effect of the injunction upon the public interest.

### The Second Circuit Appeal

Defendants immediately appealed the injunction order. The Circuit Court will hear the appeal on an expedited schedule.

In their appeal, defendants argue that the District Court’s order barring the publication of *60YL*, a transformative work of fiction that criticizes and comments upon Salinger, *CITR* and Holden, is an impermissible prior restraint not tolerated by the First Amendment. While injunctions might be appropriate in copyright cases involving “simple piracy,” the same is not true of a case, like this one, concerning a transformative work of fiction that copied minimal elements from the original.

In *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court warned that the goals of copyright are not always served by issuing injunctions, even if the taking from a copyrighted work goes “beyond the bounds of fair use.” *Id.* at 578 n.10. There is a vast difference between cases involving “simple piracy,” where injunctions may be warranted, and those “worlds apart” that raise reasonable contentions of fair use. *Id.* See also *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11<sup>th</sup> Cir. 2001) (vacating District Court injunction against publication of work that parodied *Gone with the Wind*).

The defendants argue that the District Court improperly ignored the Supreme Court’s standard for injunctions set forth in *eBay Inc. v. MercExchange*, 547 U.S. 388 (2006), which, among other things, requires plaintiffs to show actual irreparable harm that cannot be compensated with monetary damages. *Id.* at 392-93. The record before the Court is devoid of any evidence of harm to Salinger.

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**While injunctions might be appropriate in copyright cases involving “simple piracy,” the same is not true of a case, like this one...**

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Finally, the defendants argue that the District Court failed to balance the harm visited upon defendants, and the public, by the entry of the injunction. *See Winter v. Natural Res. Defense Council, Inc.*, 129 S. Ct. 365 (2008). Furthermore, by limiting the public’s access to a work of academic and entertainment value, the injunction encroaches upon freedom of speech generally. Indeed, the Supreme Court has held that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

In addition, defendants argue that Salinger failed to prove that he was likely to succeed on the merits of his claims: *60YL* is not an infringement of Salinger’s copyrights. Defendants also argue that, even if there were copyright infringement, *60YL* is entitled to the affirmative defense of fair use. Taking each of the four fair use factors in turn, Defendants have shown that: (i) *60YL* is a transformative work of fiction that comments both upon Salinger and his underlying work, though commentary on Salinger alone would have been sufficient given the highly transformative nature of Colting’s book; (ii) the nature of *CITR* as a work of fiction does not militate against a finding of fair use, especially where the “thin” copyright in a character is at issue; (iii) *60YL* took only what was reasonably necessary from *CITR* to satisfy its parodic purpose; and (iv) there is no evidence that *60YL* harms the market for *CITR* or any authorized derivatives.

Salinger’s brief in the Second Circuit is due on August 13 and defendants’ reply is due August 21. The case is scheduled for argument on September 3, 2009.

A copy of the brief filed by defendants in the Second Circuit can be found at <http://www.fkks.com> and describes in more detail the transformative nature of *60YL*. The injunction issued by the District Court prevents the public -- including readers of this article -- from reading the actual book and seeing for themselves that it constitutes fair use.

*Edward Rosenthal, Maura Wogan, Jessie Beeber and Cameron Myler of Frankfurt Kurnit Klein & Selz, PC in New York represent the defendants in this case. Marcia Paul, Kevan Choset and Deborah Adler in the New York office of Davis Wright Tremaine LLP represent J.D. Salinger and the J.D. Salinger Literary Trust.*

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## Assault and Immunity

### ***Court Applies Section 230 Immunity To Assault Claim Against MySpace***

By Lincoln D. Bandlow

In the early years of the internet, the *Prodigy* decision sent shockwaves through the burgeoning communication medium when it held that internet service providers could be held liable for defamation based on the content posted by a third party, even though the internet service provider played no editorial role in the posting. The court based that holding in part on the general efforts that the internet service provider had undertaken to police the content of material posted by users. That is, the internet service provider had a policy to screen for and remove such content as child porn or bulletin board posts that were defamatory or otherwise violated proper “netiquette.”

In light of the *Prodigy* holding that essentially said “if you do that screening, you’re a publisher and you get publisher liability with it” a number of internet service providers said “okay, we won’t do that” and stopped screening posts for such content. That response by internet service providers quickly got the attention of Congress, whose attitude was “no, wait, we want you to do that!”

Thus, in response to the *Prodigy* decision, in 1996 Congress enacted Section 230 of the Communications Decency Act, which provides internet service providers with immunity from certain claims brought against them based on the acts of third parties. Since the passage of Section 230, courts have grappled with the question of how far that immunity extends. In [\*Doe v. MySpace, Inc.\*](#), 175 Cal.App.4th 561 (2009), a California Court of Appeal held that this immunity extends to claims brought against MySpace that stemmed from minors being sexually assaulted by adults that the minors had met on the MySpace website.

#### ***Background***

The decision arose out of four cases, that had been consolidated into one appeal, involving similar facts and legal allegations. In each of the cases, girls aged thirteen to fifteen had been sexually assaulted by men that they had met on MySpace.com, a popular internet social networking site. Founded in 2003, MySpace is “the world’s most visited domain on the internet for American users” and one that, de-

spite its being limited to users aged fourteen or older, can easily be accessed by underage users by simply “entering a false birth date to appear older.” *Doe*, 175 Cal. App. 4th at 150.

A MySpace user typically creates a profile that provides personal information such as age, gender, schools, etc. Other MySpace users can search these profiles to find individuals that meet particular criteria and send emails to users who have met the criteria. The MySpace Terms of Use prohibit users from soliciting personal information from anyone under eighteen. MySpace also provides safety tips for new users that, among other things, caution against “posting anything that would make it easy for a stranger to find you, such as where you hang out every day after school,” warn that “[p]eople aren’t always who they say they are” and instruct users not to “mislead people into thinking that you’re older or younger.” *Id.*

In incidents that are every parent’s nightmare and that are tragically becoming all too frequent, a number of young girls were attacked by men who had lured these girls to meetings through finding them on MySpace. *Doe II*, a fifteen year-old girl, met a twenty-two year-old man through MySpace and was sexually assaulted by him at an in-person meeting. *Doe III*, another fifteen year-old girl, met a twenty-five year-old man on MySpace who lured her from her home, “heavily drugged her, and brutally sexually assaulted her.” *Doe IV*, a fourteen year-old, met up with an eighteen year-old she had met on MySpace who, along with his adult friend, drugged *Doe* and then they took turns sexually assaulting her. Fourteen year-old *Doe V* and fifteen year-old *Doe VI* each met eighteen and nineteen year-old men on MySpace and were later sexually assaulted at in-person meetings. *Id.* at 151.

These *Doe* plaintiffs brought substantially identical causes of action against MySpace for negligence, gross negligence and strict product liability, alleging that “MySpace has made a decision to not implement reasonable, basic safety precautions with regard to protecting young children from sexual predators” and that MySpace was “aware of the dangers that it poses to underage minors” who use the website. *Id.* In particular, the plaintiffs alleged that MySpace should

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have implemented “readily available and practicable age-verification software” or made sure that the Does’ MySpace profiles were set to “private.”

In response, MySpace brought a demurrer (the California procedural equivalent of a motion to dismiss) on the grounds that the claims were barred by Section 230. Although the trial court granted the motion, it allowed plaintiffs leave to amend to plead around Section 230. Plaintiffs did so, adding a section specifically entitled “Plaintiffs Bring No Claims That Implicate the Communications Decency Act.” They alleged that their claims “rest on MySpace’s failure to institute reasonable measures to prevent older users from directly searching out, finding, and or communicating with minors. The claims are not content based.” *Id.* MySpace filed another demurrer, which the court granted without leave to amend, finding that the plaintiffs had failed to allege sufficient facts to plead around Section 230 immunity. Plaintiffs appealed and the Court of Appeal affirmed the dismissal.

### Court of Appeal Decision

The Court first examined Section 230, pointing out Section 230 was enacted to: (1) “promote the continued development of the Internet”; (2) “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation”; (3) “encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services”; (4) “remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children’s access to objectionable or inappropriate online material; and (5) “ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.” *Id.* at 152 (quoting Section 230).

To accomplish those goals, Section 230 provides that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider” and that although States were not prevented “from enforcing any State law that is consistent” with Section 230, “[n]o cause of action

may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.” *Id.* The Court noted that the “express language of the statute indicates Congress did not intend to limit its grant of immunity to defamation claims. Instead, the legislative history demonstrates Congress intended to extend immunity to all civil claims.” *Id.* at 153.

### Zeran and Section 230

The court, citing *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4<sup>th</sup> Cir. 1997) and *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4<sup>th</sup> 790, 804-805 (2006), noted that to qualify for immunity under Section 230, three elements must be shown: (1) defendant is an interactive computer services provider; (2) defendant is not an information content provider with respect to the disputed activity; and (3) plaintiff seeks to hold the internet service provider liable for information originating with a third party user of its service. *Id.* Plaintiffs took issue with the second and third elements, alleging that MySpace was an information content provider and that plaintiffs were not trying to hold MySpace liable for the communications between the plaintiffs and their assailants, but rather, for MySpace’s failure to institute reasonable security measures. The Court rejected these arguments.

Plaintiff first argued that it was not treating MySpace as a publisher, which would trigger Section 230 immunity, but was simply alleging “a breach of a legal duty to provide reasonable safety measures” to prevent predators from gaining access to minors through MySpace and that Section 230 should be narrowly construed to extend only to claims “stemming from harms caused by the defendant’s republication of inherently offensive or harmful content.” *Id.* In rejecting that argument, the Court examined *Zeran*, the “leading case on immunity protection under Section 230.” *Id.* In that case, plaintiff discovered false advertisements placed in his name on AOL for sale of shirts that mocked the 1995 bombing of the Oklahoma City Federal Building and complained that AOL failed to remove the postings, notify others that the postings were false and screen out further such postings. The Fourth Circuit held that Section 230 immunity applied even when a provider had been notified of objectionable content on its site:

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Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users.... The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

*Doe*, 175 Cal. App. 4<sup>th</sup> at 154 (quoting *Zeran*, 129 F.3d at 331).

The California Court of Appeal then noted that same argument as that put forth by the plaintiffs had recently been rejected by the Fifth Circuit in *Doe v. MySpace, Inc.*, 528 F.3d 413 (5<sup>th</sup> Cir. 2008). There, a thirteen year-old (pretending to be eighteen) created a profile on MySpace that was automatically set to "public" because she had indicated she was eighteen (it would have automatically been set to "private" had she used her true age). She met a nineteen year-old man on MySpace, the two eventually met in person where he sexually assaulted her. After the girl and her mother filed suit against MySpace on the grounds that it had failed to implement basic safety measures to protect minors from adult predators, the Fifth Circuit, citing *Zeran* and the legislative history of Section 230, upheld the district court's dismissal of the action, interpreting Section 230 "to provide broad immunity extending to cases arising from the publication of user-generated content." *Doe v. MySpace*, 528 F.3d at 418.

In reaching that conclusion, the Fifth Circuit cited the policy reasons underlying Section 230, including the intent to "remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material." Moreover, the Fifth Circuit noted that cases from other circuit courts had broadly construed Section

230. Finally, the Fifth Circuit noted that parties harmed by publication of user-generated content were not without recourse: "they may sue the third party user who generated the content." Under Section 230, however, aggrieved parties simply cannot sue the interactive computer service that enabled the third party to publish the content online. *Id.* at 419.

The California Court of Appeal then cited the Ninth Circuit decision in *Carafano v. Metrosplash.com, Inc.* 339 F.3d 1119, 1122 (9<sup>th</sup> Cir. 2003), in which the court extended Section 230 to an online dating service, finding that it was not liable when an unidentified party posted a false online profile of an actress, which resulted in harassing phone calls, letters, and faxes to her home. Under *Carafano*, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id.* at 1124.

The California Court of Appeal also noted an Ohio district court decision which had extended Section 230 immunity to an online dating service where the plaintiff had relied on another member's claim on her profile that she was 18 years old when he had sex with her. He was subsequently arrested for unlawful sexual conduct with a minor because, in fact, she was only 14. *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007), *affd.*, 551 F.3d 412 (6<sup>th</sup> Cir. 2008). After plaintiff asserted claim based on the allegation that the dating service failed its obligation to discover that the minor lied about her age, defendant's motion to dismiss was granted on the ground that the complaint attempted to hold the dating service liable for its publication of content provided by the minor. *Id.* at 728.

### California Case Law

The California Court of Appeal then noted that these decisions, although persuasive, were not binding and turned to an examination of California case law. The only California Supreme Court case which addresses Section 230 immunity is *Barrett v. Rosenthal*, 40 Cal. 4<sup>th</sup> 33 (2006) which involved claims for defamation. Noting that such facts were "not exactly on point," the Court of Appeal noted that *Barrett* had held that "the immunity conferred by section 230 applies even when self-regulation is unsuccessful, or *completely un-*

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attempted.’” *Doe*, 175 Cal. App. 4<sup>th</sup> at 155 (quoting *Barrett*, 40 Cal. 4<sup>th</sup> at 53) (italics added by court).

Moreover, *Barrett* had noted the legislative history contained in a subsequent federal statute that explicitly supported a broad interpretation of Section 230 immunity in negligence cases. Regarding California intermediate appellate court decisions, the Court in *Doe* noted that these courts had also consistently extended Section 230 immunity to negligence claims, citing *Delfino* (negligence claims based on cyber-threats that originated from employer’s computer system barred under Section 230) and *Gentry v. eBay, Inc.*, 99 Cal. App. 4<sup>th</sup> 816, 824 (2002) (negligence and unfair trade practices claims against eBay stemming from forged sports memorabilia sold on eBay barred by Section 230). The Court of Appeal also noted that other cases had extended Section 230 immunity to other types of claims. See *Kathleen R. v. City of Livermore*, 87 Cal. App. 4<sup>th</sup> 684 (2001) (immunity from taxpayer action for waste of public funds granted to library providing internet access to patrons).

Given this “general consensus to interpret section 230 immunity broadly,” the Court concluded that Section 230 shielded MySpace from liability. Although plaintiffs had styled the claim as one for “failure to adopt reasonable safety measures,” this did not avoid Section 230 immunity:

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***the “real question” was whether plaintiffs were seeking “to hold MySpace liable for failing to exercise a publisher’s traditional editorial functions...”***

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It is undeniable that [Does] seek to hold MySpace responsible for the communications between the [Does] and their assailants. At its core, [Does] want MySpace to regulate what appears on its Web site. [Does] argue they do not “allege liability on account of MySpace’s exercise of a publisher’s traditional editorial functions, such as editing, altering, or deciding whether or not to publish certain material, which is the test for whether a claim treats a website as a publisher under *Barrett*.” But that is precisely what they allege; that is, they want MySpace to ensure that sexual predators do not gain access to (i.e., communicate with) minors on its Web site. That type of activity - to restrict or make available certain material - is expressly covered by section 230.

Plaintiffs tried to distinguish the federal and state cases discussed above by characterizing the harm in those cases as caused by the release of information while the harm plaintiffs were alleging was caused by the physical assaults. In those cases, according to plaintiffs, the claims all stemmed from the words themselves being the tortious act (false descriptions of sports memorabilia in *Gentry*, falsely attributed statements mocking the Oklahoma City bombings in *Zeran*, false profile information in *Carafano*) which brought the claims within the scope of Section 230, whereas the communications exchanged between the Does and their assailants were not actionable and thus Section 230 did not apply. The Court rejected that argument, saying this was a “false distinction” and the “real question” was whether plaintiffs were seeking “to hold MySpace liable for failing to exercise a publisher’s traditional editorial functions, namely deciding whether to publish certain material or not. Because they do, section 230 immunizes MySpace from liability.” *Id.* at 157. Moreover, the Court found that plaintiffs were simply misreading the *Gentry* and *Zeran* cases because the alleged harm in those cases did *not* stem from the information exchanged, but from conduct outside of the communications (*Gentry* harm was

from the purchase of the sports memorabilia, *Zehran* and *Carafano* harm was from the outside harassment that was caused by the posting of the false information).

### ***Distinguishing Roommates.com***

Plaintiffs also contended that, by collaborating with the plaintiffs and their eventual attackers to create MySpace profiles and by allowing the attackers to search profiles to find targets to assault, MySpace was a content provider and thus outside of Section 230 immunity. In making this argument, plaintiffs relied on *Fair Housing Council, San Fernando v. Roommates.Com*, 521 F.3d 1157 (9<sup>th</sup> Cir. 2008) in which defendant ran a website to match roommates and subscribers were required to answer a series of questions about their sex,

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sexual orientation, and whether they would bring children and also could provide comments in an open-ended essay.

The plaintiffs complained that Roommates.com's business violated the federal Fair Housing Act and California's fair housing law, both of which prohibit discrimination on the basis of race, familial status or national origin. The Ninth Circuit held that Section 230 immunity did not apply because Roommates.com was an information content provider because it "created the discriminatory questions, presented a limited choice of answers and designed its search and email systems to limit listings based on sex, sexual orientation, and presence of children" and because subscribers were forced to answer these questions as a condition of using its services. *Doe*, 175 Cal. App. 4<sup>th</sup> at 157-158 (citing *Roommates*, 521 F.3d at 1166).

Immunity was extended, however, to the additional comments section because Roommates.Com published the comments as written and did not provide guidance or urge subscribers to input discriminatory preferences. *Id.* at 1174.

The Court of Appeal noted that the *Roommates* decision represented "two ends of the spectrum with respect to how much discretion a third party user has in the content he posts on the site." On the one hand, a subscriber filling in the "additional comments" section had unfettered discretion as to content. On the other hand, the choices to the subscriber were limited in the question and answer profile section. The Court held that the situation presented in the case before it "falls somewhere in between." A MySpace user is not allowed unfettered discretion regarding the content of a profile (users are prompted to enter a name, email address, gender, postal code and date of birth and are "encouraged" to enter personal information such as schools, interests, etc.). Moreover, the information is then organized by MySpace and is searchable by other users. The Court pointed out, however,

that unlike in *Roommates*, the Doe plaintiffs were not alleging that the MySpace profile questions were discriminatory or otherwise illegal, nor were MySpace members required to answer the questions as a condition of using the site.

The Court concluded that the facts in the case before it align more closely with those in *Carafano* because, there, the online service provider had provided "neutral tools which the anonymous poster used to publish the libelous content. The dating service did nothing to encourage the posting of such content and in fact, the posting was contrary to its express policies." *Doe*, 175 Cal. App. 4<sup>th</sup> at 158. In contrast, in *Roommates*, the website was "designed to force subscribers to divulge protected characteristics and discriminatory preferences, and to match those who have rooms with those who are looking for rooms based on criteria that appear to be prohibited" by law. *Id.* (quoting *Roommates*, 521 F.3d at 1172). Thus, MySpace was not a content provider and was thus protected by Section 230 immunity.

There has been some press of late about predators using the Craigslist website to locate women who then are attacked, sexually assaulted and sometimes killed. Craigslist has since removed its "erotic services" category and otherwise tried to address this issue. If they did so out of the motivation to be good citizens, good for them. If they did so out of fear of potential liability, Doe stands for the proposition that Section 230 may eliminate that concern.

*Lincoln D. Bandlow is a partner in the Los Angeles office of Lathrop & Gage where he practices media and intellectual property litigation and is also an Adjunct Professor at USC where he teaches media and communications law. MySpace was represented by Richard L. Stone, David R. Singer and Amy M. Gallegos of Hogan & Hartson. Plaintiffs were represented by the Law Offices of Daniel M. O'Leary in Los Angeles; and Yetter, Warden & Coleman, in Houston, TX.*

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## Hawaii Intermediate Court of Appeals Rules Serial Murder Suspect Not Libeled

By Jeffrey Portnoy

In the first published media libel case from a Hawaii appellate court in more than a decade, the Hawaii Intermediate Court of Appeals ruled on June 30, 2009 that a Honolulu magazine and a Kauai newspaper did not defame a Kauai man who was identified as a suspect in a possible serial murder investigation conducted by the Kauai police department. [Wilson v. Freitas](#), 2009 WL 1863381 (Haw. Ct. App. Jun. 30, 2009).

### *Factual Background*

In separate incidents occurring on Kauai's west side during the spring and summer of 2000, three women were attacked, raped, beaten and then stabbed. Two of the women died, but the third woman survived the attack. On September 12, 2000, a Kauai man, Waldorf Roy Wilson II, was taken into custody by Kauai police for questioning about the murders. At the time, Wilson was on parole for a 1983 rape and kidnapping conviction. That same evening a Hawaii television station identified Wilson as a suspect in the police department investigation. Wilson, however, was never charged in the attacks. To date, the crimes remain unsolved.

In the August 2001 issue of *HONOLULU* magazine, Honolulu Publishing published an article entitled "The Killing Year," which detailed the efforts of the Kauai police department to track and find the apparent serial murderer. The magazine article identified Wilson by name but noted that the chief of police had declined to confirm whether Wilson was one of the suspects being investigated by the police department. The story also noted that the television story had identified Wilson as the suspected killer, a report denounced by police but "widely accepted as fact" on Kauai.

In a January 28, 2002 newspaper article, the *Garden Island* newspaper published an article concerning Wilson's upcoming parole hearing on Kauai. The newspaper article did not identify Wilson by name, but described a "42-year-old man" who had a previous conviction for rape and kidnapping. The article further reported that a flier was in circulation informing Kauai residents of the parole hearing and identified the man as a suspect in the serial murder investigation. The article went on to note that the man matched the "general de-

scription" of the assailant given by the victim who survived one of the attacks.

Wilson sued the magazine and newspaper for libel, asserting the articles had falsely accused him of in fact being the Kauai serial murderer. He also asserted claims for invasion of privacy and infliction of emotional distress. Curiously, however, Wilson never sued the television station who aired the original broadcast.

Wilson also sued the county, police chief, and various police officers for allegedly leaking information to the news media and pressuring the paroling authority to revoke his parole.

### *Trial Court Grants Summary Judgment*

Both the magazine and newspaper brought motions for summary judgment against Wilson, arguing that the articles he complained of were truthful, fair and accurate reports concerning a matter of public interest. The trial court agreed and granted the motions, dismissing all of Wilson's claims, including the invasion of privacy and emotional distress claims. The claims against the county, police chief and police officers were later dismissed as well, for want of prosecution. Wilson appealed.

### *Hawaii Intermediate Court of Appeals Affirms*

In affirming the dismissal of Wilson's defamation claims, the Hawaii Intermediate Court of Appeals (ICA) ruled that Wilson did not meet his burden of proving that either the magazine or newspaper article was false. Citing *Philadelphia Newspapers v. Hepps* case, the court noted that "[w]here the publication at issue involves a matter of public concern, the plaintiff bears the burden of proving falsity when suing a media defendant." Looking at the articles in context and as a whole, the court concluded they were "incapable of bearing the defamatory meaning ascribed to [them] by Wilson."

With respect to the magazine article, the court noted that "the article did not state or infer that Wilson was in fact the Kauai serial killer. The plain meaning of the article [was] that Wilson was a suspect in the attacks, a circumstance that [he] readily concede[d]."

As for the newspaper article, the ICA noted that the author's reference to Wilson as fitting the "general description"

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## Hawaii Intermediate Court of Appeals Rules Serial Murder Suspect Not Libeled

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of the assailant “was provided by the surviving victim and could not rationally be understood as an assertion that Wilson was, in fact, the serial killer.” Likewise, the description of the assailant provided by the victim, “a stocky, local looking man with a dark complexion,” was nebulous and encompassed characteristics shared by many people. Thus, the author’s assertion that Wilson fit this general description “did not amount to an assertion that Wilson was the guilty party.”

Because Wilson’s defamation claims failed as a matter of law, the ICA also affirmed the dismissal of his parasitic claims for false light invasion of privacy and emotional distress. “To hold otherwise,” the court said, “would permit [Wilson] to ‘end run’ the Constitution.”

### Comments

The ICA’s decision is notable in several respects.

First, the court strongly endorsed the use and importance of summary judgment in media libel cases. As the court noted: “Summary judgment is the preferred means of dealing with First Amendment cases due to the chilling effect of First Amendment rights inherent in expensive and time-consuming litigation. This is particularly the case with smaller newspapers, magazines, and television and radio stations.”

Second, the court’s construction of the truth defense is quite broad. The court’s opinion emphasizes that words and phrases in an article cannot be viewed in isolation and taken out of context. Instead, the article must be viewed as a whole to determine the sense in which it will be understood by a reasonable reader. In effect, Wilson was making a claim for libel by innuendo, but the court emphatically rejected that attempt.

Third, the court’s dismissal of the derivative false light invasion of privacy and emotional distress claims makes it clear that plaintiffs attempting to avoid First Amendment defenses for libel claims may not do so with creative pleading of alternative causes of action.

*Jeffrey Portnoy and Peter Olson of Cades Schutte LLP in Honolulu, Hawaii, represented the media defendants. Roger Myers of Holme Roberts & Owen LLP in San Francisco was co-counsel for Kauai Publishing, publisher of the Garden Island newspaper.*

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## New York Appellate Court Grants Summary Judgment to New York Post

### *There Is Nothing Wrong With Having Sexual Fantasies*

By Theresa M. House

Ava “Maximilia” Cordero attracted substantial public attention when she sued billionaire Jeffrey Epstein based on unusually explicit allegations that he sexually exploited her while she was a minor, purportedly in exchange for his help with her nascent modeling career. But Cordero’s graphic descriptions in her complaint of sexual acts she supposedly committed with Epstein took a back seat to the striking disclosure by the *New York Post* that Cordero had been born a man, even though in her suit she had held herself out to be a woman.

In response to that revelation, Cordero sued the paper for libel and other claims, alleging in part that statements in the article that she had posted on her MySpace page “masturbatory fantas[ies]” about having sex with “multiple men and then multiple women” defamed her by implying that she was a “promiscuous slut.” Although the lower court allowed the libel claim to proceed with respect to the sexual fantasies statement, *see* 2008 WL 2522631, 36 Media L. Rep. 2269 (N.Y. Sup. Ct. 2008), the Appellate Division this month unanimously dismissed the complaint in its entirety because the challenged statement was not reasonably capable of a defamatory *per se* meaning. [\*Cordero v. NYP Holdings, Inc.\*](#), No. 115597/07, 2009 WL 1885099 (NY App. 1st Dept. July 2, 2009).

#### **Factual Background**

Plaintiff first attracted attention from the *Post* in October 2007, when the paper reported that plaintiff had filed a lawsuit against, among others, the wealthy money manager, Jeffrey Epstein. *Ava Maximilia Cordero v. Jeffrey Epstein*, (N.Y. Co. Index No. 113903/2007). In that suit, plaintiff alleged that Epstein had sexually exploited her during her teens by requesting that they engage in sex acts in exchange for his assistance with her modeling career. In her complaint, plaintiff described in graphic detail bizarre sex acts she allegedly engaged in with Epstein, and as a result, the *Post* published a front-page article under the headline, “Teen Model: My kinky sex with billionaire. Bombshell Lawsuit,” which summarized the complaint’s graphic allegations and quoted Plaintiff’s and Epstein’s attorneys.

After publishing the initial article on Cordero’s suit, *Post* reporters learned that plaintiff, who appeared to be female and identi-

fied herself as such, had in fact been born biologically male. This led the *Post* to publish a follow-up article on October 23, 2007, published under the headline, “GENDER-BEND SHOCKER, Kinky-sex suit gal is a man.” The October 23 article reported that *Post* reporters had learned from various sources that plaintiff, who was the very same woman who had filed charges against Epstein for sexual exploitation, was actually born physically male: records showed plaintiff had been born Maximilian Cordero in 1983; sources close to plaintiff claimed she began dressing up as a female in her early teens and had received cosmetic work and hormone treatments to further alter her appearance; and in one of three MySpace pages featuring her pictures, one listed her gender as “male.”

The October 23 article further reported that on one of the MySpace pages, plaintiff gave “a graphic description of ‘masturbatory fantasy’ she has of being with multiple men and then multiple women.”

#### **Lower Court Proceedings**

Plaintiff sued the publisher of the *Post*, three of its reporters, and one editor setting forth claims for libel, invasion of privacy and intentional infliction of emotional distress. The *Post* defendants moved to dismiss, and the lower court threw out the privacy and emotional distress claims in their entirety, along with most of the libel claim. The court found that most of the challenged statements were not actionable either because they were true, based on party admissions, or because they were not reasonably capable of a defamatory construction.

The lower court took pause, however, with respect to plaintiff’s allegation that the October 23 article’s description of her purported “masturbatory fantasy” was libelous *per se*, because it implied that she was a “promiscuous slut.” (Plaintiff claimed the MySpace page that was the source of the statement was a forgery created by a third party.)

Apparently laboring over its decision finding that a statement that someone had a “masturbatory fantasy” could be defamatory *per se*, the lower court took pains to acknowledge that changing social mores could influence how certain sexual conduct is viewed by the community and recognized that what was once considered defamatory *per se* may no longer be considered defamatory today. It nevertheless concluded that it was for the community to decide

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## New York Appellate Court Grants Summary Judgment to New York Post

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whether those mores had changed enough to render the statement regarding plaintiff's sexual fantasies non-defamatory *per se* as a matter of law. Finding this issue of fact, the lower court declined to dismiss the libel claim as based on the statement regarding plaintiff's alleged sexual fantasy.

### The Appeal

The *Post* defendants appealed that portion of the lower court's order that allowed plaintiff's libel claim to proceed in part based upon the sole remaining statement plaintiff had alleged to be defamatory. Plaintiff elected not to cross-appeal the lower court's decisions dismissing her privacy and emotional distress causes of action or the other bases for her libel claim. Instead, plaintiff cross-appealed only a part of the lower court's order that had denied her request to seal certain court documents containing her medial records.

The *Post* defendants argued that the lower court erred in finding that it was a question of fact whether a statement that plaintiff had a particular sexual fantasy was reasonably capable of a defamatory *per se* meaning. Plaintiff contended that the statement was defamatory because it suggested she was so perverted that she would publish an online diary of masturbatory fantasies of group sex – and on that basis implied that she is promiscuous. But the statement that an individual had a sexual fantasy, the *Post* defendants countered, was not reasonably susceptible of conveying the alleged implication that plaintiff was *in fact* promiscuous: the October 23 article only reported that plaintiff had had a *fantasy* – not that plaintiff had *actually engaged* in sexual conduct with multiple men and multiple women or otherwise acted on that fantasy.

The Appellate Division First Department of the Supreme Court of New York sided unanimously with the *Post* defendants. The appellate court reached its decision by applying the familiar rule that the meaning of an allegedly defamatory statement must be considered in the context of the entire communication in which the words appeared, as well as against the background of its issuance, so that the court must take into account the circumstances underlying the publication.

While the appellate court acknowledged that a statement that a person is promiscuous is generally regarded to be defamatory *per se*, here it held that the statement plaintiff challenged was not, in the context of the article as a whole and the circumstances of its publication, reasonably susceptible of that defamatory connotation.

The appellate court found that, in the context of reporting on

plaintiff's unusually graphic and bizarre allegations against Epstein, the thrust of the October 23 article was not that plaintiff was sexually promiscuous, but rather that the young woman who had commenced the Epstein lawsuit is a transgender individual who was born a biological male. Specifically, the appellate court found that the references to the MySpace pages in the article had the effect not of accusing plaintiff of sexual impropriety, but of highlighting the ambiguity of the gender identity of the person who had sued Epstein – in large part because those statements were cabined by other statements in the article clearly indicating the news story was an update on the *Post*'s earlier report about Plaintiff's suit against the billionaire.

The appellate court further found that nothing in the article implied that plaintiff had in fact engaged in the subject of her fantasy or otherwise acted on it. The appellate court in turn concluded that the content of the article as a whole as well as its context – including that it was published as a follow-up to a previous article – rendered the implication plaintiff ascribed to the challenged statement unreasonable as a matter of law. On these bases, the court ordered that the libel claim against the *Post* defendants dismissed in its entirety because the October 23 article was not, in context, reasonably susceptible of the alleged defamatory *per se* meaning that plaintiff was promiscuous.

### Conclusion

In so holding, the First Department reaffirmed several important principles of New York libel law. It emphasized the now well-established rule that, in the absence of allegations of special damages, a plaintiff's libel claim will be dismissed if it does not fit into one of the recognized categories of speech regarded as libelous *per se*. It also underscored the principle that the fact that some readers may draw a defamatory inference from an allegedly libelous statement does not mean that the inference is reasonable. Finally, on plaintiff's cross-appeal regarding the lower court's refusal to seal certain court records, the First Department ruled that a plaintiff cannot show "good cause" to seal medical records where she herself made those records public by filing them in court in a separate action.

*Defendants NYP Holdings, Inc., Dareh Gregorian, Lucy Carne, Peter Cox, Michelle Gotthelf, and News Corporation were represented by Slade R. Metcalf and Laura M. Leitner of Hogan & Hartson LLP, New York City. Plaintiff Ava a.k.a. Maximilia Cordero was represented by Jacqueline Mari of New York City.*

## New Jersey Court Grants Summary Judgment Dismissing Donald Trump's Defamation Claim Against Book Author and Publisher

On July 15, 2009, the Law Division of the Superior Court of New Jersey granted summary judgment dismissing in full Donald Trump's claim that author Timothy L. O'Brien and publisher Time Warner Book Group Inc. and Warner Books Inc. defamed Trump in the book *TrumpNation: The Art of Being the Donald*. [Trump v. O'Brien, et al.](#), No. CAM-L-545-06 (N.J. Sup. Ct. Law Div. July 15, 2009).

### Background

O'Brien has been a business reporter for *The New York Times* and *The Wall Street Journal*, and he currently serves as business editor for the *Sunday Times*. After years of reporting on Trump, O'Brien authored *TrumpNation*, which was published in October 2005 by Warner Books Inc., now a subsidiary of Hachette Book Group USA, Inc. and known as Grand Central Publishing. Among other things, *TrumpNation* explored Trump's public persona, finances, and aspects of his varied career in real estate, casinos, television, and other arenas.

In January 2006, Trump sued O'Brien and the publisher for defamation, seeking \$5 billion in damages. Trump's allegations focused on the chapter of the book about Trump's finances. Specifically, Trump claimed that he was defamed by the book's inclusion of estimates of his net worth provided by three confidential sources – described by O'Brien as having direct knowledge of Trump's finances and having worked closely with Trump for years – who thought Trump's net worth was between \$150 million and \$250 million, rather than the billions that Trump claimed. O'Brien reported the confidential sources' estimates amidst other estimates, including those of Trump and his employees, and O'Brien also reported that Trump denied the accuracy of the sources' estimates.

As reported in [October 2008 issue of the MediaLawLetter](#), Trump moved to compel O'Brien to reveal the identities of the three confidential sources and for defendants to produce a variety of newsgathering and editorial materials withheld pursuant to the newsgatherer's privilege. After the trial court granted Trump's motion, defendants sought leave for interlocutory review, which the New Jersey Appellate

Division granted. In October 2008, the Appellate Division reversed the trial court's ruling and held that the identities of O'Brien's confidential sources were protected absolutely under either New Jersey or New York law, and that the non-confidential materials sought by Trump were likewise protected, either absolutely under New Jersey law or qualifiedly under New York law. *Trump v. O'Brien, et al.*, 403 N.J. Super. 281, 298-300 (App. Div. 2008). Because Trump had not met his burden under New York's qualified privilege, the Appellate Division declined to determine whether New Jersey or New York law should apply. *Id.* at 305.

### Motions for Summary Judgment

On March 20, 2009, the defendants moved for summary judgment on two independent bases: (1) that no reasonable jury could find that O'Brien acted with actual malice; and (2) that Trump could not prove that he suffered any damage as a result of the defendants' allegedly defamatory statements.

### Actual Malice

The defendants argued that there was no clear and convincing evidence that would permit a reasonable jury to conclude that O'Brien acted with actual malice (*i.e.*, knowledge that the allegedly defamatory information was false, or reckless disregard for its falsity). According to the defendants, the undisputed evidence demonstrated that O'Brien believed the anonymous sources were reliable, for reasons including that the sources were well-placed, previously provided O'Brien with other reliable information about Trump, and independently corroborated one another. In addition, defendants asserted that O'Brien had done extensive research regarding Trump's net worth, including by interviewing Trump and his employees, and that O'Brien had reason to doubt Trump's estimates of his net worth, including Trump's reputation for exaggeration, his refusal to provide meaningful documentation, and the variation in

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## New Jersey Court Grants Summary Judgment Dismissing Donald Trump's Defamation Claim Against Book Author and Publisher

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Trump's assessments over time. Indeed, defendants quoted Trump's deposition testimony in this case, in which Trump stated that "my net worth fluctuates and it goes up and down with markets and with attitudes and with feelings, even my own feelings." Defendants also argued that Trump's allegations of bias did not establish actual malice as to O'Brien. With regard to the publisher, defendants asserted there was no basis for a jury to find actual malice and that the publisher likewise could not be vicariously liable for O'Brien's statements.

In opposition, Trump countered that there were material issues of fact as to actual malice sufficient to survive defendants' motion. Trump argued that there was evidence that O'Brien had come to his conclusions about O'Brien's net worth prior to researching the book, failed to research adequately, and purposefully avoided and recklessly ignored contrary information. Also, Trump asserted that his warning to O'Brien and the publishers of the alleged falsities in the book, and their publication despite the warning, provided a basis for finding actual malice. In addition, Trump pointed to comments about Trump made by O'Brien in previous publications, in *TrumpNation*, during the promotion of the book, and in personal emails, as evidence that O'Brien harbored sufficient ill will towards Trump to defeat summary judgment. He also asserted that O'Brien had reason to doubt the credibility of his sources, and that O'Brien should not be entitled to rely on the sources in moving for summary judgment because such reliance would constitute using the newsperson's privilege as both a shield and a sword. Regarding the publisher, Trump's opposition to defendants' summary judgment motion abandoned his prior claim of direct liability and instead asserted that the publisher was vicariously liable for O'Brien's statements.

### Loss Causation and Damages

On the issue of loss causation and damages, defendants argued that there was no evidence of any injury to Trump and that the allegedly defamatory statements did not qualify

as libel *per se* or slander *per se*. With respect to Trump's alleged lost business opportunities, defendants argued these were speculative and not causally linked to the allegedly defamatory statements. Defendants also asserted that Trump's alleged mitigation costs were not recoverable. In response, Trump argued that a reasonable jury could find that he had lost a number of overseas and domestic real estate deals as a direct result of the book and that he expended resources to mitigate the damages allegedly caused by the book, including that he met with members of the media, sought a retraction, and purchased corrective advertising.

### Decision of the Court

Approximately two months after lengthy oral argument, the court read into the record an opinion granting summary judgment for the defendants on their motion concerning actual malice, dismissing Trump's claims in full. Accordingly, the court did not address defendants' motion on loss causation and damages.

### Standard for Summary Judgment on the Basis of Actual Malice

The court noted that, under *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), the standard for establishing actual malice is whether the allegedly defamatory material was published "with knowledge that it was false or with reckless disregard of whether it was false or not," and that on summary judgment a court must decide "whether a reasonable fact finder could find actual malice by clear and convincing evidence." *Id.* at 285. Under this standard, the court held "the allegations concerning O'Brien's investigation or his alleged failure to cite or credit information favorable to Trump concerning Trump's net worth [did not] rise[] to the level of actual malice sufficient to withstand summary judgment." *Trump v. O'Brien, et al.*, No. CAM-L-545-06 (N.J. Sup. Ct. Law Div. July 15, 2009). In reaching its decision, the court declined to choose between New York and New Jersey law because it viewed the law as consistent for purposes of defendants' motion.

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## New Jersey Court Grants Summary Judgment Dismissing Donald Trump's Defamation Claim Against Book Author and Publisher

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### *Trump's Allegations Concerning Actual Malice Could Not Survive Summary Judgment*

The court held that Trump had not adduced evidence that would enable a reasonable jury to conclude that O'Brien knew that the confidential source estimates were false or that O'Brien doubted the sources' veracity. As to Trump's argument that O'Brien failed to investigate adequately, the court cited *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 424 (1995), stating that evidence of a failure to investigate does not constitute sufficient proof of actual malice to overcome summary judgment, and at most is evidence of negligence rather than knowledge or reckless disregard for the truth.

The court noted that – in addition to citing the confidential sources' estimates of Trump's net worth – O'Brien cited numerous estimates in the billions, which supported a finding that O'Brien did not act with reckless disregard for

the truth. As to comments made by O'Brien about Trump, the court quoted *DeAngelis v. Hill*, 180 N.J. 1, 17-18 (2004) for the proposition that “[a]ctual malice has nothing to do with hostility or ill will,” and also cited *Dillon v. City of New York*, 704 N.Y.S. 2d 1, 5 (App. Div. 1999).

Rather, the court stated that actual malice concerns a publisher's state of knowledge of the falsity of a statement, not motivations in publishing the statement, and found that comments made by O'Brien about Trump did not constitute clear and convincing evidence of actual malice.



### *O'Brien Was Entitled to Rely upon the Confidential Sources to Refute Allegations of Actual Malice*

Addressing Trump's argument that the defendants could not rely upon the confidential sources to refute allegations of actual malice because of their assertion of the newspaper's privilege, the court cited *Maressa v. New Jersey Monthly*, 89 N.J. 176 (1982) and *Sprewell v. NYP Holdings, Inc.*, 841 N.Y.S. 2d 7 (App. Div. 2007). The court reasoned that under *Maressa* “the privilege does not impinge upon the rights of the defamation plaintiff . . . ‘Since defamation is a common-law action without a constitutional foundation, the legislature has the power to limit that action in favor of the right of freedom of the press.’” (quoting *Maressa*, 19 N.J. at 200.) In addition, the court noted that the journalist in *Sprewell*, 841 N.Y.S. 2d at 10-11, had obtained and reported information from a variety of sources, including the plaintiff and confidential sources, and relied on the confidential sources in obtaining summary judgment. The court therefore held that Trump “ha[d] not established that O'Brien's reliance upon the confidential sources establishes actual malice by clear and convincing evidence sufficient to defeat defendants' motion for summary judgment.” *Trump v. O'Brien, et al.*, No. CAM-L-545-06 (N.J. Sup. Ct. Law Div. July 15, 2009).

### *The Publisher Was Not Vicariously Liable for O'Brien*

The court held that O'Brien was not the publisher's agent and that O'Brien's actions therefore could not be imputed to the publisher on a theory of vicarious liability. In addition, the court held that the publisher could not be vicariously liable because there was no primary liability.

*Timothy L. O'Brien, Time Warner Book Group Inc., and Warner Books Inc. were represented by Mary Jo White, Andrew J. Ceresney, and Andrew M. Levine of Debevoise & Plimpton LLP, and Mark S. Melodia and Kellie A. Lavery of Reed Smith LLP. Donald J. Trump was represented by Marc E. Kasowitz, Mark P. Ressler, and Maria Gorecki of Kasowitz, Benson, Torres & Friedman LLP, and William M. Tambussi and William F. Cook of Brown & Connery LLP.*

## Georgia TV Station Wins Summary Judgment *News Broadcast Was True; Plaintiff Failed to Show Fault*

By Cynthia L. Counts

A Georgia television news station won an important and decisive summary judgment on a former public official's claims for defamation, false light invasion of privacy, and public disclosure of private facts. *Godfrey v. Cobb County, et al.*, No. 06-1-7337-49 (Ga. Sup. Ct. July 13, 2009).

Rather than simply deny summary judgment based upon the existence of apparently conflicting facts presented by the parties, the Cobb County Superior Court Judge took a hard look at the evidence in the case and determined that the substance of the newscast was objectively true, and therefore, no genuine issue of material fact existed for determination by a jury. Furthermore, the court held that plaintiff had failed to meet the actual malice fault standard and then went a step further in explaining that plaintiff's evidence failed as a matter of law to establish even negligence.

### *Public Safety Controversy Involving Plaintiff*

The defendant, a local Atlanta television news station, broadcast a news report about the failure of plaintiff, a former Internal Affairs Investigator for a county fire department, to conduct proper investigations and background checks on new firefighter applicants. After an internal inquiry by the Fire Department into plaintiff's incomplete investigations, he was demoted from the Internal Affairs Unit and later resigned from the department altogether.

The news report focused on plaintiff's role as a government official and the public safety concerns arising out of his deficient job performance. During the newscast, the reporter described the controversy generally and voiced criticism of plaintiff. The reporter interviewed a spokesperson for the county who pointed his finger at the investigator as being the one responsible for overseeing the background checks and charged he did not do a "thorough" job. The reporter never mentioned the investigator's demotion directly, but did state that he had resigned from the department. Later in the broadcast, the reporter noted that "for now the County says [the firefighters] will keep their jobs, although the controversy already cost [the investigator] his." The news report ended with a statement that the television station had attempted to contact the investigator, but that his "telephone number had been disconnected."

### *Plaintiff's Arguments*

Plaintiff filed suit against both the county and the television station, alleging defamation, false light invasion of privacy and public disclosure of private facts. The thrust of plaintiff's claims revolved around two statements made in the broadcast: 1) that the controversy over his failure to complete thorough background investigations cost him his job, and 2) that his telephone number had been disconnected. The news station then filed a motion for summary judgment as to all of plaintiff's claims.

In opposing the station's motion, plaintiff argued he that he resigned from the fire department for "personal reasons," and the news station in fact displayed plaintiff's resignation letter in the broadcast. However, at no time did plaintiff deny that he failed to conduct the background checks, nor did he deny that it was his responsibility to do so.

Furthermore, it was later found during discovery that plaintiff tendered his resignation only *after* his demotion and *after* a superior issued a report recommending his immediate termination for his handling of the background investigations. Finally, although plaintiff's briefs spent a great deal of time discussing his ultimate resignation from the department, the court pointed out that he never gave any other reason for his demotion from the Internal Affairs Unit other than the controversy surrounding his deficient performance in conducting the background investigations.

Plaintiff's second major contention revolved around his assertion that his *private, unlisted home* telephone number had not been disconnected, and, therefore, the reporter's statement to the contrary was false, and a genuine issue of fact existed for determination by a jury. Plaintiff further asserted that the statement about his phone number was a private fact outside the scope of actual malice. Indeed, unbeknownst to the television station, the plaintiff had two telephone numbers: A *publicly listed* number that was disconnected at some point prior to the broadcast, and a *private, unlisted* number that had not been disconnected. However, the television station had no means of discovering the unlisted number, or even the *existence* of that number through a diligent search, and plaintiff never provided the unlisted number. The only number that surfaced while the reporter was researching the story was the publicly listed number, which was incidentally also listed in plaintiff's fire department personnel file. Through artful pleading, plaintiff truth-

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## Georgia TV Station Wins Summary Judgment

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fully claimed his *home* telephone number had not been disconnected. However, plaintiff never disputed that the disconnected publicly listed number was also his.

### *Trial Court's Analysis*

In granting summary judgment to the television station on plaintiff's claims for defamation and false light invasion of privacy, the court focused on the fact that the statements made in the broadcast were objectively true – plaintiff *did* have a public telephone number that had been disconnected, and despite the fact that he voluntarily resigned from the Fire Department, the controversy *did* cost him his job as an Internal Affairs Investigator in that he had been demoted as a result of the pending investigation.

Furthermore, even though the television station reported the facts in a fashion that plaintiff did not like, they were nonetheless true and subject to the protections of the First Amendment. By carefully analyzing the evidence and plaintiff's conclusory assertions, the court found that the isolated statement that plaintiff's telephone number had been disconnected was true, even though the plaintiff had testified that his number had not been disconnected.

Indeed, the plaintiff never provided his private, unlisted telephone number and never denied that the publicly listed, disconnected telephone number was his. The court rejected plaintiff's arguments that the statements gave rise to the inference that he was incompetent and that he was the sort of person who did not pay his bills, noting that when a statement is truthful and unambiguous, the subjective associations that may be created in the minds of some people are irrelevant. Moreover, the court noted that libel by omission is not a cognizable theory of recovery under Georgia law. Thus, the news station's mere omission of facts from the broadcast that showed *why* plaintiff had not performed background checks was irrelevant, even though the inclusion of such facts would have portrayed plaintiff in a more favorable light.

In determining that actual malice was the appropriate fault standard in this case, the court found that the plaintiff was a public official: He was charged with assessing the qualifications of potential firefighters, a position that raises concerns about public health and safety. Additionally, the court also held that actual malice standard also applied because the news report was covered by several Georgia statutory privileges.

Yet, the court did not conclude its analysis with application of the actual malice standard, but went a step further to find that plaintiff failed to present any facts that would satisfy even a negligence fault standard – which plaintiff argued should have applied to the statement about his telephone number. The court explained that the reporter and the television station not only believed the report to be factually accurate, but plaintiff failed to present any evidence that the station failed to exercise care in determining the truth or falsity of broadcast. The court found plaintiff's cursory allegations – that the reporter simply *must have known* the statements were false or simply should have done more “homework” to discover that the unlisted home number had not been disconnected – to be lacking a factual basis, and insufficient to meet either an actual malice or negligence standard.

The court then turned its analysis to plaintiff's private facts claim based upon the station's statement about the telephone being disconnected. It found that plaintiff simply failed to show that any private facts had been disclosed, noting particularly that the television station did not release the plaintiff's actual private home telephone number. Furthermore, the court found that anyone could discover that the publicly listed telephone number existed by searching for plaintiff's name using the white pages, an Internet search or 411 directory assistance. An individual who called the number would then receive the same recorded disconnection message. Thus, the facts were so clear and uncontroverted that the Court granted summary judgment as to Plaintiff's public disclosure claims without having to determine the applicable fault standard.

In sum, this is a case where the defendant's motion for summary judgment was granted on all grounds. The value of this decision is the court's detailed discussion about the specific evidence and why it was insufficient under either the actual malice or the negligence standard. The order also analyzed why plaintiff's evidence failed to create a genuine issue of fact as to either falsity or private facts. Ultimately, the defendant news station won on every possible point, and the favorable legal analysis provided in this opinion might be helpful as persuasive authority in other media cases.

*Cynthia L. Counts, Counts & Associates in Atlanta, represented Fox5 in this matter. Plaintiff was represented by Clarence Johnson, Atlanta.*

## College Basketball Coach Not a Public Figure For Libel Suit Over Dismissal

A Massachusetts trial court this month held that a college basketball coach suing his former employer over statements made to the press after his coaching contract was not renewed is not a public figure, notwithstanding the coach's high profile in the local media. *Ackerman v. Paulaukas, et al.*, No. 05-1524D, 2009 WL 2230923 (Mass. Super. July 1, 2009).

The plaintiff, Thomas Ackerman, had been the coach of Assumption College's NCAA Division II basketball team from 1999 through 2004 when his yearly contract was not renewed. The *Worcester Telegram & Gazette* interviewed the college's athletic director Theodore Paulaukas about the change and published an article in February 2005 headlined "Ackerman out at Assumption." The article included quotes from Paulaukas saying "I am looking for someone who is going to get to the office before me and leave after me"; "I am looking for someone with passion, someone that projects well in the Community and someone who will aide in our fundraising efforts."

Ackerman sued the college and athletic director for libel and related claims. The defendants moved for summary judgment on the libel claim, arguing that plaintiff is a public figure who showed no evidence of actual malice. The summary judgment motion included hundreds of pages of local newspaper articles containing interviews and quotes from plaintiff about the basketball team.

Superior Court Judge Richard Tucker denied the motion, holding that plaintiff was a private figure. Surveying Massachusetts case law, the court noted that the key issue was whether the plaintiff had participated in the particular controversy giving rise to the defamation claims. Citing, e.g., *Shaari v. Harvard Student Agencies, Inc.*, 691 N.E.2d 925 (Mass. 1998).

Taking a very narrow view, the court concluded that "no controversy exists in this case beyond the comments that are themselves at issue." 2009 WL 2230923 at \*2. Thus, "[n]o matter how many articles the Telegram published quoting Ackerman between 1999 and 2005, he was not a public figure" for the article about the non-renewal of his contract.

### MEDIA LAW RESOURCE CENTER CALENDER 2009-10

#### **MLRC Dinner 2009**

*November 11, 2009*

Grand Hyatt NYC

Reception : 6:00pm-7:15pm

Dinner: 7:15pm-11:00pm

#### **MLRC Annual Meeting**

*November 11, 2009*

Grand Hyatt NYC

2:30pm-3:30pm

#### **MLRC Forum**

*November 11, 2009*

Grand Hyatt NYC

4:00pm-6:00pm

#### **2009 DCS Annual Lunch**

*November 12, 2009*

Proskauer Rose LLP

1585 Broadway

New York, NY 10036-8299

Noon-2:00pm

#### **2010 NAA/NAB/MLRC Conference Planning Meeting**

*November 12, 2009*

Sonnenschein Nath & Roth

1221 Avenue of the Americas

New York, NY 10020-1089

8:00am-9:00am

#### **[MLRC London Conference](#)**

*October 1-2, 2009*

International Developments in Libel,  
Privacy Newsgathering and New Media Law

#### **MLRC Southwestern Conference**

*January 14, 2010*

Southwestern Law School, Los Angeles, Cal.

#### **[MLRC/Stanford Digital Media Conference](#)**

*Legal Frontiers in Digital Media*

*May 13-14, 2010*

Stanford University, Palo Alto, CA

## Fair Report Privilege Protects TV News Station in Case of Mistaken Identity *Fugitive Roundup Arrested Wrong Woman*

A Tennessee federal district court applied the state's fair report privilege to grant summary judgment dismissing libel and related claims over a news report about what turned out to be a mistaken arrest. *Milligan v. U.S., et al.*, Nos. 3:07-1053, 3:08-0380, 2009 WL 2191934 (M.D. Tenn. July 21, 2009) (Trauger, J.).

The court held that the news broadcast was clearly an accurate report of "official government action" and plaintiff's claim that the privilege was lost because of actual malice was based "upon layers of unreasonable inference upon unreasonable inference."

### **Background**

The plaintiff in the case was the unfortunate victim of mistaken identity caused by a law enforcement data entry error. Plaintiff Paula Milligan, a 42 year old resident of Tennessee, was erroneously linked to an indictment of a 24 year old North Carolina woman with the same name. Plaintiff was arrested on October 24, 2006 as part of a nationwide federal fugitive round-up named "Operation Falcon III" which involved over 10,000 arrests.

A U.S. Marshals Service official in Tennessee invited local media to do a "ride-along" during the operation, provided they embargoed their news reports until after the conclusion of the nationwide sweep. Local station WZTV-Fox 17, operated by Sinclair Television, accepted the invitation and a reporter and videographer accompanied officials during a number of arrests, including observing and filming plaintiff's arrest from the street in front of her home.

The charges against plaintiff were dismissed on November 1, 2006. The next day the news embargo was lifted and WZTV-Fox 17 broadcast its report on Operation Falcon. The report included approximately seven seconds of footage of plaintiff being escorted by arresting officers together with statements that arrests were made "with warrants in hand" and that the "first arrest came early: Paula Milligan, wanted on four counts of forgery and one count of identity theft." The video and a text version of the report were also posted to the station's website.

Plaintiff sued various federal and state law enforcement officials for false arrest and related claims. In a separate action she sued WZTV-Fox 17 for libel, false light, invasion of privacy and outrageous conduct. The cases were ultimately consolidated in one federal court action.

### **Fair Report Privilege Applied**

WZTV-Fox 17 moved for summary judgment based on Tennessee's common law fair report privilege. Granting the motion,

the court first found, not surprisingly, that the broadcast was about official government action since all the statements about plaintiff were based on information received from the law enforcement official in charge of her arrest.

The court also held that the report was a fair and accurate summary of the official action, rejecting plaintiff's argument that it was inaccurate because arresting officers did not literally have "warrants in hand" during the arrest. Assuming for purposes of the motion that this statement actually referred to plaintiff's arrest, the court concluded even if the statement was technically inaccurate, plaintiff was nevertheless arrested pursuant to a warrant which provided legal justification for the arrest.

The court also rejecting plaintiff's argument that the broadcast was not fair because it associated her with others arrested on more serious felony charges, such as drug dealing, sex crimes and gang activity. The court looked at the statements in the broadcast about plaintiff's arrest and concluded that there was nothing one-sided or slanted about the report.

Plaintiff argued that the privilege should be lost because of actual malice. Relying on Tennessee law, the court found that the issue of actual malice was particularly well-suited for determination on summary judgment, rejecting plaintiff's claim that it presented a factual question for the jury.

Plaintiff's claim of actual malice was largely premised on the fact that the reporter did not conduct additional investigation of the underlying warrant or check court records and discover that the charges against her were dismissed. The court described plaintiff's argument as a "house of inferential cards." Under the circumstances, there was no basis for the reporter to doubt the information he received or to alert him to conduct further investigation. Lastly, plaintiff argued that WZTV-Fox 17 exhibited actual malice because of a short lag time in removing the report from its website after it had notice that plaintiff was the victim of a false arrest. The court dismissed this argument, noting that the station had not rebroadcast the report after it had notice and took steps to remove the content from its website.

*Sinclair Television was represented by Richard Goehler and Brian C. Neal of the Cincinnati and Nashville offices of Frost, Brown & Todd, LLC. Plaintiff was represented by Andrew C. Clarke, Borod & Kramer, Memphis, TN; Andy L. Allman, Kelly, Kelly & Allman; Debrah K. Frizzell, Frizzell & Frizzell, Hendersonville, TN.*

## Jury Awards \$17,000 to Employees for Privacy Violation

### *Managers Accessed Private MySpace Group with Employees' Grips*

A federal jury awarded \$17,016 – \$3,403.00 in back pay and \$13,612.00 in punitive damages – to two former restaurant employees who were fired for allegedly making derogatory comments about their jobs on a private MySpace group page. *Pietrylo v. Hillstone Restaurant Group*, No. 2:06-cv-05754 (D. N.J. jury verdict June 16, 2009).

The award was for the employer's unauthorized access to the MySpace group, which the jury found was in violation of the federal Stored Communications Act, 18 U.S.C. §§ 2701-11, and the New Jersey Wire Tapping & Electronic Surveillance Act, N.J.S.A. 2A:156A-27. The jury found for the defendants, however, on plaintiffs' privacy claims, holding that they had no expectation of privacy in the MySpace group.

#### **Background**

Plaintiff Brian Pietrylo and his girlfriend, plaintiff Doreen Marino, both worked as servers at the Houston's restaurant at Riverside Square mall in Hackensack, N.J., owned by defendant Hillstone Restaurant Group.

From his home computer, in March 2006 Pietrylo created a private group on MySpace called the "Spec-Tator," as a forum for present and past employees of the restaurant. The page for the group stated that the site was "A place for those of us at Riverside to talk about all the crap/drama/and gossip occurring [sic] our workplace, without having to worry about outside eyes prying in ... but because this group is oh so private, only participants will stay members. Past and present employees welcome."

Since "Spec-Tator" was a private group, Pietrylo would have to approve all members. He invited various non-management employees of the restaurant to join his group, including Marino; Pietrylo did not extend this invitation to any managers.

According to court testimony, restaurant managers learned of the group when one of the fellow employees that Pietrylo invited to join the group, Karen St. Jean, accessed and showed the group to manager TiJean Rodriguez while having dinner at Rodriguez's home. St. Jean's manager then

asked St. Jean for her e-mail address and password so that he could access the "Spec-Tator" site using her account; she provided the information. Eventually, other managers, both at the Hackensack restaurant and higher in the restaurant's corporate structure, apparently used St. Jean's individual MySpace account to access the "Spec-Tator" group home page.

On May 9, 2006, Pietrylo was fired for creating and maintaining the MySpace group. Marino was fired the next day for her involvement in the group. They sued in November 2006, alleging violations of the federal Wiretap Act and the equivalent New Jersey Wiretapping and Electronic Surveillance Control Act; and the federal Stored Communications Act, 18 U.S.C. §§ 2701-11 and the equivalent New Jersey provision (N.J.S.A. 2A:156A-27, contained within the state's Wiretapping and Electronic Surveillance Control Act); as well as wrongful termination and several invasion of privacy claims.

Plaintiffs dropped the federal and state wiretap claims. The defendant then filed a motion to dismiss on Jan. 17, 2007, which the court denied on Aug. 23, 2007. Defendant then filed a motion for summary judgment on Dec. 20, 2007, which the court denied, except as to one of the privacy claims, on July 24, 2008. [\*Pietrylo v. Hillstone Restaurant Group\*](#), No. 2:06-cv-05754, 2008 WL 6085437 (D. N.J. July 25, 2008). A defense motion to reconsider this ruling was denied on Sept. 24, 2008.

This left claims under the federal Stored Communications Act and the equivalent state provision, as well as claims of invasion of privacy and wrongful termination in violation of public policy.

#### **Applicable Law**

The federal Stored Communications Act, 18 U.S.C. § 2701, *et. seq.*, prohibits unauthorized access to "the contents of a communication while [it is] in electronic storage." Under the statute, "intentionally access[ing] without authorization a facility through which an electronic communication service is provided; or intentionally exceed[ing] an authori-

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## Jury Awards \$17,000 to Employees for Privacy Violation

(Continued from page 22)

zation to access that facility” is an offense. 18 U.S.C. § 2701.

The New Jersey state statute uses similar language, making it a crime to “knowingly access[] without authorization a facility through which an electronic communication service is provided or exceed[ing] an authorization to access that facility, and thereby obtain[], alter[], or prevent[] authorized access to a wire or electronic communication while that communication is in electronic storage.” N.J.S.A. 2A:156A-27.

Cases applying both of these statutes have focused on whether they apply to communications in transitory “storage,” before they are received by the intended recipient, or only to messages stored in an archive after they are received. Compare, e.g., *White v. White*, 344 N.J. Super. 211 (N.J. Ch. Div. 2001) (e-mails are in post-transmission storage do not fall within the definition of “electronic storage” under New Jersey Wiretap Act), with *State v. Gaikwad*, 349 N.J. Super. 62 (N.J. App. Div. 2002) (upholding conviction for accessing individuals’ e-mail stored in their mailboxes after receipt).

A federal case on the in-storage / in-transit distinction has a striking resemblance to the *Pietrylo* case. In *Konop v. Hawaiian Airlines, Inc.*, 302 F. 3d 868 (9th Cir. 2002), cert. denied, 537 U.S. 1193 (2003), Hawaiian Airlines managers used employees’ passwords, with their consent, to access a personal web site maintained by pilot Ronald C. Konop, on which he posted information critical of the airline and its pilots’ union. Konop sued the airline for various claims including violations of the federal Wiretap and Stored Communications acts.

After the district court largely granted summary judgment to the airline, Konop appealed. The Ninth Circuit issued a decision in January 2001, and largely reversed. *Konop v. Hawaiian Airlines, Inc.*, 236 F.3d 1035 (9th Cir. 2001), opinion withdrawn, 262 F.3d 972 (9th Cir. 2001). In its decision, the court decided that the Wiretap Act and the Stored Communications Act both apply communications regardless of whether the communications are “in transit or storage.”

This holding, which was contrary to the weight of authority from other courts, was severely criticized. On Aug.

28th, the court withdrew its ruling, and almost a year later released a new decision completely abandoning the original conclusion. *Konop*, 302 F. 3d 868 (9th Cir. 2002). The court majority now held that accessing stored electronic communication was not a violation of the Wiretap Act, but agreed with the original conclusion reversing the trial court’s grant of summary judgment to the airline on the Stored Communications Act claims, since the trial court had not determined whether the employees who allowed the supervisor to access Konop’s site using their passwords met the Act’s definition of “users,” which are allowed under its provisions to authorize access by third parties.

After the appellate decisions, the case was remanded to the district court, which eventually granted a defense motion to dismiss the suit. *Konop v. Hawaiian Airlines, Inc.*, Civil No. 96-04898 (C.D. Cal. order Dec. 13, 2005) (dismissing case).

Meanwhile, Hawaiian Airlines filed for bankruptcy reorganization, and Konop filed various claims, including a claim for statutory damages under the federal Stored Communications Act. The bankruptcy court dismissed the other claims, and eventually awarded \$1,000 for the statutory violation. On appeal of the bankruptcy court’s ruling, the district court held Konop could receive \$1,000 for each individual violation of the Stored Communication Act, and remanded for a determination of how many such violations occurred. *In re Hawaiian Airlines, Inc.*, 355 B.R. 225 (D. Hawai‘i 2006). In the end, Konop was awarded \$9,000.

### *Pietrylo Trial*

The arguments at the week-long trial apparently in the “Spec-Tator” case focused on whether Karen St. Jean voluntarily provided her e-mail address and password, necessary to access the “Spec-Tator” site within MySpace, to her manager.

The plaintiffs argued that St. Jean feared retaliation at work if she did not provide this information, so that it was not voluntary. Thus the manager’s access to the “Spec-Tator” site was unauthorized, and violated of the federal and state statutes, as well as a violation of the plaintiffs’ privacy rights.

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## Jury Awards \$17,000 to Employees for Privacy Violation

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The defense countered that St. Jean gave her manager the information voluntarily, “without objection and without conditions,” making their access of the site authorized. The defense also argued that the plaintiffs had no reasonable expectation of privacy when posting material to a website available to a large number of people.

After four and half hours of deliberation, the jury returned a verdict \$3,403.00 in back pay.

In considering compensatory damages, the jury found for the plaintiffs on the federal and state statutory claims, determining that the managers’ access of the “Spec-Tator” site was not authorized by Karen St. Jean. But it found for the defense on the privacy claims, deciding that while the site was a place of solitude and seclusion which was designed to protect the plaintiffs’ private affairs and concerns, the plaintiffs did not have a reasonable expectation of privacy in the site. The jury then awarded the maximum back pay instructed by the court, \$2,500 to Pietrylo and \$903 to Marino. It specifically declined to award any amount to Pietrylo for emotional distress.

Before trial, the parties stipulated that if the jury awarded compensatory damages, plaintiffs would also receive punitive damages four times the compensatory damages if the jury found that Houston’s conduct was either malicious or “wanton and willful.” Since the jury deter-

mined that while the managers’ conduct was not “wanton or willful,” it was malicious, plaintiffs were awarded \$13,612.00 in punitive damages.

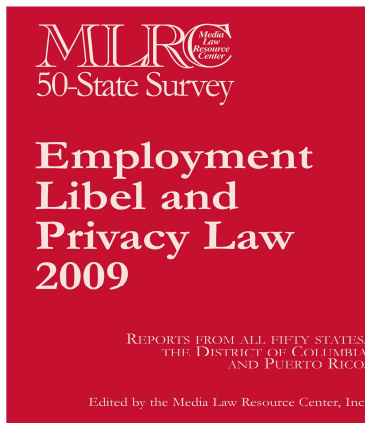
### *Post-Trial Motions*

While counsel for the restaurant told the *New Jersey Law Journal* that it would not appeal, on July 3 the company filed a motion for judgment as a matter of law or a new trial. In support of the motion, the company argued that the jury’s verdicts that the managers had violated the statutes and that their actions were malicious were based on no evidence and against the weight of evidence presented at trial; and that the damages awarded were not supportable.

Three weeks later, the plaintiffs moved for an amended judgment, seeking in \$5,000 for each plaintiff: \$1,000 in statutory damages to each plaintiff for each violation of the federal Stored Communications Act found by the jury. Plaintiffs also moved for attorney fees.

Both parties’ motions are currently pending.

*The defendants were represented by Donn duBeth Gardiner of McElroy Deutch, Mulvaney & Carpenter, LLP in Morristown, N.J. Plaintiffs were represented by Fred J. Pisani of Ramp & Pisani, LLP in Tenafly, N.J.*



## **MLRC 50-STATE SURVEY: EMPLOYMENT LIBEL AND PRIVACY LAW 2009**

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## Newspaper Publisher Plaintiff Pulverised In Libel Claim

### *Judge Eady's Exclusion Of Evidence Ruled Manifestly Unjust*

By David Hooper

Tom Bower the author and journalist has spectacularly won the libel action that Richard Desmond proprietor of Express Newspapers and equally well-known as the one-time publisher of pornographic magazines foolishly brought for a fleeting mention about his being bested in a libel action brought by the convicted felon and fellow newspaper proprietor Lord Conrad Black who was himself also the subject of a Bower unauthorised biography.

It was far from clear why Desmond thought the paragraph about him in Bower's biography of Black *Dancing on the Edge* could be said to be defamatory of him. It was thought that Desmond may have been getting his retaliation in first against Bower's as yet unpublished but unflattering biography of Desmond *Rough Trader*, which I have read and hope will be published in the USA. It presents an astonishing picture of how and why unsuitable individuals such as Desmond seek the power and influence of being newspaper proprietors in the UK. It has a riveting account of Desmond's brushes with distinctly unsavoury New York lowlife.

The issue was whether Desmond used his papers to settle personal scores and whether in a business dispute with Black he had been "ground into the dust." It was difficult to discern any libel. There was no love lost between Black and Desmond, but on the principle that my enemy's enemy is my friend Desmond rushed to Black's US jail by private jet to try and get his evidence. Desmond was not admitted into the jail, although a statement from Black was later produced at the trial. It led Bower's counsel to quip that there was one newspaper proprietor trying to get into jail and another was trying to get out!

In any event the jury did not think much of Desmond's complaint nor of the quality of his evidence and threw out Desmond's case leaving him with a bill estimated at £1.25 million which leaves one with the impression that his highly priced lawyers Schillings must have been working at a substantial discount on their normal rates. The British press relished the discomfiture of a very wealthy newspaper proprietor whom one of the witnesses had put on a par reputation-wise with Robert Maxwell. Not surprisingly Desmond's own papers took a more sanguine view of the outcome quot-

ing Desmond as apparently thinking the exercise had been worth it for setting the record straight.

After the case the jurors were lining up to embrace Tom Bower asking him to sign copies of his Conrad Black book and to promise to send them copies of *Rough Trader*, his forthcoming book on Richard Desmond – the real *casus belli*. The ruling which overturned Mr Justice Eady's exclusion of crucial defence evidence seems to have been the turning point in the jury seeing through Desmond and rejecting his evidence. It was the moment in the case where Bower's counsel Ronald Thwaites QC moved from believing that Bower would win to knowing that he would win.

The jury was able to hear the tape of Desmond's threats against Jafar Omid, Managing Director of Pentagon Capital Management, a hedge fund. Desmond wanted Omid to pay back his son £75,000 which included a juicy 50% profit whereas Mr Omid argued that the Desmonds had to be treated like anyone else in these turbulent financial markets. Desmond's tirade came straight from a *Sopranos* script. Evidently forgetting that the trading conversations of financial services companies have to be recorded, Desmond menaced "I am the worst fucking enemy you'll ever have," and in good Soprano-speak said "don't go on because you are going to aggravate me, just send me a cheque back or we are not going to be friends. In fact we are going to be enemies." Not surprisingly, Bower wanted this tape played to the jury and when it was, it swung the case in his favour. The more so because a Desmond newspaper had written an article attacking Omid three days later when he had not coughed up the £75,000. In subsequent litigation Desmond admitted that his comments had prompted journalists at his paper, the Sunday Express, to run the article about the otherwise obscure Omid – in effect precisely the sort of conduct Bower was alleging.

Bower's counsel, Ronald Thwaites QC, in caustic exchanges with Mr Justice Eady showing that there is no love lost between the two, argued that this showed how Desmond could be motivated by a personal desire for revenge and could use his control of his newspapers as a weapon and that this was relevant similar fact evidence of Desmond's propensity to behave in the way that Bower described in relation to his spat with Conrad Black.

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## Newspaper Publisher Plaintiff Pulverised In Libel Claim

*(Continued from page 25)*

Surprisingly, Mr Justice Eady refused to allow the tape to be played and to permit a witness summons requiring Mr Omid to testify about these threats. Nor would Eady allow the “P” word (pornographer) to be used at the trial. Consequently there was a flurry of applications to the Court of Appeal resulting in Eady’s rulings being overturned with the respected Judge being savaged by one Lord Justice of Appeal after another. [\*Desmond v. Bower\*](#), [2009] EWCA Civ 667 (July 6, 2009)

Having read both Bower’s book on Conrad Black and the, as yet, unpublished book on Desmond, I believe that the jury reached entirely the right decision and that a verdict in favour of Desmond would have been a travesty. However, such is the unsatisfactory nature of libel litigation that it could have been very different if Eady’s rulings had stood. The Desmond case shows just how unfair and unjust British libel litigation can be and what a lottery it is.

Desmond had seized upon a very inconsequential reference to him in one paragraph of a 300 page book. Intriguingly he had ignored a more serious allegation, namely that in an earlier case a judge had considered his evidence to be unreliable. The hair-splitting nature of libel litigation ironically had bitten Desmond when the first trial of his libel action was abandoned owing to legal howlers in the opening presentation of the case by his lawyers unexpectedly departing from their previously stated case. Desmond may argue with his lawyers about who foots the bill for that particular mishap. It was not an auspicious start for a QC whose first major libel case this was. Their problem was that at the last moment they tried to beef up their case against Bower, while surprisingly in the adrenalin of the moment overlooking the need to adhere to their pleaded case- a matter about which our courts are very strict. The first jury had to be discharged and a retrial ordered.

Mr Justice Eady unexpectedly took the view that the taped conversation was not sufficiently relevant to the issues in the case and that in any event the application to play the tape was too late. Mr Justice Eady, an unquestionably fair-minded and highly-experienced libel judge, finds himself presiding over a system where case management of issues can triumph over the presentation of a rounded picture to the jury. Layer after layer of Bower’s defence had, in earlier legal skirmishes, been peeled off with the result that Desmond could choose his battlefield and the jury would not see what Bower con-

tended was the dark side of Desmond. The judge was concerned to stop satellite litigation and the introduction of issues outside of the core libel. However, such decisions on admissibility run the very real risk that the jury will not see the true picture and of significant injustice. The jury needed to hear this evidence. And the Court of Appeal agreed. Lord Justice Pill spoke of the decision being “*plainly wrong*.” Although the Court of Appeal should allow an experienced judge a “*generous ambit within which a reasonable disagreement is possible*,” Lord Justice Hooper felt Mr Justice Eady’s decision to exclude the evidence of the telephone call was “*wrong*” and that not to allow it would “*risk the possibility of a miscarriage of justice*.”

The Court of Appeal felt that the defendant’s QC Mr Thwaites was not to blame for making his application at a late stage. The Court considered that the threshold of whether the judge’s decision exclude the evidence was “*manifestly unjust*” had been breached. Lord Justice Wilson also felt that the judge’s decision to exclude the evidence and not to grant a witness summons to require Mr Omid to give evidence was “*plainly wrong*.” This they felt was not just a discretionary case management decision where the Court of Appeal should not interfere with the decision of an experienced judge simply because they might have decided the point differently, but rather it was a decision which gave rise to a real risk of a miscarriage of justice.

There is plenty in Shakespeare about the importance of protecting reputation – ironically some of the best quotes come from the villainous Iago in *Othello* – but the courts should not forget fairness to defendants. If you claim that your reputation has been damaged, the jury should be allowed a proper and proportionate snapshot of your reputation and the way you have lived your life. Libel courts would do well to remember that fairness to defendants is an important part of freedom of speech and the other side of the coin of the proper protection of reputation.

*David Hooper is a partner with Reynolds Porter Chamberlain LLP in London. The defendant Tom Bower was represented by barristers Ronald Thwaites QC, Ely Place Chambers, and Alexandra Marzec, 5RB, and solicitors Wiggin LLP. Plaintiff was represented by barristers Ian Winter QC, Cloth Fair Chambers, and David Sherborne, 5RB, and solicitors Schillings.*

## THE OTHER SIDE OF THE POND: Developments in UK and European Media Law *Google Not Liable for Search Results; Access to Courts; Regulatory Developments*

By David Hooper

### *Google's Search Engine Is Not a Publisher*

The recent decision of Mr Justice Eady in [Metropolitan International Schools Limited –v- Designtecnica Corporation, Google UK Limited and Google Inc](#) established that Google, as a facilitator of internet searches, could not be liable in libel if the search results contained material that is defamatory. The case involved a claim by the provider of adult learning courses against an Oregon-based corporation which ran a site on which had been posted a number of defamatory criticisms of the courses and the way in which students were treated.

Google was only sued in respect of defamatory search results, not for linking to the first defendant's website. The issue, which Mr Justice Eady was asked to decide, was whether Google Inc had any liability in defamation in respect of the "snippets" which appeared on screen in response to the user's search request. He concluded that Google was not in a defamation sense the publisher of the content of the search results, but rather that Google was simply a facilitator for provision of search services.

Mr Justice Eady analysed how the system worked noting particularly that in the delivery of a response to a particular search request, there was no human input by Google nor did Google have any control over the search terms used nor in any meaningful way did Google authorise or cause the actual snippet to appear on screen. The judge considered the practicalities of the situation and recognised that there could be a very real practical problem in filtering out objectionable material bearing in mind that it could reappear if a slightly different search terms were used.

The judge, while appreciating that analogies only work so far, compared the situation to seeking to fix a library catalogue with responsibility for the contents of a book in the library containing defamatory content. The real remedy the claimant had was – if at all – against Designtecnica, and seeking to impose liability on Google was "a hopelessly inadequate substitute."

Furthermore, the actions of Google in providing this search facility did not amount to an act of publication. The case also provides an interesting discussion of the Electronic Communications (EC Directive) Regulations 2002 and notes the efforts of the European Commission to encourage member states to provide proper protection for search engines. The judge also noted the protection provided to search engines in countries such as Austria, Spain, Portugal, France and Holland. The Judge also considered expert evidence from Patrick Carome regarding the position in the United States, but the decision was based on the judge's conclusion that the actions of Google did not amount to publication under English law and that in this regard English law was in conformity with the law of the European Union.

### *Reporting Proceedings In Family Courts*

As previously noted in this column, changes to the family proceedings rules came into effect on 27 April 2009. The presumption is now that journalists can attend such proceedings, but they are likely by virtue of Section 12 Administration of Justice Act and Section 97(2) Children's Act to be severely restricted in what they can report about the detail of the cases. The press are only likely to be excluded under Rule 10.28 (4) of the Family Proceedings Rules if it is necessary to bar them in order to protect children, parties or witnesses or for the orderly conduct of proceedings.

This has not gone down a treat with celebrities and other high-profile figures. Princess Diana's brother, Earl Spencer, and his estranged wife both wanted to bar the press from proceedings where their finances were to be discussed. The courts made it very clear that the mere fact that they would prefer not to be subject to exposure and comment was not sufficient to ban the press – [Spencer –v- Spencer](#) (2009) EWHC 1529.

In another case re [Child X \(Residents and Contacts – Reporting Restrictions\)](#) (2009) EWHC 1728, the President of the Family Division, Sir Mark Potter, had to deal with a case where a celebrity and his estranged partner sought to argue

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that it was necessary for the protection of their child for the press to be banned altogether. They were particularly concerned about the foreign press who were not subject to the discipline of the English courts. Sir Mark Potter rejected the apparent attempt to secure a greater degree of privacy for the children of celebrities. He stated that the new rules gave the press a presumptive right to attend family court proceedings and that the media should only be excluded if it was necessary in the interests of the child concerned or for the orderly conduct of the proceedings. On the particular facts, however, he was persuaded that the press should be excluded because the medical treatment of the child could be adversely affected if the press were present while details of the child's medical treatment were given.

The judge criticised the fact that the original order prohibiting reporting *contra mundum* was made without proper steps being taken to notify the Respondent contrary to Section 12 (2) Human Rights Act 1998. It appears that the lawyers for the Applicant failed to draw the judge's attention to the appropriate procedure laid out in the President of the Family Division's Direction of 18 March 2005 for the service of such applications on national news media via the Press Association's CopyDirect.

This oversight did not, however, prevent the lawyers from producing a characteristically triumphalist press release about the outcome of the case. There is a limit owing to the nature of the subject matter of such proceedings as to what can be reported in such cases, but the significant feature is that the courts have set their face against secret justice and have underscored the need for such applications to be notified to the media so that the media will be aware of the existence for such orders and will have the opportunity of challenging them.

### Changes in Irish Libel Law

After many years of discussion, wide-ranging changes to the law of libel in Ireland was passed on 23 July 2009 and are likely to come into effect in September 2009. Very appropriately, a Reynolds defence is being introduced – appropriate because the Reynolds defence gets its name from a former Irish Prime Minister who had sued for libel in England. In Ireland the defence will be known as one of fair and reasonable publication on a matter of public interest. Al-

though there was controversy about the retention of blasphemous libel, the changes in the law seem to be radically for the better. It will now be possible to pay money into court without an admission of liability in order to expedite the settlement of the case. There will also be many of the changes which were introduced in England by the Defamation Act 1996 such as reducing the limitation period to 1 year and introducing a defence of an offer of amends. Previously it was a nightmare trying to settle cases in Ireland.

One salutary change will be that judges can now give guidance on the level of libel damages. This is not a moment too soon as in November 2006 a media figure, Dennis O'Brien, had been awarded damages of €750,000 against Mirror Group even though an earlier award of €317,343 in the first trial had been overturned by the Irish Supreme Court as disproportionate. To cap it all, a communications consultant called Monica Leech has very recently been awarded €1.872 million against Independent Newspapers for a series of articles suggesting that she was having an affair with a former environment minister, Martin Cullen. Why the false allegation of sex with Mr Cullen should carry such a high price tag is beyond comprehension. Nevertheless, the trial court ordered immediate payment of €750,000 damages plus €100,000 costs pending the appeal. It is much to be hoped that Irish libel awards in future are more proportionate and sensible.

In one important regard Irish law does seem to be moving ahead of English law in its proposed introduction of a single publication rule which will apply to publication on the Web - something the English courts have set their faces against. Plaintiffs will also have to verify their assertions on affidavit with potential perjury penalties, if they do not tell the truth.

The new reforms also envisage more applications being made before trial on matters such as what the defamatory words mean. The result will be that there will be less element of ambush in Irish libel actions.

### A Check On The Growth Of The Law Of Privacy And Confidentiality

In two decisions the courts have made it clear that they will look very critically at claims that material should not be

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published on the grounds of confidentiality. In [Napier –v- Pressdram](#) (2009) EWCA 443, the Court of Appeal upheld the decision of Mr Justice Eady who had refused to prevent the satirical magazine *Private Eye* publishing details of successful disciplinary proceedings against the senior partner of a law firm on the basis that there was no duty of confidentiality in such proceedings and that the claimant, who ironically was a former president of the Law Society, had failed to pass the interim restraint order test as to his prospects of success under Section 12 (iii) Human Rights Act 1998.

Equally, in [Author of a Blog –v- Times Newspapers Limited](#) (2009) EWHC 1358, a police officer was unable to prevent the Times publishing the fact that he was the author of a blog called “*Night Jack*” where he expressed his opinions on social and political matters relating to the police and justice system. Evidently it was embarrassing for him to be exposed as a result of the *Times*’ own detective work, but the court held that blogging was a public activity and did not have the necessary quality of confidence nor did the author have a reasonable expectation of privacy.

### **Data Protection Act Claim No Substitute for Libel or Injurious Falsehood Claim**

In [Quinton –v- Pearce](#) (2009) EWHC 912, Mr Justice Eady held that the Data Protection Act 1998 does not afford parallel remedies alongside defamation and malicious falsehood claims so that in effect, when those fail, one cannot use a claim under the Data Protection Act 1998 as a long stop. I should explain to American readers that the term long stop (back up) comes from cricket and it would take too long to explain it to you if you have not got the point! The case concerned a dispute between two local Council candidates relating to planning applications. The disputed leaflet had been held not to be defamatory nor malicious.

### **Reporting Restrictions and Contempt of Court**

A radical difference between the USA and the UK is that we do not allow the media to report the views of individual jurors. In [Attorney General –v- Times Newspapers Limited and Seckerson](#) (2009) EWHC 1023, the *Times* was fined £15,000 with £27,426 costs for what was generally viewed as a very balanced report indicating that two jurors, who

were not named, were questioning the verdict and expert evidence in relation to a conviction for manslaughter in a controversial shaken baby case. This was held to breach Section 8 Contempt of Court Act 1981 which is an absolute offence without – most unsatisfactorily – the sort of public interest defence that does exist elsewhere in the Contempt of Court Act such as Section 5. Permission to appeal to the House of Lords is being sought.

### **Open Justice**

[Attorney General’s reference number 3 of 1999](#) (2009) UKHL 34. An alleged rapist had, on the order of the trial judge, been acquitted because the judge was persuaded that the DNA sample identifying him should have been destroyed under the provisions of the Police and Criminal Evidence Act 1984. The Attorney General had appealed this acquittal and secured a ruling that the judge did in fact have discretion to allow the DNA material to be used. Under the rules relating to such appeals, the case had been anonymized. The BBC wished to name the alleged rapist in a programme on double-jeopardy. It was argued that his privacy rights were engaged and that the BBC should not be allowed to name him. The House of Lords, however, took the view that a trial is a public event and that in reality this had nothing to do with the accused’s private life and that the BBC should be entitled to use his name if they wished to do so. It was not private information and the trial was held in public.

### **A Libel Decision by Mr Justice Andrew Nicol**

In [Archidiacono –v- Miller](#), Mr Justice Nicol struck out a claim on the basis that the emails sent regarding the closure of a day care club by councillors which falsely suggested that the manager was on police bail on fraud and false accounting charges, whereas in fact she had simply been questioned on the subject, were covered by qualified privilege.

### **The Singh Fair Comment Decision**

Much has been written about the libel case brought by the British Chiropractor Association (BCA) against Dr Simon Singh, including by the present writer. Dr Singh had written a piece entitled “*Beware of the Spinal Trap*” in the

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comments section of the *Guardian*. He evidently considered that chiropractors made claims as to the efficacy of their treatment which they could not deliver. However, his observation that the BCA was “*the respectable face of the chiropractic profession*” and that it “*happily promotes bogus treatments*” was a remark too far.

Mr Justice Eady felt that it was an allegation of fact which would have to be justified – that is to say proved to be true. I would suggest that a more liberal interpretation and slightly less forensic of the facts would have found this to be fair comment. While the fact that the article was in the comment column in the *Guardian* is not conclusive, it was not without significance. Singh was writing about the BCA as a whole and was not criticising any particular practitioners. He was clearly expressing his opinion and it is most unfortunate that a use of a possibly careless phrase was held to convert this into an allegation of fact. Slightly different wording could so easily have underscored the fact that this was indeed an expression of opinion and therefore defensible as fair comment.

### *Mardas and the International Herald Tribune*

The Court of Appeal has refused leave to appeal against the decision of Mr Justice Eady in [Mardas –v- New York Times Company](#) [2008] EWHC 3135 (QB), reinstating a libel claim by a former associate of the Beatles who complained that an article accused him of being a charlatan and a liar and having caused a rift between the guru Maharishi Yogi and the Beatles back in 1968. See [MLRC Media-LawLetter December 2008](#) at 27. The upshot is that US defendants are liable to be sued for libel in the UK in respect of internet hits which may be measured in the 20s or 30s and a significant number of which may be attributable to the hawk-eyed lawyers at Schillings or Carter-Ruck. The courts are therefore not applying a liberal view of the abuse of process decision in the *Jameel* case.

### *Legal Costs in the UK*

Lord Justice Jackson has produced his [preliminary report on civil litigation costs in the UK](#) which runs to 663 pages.

It would appear that conditional fee agreements are here to stay, although the judge does seem to think that the premiums for After the Event insurance are too high and suffer from lack of competition in the market. Phase 2 is for there to be consultation on his preliminary proposals and views. Phase 3 will take place in September – December 2009 with his final report expected in December 2009.

### *Libel Trends*

The annual survey by Sweet and Maxwell shows there were 78 reported libel cases in the year to May 31, 2009, an increase of 32% on the previous year’s 59. Growth areas seem to be new media and claims by businesses.

### *Regulatory Developments*

On 15 June 2009 Ofcom set out [consultation proposals](#) for the revision of its broadcasting code. It will need to deal with such matters as the implementation by the UK of Audio-Visual Media Services in accordance with AVMS Directive 2007/65/EC which must be transposed into national law by 19 December 2009. At the same time (16 June 2009) the government’s final report on [Digital Britain](#) was published dealing with such matters as the Universal Service Broadband Commitment, making it easier for rights holders to bring civil actions against suspected illegal file sharers and the potential tie-up between Channel 4 and BBC Worldwide. Interestingly, despite its crucial impact on IP and IT, it ran to a mere 238 pages, one third of Lord Justice Jackson’s report. The European Parliament has voted to extend the copyright term for the protection of sound-recordings to 70 years – something which the UK government had declined to do – sticking to the existing 50 years and which the [Gowers Review](#) on the operation of the law of copyright had not supported. Good news then for the Beatles and the Rolling Stones as they collect their bus passes and winter fuel supplements.

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- Fair use and fair dealing in the digital media environment

For information contact Dave  
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## Irish Defamation Act 2009 Finally Enacted

By Karyn Harty and Lesley Caplin

The [Defamation Act, 2009](#) has been signed into law in Ireland. The new provisions affect causes of action arising after 23 July 2009.

The Act introduces a number of important procedural changes and some changes to the substantive law, including the replacement of the separate torts of libel and slander with a unified tort of defamation. Particularly welcome for media organisations are the introduction of an offer to make amends procedure and the reduction of the limitation period from 6 years to 1 year.

Defendants will no longer have to admit liability to pay money into court. Plaintiffs will be able to opt for a speedy statutory declaration that they have been defamed and both plaintiffs and defendants will be able to seek summary disposal. Pre-trial applications will be much more common under the new regime. Overall media defendants should find greater scope to encourage settlement and will be able to apologise without the apology constituting an admission of liability.

In relation to damages, many commentators have heralded the new provisions as a solution to high libel damages and it has been widely anticipated that juries will now receive guidance on figures. However on its face the Act goes no further than what is currently allowed. As matters stand the parties and the judge may address the jury on damages, but may not refer to specific figures or ranges of damages.

Submissions tend to involve general statements regarding the scale of damages that would be appropriate given the evidence. There is nothing in the Act that gives the green light to the parties or the judge putting specific figures to the jury or making comparisons with damages in other cases and whether the Irish courts will follow the *John v. MGN* line of authority and permit counsel or judges to suggest figures to juries and make comparisons with other awards, will depend on the Supreme Court and whether it is prepared to dilute the central role that the jury has traditionally enjoyed in the assessment of damages.

The Act does expressly permit the Supreme Court to substitute a figure for damages on appeal. This may go some way to resolving the anomalies associated with trial judges' inability to give guidance to juries on appropriate levels of damages. Until now the Supreme Court has declined to substitute a figure, preferring to send the matter back for retrial.

In *O'Brien v. MGN*, the Court having set aside an award of IRE250,000 as disproportionate, on retrial the jury awarded the plaintiff €750,000, with a further appeal then inevitable. Unless steps are taken to address the backlog of cases in the Supreme Court, where an appeal takes 3 years to get on for hearing, it may take some time before there is clarity on this issue. With the high water mark of damages now set at €1,872,000 in *Leech v. Independent Newspapers* in respect of a series of defamatory articles falsely insinuating that the plaintiff had an affair with a government minister, the Supreme Court may give clarity as to how the courts are to approach guidance to juries in the near future.

The Act restates the defences to a defamation claim, the primary defences now to be known as "truth" and "honest opinion" with qualified privilege more precisely defined and a new *Reynolds* type defence of "fair and reasonable publication on a matter of public interest." The Act also now places the Press Council on a statutory footing and provides for its regulation. Controversially, the Act provides that blasphemy will be a criminal offence subject to a maximum fine of €25,000.

*Karyn Harty and Lesley Caplin are lawyers with McCann Fitzgerald in Dublin.*



## Tennessee Federal Court Holds that it Would Be “Particularly Inappropriate” to Allow Deposition of Reporter

### *Court Concludes that it Must Guard Against Setting Precedent*

By Alan D. Johnson

The United States District Court for the Middle District of Tennessee ruled that the plaintiffs in a reverse discrimination suit against the Metropolitan Government of Nashville cannot take the deposition of a reporter who wrote an article about the Police Department’s promotion policy. *Johnson v. The Metropolitan Government of Nashville and Davidson County*, No. 3:07-0979 (M. D. Tenn. July 2, 2009) (Trauger, J.)

Even though the Sixth Circuit does not recognize a news reporter’s privilege in civil cases, the Court held the reporter’s “status as a journalist, combined with the dubious value of his testimony, makes it particularly inappropriate to allow this deposition to go forward.”

#### **Background**

The plaintiffs are police officers employed by the Metropolitan Nashville Police Department. They allege that they were wrongfully denied promotions from the rank of sergeant to lieutenant. Specifically, the plaintiffs, all white males, allege that the Department promoted African-American and female candidates over them without regard to objective test results and evaluations.

A central issue in the case involves a recently revised promotion policy that allows for greater subjectivity in evaluating candidates. The plaintiffs contend that the policy was changed in order to promote minorities over non-minorities regardless of their scores on objective tests. At the time the new policy was announced, *The Tennessean* published a story about the policy that included quotes from various interested members of the community. Among those quoted in the article was the spokesman for the Police Department, Don Aaron.

Mr. Aaron was quoted as saying: “[if] you have two candidates who are essentially equal and believe that both would make very good supervisors, and if your choice is to make the department more diverse, you would probably elect to include diversity in your choice.” The plaintiffs seized on this statement as evidence of racial animus from

“the lips of the defendant.” After taking Mr. Aaron’s deposition, the plaintiffs subpoenaed *The Tennessean’s* reporter, directing that he appear for a deposition and bring with him “all records” relating to the article. *The Tennessean* filed a motion to quash and for a protective order.

In response to *The Tennessean’s* motion, the plaintiffs argued that they needed confirmation from the reporter that Mr. Aaron had made the statements attributed to him in the article. They also insisted that the reporter’s deposition was necessary in order to question him about “the context of the word ‘diversity’ as used” by Mr. Aaron.

The Magistrate Judge issued a report and recommendation that *The Tennessean’s* motion be granted. The plaintiffs objected and the District Court Judge accepted the recommendation to issue the protective order.

#### **District Court Decision**

The court pointed out that the Sixth Circuit has not recognized a general reporter’s privilege in civil cases. Nevertheless, the Sixth Circuit has instructed lower courts to “make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony.” *In re Grand Jury Proceedings*, 810 F. 2d 580, 586 (6<sup>th</sup> Cir. 1987). The Court approved the Magistrate Judge’s decision to apply the balancing test performed when a protective order is sought pursuant to Rule 26(c), F. R. Civ. P.

The factors considered by the court under the balancing test are: 1) whether the discovery sought “can be obtained from some other source that is more convenient, less burdensome or less expensive”; 2) whether the party seeking the discovery “has had ample opportunity to obtain the information by discovery in the action” and; 3) whether “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.” Rule 26(b)(2), F. R. Civ. P.

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**Tennessee Federal Court Holds that it Would Be “Particularly Inappropriate” to Allow Deposition of Reporter***(Continued from page 33)*

The district court agreed with the Magistrate Judge that the information sought by the plaintiffs was available from another source, Mr. Aaron, the plaintiffs had ample opportunity to obtain the information from Mr. Aaron, and the benefit of the reporter’s testimony to the plaintiffs was slight compared to the burden placed on the reporter.

The plaintiffs’ argued that they had not been given an “ample opportunity” to obtain the discovery because Mr. Aaron had been evasive in his deposition. Mr. Aaron testified that “diversity,” as he used the term, did not simply mean “racial diversity,” rather it meant all “differences between people.” The plaintiffs argued that Mr. Aaron must have meant “racial diversity,” and that the reporter could confirm his intended meaning.

Rejecting those arguments, the court concluded that the reporter’s testimony would be of little benefit to the plaintiffs. Regardless of whether the plaintiff’s believed Mr. Aaron’s testimony, the court held that the reporter “is not in the position to reasonably know what Mr. Aaron meant by the statement.”

The court distinguished *NLRB v. Mortensen*, 701 F. Supp. 244 (D.D.C. 1988), relied upon by the plaintiffs, on the grounds that Mr. Aaron did not deny making the statements and he did not make the promotion decisions at issue in the case. The court also noted that *Mortensen* arose in a Circuit that recognizes a qualified reporter’s privilege; however, the court made an important observation. The balancing test used to overcome the reporter’s privilege in *Mortensen* is similar to Rule 26(b)(2) test employed in this case. In that Circuit, the privilege may be overcome by

demonstrating: 1) that efforts have been made to obtain the information from another source; 2) that the reporter is the only source for the information, and; 3) the information is crucial to the claim.

Perhaps the most important part of the ruling was the court’s conclusion that the burden on the reporter outweighed any benefit to the plaintiffs. Significantly, the court did not limit its analysis of the burden on the reporter to the time involved in giving a single deposition. As the Magistrate Judge held, “the collective burden on news reporters and their employers if they were routinely called

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**... the court must guard against setting a precedent that would allow a party in a civil case to hale a journalist into court**

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upon to produce their investigative files regarding matters in litigation would be considerable, and would jeopardize their ability to perform the valuable public function of gathering and reporting the news.”

In conclusion, the District Court held that although the “individual burden on [the reporter] and *The Tennessean* is relatively light, the court must guard against setting a precedent that would allow a party in a civil case to hale a journalist into court or to a deposition simply to obtain clarification of a statement....Given the policy concerns at issue here, there is simply no reason to allow this deposition to go forward.”

*Alan D. Johnson, Willis & Knight, PLC, Nashville, TN, represented The Tennessean. Plaintiffs are represented by Ann Buntin Steiner, Steiner and Steiner, Nashville, TN.*

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## Blogger Found Not Protected By Newsmen's Privilege

### *Internet Defamation May Rely Solely upon Presumed Damages*

By Jeffrey M. Pollack

In *Too Much Media LLC, John Albright and Charles Berrebbi v. Hale*, No. MON-L-2736-08 (N.J. Sup. Ct. June 30, 2009), plaintiffs sought to compel a blogger (Shellee Hale) to disclose a confidential source that Hale had found who uncovered that Too Much Media (TMM) may have been negligent in its business activities.

This case arguably has everything that a First Amendment lawyer can dream of – blogger rights, distinction between libel, slander and slander per se, set against the background of the pornography industry. In what undoubtedly will be at most a footnote to the ultimate decision in this area, trial court Judge Locasio ruled against Hale and found that she was not protected by the newsmen's privilege and found further that plaintiffs, which conceded that they could show no monetary damages, had adequately pled a complaint in defamation even though they had limited their cause of action to slander per se.

#### **Background**

Shellee Hale, a blogger in Washington State, began an investigation of corruption within the online adult-entertainment industry. In particular, Ms. Hale identified that TMM, which sells an internet accounting system for monitoring affiliate marketing to pornographic websites based upon the direction of traffic to their sites, had suffered a security breach that rendered end users private information unprotected. Ms. Hale, herself a trained programmer, was deeply troubled both by the incompetency of TMM in failing to correct the error once they had been advised that there was a security problem with their software but further by TMM's failure to advise its customers and the public that their private information was not adequately protected. In developing her story, Ms. Hale referred to a confidential source that had knowledge of the security breach and Ms. Hale wrote about the problems created by TMM's failures and reported it on internet websites, such as Oprano, the self-designated "Wall Street Journal of Porn."

Too Much Media, a New Jersey Corporation, filed suit in Monmouth County New Jersey against Ms. Hale and seeks to compel her to disclose the source that she relied upon in developing in part her story. Ms. Hale retained Jeffrey M. Pollock of Fox Rothschild LLP to take on her defense when her existing lawyers failed to assert any substantive privileges on her behalf. Fox Rothschild took a different approach and asserted that she was covered under the newsmen's privilege contained within New

Jersey's Shield Law, N.J.S.A. 2A:84A-21, et seq., and therefore did not have to disclose her source of information.

Second, noting that plaintiffs had admitted that they could not prove damages and that their claim was limited to slander per se, Fox Rothschild moved to dismiss on behalf of Ms. Hale because the only statements involved in this matter were in writing and slander is, by definition, oral. Finally, Fox Rothschild interjected that New Jersey law provided a unique defense available to the anonymous source him or herself, namely that a confidential source has an independent right to anonymity unless and until the party seeking disclosure has made a *prima facie* showing of entitlement to relief.

#### **The Shield Law**

Because Ms. Hale had already had been court ordered to testify at the time that Fox Rothschild intervened on her behalf, the court gave the firm six days to prepare for trial and proceeded to try this matter the following week. In an opinion issued June 30, 2009, the court found that Ms. Hale testified that she had created a site called *Pornafia* and the press release for *Pornafia* stated expressly that the site is an "information exchange in the fight against criminal activity within the global adult entertainment industry, which encompasses credit card fraud, ransomware, affiliate fraud, money laundering, and PPC fraud as well as other crimes" created with the aim of "providing a cost free information resource for victims, potential victims, legitimate industry players, and pertinent government agencies worldwide." Although the court recognized that Ms. Hale had created that press release regarding her website and that she intended to write on this website the court found that the information that she had created and further that she intended to post was not worthy of protection under New Jersey's Shield Law.

The New Jersey Shield Law is a creature of both statute and court rule. Under the statute N.J.S.A. 2A:84A-21, any person engaged on or connected with news media has a privilege to refuse to disclose a confidential source. Notably, the statute does not require that a newsmen be employed by a news agency or have ever published an article. Nonetheless, the court imposed its own view of what a true newsmen is suppose to be and identified that Ms. Hale had engaged in no fact checking or editorial review, that there was no accountability for the statements and that, in fact, the information she was writing was not really news. For example, the court noted that she never contacted TMM to hear its side of the

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## Blogger Found Not Protected By Newspersons Privilege

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story which the court said “does not suggest the kind of journalistic objectivity and credibility that courts have found to qualify for the protection of the Shield Law.”

The court’s ruling is extremely problematic for several reasons. First, it is essentially a content based regulation of what constitutes protected speech. Under New Jersey law, the newsperson’s privilege has a constitutional basis and is not simply a creature of statute. Accordingly, the court’s decision cannot survive under the strict scrutiny that must be applied to content based restrictions on protected speech.

Second, the court’s analysis begs a real question which is that under the New Jersey’s Shield Law a person could collect information for years with the intent to write in the future, have never written a word in their entire life, and yet if they can show that their intent was to collect information for dissemination to the general public, then that person’s confidential sources should be protected under New Jersey law.

In this case, Judge Locasio unfortunately decided that he could “play Kreskin” and decide what Ms. Hale did and did not intend to do. Where the only proof adduced was that she did intend to write (and there was no proof adduced that she did not) the court still decided that it knew better than she did what she actually intended to do. Finally, the court’s analysis is problematic because it is a regulation of speech. Imagine, for example, that someone wrote about alleged corruption in the Essex County Courthouse and the matter was brought before an Essex County Judge – what incentive would the Essex County Judge have to find that this was really protected speech. Surely it would be simpler for the judge decide that the content is not news, thus not protected, and therefore compel disclosure of the author’s source of information.

### *Slander Per Se*

After the court decided against Ms. Hale on the issue of the newsperson’s privilege it then found that although plaintiffs admitted that they could show no monetary damages and had limited their claim to slander per se, the court nonetheless found that a statement on the internet could constitute actionable libel even though libel requires proof as to damages. Completely disregarding that plaintiffs had conceded that they could prove no monetary damages, the court nonetheless found that damages were not a necessary element because Ms. Hale’s published comments could cause actual harm to the apparent reputation and standing in the community, personal humiliation or mental anguish and suffering, even if there were no dollar value to the injury.

This conclusion is astounding, not only because it violates the fundamental concept that damages are a necessary element to libel but more importantly perhaps it creates a tremendous risk to anyone who writes on the internet. If this court decision stands, and we believe that it is fatally flawed from its inception, this would mean that anyone writing on the internet could be subject to jurisdiction almost anywhere in Federal Court without any proof of monetary damages. Rather, simply alleging that a harmful or offensive statement was defamatory and impaired a reputation or standing in a community, or was personally humiliated or caused mental anguish or suffering, could render the writer subject to jurisdiction in any court of the United States in which either the plaintiff or defendant resided.

Clearly this would be a significant change in the law. Finally, the court completely ignored and failed to address one of Ms. Hale’s major arguments, that the confidential source has his or her own independent right not to be identified under New Jersey law. The New Jersey courts have already recognized in decided case law that a confidential source had its own right of anonymity. This issue again will be the subject of reconsideration and of appeal as Ms. Hale pursues her case forward.

### *Observations and Conclusions*

This case raises three fundamental questions for bloggers and internet posters. First, whether someone posting on the internet and relying upon a confidential source is entitled to the newsperson’s privilege even though that person is not employed as a member of a news organization. This issue will become even more critical in the future as newspapers continue to fold and many reporters are therefore writing only on the internet rather than in hard written copy.

Second, this court has created a new theory of defamation law that damages are not necessary for a libel claim and therefore anyone writing on the internet must not only be concerned about the four categories of slander per se but more importantly, now must be concerned that any harmful or offensive statement they make could have an impact across the entire country with out any proof of damages other than that to reputation. Finally, it is unfortunate that the trial court failed to even consider the argument, regarding the individual source’s right to anonymity that now must be developed and evaluated in a motion for reconsideration to be filed shortly.

*Jeffrey M. Pollock, Joseph Schramm, III, and Barry Muller of Fox Rothschild LLP represented Shellee Hale.*

## District Court Summarily Dismisses Claim That *Las Vegas* Series Infringed Plaintiffs' Movie Script, Television Treatment

### *No Substantially Similarity*

By David Halberstadter

Judge Gary Allen Feess of the Central District of California has entered judgment and awarded attorneys' fees in favor of DreamWorks LLC in a copyright infringement lawsuit in which the plaintiffs claimed that the television series *Las Vegas* infringed upon their movie script and their separate television series proposal. Each of plaintiffs' works, like the *Las Vegas* series, was set in an upscale Las Vegas hotel/casino. DreamWorks executive produced the television series. *Todd Camhe, Jonathan Segal et al. v. DreamWorks LLC*, No. 07-3741-GAF (C.D. Cal. filed May 14, 2009).

Applying the Ninth Circuit's "extrinsic test" for substantial similarity by objectively comparing each of plaintiffs' works to the television series, the court found that there was no basis for plaintiffs' infringement claims as a matter of law. The only similarities between plaintiffs' works and the *Las Vegas* television series were unprotectable *scenes a faire* and stock elements that would be expected in any work about high-end Las Vegas hotel/casinos and the people who work in and visit such locales. The court refused to allow plaintiffs to aggregate their separate works into a single comparison with *Las Vegas*, and declined to apply the so-called "inverse ratio rule" to lessen plaintiffs' burden of proving substantial similarity.

#### **Background**

By early 2000, plaintiffs had written two different works situated in Las Vegas. The first, a motion picture screenplay titled *Fringe Players*, tells the story of a young casino host who aspires to wealth and power by attracting high rollers – known as "whales" – to his casino. This modern variant on the Faust legend focuses on the host's efforts to land the largest "whale" and the unanticipated, unwelcome

consequences that follow when he succeeds. The second work, a detailed outline (or "treatment") for a television series titled *Hard Rock Hotel*, centers around the hotel/casino's wealthy, manipulative owner and his ambitious employees, who stab each other in the back to advance their careers.

According to plaintiffs, in connection with an August 2000 presentation regarding an unrelated project, they provided copies of their Las Vegas-based works to DreamWorks executives. DreamWorks ultimately passed on plaintiffs' project.

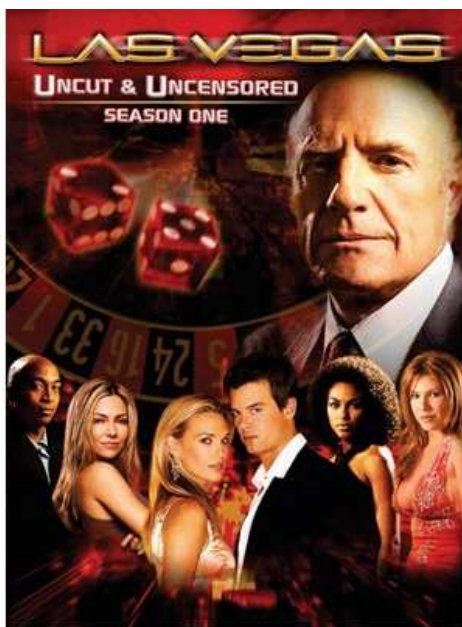
Two years later, the well-regarded screenwriter Gary Scott Thompson (*Hollow Man*, *The Fast and the Furious*) worked with DreamWorks to develop the television series *Las Vegas*, which aired on the NBC network from 2003 to 2008. *Las Vegas* follows the elite surveillance team charged with maintaining security at the fictional Montecito Hotel. The ensemble of characters includes the ex-CIA head of security, his rebellious daughter and his ex-Marine second-in-command, a casino host, an MIT graduate who works as head valet, the special events director and the head pit boss. All of the series' episodes center on surveillance and security issues at the hotel/casino as a variety of visitors come and go, and on the relationships between and among the principal characters and others.

Following the completion of discovery, DreamWorks moved for summary judgment. It contended, among other things, that the *Las Vegas* series was not substantially similar in protectable expression to either of plaintiffs' works. The motion was vigorously opposed by plaintiffs, who argued that the court properly could consider their screenplay and treatment together for purposes of comparing them to *Las Vegas*. They asserted that evidence of DreamWorks' access to their works required the court to apply a lower standard of substantial similarity under the "inverse ratio rule" that the Ninth Circuit had applied in certain earlier decisions. Finally, plaintiffs claimed that the evidence of similarities between their works and *Las Vegas* precluded summary judgment.

#### **District Court's Ruling**

The district court heard argument on DreamWorks' motion in late February 2009 and issued its written order granting sum-

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## District Court Summarily Dismisses Claim That *Las Vegas* Series Infringed Plaintiffs' Movie Script, Television Treatment

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mary judgment on May 14, 2009. The court first addressed plaintiffs' contention that the "inverse-ratio rule" applied to lower their burden of proof of substantial similarity because of the purported evidence of DreamWorks' access to plaintiffs' works.

*The Inverse Ratio Rule.* The court observed that several decisions in the Ninth Circuit have questioned "the viability and imagined logic" of the rule, which was described in the copyright treatise *Nimmer on Copyright* and first acknowledged by the Ninth Circuit in *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9<sup>th</sup> Cir. 1977). For example, the court pointed out that in *Aliotti v. R. Dakin & Co.*, 831 F.2d 898, 902 (9<sup>th</sup> Cir. 1987), the Ninth Circuit had opined that "no amount of proof of access will suffice to show copying if there are not similarities." Judge Feess observed that in *Aliotti*, the Ninth Circuit explained that since no amount of access relieves the plaintiff of proving substantial similarity, the "inverse ratio rule" confuses and even conceals the substantial similarity requirement.

The district court pointed out that more recently, in *Funky Films, Inc. v. Time Warner*, 462 F.3d 1072, 1077 (9<sup>th</sup> Cir. 2006), the

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**"no amount of proof of access will suffice to show copying if there are not similarities."**

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trial court had assumed access in ruling on a motion for summary judgment and granted a defendant's motion on a finding of no substantial similarity. The plaintiff on appeal claimed that a continuance should have been granted to permit it to develop evidence of a high degree of access so that it could invoke the inverse ratio rule. The Ninth Circuit rejected the argument and affirmed the trial court, noting: "We do not agree that appellants' invocation of the inverse-ratio rule requires reversal of the district court's decision. No amount of proof of access will suffice to show copying if there are no similarities, and, in this case, additional discovery would not change the fact that the two works lack any concrete or articulable similarities."

Judge Feess concluded that regardless of the degree of purported access, plaintiffs still bore the burden of proving the full measure of substantial similarity between *Las Vegas* and their own works.

*Aggregation of plaintiffs' Works.* Next, the district court considered plaintiffs' contention that they could combine their

two distinct works (their motion picture screenplay and television series treatment) to show substantial similarity to *Las Vegas*. DreamWorks had argued that each of plaintiffs' works had to be compared separately to *Las Vegas* and subjected to separate substantial similarity analyses.

Judge Feess agreed with DreamWorks, finding no legal support for plaintiffs' aggregation theory. Plaintiffs had relied upon *Metcalfe v. Bochco*, 294 F.3d 1069 (9<sup>th</sup> Cir. 2002), in which the plaintiff's infringement claim was based upon a written treatment and two versions of a screenplay for a potential television series, all of which told the same basic story. According to Plaintiffs, the *Metcalfe* court held that the treatment and the film script in combination were sufficiently similar to withstand summary judgment.

Judge Feess rejected this argument, holding that "*Metcalfe* contains no such holding and the court nowhere stated that it considered the works in combination. Indeed, the [*Metcalfe*] court's own summary of the case indicates that the court was comparing one screenplay with another." The Ninth Circuit discussed "aggregation" in *Metcalfe* only for the purpose of explaining that unprotected elements could be selected and se-

quenced in a single work in such a way that the aggregation reflected sufficient originality to

justify protection under the Copyright Act. In the district court's view, "*Metcalfe* holds that an author's selection and sequencing of elements may be protectable, but not that the court should comb through an author's multiple works, imagine a new work amalgamated from those works, and then assess whether a defendant's work is substantially similar to, and therefore infringes, the amalgamated works of the plaintiff."

The court also found that the Second and Sixth Circuit decisions relied on by plaintiffs were likewise inapposite. In short, "none of these cases support combining plaintiffs' different works into a single copyright analysis. ... [O]ne looks to both works to identify protectable elements, but that process does not require, contemplate or even permit aggregation."

*No Substantial Similarity in Protected Expression.* After addressing these preliminary issues, the district court applied the Ninth Circuit's "extrinsic test" for substantial similarity by comparing each of plaintiffs' works to the television series *Las*

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## District Court Summarily Dismisses Claim That *Las Vegas* Series Infringed Plaintiffs' Movie Script, Television Treatment

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*Vegas*. Judge Feess observed that the only common elements between plaintiffs' works and the DreamWorks series were unprotectable.

In the court's opinion, "[t]he most obvious similarity is the locale – Las Vegas and its environs and the characters that inhabit that environment. However, none of these elements provides any basis for a copyright claim: "The city of Las Vegas in general, and hotels and casinos in particular, have provided the setting for movies since at least 1960 when the original

*Ocean's Eleven*

was released ....

Since then, many

movies, some well

known, others not,

have been set in

Las Vegas with

casino life frequently a story element. Some of the more famous include: *Leaving Las Vegas* (1995); *Showgirls* (1995); *Godfather II* (1974); *Honeymoon in Vegas* (1992); *Ocean's Eleven* (2001); *Casino* (1995)."

The court noted that "[a]ll of these movies share a locale and a wide variety of stock characters associated with casinos, hotels, and gambling, including: valets, pit bosses, casino hosts, pathetic losers, celebrities, high-rollers, and call girls. . . . Likewise, the idea that a story about Las Vegas may feature sexy characters engaged in uninhibited, fleeting, perhaps illicit, relationships can hardly be described as novel or original."

Judge Feess concluded from his detailed review and comparison of the *Las Vegas* series and plaintiffs' works that there was no similarity in protectable expression between the works, and that plaintiffs therefore could not satisfy their burden of proving infringement as a matter of undisputed fact and law.

### Award of Attorneys' Fees

Following the summary judgment order, DreamWorks sought entry of a proposed judgment that entitled it to seek recovery of its attorneys' fees. Plaintiffs objected to the proposed judgment's language concerning attorneys' fees recovery, argu-

ing that the "mere awarding of summary judgment on a copyright claim does not warrant the awarding of attorney fees."

In a separate Minute Order issued on May 28, 2009, the district court overruled plaintiffs' objections and finding that DreamWorks was entitled to recover its attorneys' fees. In deciding to award DreamWorks its attorneys' fees, the court expressly followed the principles articulated by the United States Supreme Court in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), and the standards adopted by the Ninth Circuit upon remand of that decision in *Fantasy, Inc. v. Fogerty*, 94 F.3d

553, 557-58 (9th Cir. 1996). Specifically, the court:

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**... the idea that a story about Las Vegas may feature sexy characters engaged in uninhibited, fleeting, perhaps illicit, relationships can hardly be described as novel or original."**

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considered that DreamWorks prevailed on

summary judgment because, as a matter of law, its work was not substantially similar to plaintiffs' works. It considered that the majority of the similarities plaintiffs identified between the works were not protectable. It considered how plaintiffs improperly, and in clear contravention of established law, attempted to aggregate two separate works for purposes of comparison with DreamWorks' allegedly infringing television show, *Las Vegas*. The Court also considered plaintiffs' motivation in bringing suit, after threatening DreamWorks with infringement litigation if DreamWorks did not hire plaintiffs as staff writers on *Las Vegas*. The Court concluded the successful defense of plaintiffs' claims encourages further creative works and furthers the policies of the Copyright Act "every bit as much as successful prosecution of an infringement claim." *Fogerty*, 510 U.S. at 527.

*Gail M. Title, David Halberstadter and Tiffany J. Hofeldt of Katten Muchin Rosenman LLP in Los Angeles represented DreamWorks. Plaintiffs were represented by Storch Amini & Munves, P.C. in New York and Ghoreichi Law Firm in Los Angeles..*

## Texas Clerk Required to Provide Same Day Access to Civil Court Filings Under First Amendment

### *Two To Five Day Delays In Access Are Effectively Denials Of Access*

By Rachel Matteo-Boehm and Laurie J. Rust

In a notable right of access victory, the United States District Court for the Southern District of Texas has issued a preliminary injunction ordering the Harris County District Clerk's Office to provide same day access to new civil court case-initiating documents, except in those instances where immediate relief is requested (for example, a TRO) or the document has been ordered sealed. [Courthouse News Service v. Loren Jackson, et al.](#), Civil No. 09-cv-01844, 2009 U.S. Dist. LEXIS 62300 (S.D. Tex. July 20, 2009).

The decision is one of only a handful of cases in the nation to have discussed the First Amendment right of access as it relates to *delayed* access to court records, and the only one to have applied that law to this particular set of facts.

#### **Background**

At issue in the case was whether the Harris County District Clerk's Office was violating Courthouse News Service's First Amendment rights by denying its court reporter timely access to civil case filings. Courthouse News is a 19-year-old nationwide legal news service for lawyers and the news media. It is similar to other wire services, except that Courthouse News focuses on civil lawsuits, from the date of filing through the appellate level. Courthouse News' nearly 2,500 subscribers nationwide include lawyers, law firms, and media entities. Courthouse News offers various news products to its subscribers, including daily litigation reports, news alerts via email, and four different print publications. In addition, Courthouse News' web site, [www.courthousenews.com](http://www.courthousenews.com), features news reports and commentary about civil cases and appeals.

For almost ten years, Courthouse News has visited the Harris County Civil District Courts on a daily basis to review and report on each day's new petitions (aka complaints). For most of that time, reporters were permitted to review most new civil petitions on the same day they were filed, regardless of whether they had been fully processed, scanned, or posted online. This tradition of same-day access was hardly unusual. At most major federal and state courts around the country, news reporters who visit the courts every day have traditionally been permitted to review the day's new case-initiating documents at the end of the day on which they are filed. This timely access has always been important to ensuring the media can report on new cases while they are still newsworthy, and it is

even more important in today's digital age. With information being exchanged across the Internet at lightning speed, old news is not news at all; it is history.

In November 2008, a new Harris County District Court Clerk, Loren Jackson, was elected. In March 2009, Courthouse News' reporter was told he would no longer be permitted to look at the paper petitions themselves. Instead, his exclusive means of accessing new petitions would be through the "eDocs" section of the District Clerk's web site. In practice, most filings were not available on the web site until two to five court days after filing. New filings could be reviewed free of charge, but printouts cost \$1 per page. All printouts were of certified versions of documents; there was no option to obtain printouts of uncertified versions of the same documents for a reduced fee.

Although Courthouse News met with Clerk Jackson and other officials from the Clerk's Office in an attempt to work out a solution that would ensure timely access to filings without posing an undue burden on the Clerk's Office, those efforts proved unsuccessful, and Courthouse News' reporter continued to experience delayed access to the vast majority of each day's new filings. To ensure that it was accurately reporting the access delays it was experiencing, Courthouse News' reporter conducted a tracking exercise, which showed that Courthouse News' reporter was only seeing an average of five or six new civil petitions on a same-day basis (on average, 75 new civil petitions are filed with the Harris County Civil District Clerk each day, with the actual number ranging from approximately 55 to 90). As to the remaining 90-95 percent of the day's new petitions, Courthouse News' reporter was not permitted to see most of them until they were eventually made available on the Clerk's web site.

A two to five day delay in providing media access to new petitions would be a problem in any event, but in this case, the refusal of the Clerk's Office to provide timely access was made even more egregious by the fact that the District Clerk was itself acting as a publisher, posting information about new petitions and the petitions themselves on its own revenue-generating web site before anyone else was allowed to see them. By denying timely access to new petitions and insisting that the media should be content to wait to report on those petitions until after they had been posted on the Clerk's web site, the Clerk's Office had elevated itself above the news media to a favored position with regard to the publication of court records.

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## Texas Clerk Required to Provide Same Day Access to Civil Court Filings Under First Amendment

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Accordingly, on June 12, 2009, Courthouse News filed a lawsuit against the District Clerk and his chief deputy, Wes McCoy, in federal court in Houston. In its complaint, Courthouse News argued that the effect of the two to five day delay was a total denial of access, though that denial was limited in time. Courthouse News sought relief under 42 U.S.C. § 1983 for violation of both its First Amendment and common law right of access. Courthouse News also alleged violations of the Texas constitution, the Texas common law, and Rule 76a of the Texas Rules of Civil Procedure. Together with its suit, Courthouse News filed a motion for a preliminary injunction, seeking to maintain the relevant status quo – in this case, a return to the Clerk’s Office’s longstanding tradition of same day access.

### **First Amendment Right of Access**

While the parties in this case agreed that there is a right of access to newly-filed civil petitions, they disagreed on whether the two to five day delay in the availability of those documents was the functional equivalent of a denial of access and, thus, unconstitutional.

Courthouse News argued that the First Amendment right of timely access to civil case filings is confirmed by the two-pronged inquiry used by the Supreme Court in *Richmond Newspapers* and its progeny. The inquiry examines the complementary considerations of history and utility to determine whether a constitutional right of access exists. As to the first factor, the “tradition of accessibility,” courts have traditionally made petitions and complaints initiating civil lawsuits available for press review and copying. This “tradition of accessibility” includes not only a tradition of access, but also a tradition of affording the media *timely* access – that is, access to new petitions at the end of the day on which those documents are filed. Indeed, the Harris County court allowed reporters to review and copy newly-filed civil petitions on a same-day basis for nearly ten years before it began changing its procedures. A similar tradition of same-day access persists in courts around the country. Similarly, there could be no serious disagreement that prompt public access to case-initiating documents plays a “significant positive role,” thus satisfying the second prong of the Supreme Court’s analysis.

In response, the Clerk’s Office did not dispute that a First Amendment right of access attached to case-initiating civil filings in the first instance, but argued that the “slight delay” in availability was a reasonable time, place, or manner restriction. The Clerk ar-

gued that the delay was reasonable and necessary because the Clerk’s office had scan and “verify” (*i.e.*, check the work of docketing clerks) every petition before the press or public could be allowed to see them. Further, the Clerk argued that providing Courthouse News with same-day access interfered with their goal of “getting online and not in line.” Judge Melinda Harmon disagreed.

In an order issued July 21, 2009, Judge Harmon found that Courthouse News established that, for the purposes of its request for injunctive relief, it was likely to be successful in its argument. “It is clearly in the public interest to enjoin Defendants’ conduct. There is an important First Amendment interest in providing timely access to new case-initiating documents,” Judge Harmon wrote. She also noted the irony that, in attempting to increase efficiency and access to civil filings, it was taking the Clerk several days to provide access to filings the Courthouse News reporter used to access on the day they were filed.

As support, Judge Harmon cited the Seventh Circuit’s decision in *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994), which held that “a necessary corollary to the presumption [of access] is that once found to be appropriate, access should be immediate and contemporaneous.” She distinguished *United States v. Edwards*, 823 F.2d 111 (5th Cir. 1987), in which the Fifth Circuit affirmed the district court’s refusal to release transcripts of closed proceedings prior to the jury verdict to maintain an impartial jury. Judge Harmon held that the Clerk’s administrative goal of encouraging electronic filings failed to rise to the level of significance that a trial court’s interest in maintaining an impartial jury does. Judge Harmon noted that, even assuming, *arguendo*, that the Clerk has an overriding interest, the Clerk failed to demonstrate that the delays in access were narrowly tailored to serve such an interest and that no less restrictive means of achieving that interest exist.

Judge Harmon ordered that Courthouse News pay a nominal bond of \$1,000 as security. The court has not yet set the case for trial on the permanent injunction.

*Plaintiff Courthouse News Service is represented in this matter by Rachel Matteo-Boehm, Katherine Keating, and Laurie Rust, Holme Roberts & Owen LLP, San Francisco, CA and John Edwards, Jackson Walker LLP, Houston, TX. Defendants Loren Jackson, in his official capacity as Harris County District Clerk, and Wes McCoy, in his official capacity as Chief Deputy – Services for the Harris County District Clerk’s Office, are represented by Mary Baker, Office of Harris County Attorney.*

## ETHICS CORNER

### I WANT TO BE YOUR “FRIEND.”

#### What Constitutes Misconduct under Rule 8.4 by a Lawyer Who Just Wants to Gather Information for a Case?

By Timothy J. Conner

Social networking is all the rage. In a recent survey by The Nielson Co. it was reported that last year people spent almost 14 billion minutes on Facebook, five billion minutes on MySpace, 300 million minutes on Twitter, and 202 million minutes on LinkedIn. And it's not just for the younger generation; everyone's doing it. Many of our media clients routinely gather information from social networking sites as part of their newsgathering operations.

So, it stands to reason that there may be information posted to someone's Facebook page, for instance, that may be relevant in a lawsuit, say material that might impeach a witness. But, how do you get access to the information if you're the attorney handling a matter? If you intend to use the information against someone, and they know that, they will surely not be your "friend." Can you misstate your identity and intent in order to gain access? Can you hire an investigator to pose as a "friend" and provide the information to you? What if you're investigating a potential violation of intellectual property rights, or even a possible criminal act?

The Philadelphia Bar Association Professional Guidance Committee recently addressed whether an attorney could hire an investigator to pose as a "friend" for the purpose of gathering information from a third party's Facebook and MySpace pages. Opinion 2009-02 (March 2009). An attorney had deposed a non-party witness who was helpful to the other side. The witness was not represented by counsel. The attorney knew based on deposition testimony that the witness had both Facebook and MySpace accounts, and firmly believed there was information posted to those pages that could be used to impeach the witness's testimony. So the attorney asked the Professional Guidance Committee whether they could ethically have a third person, whose identity the witness would not recognize as being associated with the attorney, pose as a "friend" to gain access and gather information from the pages that could then be potentially used against the witness.

The Professional Guidance Committee said no. The Committee reviewed several Rules of Professional Conduct, chief among them Rule 8.4 which in relevant part provides:

#### Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; ...

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; ...

The Committee concluded that the proposed conduct would flatly violate this Rule "because the planned communication by the third party with the witness is deceptive." The conduct would be deceptive because it proposed to omit the material fact that the person seeking access to the witness's social networking pages would be doing so only to obtain information that might be used to impeach the witness in a legal proceeding.

The Committee rejected the argument that the witness had a reputation for allowing virtually anyone to be a "friend" and that by so doing she exposed herself to the very type of risk at issue. The Committee stated that it could not excuse deceit on that basis saying "[d]eception is deception, regardless of the victim's wariness in her interactions on the internet and susceptibility to being deceived."

The Committee also rejected the argument that the proposed conduct was similar to hiring an investigator to perform surveillance of a plaintiff in a personal injury case, a practice the Committee acknowledged was common and ethical. In the surveillance scenario, an investigator simply follows the person around and videotapes them in public places. No misrepresentations are made in order to gain access.

#### ***How Far Does Rule 8.4 Go?***

The version of Rule 8.4 applied by the Professional Guidance Committee in the above opinion has been around since at least 1983 when the American Bar Association adopted the Model Rules of Professional Conduct. Application of Rule 8.4's mandate, however, varies greatly across jurisdictions and

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## Ethics Corner: I WANT TO BE YOUR “FRIEND.”

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has led to a significant debate over the appropriate scope of the Rule.

In addition to the opinion discussed above, New York County, the District of Columbia, Utah, and Arizona have all issued ethics opinions addressing whether any exceptions to the Rule might exist. Oregon, Florida, and Alabama have adopted exceptions regarding their respective versions of the Rule, and there is case law allowing exceptions as well (“testers” regarding fair housing issues, for example).

The debate shown by these authorities demonstrates a wide disparity in situations and interpretations, from some jurisdictions, like Colorado, admitting of no exceptions in a fairly extreme case, *see, In the Matter of Pautler*, 47 P. 3d 1175 (Colo. 2002), to others, like Oregon, which has adopted a broadly worded exception in the Rule itself.

### *An Exception for Civil Attorneys Supervising Others*

The New York County Lawyer’s Association Committee on Professional Ethics recently issued a formal opinion that allows non-governmental lawyers to utilize and/or supervise an investigator who employs dissemblance under some circumstances and still remain on the right side of the Rule. [Formal Opinion No. 737](#) (May 23, 2007). After reviewing a handful of varying State Bar versions of the Rule which permit some level of deceit in gathering information, and some limited case law addressing the issue, the NYCLA Committee concluded that:

Non-governmental attorneys may therefore in our view ethically supervise non-attorney investigators employing a limited amount of dissemblance in some strictly limited circumstances *where*: (i) either (a) the investigation is of a violation of a civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably available through other lawful means; and (iii) the lawyer’s conduct and the investigator’s conduct that the lawyer is supervising do not otherwise violate the Code ... or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of third parties. Moreover,

the investigator must be instructed not to elicit information protected by the attorney-client privilege.

The NYCLA Committee stated that their opinion was “narrow” and specifically noted that it did not address whether *a lawyer* is ever permitted to make dissembling statements directly, saving that issue for another day. The opinion also distinguished dissemblance from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of the dissemblance. “For purposes of this opinion, dissemblance refers to misstatements as to the identity and purpose made solely for gathering evidence.... Dissemblance ends where misrepresentations or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and unrepresented persons in violation of the Code, ... or in evidence-gathering conduct that unlawfully violates the rights of third parties.”

### *An Exception for Government Attorneys*

The District of Columbia Bar’s Legal Ethics Committee issued its [Opinion 323](#) (March 29, 2004) addressing whether lawyers employed by the government violate Rule 8.4 (c)’s prohibitions if they engage in fraud, deceit, or misrepresentation in the course of their non-representational official duties. The Committee was confronted with the situation where lawyers working for government agencies might be required from time to time to act deceitfully as part of their official duties, and as authorized by other applicable law.

The Committee concluded that such conduct would not violate the lawyer’s ethical duties imposed by Rule 8.4(c). The Committee rationalized its decision by looking to the underlying purpose of the Rule. “The prohibition ... applies, in our view, only to conduct that calls into question a lawyer’s suitability to practice law.” The Committee decided that making misrepresentations in the course of official conduct as an employee of the government where the lawyer reasonably believes the conduct is authorized by law is an exception to the Rule.

The D.C. Bar Committee emphasized that its opinion was a narrow one, stating that “[i]t is not blanket permission for an (sic) attorneys employed by government agencies to misrepresent themselves. Nor does it authorize misrepresentation when a countervailing legal duty to give truthful answers applies,” e.g., testimony before Congress.

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**Ethics Corner: I WANT TO BE YOUR “FRIEND.”***(Continued from page 43)*

Florida has adopted a different version of the Rule itself, explicitly allowing an exception related to lawyers employed by the government. Florida’s version reads in relevant part:

A lawyer shall not:

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.

Alabama recognizes a limited exception for a government prosecutor as well. Rule 3.8(2).

***Oregon Adopts a Broad Exception for “Covert Activity”***

Perhaps the broadest exception which has actually been written into the Rule is under Oregon’s version of [Rule 8.4](#), which provides in relevant part:

(b) ... it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer’s conduct is otherwise in compliance with these Rules of Professional Conduct. “Covert activity,” as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. “Covert activity” may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility

that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Oregon’s adoption of this exception grew out of a decision by its Supreme Court publicly reprimanding an attorney for a violation of Rule 8.4(c). *In Re Gatti*, 8 P. 3d 966 (Ore. 2000). There, a lawyer suspected illegal activity by a medical review company. He telephoned several persons at the company and either introduced himself as a doctor or led people to believe he was a doctor, in order to gather information of what he believed was potential illegal activity. He eventually filed suit against the medical review company and an insurer alleging fraud and intentional interference with contractual relationships. The lawyer was found

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***Social networking sites may provide fruitful ground for information gathering... but as attorneys we must be aware of the heightened standards that govern our conduct.***

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to have violated Rule 8.4 (c). Although several arguments were

made for exceptions to the Rule for investigation of civil rights and constitutional violations and other unlawful activity, including amici arguing for governmental lawyers working with law enforcement, the Court rejected all such arguments and refused to read any exception into the Rule, leading to the adoption of the above quoted exception.

***Conclusion***

Unless your jurisdiction recognizes an exception to the general provisions in Rule 8.4, lawyers would be wise to avoid trying to gather information themselves or through an investigator in any manner that utilizes dishonesty, fraud, deceit, or misrepresentation. Even in those limited jurisdictions where there is an ethics opinion, case law, or version of the Rule that allows for an exception, lawyers should be extremely careful to analyze the situation and decide whether they fall within the exception before acting. Social networking sites may provide fruitful ground for information gathering, and the news organizations we represent mine those sites all the time, but as attorneys we must be aware of the heightened standards that govern our conduct.

*Mr. Conner is a partner in the Jacksonville, Florida office of Holland & Knight LLP.*