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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through June 24, 1999

In This Issue...

PUBLISHED BY THE

LIBEL DEFENSE RESOURCE CENTER

404 Park Avenue South
16th Floor
New York, NY 10016
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1999 NAA/NAB/LDRC LIBEL CONFERENCE

September 22-24, 1999
Hyatt Regency Crystal City Hotel
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Supreme Court Rules That Media "Ride-Alongs" into Private Homes Violate the Fourth Amendment

By Jay Ward Brown

Law enforcement officers who permit reporters to accompany them into private homes when they execute warrants violate the homeowner's Fourth Amendment rights, a unanimous Supreme Court has ruled. *Wilson v. Layne*, No. 98-83, 1999 WL 320817 (U.S. May 24, 1999). In a companion case in which CNN reporters had accompanied federal agents as they searched a Montana ranch, the Court issued a per curiam opinion vacating the Ninth Circuit's judgment and remanding for further proceedings, apparently leaving open the question of how far beyond the confines of the

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"Ride-Alongs" into Private Homes Violate the Fourth Amendment

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home the principle announced in *Wilson* extends. *Hanlon v. Berger*, No. 97-1927, 1999 WL 320818 (U.S. May 24, 1999).

The first of the two cases decided by the Supreme Court arose when a *Washington Post* reporter and photographer accompanied deputies from the U.S. Marshal Service and a Maryland sheriff's office as they executed an arrest warrant for fugitive felon Dominic Wilson. The planned arrest was part of a nationwide enforcement program that the *Post* had been covering for some time. Wilson's parents, roused from their bed early in the morning by police, were photographed by the *Post* in their nightclothes. Police briefly mistook the elder Mr. Wilson for his son and detained him on the floor at gunpoint. Dominic Wilson was not at the house, no arrest was made, and the *Post* never published its photographs.

In the second case, a CNN crew accompanied federal Fish & Wildlife agents as they executed a search warrant on Paul and Erma Berger's 75,000-acre Montana ranch. The agents were looking for evidence of poisoned wildlife. CNN personnel did not enter the Bergers' house, although an agent who entered the house with the Bergers' consent was wearing a CNN microphone. Mr. Berger ultimately was convicted on misdemeanor charges stemming from the raid, but was acquitted of felony charges. CNN later broadcast footage of the search on two of its environmental news programs.

The Wilsons sued the law enforcement agents who searched their home, while the Bergers sued both the agents and CNN. After the Fourth and Ninth Circuits reached different results, the Supreme Court granted certiorari in both cases.

Writing for a unanimous court on the main issue in Wilson, Chief Justice Rehnquist observed that "the Fourth Amendment embodies a centuries-old principle of respect for the privacy of the home." Although the officers had obtained a warrant to enter the Wilsons' house," the Chief Justice said that "it does not necessarily follow that they were entitled to bring a newspaper reporter and a photographer with them."

> ***"[T]he reasons advanced by the media, taken in their entirety, fall short of justifying the presence of media inside a home."***

According to the court, "the Fourth Amendment requires that police actions in execution of a warrant be related to the objective of the authorized intrusion." That is, the only people who may accompany officers when they execute a warrant are those who "directly aid" the police to achieve their purpose, i.e., people who provide assistance in serving the warrant or accomplishing the arrest:

> We hold that it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aide of the execution of the warrant.

CNN and some two dozen media organizations appearing as amici curiae urged the Court not to adopt a rule that ride-along newsgathering is per se a violation of the Fourth Amendment in all circumstances. The privacy rights protected by the Fourth Amendment should be analyzed on a case-by-case basis in light of the important public purposes served by press coverage of arrests and searches, the media had told the Court.

Although the Court in *Wilson* expressly reaffirmed the principle that the press's first-hand observation of public officials' conduct, including in connection with the criminal justice system, plays an important role in

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"Ride-Alongs" into Private Homes Violate the Fourth Amendment

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our system of government, it concluded that "the reasons advanced by the media, taken in their entirety, fall short of justifying the presence of media inside a home." In short, at least in the context of the execution of a warrant within a person's house, the Court appears to have adopted a per se rule that this type of ride-along newsgathering always violates the Fourth Amendment in the absence of the homeowner's consent.

Notwithstanding the forceful tone of the Court's opinion on the Fourth Amendment issue, the Court (by a vote of 8-1) affirmed the ruling of the en banc Fourth Circuit that the officers in *Wilson* were entitled to qualified immunity because the law on this point was not clear at the time they invited the *Washington Post* to accompany them into the Wilsons' home. Justice Stevens dissented, arguing that even in the absence of specific rulings in the ride-along context, general Fourth Amendment principles should have made it clear to any law enforcement officer that providing such access to the media would violate a homeowner's rights.

In its separate, four-paragraph per curiam opinion in *Hanlon v. Berger*, the Court ruled unanimously that the facts recited in the Bergers' complaint were sufficient to "allege a Fourth Amendment violation" under the decision in *Wilson*. Eight of the justices held that the Fish & Wildlife agents were entitled to qualified immunity because the law on ride-alongs was unclear at the time of that search as well. The Court vacated the judgment of the Ninth Circuit and remanded *Hanlon* for further proceedings.

Given that the Court appeared in *Wilson* to take pains to confine its ruling to the context of police/media entry into the home, the cursory opinion in *Hanlon* leaves several unanswered questions. While holding that the Bergers had "alleged" a sufficient Fourth Amendment violation, the Court did not explain whether the allegations concerning CNN's presence during the search of the Bergers' land and outbuildings were enough, if proved, to constitute a violation of the Fourth Amendment. Evidently, the Court prefers to let the lower courts wrestle with such issues, a result that may encourage law enforcement authorities to deny media access to a broader class of ride-alongs.

A coda: In *Hanlon*, the Ninth Circuit also ruled that CNN was a "joint actor" with the government agents and, thus, jointly liable for any Fourth Amendment violation. CNN had filed its own petition for a writ of certiorari on this issue as well, which remained pending throughout briefing and argument of the officers' appeals. However, a week after announcing its decisions in *Wilson* and *Hanlon*, the Court denied CNN's petition without further comment. *CNN, Inc. v. Berger*, No. 97-1914, 1999 WL 343316 (U.S., June 1, 1999). Because the Court vacated the Ninth Circuit's judgment in its ruling on the officers' appeal, the findings that CNN was a joint actor and its liability as such appear ripe for reconsideration on remand as well.

CNN is represented in this case by David C. Kohler and Jennifer Falk Weiss of Cable News Network, Inc. and P. Cameron DeVore, Jessica L. Goldman, Michele Earl-Hubbard, Eric M. Stahl and David Bowman of Davis Wright Tremaine L..L.P. The two dozen media organizations that appeared as amici curiae were represented by Lee Levine, James Grossberg and Jay Ward Brown of Levine Sullivan & Koch, L.L.P.

Any developments you think other LDRC members should know about? Call us, or send us an email or a note.

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Second Circuit Vacates *Gonzales v. NBC* While Petition for Rehearing is Pending

District Courts Instructed Not to Use Ruling as Precedent

The U.S. Court of Appeals for the Second Circuit has quietly vacated its September 1998 ruling in *Gonzales v. National Broadcasting Co.*, 155 F.3d 618, 626, 26 Media L. Rep. 2301 (2d Cir. 1998), which rejected a privilege under federal law for non-confidential sources and information. *Gonzales v. National Broadcasting Company, Inc.*, No. 97-9454 (2d Cir. June 1, 1999). The vacatur comes while the appellate court is considering a petition for rehearing.

The September 1998 unanimous three-judge panel decision sent shockwaves through the media community. The appellate court's ruling affirmed a decision from the Southern District of New York compelling disclosure of outtakes from an NBC Dateline investigation into Louisiana state police practices.

While the district court decision was based upon the application of the three-part balancing test required under the qualified privilege, the appellate court did not affirm the decision based upon the balancing test. Rather, the court held that the three-part test was unnecessary because "there is no journalists' privilege for non-confidential information." *Gonzales v. National Broadcasting Co.*, 155 F.3d 618, 626, 26 Media L. Rep. 2301 (2d Cir. 1998). The panel rejected the argument that the possibility of subsequent compelled disclosure of non-confidential material will interfere with journalists' editorial decisions, and further held that the press is not situated differently from any other business that may find itself possessing relevant evidence.

In December, Judge Peter K. Leisure of the U.S. District Court for the Southern District of New York applied the holding of *Gonzales* to compel the *Wall Street Journal* to comply with demands for non-confidential information made by a Massachusetts company defending a securities class action in federal district court in Boston. *In re Dow Jones & Co.*, 98 Misc. 8-85 (PKL), 27 Media L. Rep. 1307, 1998 U.S. Dist. LEXIS 19635, 1998 WL 883299 (S.D.N.Y. 1998). In a parallel proceeding, another judge, Judge William H. Pauley of the Southern District ordered Reuters News Service to produce non-confidential interview notes and tapes to defendants in the same underlying federal securities case. *In re Raemaekers*, 33 F. Supp. 2d 312 (S.D.N.Y. 1999). Anecdotal evidence suggested that the number of subpoenas issued to news organizations in New York post-*Gonzales*, and the agressiveness with which they were pursued, rose significantly.

The order vacating *Gonzales* also instructed that "[u]ntil the petition for rehearing is decided, district courts should rule in accordance with the law as it existed preceding the panel's opinion in this case, drawing no inference from the fact that the panel's opinion has been vacated." *Gonzales v. National Broadcasting Company, Inc.*, No. 97-9454 (2d Cir. June 1, 1999). On June 8, 1999, the appellate court followed this instruction vacating the district court's decision in the *Dow Jones* case.

Interestingly, NBC did not receive notice of the vacatur from the court. Rather, it was only after the vacatur of the *Dow Jones* decision, which referenced the June 1 *Gonzales* decision, that NBC learned of the order in *Gonzales*.

Hit Man Lawsuit Settled

The so-called Hit Man lawsuit, *Rice v. Paladin Enterprises, Inc.*, was settled on May 21, 1999, three days before trial was scheduled to commence. Various news media have reported that Paladin's insurance carrier agreed to pay $5 million to the plaintiffs to settle the case. In addition, it has been reported that Paladin agreed to stop selling the Hit Man book and to provide all remaining copies to the plaintiffs. By the same token, it has also been reported that, on the date the settlement was announced, all 700 copies of Hit Man in Paladin's inventory had been sold and that an anarchist group posted the book's text on its website at:

www.overthrow.com/hitmanonline/HTML.

Paladin was represented throughout the litigation by LDRC defense counsel section members, Thomas B. Kelley and Steven D. Zansberg of Faegre & Benson LLP in Denver, Colorado and Lee Levine, Seth D. Berlin, and Ashley I. Kissinger of Levine, Sullivan & Koch, L.L.P. in Washington, D.C.

Although they are not able to discuss the settlement, they have agreed to prepare the an article for next month's *Libelletter* for the benefit of the LDRC membership describing their anticipated strategy for the trial and discussing the potential ramifications of this litigation.

Federal Wiretap Act: District Court Dimisses as Unconstitutional Claim Against Media Reporting Intercepted Conversations

By James Sicilian and Mario R. Borelli

In a recent decision, Judge Robert N. Chatigny of the United States District Court for the District of Connecticut dismissed claims against television and newspaper companies who published news reports based in part on tapes and transcripts of telephone conversations that were allegedly intercepted in violation of federal and state wiretap statutes. There was no claim that the media defendants were responsible for the allegedly illegal wiretapping. Rather, it was alleged that parties unknown made the tapes and transcripts and delivered copies anonymously to the media defendants. Judge Chatigny held applicable here the principle "that if a newspaper or television station lawfully obtains truthful information about a matter of public concern, they may not be punished for publishing the information in the absence of a truly compelling state interest of the highest order."

An Assistant Fire Chief Overheard

The case, *Graves v. City of Hartford, et al.*; No. 3:98CV01568 (D. Conn. April 9, 1999), arose from telephone conversations between the City of Hartford's then-Assistant Fire Chief and plaintiff Vincent Graves, a city firefighter. During the conversations, the Assistant Chief was heard making what were described as racist and homophobic remarks. The conversations were intercepted and recorded by unknown parties, who later distributed copies of the tapes and written transcripts of the intercepted conversations to city officials and local media outlets.

According to the complaint, the telephone conversations led to a public controversy resulting in, among other things, verbal reprimands from city officials to the Assistant Fire Chief, public criticism of

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Federal Wiretap Act

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the Assistant Fire Chief by the Mayor of Hartford, the demotion of the Assistant Fire Chief and, ultimately, the Assistant Fire Chief's retirement from the Department. Although the plaintiff, Graves, did not allege that he suffered any adverse employment consequences as a result of his participation in the conversations, he alleged that he and his family members suffered "severe mental, emotional, psychological and/or psychiatric distress and trauma" as a result of the disclosure of the conversations.

Motions to Dismiss

Three of the media defendants, WVIT-TV, Inc., Post-Newsweek Stations, Orlando, Inc. (WFSB-TV) and Tribune Television Company (WTIC-TV), moved to dismiss the complaint on the ground that their reports were protected by the First Amendment, which barred the court from holding them liable under either federal or state wiretap statutes. They were joined by a fourth television station defendant, Lin Television Corporation (WTNH-TV), and a newspaper, *The Hartford Courant*.

The media defendants argued that under *Smith v. Daily Mail Publishing Co.*, 443 U. S. 97 (1979), and its progeny, "where a person 'lawfully obtains truthful information about a matter of public significance,' . . . '[the government] may not constitutionally punish publication of that information, absent the need to further a state interest of the highest order.'" Therefore, the First Amendment protected the media defendants from liability under the federal and state wiretap acts as applied to the circumstances of the case.

During a hearing on the motions to dismiss on April 9, 1999, Judge Chatigny agreed with the media defendants' position. Ruling from the bench, the Judge asserted:

> "The cases cited by the media defendants, including Smith against Daily Mail, make it clear to me that if a newspaper or television station lawfully obtains truthful information about a matter of public concern, they may not be punished for publishing the information in the absence of a truly compelling state interest of the highest order."

The court found that, under the allegations of the complaint, the media defendants had obtained the tapes and transcripts lawfully, and that the tapes and transcripts contained truthful information on matters of public concern. Judge Chatigny noted:

> "I doubt that Congress, when it enacted the Federal Wiretap Act, intended to subject media defendants to liability in circumstances like the ones presented here. But, in any event, it's clear that the First Amendment protects them against that type of claim."

The case is proceeding against other non-media defendants, and it is not known if the plaintiff intends to appeal the decision.

James Sicilian is a partner, and Mario R. Borelli an associate, at Day, Berry & Howard LLP in Hartford, Connecticut, and represented the defendants WVIT-TV, Inc., Post-Newsweek Stations, Orlando, Inc., and Tribune Television Company.

Sports Illustrated Loses Libel Trial In Tennessee

Former Boxer Wins $10.7M Damage Award

A jury in Nashville, Tennessee federal court this month awarded former boxer turned actor, Randall "Tex" Cobb, $8.5 million in compensatory damages and $2.2 million in punitive damages in his libel suit against Time, Inc., publisher of *Sports Illustrated*. Cobb, something of a local hero who conceded that he was a public figure, alleged that an article published in a 1993 issue of *Sports Illustrated* falsely accused him of participating in a fixed boxing match in Florida and of sharing cocaine with his opponent after the fight. Cobb had originally named the reporters of the story in the libel action in addition to Time Inc., but they were dismissed from the case for lack of personal jurisdiction. *See LDRC LibelLetter*, May 1995 at 4.

The article at issue focused on boxing promoter, Rick "Elvis" Parker, who represented Cobb, among other fighters. The article reported that Parker had been involved in fixing certain fights, including one between Cobb and Sonny Barch held on September 15, 1992 in Florida. Barch himself told *Sports Illustrated* that he had met with Cobb before the fight to discuss the logistics of fixing the match and he was the source for the allegation that they had shared drugs after the fight. Barch, who had a checkered past, was unavailable to testify at trial.

Don Hazelton, the former Executive Director of the Florida State Athletic Commission, also a source for the story, was available, however, and testified that he concluded that the fight, which he had witnessed, was fixed and explained the various reasons for his conclusion. Other corroborating evidence and testimony was introduced by *Sports Illustrated* which asserted that its story was thoroughly and professionally researched.

In the end, and after a three-week trial, the jury chose to believe Cobb, who contended that he never knowingly participated in a fixed fight, that he did not meet with Barch on the day of the fight, and that he did not share cocaine with Barch after their match.

Sports Illustrated, in addition to defending the case on the issues of truth and lack of actual malice, contended that the plaintiff offered no proof of substantial damages. While asserting that he lost approximately $6 million in income as a result of the story, *Sports Illustrated* argued (and will undoubtedly argue again on post-trial motions) that Cobb had no evidence to support his contention.

Sports Illustrated presently intends to file a post-trial motion for judgment notwithstanding the verdict.

St. Martin's Press Wins Jury Libel Trial In New Hampshire

A federal district court jury in New Hampshire on June 22 returned a verdict for the defendants, St. Martin's Press and author Susan Trento, in a libel suit brought by former Hill & Knowlton chairman, Robert K. Gray. Gray filed suit in 1995 over *The Power House: Robert Keith Gray and the Selling of Access and Influence in Washington*, a book that chronicles his career as one of Washington's most prominent and highly visible lobbyists and influence peddlers.

Gray went to trial on four allegedly defamatory statements in the book: that he misused government property, that at various times he faked telephone calls with White House officials (presumably to enhance his aura of access), that he bribed a union official, and that he engaged in money laundering.

Gray initially sued over eight statements in the book, but prior to trial the court ruled that four statements were protected opinion. A year ago Gray unsuccessfully sought to add twenty statements to the case. Earlier this year the trial court ruled that Gray could not introduce those or other allegedly false statements in the book to prove that the four statements in suit were published with actual malice. The court ruled that "collateral factual inaccuracies" were not probative of whether defendants had acted with actual malice. *Gray v. St. Martin's Press, Inc.*, No. 95-285-M (D.N.H. Order dated Feb. 18, 1999).

William Chapman and James Bassett of Orr & Reno represented the defendants at the trial and will be able to tell us more about the case in next month's *LDRC LibelLetter*.

Libel-Proof Prisoner In Georgia Jail
A Rapist/Murderer/Molester with a Thin Skin

By Brooks C. Rathet

On May 14, 1999, Judge David E. Barrett of the Union County, Georgia Superior Court dismissed a libel claim brought against *North Georgia News* by William Larry Weaver, a convicted murderer, rapist, statutory rapist, child molester and felony escapee, finding he was libel-proof. *Weaver v. North Georgia News, et al.*, No. 99-CV-77-DB (Ga. May 14, 1999). The court rejected Weaver's claims that he was defamed when the newspaper allegedly misreported that he had "chiseled" his way out of prison and that he had stolen a pickup truck after his escape.

> *"That which one does not have, one cannot lose or have damaged."*

Weaver is an inmate at Phillips State Prison in Buford, Georgia. His libel complaint arose out of a March 4, 1998, article published by the *North Georgia News* headlined, "Weaver found guilty of murder in Montana, a crime committed after his escape from Towns/Union Jail." The article traced Weaver's criminal odyssey that began with his 1990 conviction in Georgia of rape, statutory rape and child molestation. Just two months after his conviction, Weaver escaped from the Towns-Union Jail after, as the *North Georgia News* reported, he allegedly "chiseled out several cinder blocks and escaped past a night jailer . . . ." The article went on to describe how Weaver stole a pickup truck from a nearby home and drove away.

Although authorities found the pickup truck the next day, they didn't find Weaver until 1994, when he was arrested for a traffic violation in Washington State. Weaver was returned to Georgia in 1997 where a court denied him a new trial on his 1990 convictions. During that period, Weaver told a fellow inmate about at least one of his activities while on the lam — the shotgun killing of a Montana man. At the time the *North Georgia News* published its article, Weaver faced a possible life sentence in Montana for the shooting. After the article's publication, a Montana jury convicted Weaver of murder.

In his complaint against the *North Georgia News*, which Weaver filed from the Georgia prison where he is currently incarcerated, Weaver did not deny that he was a convicted rapist, statutory rapist, child molester, prison escapee and murderer. Instead, he claimed that the article at issue falsely reported that he "chiseled" his way out of prison, rather than escaped through some other means that Weaver did not describe in his complaint. Additionally, he claimed that he "was never tried or convicted of stealing a pickup truck." The newspaper moved to dismiss on the grounds that: even if untrue, the description that Weaver "chiseled" as a means of escape is incapable of a defamatory meaning; the gist or sting of the article, detailing Weaver's extensive conviction record, was true regardless of the details of the escape and truck theft; and, Weaver is "libel proof" as a matter of law.

The court dismissed on the grounds that the article at issue was substantially accurate in reporting on both the escape and Weaver's criminal record. Whether he chiseled out several cinder blocks or not did not alter the substantial accuracy in reporting that Weaver escaped from prison. The court further held that Weaver's criminal history rendered him "libel proof" based on his myriad felony convictions. Thus, Weaver "could not have suffered any loss to his reputation by an even totally baseless claim for theft of a motor vehicle." According to the court, "That which one does not have, one cannot lose or have damaged . . . . A claim for theft can not sully the reputation of a man whose criminal record reads like that of William Larry Weaver." Weaver filed a notice of appeal from the trial court's order and has moved to stay a similar case against *The Gainesville Times* pending the outcome of his appeal against the *North Georgia News*.

Brooks C. Rathet is an associate at Dow, Lohnes & Albertson in Atlanta, representing North Georgia News.

Operation Tailwind Military Participants Sue CNN and *Time* in Four More Lawsuits

In the latest round of the Tailwind saga, five military participants in Operation Tailwind — Robert Van Buskirk, Michael Hagen, John Sadler, Gary Michael Rose and Barry Pencek — have filed four separate defamation suits against CNN and *Time* arising from the controversial reports about the mission that appeared on CNN's NewsStand program and in *Time* magazine.

All complaints allege that the NewsStand broadcast and *Time* magazine article reported false statements, portrayed source remarks out of context, and did not report information that contradicted allegations that Operation Tailwind used lethal nerve gas to kill American defectors and innocent Laos women and children. The plaintiffs claim that if these reports were true, they could be charged with the commission of war crimes. The plaintiffs also allege that CNN and *Time*'s retractions of the story were insufficient because they did not correct statements, but only said there was not enough evidence to support the assertions.

A Primary Source Sues

Two of the lawsuits are by sources who had been interviewed and quoted in the Tailwind reports. Robert Van Buskirk, a former Green Beret Lieutenant and current resident of North Carolina, filed his defamation claim against CNN, *Time* and Time Warner in a North Carolina District Court on June 2, 1999. He claims defamation, libel per se and intentional infliction of emotional distress from statements made by and about him that were allegedly taken out of context to portray him as a source of false statements about the mission.

He also alleges defamation from retractions that portrayed him as "CNN's primary source on the ground," as an inconsistent and unreliable source because his 1983 book on Tailwind did not mention nerve gas or defectors, and because he had taken medication to treat a nervous disorder for ten years.

Van Buskirk is seeking $75,000 in compensatory damages and $100 million in punitive damages.

Another Source Claims Misrepresentation

Also on June 2, Michael Hagen, a member of the Tailwind mission and current resident of California, filed suit in California State Court in Los Angeles against CNN, *Time*, former CNN reporter Peter Arnett, former CNN producers April Oliver and John Smith, and CNN associate producer Amy Kasarda. In addition to defamation, libel and slander claims, Hagen is suing for negligent and intentional misrepresentation, negligent and intentional infliction of emotional distress, negligence, false light, and invasion of privacy for appropriating his likeness for defendant's advantage.

Like Van Buskirk, Hagen alleges that statements he made during his interview were edited out of context, and that the defendants continued to defame him in subsequent retractions, which he claims do not comply with the California code.

In addition, Hagen alleges that defendants misrepresented the purpose of the interview, leading him to believe they wanted to interview him about his medical problems related to the Vietnam War and difficulty obtaining benefits from the Veteran's Administration. Hagen asserts he relied on representations that the defendants would help him obtain his VA benefits in agreeing to the interview. The plaintiff also claims that defendants tricked him in to making statements about his knowledge of nerve gas because he was under the influence of narcotics medications during the interview. Consequently, he claims he did not give valid permission to use either his likeness or the pictures he gave defendants of other members of Operation Tailwind.

Other Tailwind Participants Claim Harm

In the other two complaints, the plaintiffs were not quoted in the Tailwind reports and instead are

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Operation Tailwind

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basing their defamation suits on statements made about Operation Tailwind in general. Retired Colonel John F. Sadler, a citizen of Washington, and Captain Gary Michael Rose, a Michigan resident and former medic for Tailwind, filed suit in an Arkansas U.S. District Court on June 7 against CNN, *Time*, Time Warner, CNN producers, editors and reporters (including Oliver, Smith and Arnett) the President and CEO of CNN, and the Editor in Chief of *Time*. The plaintiffs are suing for defamation, libel, slander and intentional infliction of emotional distress.

Sadler, who as Commander of Operation Tailwind was responsible for planning, authorizing, and executing the mission, claims that all allegedly false statements about Tailwind in the reports defame him personally. The plaintiffs also allege that the defendants disregarded normal standards of investigation by relying on unreliable sources (specifically Van Buskirk) and neglecting to publish conflicting accounts of Tailwind, including Sadler's flat denial of the allegations in the report.

And a Class Action

Barry D. Pencek, a former helicopter pilot, filed an individual action against CNN and *Time* on May 28 in Georgia State Court as well as a class action on behalf of all helicopter pilots who directly participated in Operation Tailwind. Bencek's filing asserts claims of slander, libel, libel per se, false light, invasion of privacy, and intentional infliction of emotional distress for the reports on Operation Tailwind. Interestingly, although the plaintiff is seeking damages from allegedly defamatory statements about the use of nerve gas, all statements in plaintiff's complaint regarding helicopter pilots state that the pilots thought they were only dropping tear gas during the Tailwind mission.

Atlanta-Journal Constitution Reporters Ordered to Jail For Refusing to Disclose Sources in Jewell Suit

On June 3, 1999, in former Olympic bombing suspect Richard Jewell's libel action against the *Atlanta Journal-Constitution*, Fulton County State Court Judge John Mather held the newspaper in contempt and ordered two of its reporters to jail until such time as they identify the confidential sources for the newspapers' reporting that Jewell had become the focus of the F.B.I.'s investigation into the bombing.

Under Georgia law, contempt orders are immediately appealable; discovery orders per se are not. A notice of appeal immediately filed by the newspaper automatically blocked the threatened punishment, which under Georgia law may not now be imposed unless and until the trial court's underlying order requiring disclosure of confidential sources is considered on the merits by Georgia's appellate courts and affirmed.

The trial court based its order requiring disclosure of the *Journal-Constitution*'s confidential sources not on any finding that Jewell had demonstrated a need for the confidential sources' identities but on the court's conclusion that no special privilege protects reporters. The court's analysis of the matter began and ended with its conclusion that *Branzburg* failed to recognize any constitutionally-based reporter's privilege and that the Georgia statutory reporter's privilege is expressly limited to non-parties.

According to LDRC member Peter Canfield, who represents the newspaper, Georgia law applicable to all litigants requires that sensitive discovery is not to be compelled absent a showing of compelling need. But even though the trial court has regularly relied on this principle in refusing to compel discovery of other matters — e.g., Jewell's tax returns and the F.B.I.'s inventory of what was seized from his property - — the trial court, citing its interest in avoiding piecemeal litigation, refused to make any examination of necessity before compelling the identification of confidential sources.

As a result, the trial court did not consider the *Journal-Constitution*'s contention that identification of the confidential sources was unnecessary because the accuracy of the reported statements to which they relate — that Jewell had become the focus of the FBI investigation, that he fit the FBI's profile, etc. — is not in genuine dispute. In a July 1997 report to Congress, the Justice Department has acknowledged that, almost a full day prior to the *Journal-Constitution*'s initial report, Jewell had emerged as the FBI's "principal (though not the only) suspect" focus of the investigation, in large part because "Jewell fit the profile of a person who might create an incident so he could emerge as a hero."

The trial court has indicated that it intends to take no further action in the case until the confidential source appeal is resolved, which is expected to take more than a year.

Jewell-like Claims Dismissed Under Georgia Fair Report

Shahriyar Bakhtiarnejad v. The Atlanta Journal-Constitution

By Thomas M. Clyde

On May 24, 1999, *The Atlanta Journal-Constitution* won dismissal of a libel suit filed by the lawyers who also represent former Olympic bombing suspect Richard Jewell. The suit was brought on behalf of a plaintiff who, similar to Jewell, claimed that he was libeled when the newspaper reported that he was a suspect in a criminal investigation. In dismissing the suit, Fulton County, Georgia State Court Judge Brenda H. Cole held that *The Journal-Constitution* was shielded from liability by Georgia's "fair report" privilege, which protects accurate reports of court proceedings and records and statements from police officials. *Shahriyar Bakhtiarnejad v. Cox Enterprises d/b/a The Atlanta Journal-Constitution, et al.*, No. 98VS0147570E (Fulton County State Ct. May 24, 1999).

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Another Jewell?

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The case arose out of a *Journal-Constitution* article that reported on three arrest warrants issued by Gwinnett County, Georgia police against the plaintiff, Shahriyar Bakhtiarnejad, a 32-year-old tae kwon do instructor from an Atlanta suburb. Bakhtiarnejad was accused in the warrants of two counts of child molestation and one count of aggravated child molestation against one of his former students.

The arrest warrants were issued by a magistrate judge and publicly filed on August 19, 1998. *The Journal-Constitution* learned of the warrants on August 20, 1998, during a routine public records search. After learning of the warrants, a *Journal-Constitution* reporter telephoned the Gwinnett County police officer who made out the warrants for more information about the charges. The police officer repeated to the reporter the substance of the charges that were outlined in the arrest warrants.

The next day, August 21, 1998, *The Journal-Constitution* published an article about the issuance of the arrest warrants under the headline "Martial arts instructor accused of molesting girl." That same day, Gwinnett County police officially recalled the arrest warrants after an earlier interview with plaintiff cast doubt in their minds on the veracity of the charges. *The Journal-Constitution* reported on the withdrawal of the warrants on August 22, 1998.

In his complaint, plaintiff claimed that *The Journal-Constitution* article went beyond the mere reporting of the arrest warrants and libelously accused him of actually committing the crimes for which he was charged. Plaintiff further claimed that the article libeled him by stating that he had been arrested for the charged crimes, when in fact he was never arrested and the charges against him were ultimately dropped. In its motion to dismiss plaintiff's complaint, *The Journal-Constitution* invoked Georgia's fair report privilege to protect what it claimed was a fair and accurate report on the issuance of the arrest warrants.

Central to the dispute was the precise scope of the fair report privilege. In Georgia, this privilege is codified as one of eight privileges that protect certain types of statements from liability. Although these privileges are generally considered to be qualified rather than absolute in nature, Georgia case law is unsettled about the protection afforded by the fair report privilege. Plaintiff claimed that the privilege is a qualified one that can be pierced by a showing of actual malice, and that he had successfully pled actual malice in his complaint. *The Journal-Constitution* countered that the fair report privilege is absolute in nature and that because its August 21, 1998 article was a "fair and accurate" report, it was entitled to dismissal.

In dismissing plaintiff's complaint, the court agreed with *The Journal-Constitution* that in the context of the case the fair report privilege "is not vitiated by a showing of actual malice." In reaching this conclusion, the court looked to both Georgia statute and the First Amendment for guidance. The court further held that even were the fair report privilege qualified in nature, plaintiff still had not pled sufficient facts to allow the court to conclude that actual malice existed. Plaintiff's bald assertion of actual malice, unsupported by any facts, was insufficient to survive *The Journal-Constitution*'s motion to dismiss. Therefore, because "[t]he challenged article accurately reported that Plaintiff was 'accused of' and 'face[d] charges' of child molestation 'according to arrest warrants,'" dismissal of plaintiff's complaint was warranted.

Because plaintiff's libel claim was dismissed, the court also dismissed his intentional infliction of emotional distress claim.

In addition to *The Journal-Constitution*, plaintiff named as defendants in the suit the police officer who gave an interview to the newspaper and the alleged victim of the molestation, who had made the initial charges to the police. The police officer has filed a motion to dismiss. The alleged victim has counterclaimed against plaintiff for damages for sexual assault.

Thomas M. Clyde is a senior associate with Dow, Lohnes & Albertson, Atlanta, Georgia, and represented the Atlanta Journal Constitution and Michael Weiss in this matter.

Leave to Appeal Granted in New York

Defining Public Figures and Concerns at Issue

In the latest chapter of the contentious divorce and subsequent libel suit involving singer Melba Moore and her former husband/manager Charles Huggins, New York's Appellate Division, First Department, has granted the *Daily News'* motion for leave to appeal from the court's decision reversing summary judgment entered on behalf of the paper. *Huggins v. Moore and The Daily News*, No. 118787/93 (N.Y. App. Div. June 22, 1999), *see LDRC LibelLetter*, April 1999 at 11.

Huggins' suit against the *Daily News* arose out of three gossip items which reported Moore's allegations that, among other things, Huggins had embezzled money from her and had fraudulently obtained a divorce. While the trial court had granted the paper's motion for summary judgment on the basis that the 18 statements complained of were protected opinion, the appellate court reversed summary judgment as to six of the statements.

More troubling than the appellate court's treatment of opinion was its determinations with regard to the issues of public figure status and public concern. Specifically, the court refused to treat Huggins as a public figure because it found that while Huggins may have been in the business of promoting celebrities, he "had not sought publicity for himself personally." With regard to the public concern issue, the court rejected New York's gross irresponsibility standard, which normally applies to matters of public concern, because the case centered on reports of a divorce and the business arrangements between husband and wife, which the court found to be "essentially private affairs."

In addition to granting leave to appeal the court also granted a motion filed on behalf of ABC, Inc., The Associated Press, Association of American Publishers, Bloomberg L.P., CBS Corp., Dow Jones & Co., Inc., Gannett Co., Inc., The Hearst Corp., Johnson Newspaper Corp., Magazine Publishers of America, National Broadcasting Co., Inc., Newsweek, Inc., *The New York Post*, The New York Times Co., Advance Publications, and Time, Inc., for leave to file a memorandum of law amici curiae in support of the motion for leave to appeal.

Plaintiff Loses Forum Battle In Libel Case Against *The New Republic*

By Alexandre de Gramont

In a decision dated May 17, 1999, the U.S. District Court for the Middle District of Florida granted the defendants' motion to transfer *Weyrich v. The New Republic, Inc. et al.* to the District of Columbia. This ended a forum battle that began when the plaintiff filed the case in state court in Orange County, Florida in September 1998.

A Case About Politics "Inside the Beltway"

The *Weyrich* action might well be characterized as the quintessential "inside-the-beltway" case. While Paul Weyrich is known throughout the country as a conservative political activist, he has achieved special fame inside Washington as the man who founded the Heritage Foundation and National Empowerment Television; coined the term "Moral Majority"; orchestrated the Republican Party's alliance with evangelical Christians; and, in the wake of President Clinton's acquittal by the Senate, suggested that it may be time for conservatives to "drop out of this culture."

The case arises from a cover article in the October 27, 1997 edition of *The New Republic* entitled "Robespierre of the Right: Paul Weyrich and the Conservative Quest for Purity." The article chronicles Mr. Weyrich's rise in conservative politics inside Washington, and discusses his relationships with a variety of other prominent Washington figures, such as Newt Gingrich, Orrin Hatch, Trent Lott, John McCain, George Will, and the late John Tower.

The theme of the article is that Mr. Weyrich "has become, in many respects, a case study of the conservative mind — a metaphor for the right's deep-seated inability to accept the compromising nature of power." The image used throughout the

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article is of Mr. Weyrich as "a kind of K Street Robespierre" — a reference to the famed French revolutionary who, in his quest for purity, unleashed a reign of terror. The magazine's cover features an illustration of Mr. Weyrich operating a guillotine and surrounded by the heads of Jack Kemp, Trent Lott, Newt Gingrich, John Tower, and others. Accompanying the article is another illustration depicting Mr. Weyrich gleefully eating conservatives off a skewer. The article is supertitled: "What I ate at the revolution."

The Beltway Parties

Mr. Weyrich works in Washington and lives in a Virginia suburb of Washington. *The New Republic* is published in Washington, where the article's author, David Grann (a senior editor at *The New Republic*), also works and lives. The article was written, researched, edited, and fact-checked in Washington, which is where most of events described in the article took place. Even Mr. Weyrich's lead counsel, Larry Klayman of Judicial Watch, is a well-known Washington lawyer and conservative.

And so naturally Mr. Weyrich chose to file his lawsuit in state court in Orlando, Florida. Mr. Weyrich and his lawyers apparently chose that forum to take advantage of the relatively conservative jury pool there, and because the television network founded by Mr. Weyrich, National Empowerment Television (now doing business as "America's Voice"), has a large viewership in Orange County.

In addition to *The New Republic*, Inc. and Mr. Grann, the complaint names as defendants *The New Republic*'s editor-in-chief, Martin Peretz, and the cartoonists who drew the guillotine and skewer illustrations, respectively, Taylor Jones and Vint Lawrence. The complaint sets forth counts for libel and invasion of privacy/false light. It also alleges that the defendants' conduct is part of a "conspiracy" against "other notable conservative persons and organizations, including Judicial Watch Chairman Larry Klayman and Supreme Court Justice Antonin Scalia."

Keeton v. Hustler Revisited?

Ever since the U.S. Supreme Court's decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984), plaintiffs have felt free to "shop around" for the most hospitable forum to bring a libel action against the media. The plaintiff in *Keeton* was a resident of New York. Hustler Magazine, Inc. ("*Hustler*") was incorporated in Ohio with its principal place of business in California. After the action was dismissed in Ohio on statute-of-limitation grounds, the plaintiff refiled the action in New Hampshire in order to take advantage of the state's six-year statute of limitations. Although the only connection between the lawsuit and New Hampshire was that *Hustler* had a small circulation there, the Supreme Court held that a New Hampshire court could exercise personal jurisdiction over *Hustler* without violating the Due Process Clause of the Fourteenth Amendment.

Although the *Keeton* decision has emboldened the forum-shopping efforts of libel plaintiffs, the *Weyrich* case — along with a handful of other decisions transferring libel cases — illustrates that there are still procedural tools available to media defendants when the plaintiff has chosen an inappropriate or inconvenient forum.

The *Weyrich* defendants first removed the case to federal court on diversity grounds pursuant to 28 U.S.C. § 1332. While the *Keeton* decision held that the New Hampshire court could exercise personal jurisdiction over *Hustler*, it did not reach the issue of whether the court could exercise such jurisdiction over the magazine's editor-in-chief (or, for that matter, over L.F.P., Inc., Hustler Magazine, Inc.'s holding company).

Accordingly, the *Weyrich* defendants filed a motion to dismiss the individual defendants on personal jurisdiction grounds pursuant to Federal Rule of Civil Procedure 12(b)(2), or to transfer the case

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Plaintiff Loses Case Against *The New Republic*

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to the District of Columbia pursuant to 28 U.S.C. § 1406 (providing for transfer of a case "laying venue in the wrong district"). In the alternative, the defendants moved to transfer the case to the District of Columbia pursuant to 28 U.S.C. § 1404, which provides for transfer "[f]or the convenience of the parties and witnesses [and] in the interest of justice . . . ." The defendants also filed a Rule 12(b)(6) motion to dismiss the complaint in its entirety.

The Court's Decision Granting Transfer

The U.S. District Court for the Middle District of Florida (the Hon. Anne C. Conway) declined to reach the personal jurisdiction issue or defendants' Rule 12(b)(6) motion, instead transferring the case to the District of Columbia pursuant to Section 1404. Judge Conway rejected Mr. Weyrich's argument that the interests of justice would be best served by permitting the plaintiff his choice of forum, where, he argued, he "suffered significant injury by reason of the substantial viewership he and his cable network enjoyed in Florida." *Weyrich v. The New Republic, Inc.*, No. 98-1168-22C, slip op. at 2 (M.D. Fla. May 14, 1999). (As Judge Conway noted, this argument was undercut by the fact that *The New Republic*'s circulation in Florida represented about 3.5% of its overall circulation. Thus, the likelihood that any of Mr. Weyrich's "substantial viewership" ever saw the article at issue was "remote" at best. *Id.* at 5.)

Instead, Judge Conway agreed with the defendants that "Plaintiff's choice of forum is clearly outweighed by other considerations." *Id.* at 6. First, the court concluded that the District of Columbia was a more convenient forum for the parties in the case, all of whom lived in or relatively near Washington. *Id.* at 3-4. Second, the court found that the District of Columbia was a more convenient forum for the likely witnesses, most of whom are (as characterized by the defendants' brief) "fixtures" of the nation's capitol. *See Id.* at 4-5.

Third, the court concluded that because *The New Republic, Inc.* — as well as most of the organizations with which Mr. Weyrich is or has been associated — were in Washington, most if not all of the relevant evidence would likely be found there. *Id.* at 6. Finally, the court agreed with defendants that the public interest would be best served by transferring the case to the District of Columbia given the list of likely witnesses. As stated by the court:

> "[T]he public interest weighs in favor of transfer due to the fact that members of Congress are listed as witnesses. It is certainly less disruptive of this nation's business for members of Congress to testify in Washington." *Id.* at 6.

Following Transfer

Following its transfer to the District of Columbia, the case has been assigned to U.S. District Judge Thomas Penfield Jackson (who is also presiding over the *Microsoft* trial). Judge Jackson held his first status hearing in the case on June 18, 1999. At the hearing, he specifically rejected the plaintiff's request for discovery to proceed immediately. Instead, Judge Jackson ruled that no discovery would be allowed prior to a hearing on the Defendants' Rule 12(b)(6) motion, which he set for August 13, 1999.

Alexandre de Gramont was an LDRC intern in 1988. He is now a Partner at Crowell & Moring L.L.P. in Washington, D.C., where, along with Andrew H. Marks and Stuart H. Newberger, he represents the defendants in the Weyrich case.

UPDATES

Adverse UK Internet Decision Will Not Be Appealed

Demon Internet, one of the UK's largest Internet service providers, will not appeal a recent High Court pretrial ruling that held the ISP could be liable as the "publisher" of a third party's defamatory newsgroup posting. *Godfrey v. Demon Internet Limited*, 1998-G-No. 30 (High Court Mar. 26, 1999); *See LDRC LibelLetter* April 1999 at 19. Without public comment, Demon let the deadline pass for filing an appeal — a decision which disappointed Internet advocates in the UK.

The High Court decision specifically held that Demon could not invoke the "innocent dissemination" defense in a defamation case because it had received a prior letter of complaint about the posting. Betraying a lack of understanding about the scope and capacity of the Internet, the court drew an analogy to a case involving the posting of a defamatory note on the message board of a gentleman's club.

With the decision not to appeal, UK ISPs will continue to face pressure to remove Internet content in the face of a complaint. The only note of solace in the case, and perhaps a factor that led to the decision not to appeal, was the High Court's statement that damages against Demon were likely to be small.

Former UK Cabinet Minister Sentenced for Perjury in Libel Case

In what might mark the final chapter in the saga of disgraced former UK Cabinet Minister Jonathan Aitken, an Old Bailey criminal court judge recently sentenced Aitken to 18 months in prison for perjury and perverting the course of justice in the course of a libel trial he brought against the *Guardian* newspaper. Earlier this year, Aitken pled guilty to the charges.

In 1995, the *Guardian* published an article exposing Aitken's ethically questionable links to Saudi Arabian arms dealers. The libel case began that same year when with great rhetorical flourish and media attention, Aitken announced that he was suing the *Guardian* to reclaim his reputation armed with the "sword of truth" and the "shield of fair play." Although the newspaper ultimately prevailed, the trial was a textbook example of the burdens of defending a libel action in the UK. Because of the difficulty in obtaining evidence to prove truth, the paper offered to settle with Aitken, but in a remarkable example of hubris Aitken refused all offers of settlement.

Through its own investigation during trial, the *Guardian* discovered warehoused airline and hotel bills that proved Aitken lied about the details of a Paris rendezvous with an arms dealer. The revelation caused his case against the *Guardian* to collapse. In the subsequent perjury investigation, Aitken admitted to lying at trial and to drafting a false statement for his daughter to bolster his testimony.

Argument Doesn't Hold Water *Canoeist Found Guilty*

On June 11, Timothy Boomer — the unhappy canoer who unleashed an obviously colorful and loud verbal burst after falling into a river (*see LDRC LibelLetter* February 1999, at 18) — was found guilty of violating an 1897 Michigan law prohibiting swearing near children. The ACLU has vowed to fight the conviction, arguing that Boomer's conviction cannot be based on the fighting words doctrine because Boomer's string of profanity was directed at no one in particular. The misdemeanor conviction carries with it a $100 fine and up to 90 days in jail. District Court Judge Allen Yenior has delayed sentencing pending the appeal, but it is expected that a sentencing date will be set before the appeal is heard.

A bright spot in this case occurred when Judge Yenior ruled that a portion of the 1897 statute — concerning the use of profanity near women — violated the Constitution under an equal protection analysis.

Seventh Circuit Recognizes Presumption of Access to Discovery Materials

Broad Stipulated Protective Orders Rejected

By Michael M. Conway and Anne C. Morgan

Using a routine commercial lawsuit as the vehicle, the Seventh Circuit, in an opinion written by Chief Judge Richard Posner, has significantly advanced the public's right of access to sealed documents in a civil case by finding a "presumption of access" to discovery materials in *Citizens First National Bank of Princeton v. Cincinnati Insurance Co.*, Nos. 98-3534, 98-3535, and 98-3957 (7th Cir. May 28,1999)

In doing so, the Seventh Circuit joined the Sixth Circuit in *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 277 (6th Cir. 1996) in explicitly articulating the reach of the presumption of access and in imposing on a district court judge the independent obligation to ensure that the presumption of access is protected even though no party demands access to documents sealed under a protective order.

In *Citizens Bank*, the lower court entered a routine stipulated protective order allowing either party to file under seal any document it designated as "Confidential," so long as the document is, "in good faith," believed to contain trade secrets or other confidential commercial or governmental information, including information held in a fiduciary capacity. The order encompassed documents both at the discovery stage and at trial.

The underlying action itself arose out of losses sustained by trust accounts at Citizens Bank as a result of claims made against the bank by its trust customers, the Office of the Comptroller of the Currency and the United States Department of Labor. (Findings of Fact, Case No. 96 C 3971 at 2). The losses were found to be largely a result of the bank's "imprudent," though not fraudulent, investments in "inverse floater" derivatives. (Findings at 3,4, Conclusions of Law at 3). In some cases, the investments were also found to have violated ERISA. (Findings at 9). Cincinnati Insurance Co., Citizens' insurance carrier, denied the bank's claim under its Directors and Officers Liability policy, which included an endorsement insuring Citizens for errors and omissions committed in the administration of its trust accounts. (Findings at 2, 11-13). Following a bench trial, the district judge found that Cincinnati had denied coverage in bad faith and awarded Citizens $4.9 million plus prejudgment interest and attorneys' fees. (Conclusions at 7 and Judgment).

> *[T]he public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.*

On appeal a party moved to file an appendix under seal, citing the district court's nearly two-year old "umbrella" protective order to the appellate court. The Seventh Circuit not only rejected this request, but also criticized the district court's unquestioning entry of the stipulated protective order.

Chief Judge Posner's opinion, read to apply the presumption of access to pretrial discovery, extends the scope of the Seventh Circuit's prior opinion in *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, which cautioned that "material uncovered during pretrial discovery is ordinarily not within the scope of press access to court proceedings and documents until admitted into the record." 24 F.3d 893, 897-898 (7th Cir. 1994)(citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984)).

While acknowledging that "it is true that pretrial discovery . . . is usually conducted in private" under *Seattle Times*, the Seventh Circuit nevertheless criticized the district court's order for not being limited to pretrial discovery nor recognizing the

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Seventh Circuit Recognizes Presumption of Access

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public interest in what goes on "at all stages" of a judicial proceeding. *Citizens Bank* at 2. Explicitly rejecting the view that "umbrella" protective orders are unproblematic at the discovery stages, the Seventh Circuit emphasized a district court judge's duty as the "primary representative of the public interest" in the judicial process to carefully review "any" request to seal "any" part of the record. *Citizens Bank* at 3.

[The judge] may not rubber stamp a stipulation to seal the record.

The complete lack of media or third-party interest in unsealing any part of the record in *Citizens Bank* was actually used to bolster the court's reasoning. Without judicial determination of good cause, according to the opinion, the public interest will go unprotected unless the media "happen to be interested" in the case and move to unseal the record. *Citizens Bank* at 3.

For this very reason, declares the Seventh Circuit, a judge may not "rubber stamp" a stipulation to seal the record in a civil case. *Citizens Bank* at 3, citing *In re Krynicki*, 983 F.2d 74 (7th Cir. 1992)(chambers opinion) (Easterbrook, J.)("Judicial proceedings are not closed whenever the details are titillating, and open only when the facts are so boring that no one other than the parties cares about them.") Not only must a judge find "good cause" for restricting access, as articulated in *Citizens First*, but the court must also be "firmly convinced" that disclosure is inappropriate before sealing any part of the record. *Grove Fresh*, 24 F.3d at 897.

In another broad application of the Sixth Circuit's holding in *Procter & Gamble*, the Seventh Circuit also declared the district court order in *Citizens Bank* "so loose" in allowing the parties themselves to seal documents as to be invalid on its face. Though several courts of appeals, including the Seventh Circuit in *In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1313 n. 17 (7th Cir. 1984), have emphasized the need for district courts to articulate on the record their reasons for entering a protective order, lack of such a description has not mandated reversal in prior Sixth or Seventh Circuit cases. *Grove Fresh*, 24 F.3d at 898 ("In this circuit, we have yet to hold that where such a description is lacking, reversal is per se appropriate").

In finding a presumption of access to civil discovery proceedings, *Citizens Bank* places an unfamiliar burden on litigants requesting protective orders. Parties will now have to make a strong showing that their interests in secrecy outweigh the public's right to know, even in cases where the public articulates no particular desire to know. District court judges bear explicit responsibility for protecting the public's interest.

Under *Citizens Bank* protective orders may only be granted if the judge (1) is satisfied that the parties know what a trade secret is and are acting in good faith in making designations of trade secrets, and (2) makes explicit that either party or any interested member of the public can challenge the secreting of particular documents in the future. *Citizens Bank* at 5.

Michael M. Conway is a partner of Hopkins & Sutter in Chicago and Anne C. Morgan is a summer associate who attends Northwestern Law School.

LDRC would like to thank our summer interns — Lara Schneider, Cardozo Law School, Class of 2000; Ashley Clymer Bashore, Columbia Law School, Class of 2001 and Patricia Stewart, Columbia Law School, Class of 2001 — for their contributions to this month's LibelLetter.

Tennessee Courts Give With One Hand, Take Away With the Other

Prior Restraint Order Rescinded — Appellate Court Immediately Issues Stay Against Publication

On June 7, Knox County, Tennessee Criminal Court Judge Richard Baumgartner rescinded an eight month injunction against the publication of the details of the defense costs in the criminal trial of Thomas Dee "Zoo Man" Huskey. But just hours later, Judge James Curwood Witt Jr. issued a stay against further publication of defense counsel fees and expenses incurred in the defense of Huskey. The case received a great deal of attention in Tennessee due to the expenses — allegedly more than $250,000 — incurred in the trial, expenses paid by Tennessee taxpayers.

The Knoxville News-Sentinel obtained access to summary information about the defense costs of the four-year old criminal case in early 1998 but was given detailed records by an anonymous source in May of that same year. On October 22, 1998, *Sentinel* reporter John North contacted one of Huskey's attorneys to advise him that the paper was going to publish an article about the information contained in the records. The next day, Huskey's attorneys filed an application for a temporary restraining order and an injunction against publication, which was granted by the trial court. The *Sentinel* considered the order to be invalid on its face and defied the order by publishing an article which utilized some of the information from the records. Following hearings on October 28 and November 4, 1998, the trial court issued an injunction enjoining the *Sentinel* from "the publication or dissemination in any manner of any information contained in the detailed time records . . . ." *Huskey v. The Knoxville News Sentinel*, CCA No. 03C01-9811-00410, at 5 (Tenn. Ct. Crim. App., Jan. 29, 1999). *See also LDRC LibelLetter*, November 1998 at 27; February 1999 at 23.

While the *Sentinel's* application for extraordinary appeal was granted and heard in the Tennessee Criminal Court of Appeals on December 31, 1998, that court refused to rule on the prior restraint because the record on appeal was incomplete — the record did not contain the detailed time sheets at issue (the parties had agreed to keep the expense reports out of the public record).

The Knoxville News-Sentinel has been quoted as saying that the impact of the current stay is minimal, as most of the information in the expense records has already been published.

Ninth Circuit Dismisses as Moot Media Petition on Access to Unabom Juror Names

By Charity Kenyon

In the high profile criminal case of Theodore (Ted) Kaczynski, the "Unabomber," U.S. District Court Judge Garland E. Burrell informed prospective jurors privately and before considering any evidence or the media's opposition, that their identifying information would be released to the public only after the trial. *Unabom Trial Media Coalition v. U.S. Dist. Court for Eastern Dist. of California (Sacramento)*, __ F.3d __, 1999 WL 359682, 1999 Daily Journal D.A.R. 5553 (9th Cir. (Cal.), June 7, 1999), (No. 97-71318). He denied access to transcripts of *in camera* discussions of the public access issue as well as to pretrial briefs in support of the government's Fed. R. Evid. 404(b) motion. The court released the requested information to the public shortly after Kaczynski's abrupt guilty plea.

The media petitioned the Ninth Circuit for extraordinary relief.

It took over a year after oral argument and some eighteen months after the media petition was filed for the court of appeals in a per curiam decision to decide that the petition raising a question of first impression

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Ninth Circuit Dismisses Media's Petition

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in the 9th Circuit — whether and if so according to what standards juror identifying information can be withheld from the press and public before, during or after trial — was moot. *Unabom Trial Media v. USDC*, 9771318 (9th Cir. June 7, 1999). Following on the heels of the *U.S. v. McVeigh*, 119 F.3d 806, 25 Media L. Rep. 1937 (10th Cir. 1997) and *U.S. v. Branch*, 91 F.3d 699, 45 Fed. R. Evid. Serv. 676 (5th Cir.1996), both involving anonymous juries in high-profile cases, the 9th Circuit opinion suggests that it was not ready to decide the issues implicated in Judge Burrell's approach. In the meantime, another panel of the court reaffirmed the circuit's historic support for media access to pretrial proceedings and transcripts in *Phoenix Newspapers v. U.S. District Court*, 156 F.3d 940 (9th Cir. 1998), involving the trial of Arizona Governor John Symington.

While the *Unabom* opinion does not decide the issues presented, it also emphasizes the highly unusual facts and circumstances of the case and does not imply support for routine nondisclosure of juror names even in "high profile" cases. The court indicated that exceptional circumstances would be required to withhold the identity of the jurors from the public and the media. "If Kaczynski or the government were again to move to impanel a partially anonymous jury, they would have to offer up new evidence that the case still stirred up 'deep passions' despite the passage of time."

District Court Judge Burrell sent his letter to jurors promising anonymity before hearing from the media or receiving any evidence to support anonymity. He released this letter to the media and public a month *after* he determined that the parties had presented sufficient evidence (most of which was withheld from the media) to support juror anonymity during trial. Shortly after he released the letter, the media petitioned for mandamus, relying heavily on the court's having secretly prejudged the issue to demonstrate the court's procedural error.

The court of appeals determined, however, that the judge had not bound himself by making this secret promise to jurors. That conclusion allowed the court effectively to ignore the letter and thereby finesse whether it constituted a matter of procedural error that could be capable of repetition, thus deserving of review in the face of a mootness challenge. The court also used its determined ignoring of the letter to support its suggestion that the issue could have been reviewed had the media more quickly sought review.

The decision also contains a few disturbing factual conclusions, such as the leaps from evidence of zealous media contacts with witnesses and attorneys to the conclusion of "harassment," and from proper media contacts with such sources to evidence of potential or likely improper juror contacts during trial. In all events, the evidence points over and again to a court unwilling at this point to address the substantive issues of the petition while limiting the Unabom court's handling of the jurors identities to what it perceives and endeavors to describe as the extreme nature of this case.

Charity Kenyon is with the firm of Riegels Campos & Kenyon LLP in Sacramento, California, and represented the media in this matter.

Supreme Court Acts Decisively in Commercial Speech Case

Rejects Federal Restriction on Gambling Advertising

By Nory Miller

The United States Supreme Court issued a strong decision in *Greater New Orleans Broadcasting Association, Inc. v. United States*, speaking virtually with one voice in invalidating a federal restriction on gambling advertising and clarifying the protection afforded to commercial speech. *Greater New Orleans Broadcasting Association v. United States*, 67 U.S.L.W. 4451 (U.S. June 14, 1999). The law at issue is 18 U.S.C. § 1304, a 1934 provision that bans all broadcast advertising of games of chance — providing criminal sanctions, including jail time, for violators.

A Ban With Many Exceptions

In the past 30 years or so, Congress has responded to changing attitudes toward gambling, including the increasingly prevalent view that it can be a useful means of generating profits and tax revenues, by carving exceptions into the 1934 rule. By the mid-1990s, the prohibition largely served to ban only broadcast advertising of casinos owned by private companies. An FCC regulation, 47 C.F.R. § 73.1211, mirrors the statutory scheme. Violators are subject to FCC sanctions, including loss of the station's license.

A group of broadcast stations in Louisiana, who were interested in carrying advertisements from the private, for-profit casinos which operate lawfully in both Louisiana and neighboring Mississippi, challenged the statute and regulation on First Amendment grounds. They asked that the rules be declared unconstitutional as applied to them and that the federal government be enjoined from enforcing the rules against them.

The district court rejected their arguments, and granted summary judgment to the government. The Fifth Circuit affirmed. A petition to the Supreme Court resulted in a remand in light of *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) — a decision that term which had invalidated Rhode Island's ban on advertising liquor prices, suggested in various ways the increasingly tough standards to which commercial speech should be subject, but failed to generate a majority opinion.

On remand, however, the Fifth Circuit reconfirmed its earlier decision upholding the ban on gambling advertising. The Fifth Circuit explained that the splintered result in *44 Liquormart* provided insufficient guidance. Instead, it relied heavily on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) (written by Chief Justice Rehnquist), last decade's decision upholding Puerto Rico's ban on casino advertising as a reasonable means for Puerto Rico to suppress demand for casino gambling among its own residents while it kept casinos open in order to deplete the resources of its out-of-town visitors. The Supreme Court then granted certiorari for the second time, scheduling full briefing and argument.

Strong Central Hudson Test

The Court's decision issued June 14, and reversed the Fifth Circuit 9 to 0. Justice Stevens wrote for eight of the nine members of the Court, signaling unified support for substantial protection of commercial speech under a strong *Central Hudson* test, and choosing to leave until another day the question of whether certain types of commercial speech restrictions may be subject to even more rigorous scrutiny. The ninth member of the Court, Justice Thomas, concurred only in the judgment that declared the federal advertising restriction invalid as applied to petitioners, because he would provide even stronger protection for commercial speech under these circumstances.

Although several other members of the Court have made clear in previous cases that they share Justice Thomas' concerns, the majority found that, in this case, there was "no need to break new ground" because *Central Hudson* provided "an adequate basis" to

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Supreme Court Rejects Gambling Advertising Restriction

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find the challenged rules invalid. The *Central Hudson* test, *see Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), permits restrictions on commercial speech if the speech is false or misleading or advertises an illegal product or service (prong one). Otherwise, restrictions will be upheld only if the government can establish that it is pursuing a substantial interest (prong two); the restriction will directly and materially further the government's interest (prong three); and the restriction is not unnecessarily broad (prong four). The Court subjected the government's claims to a rigorous independent review, questioning the government's policy justifications in light of related statutory provisions and carefully comparing factual assertions to available evidence.

Questions Government Interest

The Court found that the rules at issue failed both prong three and prong four. Interestingly, even before reaching its prong three analysis, the Court expressed considerable skepticism as to whether the government had substantial interests at stake — as is necessary to meet prong two of the *Central Hudson* test. The government had asserted interests in curbing the potential social costs of gambling and in helping anti-gambling states to suppress gambling. But the Court noted that Congress had also sanctioned various forms of gambling, including Indian casino gambling, and in doing so had obviously embraced countervailing policy considerations.

The Court found no difficulty in accepting that a government *could* have a legitimate and substantial interest in alleviating the social ills recited by the government as associated with gambling, but it noted that "the federal policy of discouraging gambling in general, and casino gambling in particular" — whatever it may have been in 1934 — was "now decidedly equivocal."

Ultimately, the Court chose, as it has in previous commercial speech cases, to consider Congress' inconsistent policies within the framework of the third prong of *Central Hudson*. Nonetheless, the Court commented in its discussion of the substantiality of the government's interests, that the substantiality of the government's interests here was not "self-evident" and that the Court could not "ignore Congress' unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General."

Prong Three Analysis

In its prong three analysis, the Court reviewed the causal chains urged by the government to show that its restriction directly and materially served its asserted interests. Significantly, the Court expressly rejected any automatic link between advertising and increased overall demand. Although the Court has embraced such a link in the past, notably in *Posadas*, here the Court pulled back from that position, recognizing that much advertising simply affects market share.

The Court explained that although it might be fair to assume that advertising would have "some impact" on overall demand, "it is also reasonable to assume that much of that advertising would merely channel gamblers to one casino rather than another." The Court also questioned the causal chain between broadcast advertising of casinos and compulsive gambling, refusing to accept the claimed connection at face value.

Furthermore, the Court considered the challenged restriction within the context of the government's entire statutory scheme, looking beyond the particular provision at issue. The Court found it highly relevant that Congress had enacted legislation to permit casinos owned by Indian tribes, whether operated by the tribes themselves or by private companies, and to permit those casinos to advertise on radio and television stations. The Court also noted that Congress had chosen to permit broadcast advertising of charitable gambling, gambling offered by state and local

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jurisdictions, gambling on horse or dog racing, and various other types of gambling. Finding the overall regulatory regime "so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it," the Court rejected the government's plea for remand to present evidence supporting its asserted causal links.

Was Regulation Too Broad

With respect to prong four, the Court made clear that the government's failure to at least try regulating conduct as a means of achieving its asserted interests undermined the government's position. The Court included a list of nonspeech regulations that "could more directly and effectively alleviate" the problems the advertising ban was allegedly aimed at.

In rejecting the government's attempt to justify its inconsistent approach with respect to Indian and private casinos on the ground that it had an affirmative interest in protecting the welfare of Native Americans, the Court reiterated the fundamental principle that speech is different. Explaining that the government may have valid reasons for imposing different commercial regulations on Indian and non-Indian businesses, the Court emphasized that "[i]t does not follow" that there is a justification for "abridging non-Indians' freedom of speech more severely than the freedom of their tribal competitors."

The Court explained further that "the power to prohibit or to regulate particular conduct does not necessarily include the power to prohibit or regulate speech about that conduct" — making clear that the dicta in *Posadas* to the contrary has been consigned to the judicial dust bin. The Court also relied on the principle it espoused in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993), that the lines drawn between permitted and prohibited speech must bear a meaningful relationship to the particular interest asserted. And it cautioned that differential treatment of speakers conveying virtually identical messages are "in serious tension with the principles undergirding the First Amendment."

Edge Remains

To the extent it was in doubt, however, the Court made clear that *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993), has not been overruled. (*Edge Broadcasting* upheld a different part of the federal gambling advertising law that permits advertising of state lotteries by stations operating in states that conduct such lotteries, but not in those that do not. Thus, the Court suggested that had the challenged law protected residents from advertising of activities that are illegal in their states, while permitting advertising in states in which the underlying conduct is lawful, there might have been a different result.

Rehnquist and Thomas Concurrences

Chief Justice Rehnquist joined the opinion but also concurred separately to set forth his view that substantive regulations of the gambling industry would be upheld, despite exceptions and inconsistencies, because legislatures are granted leeway in determining which evils to address and which remedies to adopt. Then, distinguishing the case at bar, the Chief Justice concurred that "a more demanding standard of review" is imposed when Congress regulates commercial speech.

Justice Thomas, who concurred only in the judgment, wrote separately to reiterate his position that *Central Hudson* was not a rigorous enough standard for commercial speech restrictions that are aimed at keeping truthful information about lawful activities from the public. Quoting from his concurrence in *44 Liquormart*, Justice Thomas explained that an asserted government interest in keeping "legal users of a product or service ignorant in order to manipulate their choices in the marketplace" is "*per se* illegitimate and can no more justify regulation of 'commercial speech' than it can justify regulation of 'noncommercial' speech."

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What Is Left?

Because the broadcasters brought an as applied challenge, the decision's impact on the validity of the gambling advertising ban nationwide has not been fully determined. Literally, the Court invalidated the ban as applied to Louisiana radio and television stations.

In addition, the Court's decision makes clear that the ban on broadcast advertising of private casinos cannot constitutionally be enforced against any station in any of the eleven or so states that have legalized private casino gambling. Similarly, a station must be permitted to carry advertising about other types of gambling, such as card rooms, if the state in which it operates has legalized that type of gambling, even if it has not legalized casino gambling generally. The Court's opinion also provides a very strong basis for invalidating the ban against private casino advertising as applied to a station in any of the 31 or so states in which Indian casino gambling is permitted by federal law, because the Court rejected the government's argument that there was a relevant distinction between Indian and private casinos with respect to this advertising restriction.

The applicable law with respect to stations in the remaining states is not addressed as directly in the opinion. However, there are strong arguments that the federal ban is sufficiently incoherent that its ban on advertising of lawful gambling conducted in neighboring states cannot pass muster even in states that themselves ban casino gambling, or all gambling.

For example, federal law permits broadcast advertising for Indian casinos in *every* state in the country — whether or not that state has legalized casino gambling, and whether or not that state would have to accept an Indian-owned casino under the federal Indian Gaming Act. Federal law also permits broadcast advertising for various other types of gambling in *every* state of the country. Thus, federal law permits an Indian casino in Arizona, and various other out-of-state gambling enterprises, to advertise on broadcast stations in Utah, even though Utah has not legalized any form of gambling.

Given the Court's *Greater New Orleans* opinion, the federal government should find it difficult to explain how, under these circumstances, its ban on broadcast advertisements of private casinos by stations in Utah would materially advance its interests and why restricting speech but not regulating gambling itself is a choice consistent with the First Amendment.

Meanwhile, the Ninth Circuit and a district court in New Jersey have independently invalidated the prohibition, and those decisions govern in their jurisdictions. *See Valley Broadcasting Co. v. United States*, 107 F.3d 1328 (9th Cir. 1997); *Players International, Inc. v. United States*, 988 F. Supp. 497 (D.N.J. 1997) (pending before the Third Circuit).

Most important, the Court has made very clear that legislatures will not be accorded much deference when they choose to inhibit commercial speech rather than to regulate conduct. Their commitment to their asserted interests will be questioned, the effectiveness of their speech restrictions will be analyzed, and any nonspeech regulatory alternatives available to them will be carefully weighed.

The impact of the increasingly tough *Central Hudson* test on future commercial speech hot button issues, such as tobacco advertising restrictions, should depend in large part on the coherence of the government's overall regulatory scheme and its history of — or reasonable consideration of — nonspeech alternatives. Moreover, the Court has only postponed the question of whether the First Amendment provides even greater protection to certain types of commercial speech restrictions. That question remains for another day.

Nory Miller is a partner of Jenner & Block, Washington D.C., which represented Greater New Orleans Broadcasting Association in its most recent appearance before the Supreme Court.

New Role for Media Attorneys: "Cybersleuth"

A "How To" Guide for Dealing With Infringers and Worse

By Charles J. Glasser, Jr.

Your phone rings at 11 a.m., and it's an urgent call from one of your managing editors, or perhaps even someone in the publisher's office. The voice on the other end says: *"Someone on the Internet is ripping us off! What can we do about it? Who's doing it? We want that site taken down today!"* There's no First Amendment conflict here: the issues are simple. Someone is stealing wholesale chunks of your client's copyrighted material (not difficult in this cut-and-paste computer era), or, worse yet, someone has created an entirely phony version of your client's website for the purpose of trading on your client's credibility as a news provider. This article will discuss some of the tools media attorneys can employ to quash both of these problems speedily and often without court intervention. Moreover, many of these techniques may prove valuable in libel defense, where a plaintiff alleges that a publisher's Internet speech is libelous.

Infringements & Scams

As outside general counsel to Bloomberg L.P., Willkie Farr & Gallagher got calls on both problems last month. One, a run-of-the-mill infringement case, saw a Florida webmaster copy entire stories from Bloomberg's proprietary Bloomberg.com news page, and simply paste it into his stock market news web page called "hotstocktip.com." Using the methods described in this article, we succeeded in shutting down the infringing use within 18 hours, without court intervention.

The other case, which made front page news worldwide, involved an elaborate scheme by a North Carolina man who created a phony Bloomberg web page carrying a bogus story about a corporate merger. The schemer, Gary Dale Hoke, owned options in PairGain, one of the companies discussed in the phony story. Hoke then used phony identities to log onto various Internet chat groups for investors, touted the bogus impending merger, and included a URL link to the phony web page, which appeared to verify his touts. By clicking on the URL included in his phony chat group messages, readers were taken to a web page that looked exactly like Bloomberg's web page, with the phony merger story.

In the three hours from Hoke's initial posting, the value of PairGain stock shot up 30% and its normal volume of trading tripled. We succeeded in shutting down the phony web page the same afternoon, and based in part on information provided by Willkie Farr, the FBI arrested Hoke within a week. A trademark infringement and counterfeiting complaint against Hoke has been filed on Bloomberg's behalf in the Southern District of New York.

Finding Out Who's Doing What and Where

In both circumstances, the first thing counsel must do is access the offending web page immediately, and make a screen print. Infringers often take their sites down sporadically to avoid detection, especially if they get an unusually large number of hits in a given time. In addition, infringers often change content, especially those who steal time-sensitive text like news stories. In your browser options, you can have your printer print out the time and date, as well as the "target" URL of the web page. Although you can indicate this information in your affidavit, it looks better to have it on the page as well. You'll need this print later either to file a complaint or to cut off the page's access.

Once you have accessed the page, note the URL of the offending page. Now you need to ascertain who is responsible for that page. Go to the web page

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www.networksolutions.com ("NSI") and input the offending domain in the "search for domain name" window. This web page is a link to the registry of domain names, and under "domain information" will tell you what person or entity is listed as owning and operating that site. For example, by checking Bloomberg.com you will see that the site is run by Bloomberg at 499 Park Avenue, 15th Floor, New York, NY. These registration pages carry the fax and phone number of the site operator.

Often, this is enough information to send a cease-and-desist fax, or even file a complaint. While in some cases of copyright infringement, a stern phone call and follow-up letter is often enough to stop the theft, there are situations where you have to be prepared to cut off an infringer's access quickly. This is most likely the case when the NSI registration information is outdated (as in situations where the site has been sold) or when you receive denials or resistance from the infringer.

The Digital Millennium Copyright Act ("DMCA") provides a way to cut impostors and infringers off from the Internet through service of a properly worded demand letter, discussed below. But before you can invoke the Act, you need to find out who to serve with that demand.

Samspade and Internet Protocols

Most webmasters are not actually Internet providers. Like most of us, they pay a fee to an Internet Service Provider ("ISP") for access. Each computer linked to the Internet does so through a server. Each server has a unique identifying number called an Internet Protocol Address, not unlike a phone number. The NSI page provides the address of server where the offending page resides. Now you need to find out which ISP provides the connection between that server and the Internet. Copy the protocol address of the server (there may be two or more) and then go to www.samspade.org. This free page was set up to help individuals track down the senders of unwanted e-mail ("spam") and other forms of Internet abuse.

On the Samspade page there is a window called "traceroute." Enter the protocol addresses one at a time in that window and with respect to each address hit "search." This page searches backwards to the originating access point for the server: the ISP used by the operator of the offending page to access the Internet. Double click on the very last protocol listed, and you'll get the name and phone number for the offending page's ISP. It is upon this party that you can make your demand under the DMCA that Internet access for the offending page be cut off.

Pulling the Plug Under the Digital Millennium Copyright Act

As every media attorney knows, federal law immunizes ISP's from liability for unknowing vicarious copyright and trademark infringement. However, the DMCA also provides holders of proprietary rights with a method of providing notice prospectively, and if attorneys follow the procedure, most ISPs will cooperate fully and quickly.

Call the ISP (you'll have its information from the Samspade page), and ask to speak to their Net Abuse Department. Sometimes staffed by attorneys, sometimes by paralegals or Internet technicians, such ISP departments are usually empowered to receive service of DMCA demand letters and act accordingly. By calling them ahead of time, you can often give them the information over the phone, so that they can begin verifying the data while awaiting your letter. Many ISP's are willing to accept initial service of the demand letter by fax.

17 U.S.C. § 512 provides that if an ISP re-

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ceives notice of infringement that contains the elements specified under the statute, it can be held vicariously liable for pages accessed through its system. To avoid such liability, ISPs will "pull the plug" upon receipt of a factually correct DMCA letter. By statute, the letter must contain the following: (1) a statement that you are authorized to act on behalf of the copyright or trademark holder; (2) the location of the offending page (ISPs require more than a web URL, and you should supply them with the protocol address and a copy of the offending page); (3) a statement that you have a good faith belief that the use complained of is unauthorized; and (4) a statement that the information contained in the demand is accurate and, under penalty of perjury, that you are authorized to act on behalf of the copyright holder.

Most ISPs will cut off access within a few hours of receipt if all the data checks out. Others may take longer, but the offending page will usually come down within a "reasonable" time, usually no more than 48 hours.

Using Subpoenas to Track Down Operators of Phony Web Pages

There are circumstances, of course, where your client may need to file a complaint for copyright or trademark infringement, and the infringing webmaster may use an elaborate structure of phony names and addresses to avoid detection. These are facilitated by the use of free e-mail addresses and free web hosting services offered throughout the Internet. The phony Bloomberg web page resided at a URL located on Angelfire.com, one of the many businesses that offer free hosting of web pages. To get a free page at Angelfire, one need only provide them with an e-mail address. The e-mail address provided to Angelfire by Hoke for his phony web page was, in turn, a phony free e-mail account set up at Hotmail.com. Companies like Angelfire and Hotmail are not obligated to check the authenticity of the information provided to them.

These free services do not provide access to the Internet: they merely allow persons free services once they are already online. What Hoke did not realize (nor do most people) is that while the biographical information he supplied to these companies was phony, these free service companies maintain records indicating what server (identified by protocol) accesses the free account at what time to make changes to the phony web page or to read and send e-mail from a phony e-mail account. The only way to access these free services is through ISPs, which do maintain accurate biographical information (including dial-up numbers and credit card information) in order to collect their monthly service charges. Each ISP's server has, of course, identifying protocols that can be traced back to the individual user.

For example, say the LDRC wanted to maintain a free page at Angelfire. Sandy Baron would first have to log onto her AOL account, and then access Angelfire to upload the page. Angelfire (like others) maintains records of the identifying protocol of each computer accessing that page to upload a file. So if on Tuesday, June 8, Sandy were to upload a web page to her free Angelfire account, Angelfire would have a record of that specific access from Sandy's AOL server. Even if Sandy gave phony biographical information to Angelfire, AOL would still have an accurate record of Sandy's access to her AOL account, including the phone number from which she dialed up her AOL account and payment information for the LDRC account with AOL.

In the Bloomberg phony web page case, we filed a complaint in the Southern District against John Does for trademark infringement based on use by the phony page of registered Bloomberg marks. Using the complaint's ancillary subpoena

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authorization under F.R.C.P. 45, we served subpoenas to Hotmail and Angelfire requesting information about the phony e-mail account and web page. This in turn gave us the protocol numbers of the servers Hoke had used to access these phony accounts. Then we served subpoenas to the proprietors of those servers. The FBI, authorized by a grand jury investigation, served similar subpoenas to these companies.

These document requests should be narrowly drawn to help facilitate the ISP's cooperation, and should describe to the ISP's Net Abuse Department the specific information you are seeking. They should identify the offending page precisely and request the accessing protocol and exact time of access. Requests for copies of any e-mail should also include a request for any packet route information and headers. These electronic trails exist for every piece of e-mail sent across the Internet, and although these trails may not appear on your screen, your ISP maintains this data. The information contained in these headers will be invaluable in proving that a particular individual did (or did not) send a particular e-mail message from a particular computer.

By using the above techniques, one server used to create and modify the phony Bloomberg web page was identified as belonging to PairGain, Hoke's employer and one of the companies touted in the phony merger story. The other server was identified as belonging to Mindspring, an ISP used by Hoke for his Internet access. By asking for dial-up access records at the time of access, Mindspring records indicated several accesses by a telephone number registered to Hoke, as well as Hoke's home address and credit card information. Hoke had used his Mindspring account to upload and make edits to the phony page residing at Angelfire.

In less than a week, we had our man, and the FBI arrested Hoke for securities law violations. Bloomberg has filed an Amended Complaint naming Hoke as the creator of the phony web page. Hoke has pled guilty to the securities law violations. He has not as yet answered the civil complaint.

This appearance of a phony web page may mark the first but not likely the last time media counsel will have to act as "cybersleuths." There is a good possibility that phony web pages will in the future be the basis for defamation claims, and in the event that media counsel are presented with libel claims based on phony pages, the preceding techniques may be valuable for proving on motion to dismiss that the allegedly libelous page is phony and was not created by the genuine publisher.

Charles Glasser is an associate at Willkie Farr & Gallagher, and pursued the two cases discussed above with Willkie partner Richard L. Klein.

California Court Rejects Jurisdiction in Libel Suit Over Web Site

In a non-media Internet libel case brought by a non-resident plaintiff, a California appellate court held there was no jurisdiction over non-resident defendants who merely contracted with California ISPs for web hosting services. *Jewish Defense Org. et al. v. The Superior Court of Los Angeles County, (Steve Rambam real party in interest)*, B129319 (Cal. Ct. App. June 8, 1999) (granting a writ of mandate to quash service). Looking to traditional defamation law and recent Internet cases, the court determined that contracting with California ISPs via computer is not purposeful availment of the state sufficient to justify the exercise of jurisdiction.

The Cast of Characters

The underlying libel suit was the latest in a series of disputes between the parties who are associated with different militant Jewish activist groups. The prior disputes included other libel actions and an alleged gun assault. The defendants' web site (which uses plaintiff's name as a domain name) alleges, among other things, that plaintiff is a government informant, a psychopath and a secret admirer of the Nazis. Slip op. at 2. Defendants contracted for web hosting services with Geocities and Xoom, Inc. both of whom operate in California. Other jurisdictional facts were deeply disputed, including the proper identity of one of the defendants. The court found plaintiff's assertions that defendant did have substantial contact with California to lack adequate foundation and to be altogether inadequate to meet the requirement of the requisite competent evidence. Plaintiff apparently filed suit in California after confusing a New York defendant with a similarly named Anaheim, California gas station operator.

No Basis for General Jurisdiction

The court determined that the defendants had no continuous and systematic contacts with California to justify the exercise of general jurisdiction over them. Most notably, the court acknowledged that simply contracting with California ISPs for web hosting services is not a basis for jurisdiction. The decision quotes with apparent approval defendants' argument that:

> California and New York are the hubs for world wide Internet dissemination. Contractors there were chosen not to target New York and California but because those states are leaders in the technology involved. . . . If the [court] found personal jurisdiction, based on the happenstance of the physical location of the Internet server, every complaint arising out of the alleged tort on the Internet would automatically result in personal jurisdiction wherever the Internet server is located.

Slip op. n.1.

No Basis for Specific Jurisdiction

The court similarly rejected exercising specific jurisdiction over the defendants, first under a traditional defamation law analysis, and then under recent Internet case law. On the defamation side, the court applied the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984) as applied in California in *Gordy v. Daily News*, 95 F.3d 829 (9th Cir. 1996). Under this analysis, defendants contracting with California ISPs caused no foreseeable risk that plaintiff would be injured in California — California was not plaintiff's principal place of business, the alleged defamation was not targeted at the state, and the brunt of harm would not be felt in California.

Reviewing recent Internet law, the court quoting with approval from *Zippo Mfg. Co. v. Zippo Dot Com, Inc*, 952 F.Supp 1119, 1123-24 (W.D. Pa. 1997) that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." The defendants web site merely made information available and their contracting with California ISPs did not constitute "purposeful availment" of the state.

Trademark Law in Cyberspace: *Domain Name Registration Does Not Trump Senior Mark*

On April 22, the Ninth Circuit enjoined the use of a domain name that was confusingly similar to a registered trademark. *Brookfield Communications, Inc. v. West Coast Entertainment Corporation*, (9th Cir. Apr. 22, 1999) (No. 98-56918). In reversing the district court, Ninth Circuit relied upon basic and rather traditional trademark analysis, despite the Internet context.

"moviebuff.com" vs. "MovieBuff"

The case arose over the use of a domain name and a trademark: "moviebuff.com" and "Movie Buff." West Coast Entertainment had registered "moviebuff.com" as a domain name with Network Solutions in February 1996. West Coast claimed that it chose that domain name because the term "Movie Buff" was part of its earlier registered service mark, "The Movie Buff's Movie Store," a mark that was issued in 1991. West Coast used the phrase "Movie Buff" in various phrases to sell and rent video tapes and to promote other goods and services.

Brookfield began in 1987 offering software and services to professionals with the entertainment industry. In 1993 it began to market computer software with a searchable database of entertainment industry information under the "MovieBuff" mark to the consumer market as well as the industry. In 1996 or 1997, it began to use its websites to sell its software and to offer an internet based database, also under the "MovieBuff" mark.

In 1997, Brookfield applied for federal trademark registration of "MovieBuff" as a mark for computer software providing data and information in the entertainment field and on-line network database of data and information in the motion picture and television industries. The federal registrations were issued in 1998. Brookfield had obtained a California state trademark registration for the mark "MovieBuff" covering "computer software in 1994.

In 1996, Brookfield Communications attempted to register the "moviebuff.com" domain name with Network Solutions. When it discovered that West Coast had already done so, Brookfield registered "brookfieldcomm.com" and "moviebuffonline.com" as domain names.

West Coast Finally Launches its Site

In October 1998, Brookfield learned that West Coast was about to launch its "moviebuff.com" web site, and that the site would contain a searchable database similar to Brookfield's "MovieBuff" database. Brookfield issued a cease-and desist letter to West Coast but, West Coast issued a press release the next day announcing the launch of its web site.

Brookfield immediately filed a complaint in the district court, alleging trademark infringement and unfair competition and sought a temporary restraining order against using the mark MOVIEBUFF in any way.

West Coast responded that it was the senior user of the mark by virtue of its earlier registered mark, "The Movie Buff's Movie Store." West Coast also claimed common-law rights in the mark by virtue of using "moviebuff.com" before Brookfield offered its database. Further, West Coast claimed that the likelihood of confusion between the domain name and the mark was minimal to nonexistent.

The district court denied Brookfield's motion based on the reasons set forth by West Coast. When its request for an injunction pending appeal was denied by the district court, Brookfield filed an emergency motion for injunction pending appeal in the Ninth Circuit which was granted.

The Senior User and Confusion

Brookfield had a presumption of validity in its mark by viture of its federal registration. It had used the mark on software in 1993 to date, while West Coast did not use it in any context until 1996.

The court rejected West Coast's "constructive use" argument that its use of "The Movie Buff's Movie Store" constituted "use" of moviebuff.com. The court also rejected that West Coast could "tack" the domain name use to its earlier service mark--a trademark theory that allows continuous protection of a mark even in the face of minor alterations if the marks are legally equivalent to one another or indistinguishable such that consumers would consider them the same mark. Reviewing the precedents for "tacking," the court concluded that it did not apply to such dissimilar marks.

Further, noting that fundamental trademark law finds ownership is governed by use of the mark, registration of a

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Trademark Law in Cyberspace

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domain name alone with Network Solutions is insufficient to constitute "use" and the court rejected the diminimus use actually made by West Coast of this site for email as sufficient to give West Coast any rights in the mark. The court determined that Brookfield was the senior user of the mark.

Acknowledging that "establishing seniority . . . is only half the battle...Brookfield must also show that the public is likely to be somehow confused about the source or sponsorship of the "moviebuff.com" web site." *Slip Op.* at 14. In its "likelihood of confusion analysis, the court employed the eight *Sleekcraft* factors:

> [s]imilarity of the conflicting designations; relatedness or proximity of the two companies' products or services; strength of Brookfield's mark; marketing channels used; degree of care likely to be exercised by purchasers in selecting goods; West Coast's intent in selecting its mark; evidence of actual confusion; and likelihood of expansion in product lines.

Slip op. at 15 (citing *AMF v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979)).

Employing these factors, the court concluded that Brookfield had demonstrated a likelihood of success on the Lanham Act claim.

Metatags and Fair Use

The court went on to find that the Lanham Act also barred West Coast from using metatags that were confusingly similar to Brookfield's mark--"[u]sing another's trademark in one's metatags is much like posting a sign with another's trademark in front of one's store." *Slip op.* at 26. The court also ruled against West Coast on its fair use argument. While the court acknowledged that it is "well established that the Lanham Act does not prevent one from using a competitor's mark truthfully to identify the competitor's goods", the court found that the use of the term "MovieBuff" (as compared to "Movie Buff") did not constitute fair use.

> The term "Movie Buff" is a descriptive term, which is routinely used in the English language to describe a movie devotee. "MovieBuff" is not . . . . The proper term for the "motion picture enthusiast" is "Movie Buff," which West coast certainly can use. It cannot, however, omit the space. Slip op. at 28.

The Patenting of Downloadable Music and Video

By Samuel Fifer and Joseph A. Mahoney

The patent system protects inventors' investments while at the same time promoting innovation and advancing the state of the art. But with the United States Patent and Trademark Office (PTO) having issued an average of about 50 patents per day in 1998 for internet tools and other software, many believe that such patents will impede the Web's growth, particularly those that broadly cover rapidly proliferating internet business models. In addition, many believe that these newly-issued patents are flawed and products of the PTO's sometimes shoddy patent examination procedures. The result is gridlock: Potentially explosive growth running up against formidable legal barriers.

Barriers to Progress?

Many in the entertainment industry view Sightsound.com's patents as alarming barriers to anyone wanting to sell downloadable digital audio or video over the internet. Sightsound.com was founded in 1995 by engineer Arthur Hair and entrepreneur Scott Sander, and is based on Hair's recognition in the mid-1980's that there had to be better alternatives to compact discs for distributing music.

Its two patents — U.S. Pat. Nos. 5,191,573 and 5,675,734 issued in 1993 and 1997, respectively — broadly claim the exclusive rights to a method and system for "transferring desired video or digital audio signals" in the form of a telecommunications connection between a first computer and a second computer, and

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Patenting Downloadable Music and Video

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transferring the desired digital video and audio signals from the first to the second computer, employing means for electronically selling the signals.

There are 34 claims in the '734 patent and six in the '573 patent. These claims describe the contours of these exclusive rights and are undoubtedly broad in scope. Therefore, one would expect that the specifications of the patents -- the drawings and rest of the text -- used to support the claims would detail, on a highly technical level, the hardware and software used in the system. But, surprisingly, these specifications contain no such detail. For example, while the patents claim a new method and system for electronic copyright protection, specific means for achieving this result is not specified. One might wonder, then, that if the patents only cover the somewhat abstract business process of downloading music and video, how can that be patentable?

Blur of Invention and Idea

Mathematical algorithms and abstract ideas, by themselves, have always been *per se* unpatentable. And, until recently, business methods had likewise been thought to be unpatentable.

However, the Federal Circuit Court of Appeals in *State Street Bank and Trust Co. v. Signature Financial Group, Inc.* discarded the business method exception to patentability, and in *AT&T Corp. v. Excel Comm. Inc.* reassessed the mathematical algorithm exception to hold that process patent claims are patentable when they apply the algorithm to produce a useful, concrete, tangible result without preempting other uses. These recent holdings, which have upheld the validity of recently issued patents, illustrate how the line between a patentable invention and an abstract idea continues to blur.

Skepticism abounds over the validity of software and internet business method patents, and many patent practitioners believe that the PTO is ill-equipped to search and examine such applications. To qualify for a patent, the technology must be new and not obvious in view of the prior art (*i.e.*, prior patents, trade journals, reports, trade show demonstrations, etc.). These determinations are often made based on a search at the PTO. Unfortunately, because software patenting is relatively new, the PTO has not amassed a complete search library and, thus, may not, and often does not, locate the most relevant prior art.

Although patent applicants have a duty to provide the PTO with prior art known to them, this alone does not solve the problem. The PTO admits that its examiners have no easy way available to them to dig through the prior art (and keep the applicants honest), and public hearings will be held by the PTO on June 28 in San Francisco and on July 14 in Arlington, Virginia to gather comments from interested parties on the PTO's current procedures for prior art searching and what it can do to improve it.

Causing Some Turmoil

In the meantime, Sightsound has offered MP3.com, a leading digital music site, and others the choice between taking a license under its patents, and paying a 1.0% royalty rate on the total price charged to customers per transaction, or ceasing all sales of downloaded music and video. It is currently litigating a patent infringement lawsuit it filed last January against music site N2K, Inc., claiming that N2K employed this technology without paying Sightsound for the privilege. Sightsound is moving up the distribution chain as well and is offering artists better royalty deals of up to 70% of sales versus 12-15% of revenue typically given artists who deal with major recording labels.

Thus, Sightsound's exploitation of its patent rights has caused some turmoil in the industry. It remains to be seen whether the downloading of music and video will substitute for the strong desire by many people to have the "bricks-and-mortar" experience of going to movie theatres or the tangible experience of bringing home CDs and tapes.

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Internet Bookseller Amazon.com Sued For Libel in U.K., Faces Pressure to Withdraw Books

By Kurt Wimmer

Most media lawyers are, by now, familiar with the chilling effect of libel laws outside the United States. The bar often has succeeded in persuading U.S. courts not to enforce judgments against U.S. defendants based on the laws of the United Kingdom, India and other countries because those countries' laws do not have protections parallel to those contained in the First Amendment. For a media distributor operating across international boundaries on the Internet, the legal rules governing liability are not clearly defined; relying on U.S. courts not to enforce foreign judgments may not be sufficient to protect against the risks of potential defamation actions. As a result, the chill of foreign law may not require much more than a threat, as growing Internet bookseller Amazon.com has discovered in the past few weeks.

Amazon is a Seattle-based website that takes orders for books, videos, games, music and other goods over the Internet. Since it was founded in 1995, the site claims to have served more than 10 million customers in 160 countries. Its rich catalogue of available works makes it a godsend in countries where diverse bookstores don't exist, and discounts and broad availability make it popular even where brick-and-mortar bookstores are plentiful. Amazon has become the leading electronic commerce site on the Internet, with an astronomical market capitalization to match. This combination of spectacular valuation and international reach, of course, make the bookseller a prime target for litigation — particularly by those bent on suppressing controversial opinions.

Amazon Pulls Book on Scientology

Scientology and the Northern Irish conflict have brought Amazon squarely into the spotlight. The first dispute concerned the book "A Piece of Blue Sky" by British writer Jon Atack, which contained a critical examination of Scientology and its founder, L. Ron Hubbard. Courts in the United Kingdom had ruled in a 1995 case that the book defamed Hubbard under U.K. law and had issued an injunction against its distribution.

Amazon discovered in February that the book was subject to an injunction against its sale and removed it from distribution. Unfortunately, Amazon's action meant that the book — which also is distributed internationally online by websites run by Barnes & Noble and Borders Books — would be unavailable to Amazon customers in any of the countries served by the website.

Following Amazon's action, an article on popular Internet news source Wired News provoked a blistering round of criticism against Amazon. Postings to Internet newsgroups, particularly those concerning the controversial Scientology movement, criticized Amazon for pulling the book from its website.

Amazon's actions, many asserted, had the effect of extending the U.K. injunction to numerous countries where it had no effect — including the United States. (The Scientology movement has been active both in libel litigation and in copyright litigation and has succeeded in asserting copyright to its basic texts and thus preventing them from being broadly distributed.)

After 24 hours, Amazon reversed course and said that it would return the book to its list of offerings. It is not, however, selling the book on its U.K. website.

Irish Activist Sues

This was, however, only the beginning of Amazon's legal travails. In late May, David Trimble, a Northern Irish activist, sued Amazon for libel based on its distribution of "The Committee: Political Assassination in Northern Ireland," a work by Irish investigative journalist Sean McPhilemy. The suit was timed to coincide with the paperback release of the book, which has gained attention worldwide. Trimble also sued the author and publisher, Roberts Rinehart Publishers.

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Amazon.com Sued For Libel in U.K.

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The book is also subject to litigation in the United States by plaintiffs David and Albert Prentice, in a $100 million libel case in which Judge Noel Kramer of the District of Columbia Superior Court recently denied the plaintiffs access to the author's notes (*Prentice v. McPhilemy*, filed June 1998). At the time of the suit, the book was published only in the United States. But because of Internet sales, largely through Amazon, its publisher asserts that "The Committee" was rated as one of the top-selling books in the United Kingdom.

In the case of "The Committee," the publishers saw the combination of American publishing and Internet distribution as a way to reach an international audience that otherwise could not be reached. As the publisher's website states, "due to lack of laws protecting freedom of the press and freedom of expression, and official censorship in Britain, as well as libel laws that heavily favor those named in the book, The Committee cannot presently be published in Britain or Ireland . . . . By publishing this book in the United States, we are able to present the evidence of this shocking conspiracy to the world for the first time." The website does not, however, sell the book to residents of Ireland or the U.K.

Once again, Amazon confronted the question of whether it should continue to sell a controversial book. Here, however, the decision implied different consequences because Amazon itself was a libel defendant. This month, the website made a split decision. It withdrew "The Committee" from its U.K. website, Amazon.co.uk. It continues, however, to sell the book through its U.S. website, Amazon.com.

Amazon.co.uk does not provide a direct link from its British website to the American website where the book still can be purchased, but some sources speculated that British residents still could purchase the book through the U.S. website. (Whether a purchase from a U.S. website with delivery into the U.K. would be different as a matter of law from a purchase from a U.K. website is quite unclear.)

This decision has not satisfied the plaintiff. Jason McCue, the plaintiff's lawyer, was quoted on BBC as threatening legal action against Amazon.com in the United States if it fails to withdraw the book in the United States as well.

It is hardly surprising that plaintiffs would choose the United Kingdom as a libel forum. U.K. law requires the defendant to prove the truth of allegedly defamatory statements. The plaintiff need not prove our U.S. standard of "actual malice," regardless of whether the plaintiff is a public figure or public official. Although a case pending before the House of Lords may modify U.K. law on this issue, libel in the U.K. is, essentially, a strict liability offense.

The conflict illustrates the extent to which the Internet promises to strengthen freedom of expression by making jurisdictional barriers more porous - and the dangers presented to that potential by application of international libel laws. By marketing internationally, Amazon extends the reach of authors to a worldwide audience even if local governments might object to their ideas.

This effect has been noted in the early days of the Serbian conflict, in which Radio B92, an independent radio station operating in Belgrade, continued to broadcast via the Internet even though its traditional broadcasting operation had been seized by the Milosevich regime. It also had been noted with a more mundane medium: the use of fax machines a decade ago in China during the Tiananmen Square conflict.

The Amazon conflict illustrates the potential for domestic courts to chill expression in countries beyond their reach — or, on the contrary, the ability of a strong international presence to bring controversial works to countries where they otherwise might be off-limits. Whether the chill prevails will depend upon the resolve of the bookseller and its ability to defend itself against legal actions filed in unfriendly forum states.

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Washington Redskins Challenge Scheduled Cancellation of "Redskins" Registrations As Disparaging to Native Americans

By Marc E. Ackerman and Gregory Frantz

On June 1, 1999, the Washington Redskins filed a complaint in the United States District Court for the District of Columbia, launching a new phase in the litigation between the club and seven Native Americans who are seeking to cancel the club's trademark regulations on the basis that the club's use of the word "Redskins" as the name of the team may be disparaging to them. *See Pro-Football, Inc. v. Harjo, et al.*, No. 1:99CV01385 (Judge Colleen Kollar-Kotelly). This phase of the litigation promises to have broad implications as to the right of government to regulate speech under Section 2(a) of the Lanham Act that may be perceived subjectively as offensive.

Phase 1: PTO Board

The first phase of the litigation took place before the Patent and Trademark Office Trademark Trial and Appeal Board ("TTAB"). In 1992, seven Native Americans, led by Suzan Shown Harjo, petitioned the TTAB to cancel six federal trademark registrations owned by the Washington Redskins football team, all of which contain the word "Redskins" ("Redskins Marks"). *Harjo, et al. v. Pro-Football, Inc.*, Cancellation No. 21,069.

The Redskins Marks were federally registered at various times between 1967 and 1990, and the team has used the name Redskins since 1933, when then-owner George Preston Marshall changed the name of the team from the Boston Braves to the Boston Redskins, in order to distinguish the football team from the baseball team in Boston. That same year, the team moved to Washington; the Washington Redskins have developed into one of the most famous and successful sports franchises in the history of professional sports.

The petition was brought in the TTAB under Section 2(a) of the Lanham Act, which prohibits the federal registration of any trademark that "[c]onsists of or comprises . . . scandalous matter; or matter which may disparage . . . persons . . . or bring them into contempt or disrepute." 15 U.S.C. § 1052(a). After years of discovery and motion practice and after submission of evidence and oral argument, on April 2, 1999, the TTAB scheduled the cancellation of the registrations for the Redskins Marks. The TTAB ruled that the marks were not "scandalous," but that they "may disparage" Native Americans and "may bring them into contempt or disrepute."

The complaint filed recently by the Redskins in the D.C. District Court challenges the TTAB's decision, and raises constitutional claims that the TTAB declined to address.

Constitutionality of Section 2(a)

The Redskins' federal action claims that, under the First Amendment, Section 2(a) is unconstitutional on its face and as applied to the club. It is well established that trademarks are constitutionally protected commercial speech; indeed, the inherent communicative value of a trademark may raise the constitutional protection of trademarks to a level above commercial speech. Since Section 2(a) regulates the content of speech that does not amount to fighting words or obscenity, the First Amendment is clearly implicated by the TTAB's action.

The TTAB, however, citing its position as an administrative agency, expressly declined to consider the constitutional arguments raised by the Redskins. Thus, the D.C. District Court will be the first opportunity for the parties to fully argue, and the court to consider, the important constitutional implications of the TTAB's decision.

Case law is sparse as to the possible conflict between Section 2(a) and the First Amendment. The only case to address this constitutional problem more

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or less "sidestepped" the issue. In *In re McGinley* 660 F.2d 481 (C.C.P.A. 1981), the Court of Customs and Patent Appeals (the direct predecessor to the TTAB) held that First Amendment rights were not an issue in a cancellation proceeding because the trademark owner is not denied the right to use the mark, but merely denied the benefits of federal registration. However, the court failed to cite any case or articulate much support for its conclusion. Most notably, it failed to discuss seemingly relevant Supreme Court precedent discussing the unconstitutional conditions doctrine, and commercial speech balancing principles.

The unconstitutional conditions doctrine, as articulated by the Supreme Court, states that government cannot condition the granting of a benefit to a person on that person's relinquishing of a constitutional right, i.e., the First Amendment's right of freedom of speech. In effect, that would be the same thing as directly penalizing the individual for speech. The Redskins argue that, through its enforcement of the Section 2(a) of the Lanham Act, the government is suppressing the Redskins' speech through the denial of the benefit of federal trademark registration.

The Redskins also assert that the Redskins Marks should not be considered merely ordinary commercial speech, which receives less constitutional protection than non-commercial speech. Commercial speech has been defined as speech that merely proposes a commercial transaction. The Redskins claim that the Redskins Marks are closer to core speech, because the word "Redskins," when used in the context of professional football, conjures up the storied history, success, and memories of the team. Thus, the Redskins say, the club's use of the Redskins Marks, and the public's association therewith, is more analogous to a film, novel, or work of art than to a mere proposal to engage in a commercial transaction.

The Redskins further challenge Section 2(a) on the grounds that the statute is unconstitutionally vague under the First and Fifth Amendments. In essence, the Redskins claim that the terms "may disparage" and "may bring ... into contempt or disrepute", which are not defined in the statute or legislative history, are so vague as to give the government unfettered discretion to deny or cancel any registrations conveying messages of which the government does not approve.

In particular, the Redskins cite Congress' inclusion of the word "may" in the statute as giving unconstitutionally broad discretion to the government in restricting speech. Such broad discretion violates First Amendment vagueness doctrine, and permits the government to deprive a trademark owner of property rights without due process in violation of the Fifth Amendment.

Disparagement, Contempt or Dispute

The Redskins' complaint also challenges the TTAB's finding that the Redskins Marks "may disparage" Native Americans and "may" bring them into "contempt or disrepute". (The TTAB treated the "disparagement" and "contempt or disrepute" grounds as one and the same — a position the Redskins challenge as not comporting with rules of statutory construction.) The TTAB's ruling scheduling cancellation of the registrations for the Redskins Marks is unprecedented — in its history, the TTAB has never canceled a registration for a mark that has been in use for over sixty years and registered without challenge for thirty years based on the disparagement, contempt or disrepute provisions of Section 2(a) of the Lanham Act.

The Redskins assert in their complaint that a mark should be considered under Section 2(a) in the context of the goods or services for which it is used, and that, within the context of professional football, the word "Redskins" has only positive associations. The TTAB, in contrast, had cited Native American

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imagery used by fans at Redskins games, and the tendency for fans and the media to speak metaphorically about the team in Native American terms. As support for its finding that the Redskins Marks cannot be entirely separated from the original meaning of "redskin" as a term designating Native Americans. The Redskins argue that they should not be held accountable for the actions of third parties, such as the media or the general public.

In considering the meaning of the word "disparage," the TTAB determined that since the statute says "*may* disparage," it was unnecessary for the petitioners to demonstrate that the Redskins *intended* to disparage Native Americans. The Redskins argue that intent should be a necessary element of proof, and that there is no evidence that the club intended to disparage Native Americans in adopting or using the marks.

The Redskins also challenge much of the evidence relied upon by the TTAB in finding the Redskins Marks to be disparaging. The TTAB considered dictionary usage labels, the testimony of linguistics and history experts, and a telephone survey conducted by the Native American petitioners. At best, the evidence was decidedly mixed. Some dictionary usage labels indicated that the term "redskin" when used generally is sometimes offensive; however, other labels did not include an "offensive" designation. The petitioners' experts testified that "redskin" is a derogatory term, while the Redskins' experts concluded it is not.

The Redskins are particularly critical of the telephone survey conducted by the petitioners, which purported to demonstrate that a "substantial composite" of Native Americans find the term "redskin" to be disparaging. Even the TTAB conceded that the survey was flawed and of "limited applicability." For instance, the survey asked participants what their opinion was of the word "redskin" today, rather than at the time of registration of the marks, which was the TTAB's stated relevant time period. The survey also failed to inform participants that the relevant context of the term "redskin" was professional football. And the survey did not use the term "disparaging", the term used in the Lanham Act, but instead asked whether the respondent found the term to be "offensive", a term not found in the Lanham Act. Yet, the TTAB overlooked all of these shortcomings, and allowed the survey into evidence.

Given constantly evolving First Amendment jurisprudence, as well as the relative sparseness of case law interpreting Section 2(a) of the Lanham Act, this case is certainly one that will be of continued significant interest to trademark and First Amendment practitioners.

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Ban on Lawn Toss of Free Paper Unconstitutional

Georgia Constitution Broader than First Amendment

By Adam Webb

In overturning a city ordinance that banned the delivery of free publications to driveways, porches, and lawns, the Georgia Supreme Court has reaffirmed that the *Georgia Constitution* "provides even broader protection of speech than the first amendment." The court found that the ordinance was not narrowly tailored to serve the government's objectives of preventing litter and preserving aesthetics. Furthermore, the court held that the ordinance failed to leave open adequate alternative means of communication. The court went a step further, however, and recognized that because the ordinance impacted noncommercial speech, the *Georgia Constitution* re-

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Ban on Lawn Toss Unconstitutional

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quired "the city to narrowly draw its regulations to suppress no more speech than is necessary to achieve the city's goals."

Appellant Statesboro Publishing prints and distributes the *Penny-Saver*, an advertising circular that also includes some noncommercial community announcements, in the City of Sylvania, Georgia. In 1992, the City of Sylvania passed an ordinance that prohibited the distribution of "any handbill or printed or written material by placing, or causing the same to be placed, in any yards, driveways, walkways or porches of any structure within the City." The ordinance specifically left open three possible means of distribution: the mails, personal delivery, and doorknob or mailbox hanging devices. In addition, the ordinance exempted publications for which the recipient paid.

After Statesboro Publishing threatened a legal challenge to the ordinance, the City filed a declaratory judgment action. The Superior Court of Chatham County upheld the ordinance as a reasonable time, place, and manner restriction. Statesboro Publishing appealed the decision to the Georgia Supreme Court, arguing that the ordinance violated the First Amendment and Georgia's constitutional free speech provisions. The publisher was supported by amicus briefs from the Georgia Press Association, Newspaper Association of America, and the *Atlanta Journal-Constitution*. The City was joined by amicus curiae the Georgia Municipal Association.

In its decision, the Supreme Court first undertook the time, place, and manner analysis required by the First Amendment to the United States Constitution. The court stated that "restrictions are valid if they do not refer to the content of the speech, are narrowly tailored to serve a significant government interest, and leave open alternative methods of communication." Although the court held that the ordinance was content neutral, it found that the ordinance banned circulation "that the city has not shown creates litter or destroys its beauty." The court noted that the city had failed to make use of the many other alternatives to the outright ban on distribution to yards and porches, such as requiring residents to keep their lawns free from litter. The court also found that the ordinance failed to leave open sufficient alternatives for distributing publications such as the *Penny-Saver* because using the mail or mailbox hanging devices "would impose substantial costs."

The court then subjected the ordinance to analysis under the free speech clause of the Georgia Constitution. The court recognized that Georgia's speech protections are more stringent than the First Amendment. The court held that, whereas the First Amendment does not require "the government to adopt the least restrictive means for regulating content-neutral speech," the Georgia Constitution does. Where time, place, or manner restrictions are imposed on noncommercial speech, the government can restrict only the speech that will directly infringe upon its goals.

This decision is the first by the Georgia court to adopt such a strict standard for evaluating time, place, or manner restrictions on speech. The implications of this rule are potentially far-reaching. The court has stated that where a regulation burdens the ability to convey any noncommercial message, it will be subjected to the most rigorous scrutiny by Georgia's courts.

Justice Hines refused to concur with this expansive interpretation of Georgia's free speech clause but did concur in the remainder of the opinion. Justice Carley dissented arguing that the majority's First Amendment analysis was incorrect and that the Georgia constitutional issues should not have been reached because they were not argued in the lower court.

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CERT. DENIED: U.S. Supreme Court Lets Stand Copyright Rulings Against West Publishing Co.

The United States Supreme Court recently denied certiorari in two related cases where the Second Circuit held that plaintiffs' publication of judicial decisions on CD-ROM with West Publishing's star pagination infringed none of West's copyrightable expression, and that certain of West's enhancements to judicial opinions were not sufficiently original or creative for copyright protection. *West Publishing Co. v. Matthew Bender & Co.*, 158 F.3d 693 (2d Cir. 1998), *cert. denied*, 67 U.S.L.W. 3728 (U.S. June 1, 1999) (No. 98-1500); *West Publishing Co. v. HyperLaw Inc.*, 158 F.3d 674 (2d Cir. 1998), *cert. denied*, 67 U.S.L.W. 3728 (U.S. June 1, 1999) (No. 98-1519).

Matthew Bender v. West Publishing Co.

In a 2-1 opinion, the Second Circuit upheld the District Court's grant of summary judgment of noninfringement to the plaintiffs, holding that West had no copyrightable interest in the pagination of particular cases in the Federal Reporter System that is infringed by a CD-ROM. In so holding, the court distanced itself from an Eighth Circuit decision in *West Publishing Co. v. Mead Data Central* that West's star pagination system was protected as a reflection of their original arrangement of cases.

West publishes judicial case reports that combine independently authored features and enhancements with the text of federal and state judicial opinions. Under the fair use doctrine, other publishing companies may insert into their products parallel citations to the volume and initial page number of West case reporters without infringing West's copyright.

Matthew Bender, a company that sells CD-ROM compilations of judicial opinions entitled *Authority from Matthew Bender*, planned to insert into their products as well a citation to the exact page number of text within West's printed versions of opinions, West's so-called "star pagination." Matthew Bender sought a judgment declaring that the use of West's star pagination system does not infringe West's copyrights.

HyperLaw, a company that also markets CD-ROM compilations of judicial opinions including ones drawn directly from West publications, intervened seeking the same relief.

The Second Circuit held that the plaintiffs' products were not infringing copies of West's arrangement of cases because the selection and arrangement of the opinions as fixed in the plaintiffs' products were not substantially similar to West's arrangement. Even though it was possible for a user to manipulate the order of the opinions through the use of star pagination to create a copy of West's arrangement, the court concluded that the products themselves did not create copies. The court found that the plaintiffs would not be liable for contributory infringement either because the plaintiffs' products have substantial non-infringing uses as tools for research and citation.

In addition, the court concluded that even if the plaintiffs' products were considered infringing copies, the plaintiffs' use of star pagination would still not amount to copyright infringement because it would be fair use. Under the fair use doctrine, the plaintiffs could lawfully create a copy of West's arrangement through the use of parallel citations to West's reporters. And once a lawful copy has been created through parallel citation, star pagination, which is original expression since it only allows the user to ascertain page breaks, may be lawfully copied.

HyperLaw, Inc. v. West Publishing Co.

In addition to intervening in the star pagination issue, HyperLaw sought a declaration that it could copy the text of West's case reports (although

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Supreme Court Lets Stand Rulings Against West Publishing Co.

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not the syllabi, headnotes, or West Key Numbers in those reports) without infringement. The Second Circuit upheld a bench trial's finding West's "enhancements" to judicial opinions did not demonstrate sufficient originality and creativity in the selection and arrangement of the material to be copyrightable.

West claimed that it made four kinds of alterations in case reports, which HyperLaw proposed to copy, that are protected by copyright: the addition to judicial opinions as received from courts of lines identifying the parties, the court, and certain decision details; attorney information; subsequent procedural developments; and the inclusion of parallel and alternative citations.

The district court held, and the Second Circuit agreed, that these elements were not protected by copyright because "West's choices on selection and arrangement [could] reasonably be viewed as obvious, typical, and lacking even minimal creativity." The court also found that West's overall selection and arrangement of this material lacked creative insight because courts provide most of the information in their opinions anyway.

Judge Sweet dissented from both opinions, finding that both decisions could damage West's economic incentives by permitting Matthew Bender and HyperLaw to "appropriate the practical and commercial value of the West compilation." In *HyperLaw*, Judge Sweet focused on the creativity and originality of West's work as a whole, not of each isolated element. He also found it ironic that West's success in the market may have contributed to the majority's conclusion that the selection and arrangement of West's enhancements to judicial opinions was typical and obvious.

The Supreme Court's denial of West's petitions for writs of certiorari leaves the Second Circuit's decisions on these points authoritative in the Second Circuit.

Gannett Issues Ethical Guidelines

On June 14, Gannett Company Inc. Newspaper Division issued new guidelines on ethical news-gathering conduct for its 73 daily newspapers. The guidelines were developed on the heels of the highly publicized news-gathering issues addressed at *The Cincinnati Enquirer*, where reporting on Chiquita Brands International was based in part on illegally obtained voice mails by a renegade reporter from the Chiquita system. As Gannett notes in its press releases, however, it was not the only paper to face questions about its news-gathering. As Gannett said:

> The new Principles were prompted by several factors: a desire to support strong but honorable investigative reporting; a deep concern over public distrust of the media; a need to address the increase in lawsuits focusing on news-gathering methods and not on the truth of stories; and the desire to alleviate reader concerns about fairness and accuracy of content.

USA Today, which is not part of the Newspaper Division, is not governed by the guidelines nor are Gannett-owned television stations.

The Principles for Ethical Conduct for Newsrooms can be found at: www.gannett.com/go/press/pr061499.htm.

Actual Malice Required in Lanham Act Claim

By Chip Babcock

Procter & Gamble's lawsuit over its 20 year old Satanism rumor against Amway Corporation, in the words of one legal publication, "went down in flames" earlier this month when Houston, Texas, United States District Judge, Vanessa Gilmore, granted a defense motion for judgment as a matter of law. *Procter & Gamble, et al. vs. Amway Corporation, et al.* Civil Action No. H-97-2384 (S.D.Tex., Houston Division). The ruling came at the close of all evidence in the two week jury trial. The primary bases for the Court's ruling involved issues of actual malice and res judicata.

Procter & Gamble is Public Figure

First, the Court ruled that Procter & Gamble was a limited purpose public figure with respect to the Satanism rumor and therefore did not decide whether the advertising giant was a general purpose public figure. Having determined public figure status, the Court applied the actual malice standard to Procter & Gamble's claims for defamation, common law product disparagement and tortious interference with business relations, as well as Procter & Gamble's claims under the Lanham Act.

Judge Gilmore's ruling under the Lanham Act followed the recent decision of the Eighth Circuit in *Porous Media Corp. v. Pall Corp.*, 173 F.3d 1109 (8th Cir. 1999), which applied a public figure/actual malice analysis to a Lanham Act claim. The Court also relied upon the following statements from McCarthy on intellectual property, one of the leading treatises in the area:

> Any tort which penalizes an allegedly false and disparaging statement about another's product must comport with the principles of free speech embodied in the First Amendment. It makes no difference whether that tort is created by common law or statute, or by state or federal law. Thus, a plaintiff cannot, by refraining from pleading common law product disparagement, circumvent the constitutional constraints of the First Amendment by using the post-1989 version of Lanham Act § 43(a) as a vehicle to challenge alleged product disparagement.

McCarthy on Trademarks & Unfair Competition § 27:100 (4th ed. 1997).

In addition, the Court found that much of the Texas lawsuit was barred by the doctrine of res judicata in light of previous litigation between the two companies in Utah where Amway prevailed at summary judgment.

Procter & Gamble Appeals

Procter & Gamble has appealed the case and has publicly commented that the Court's application of the actual malice rule to the Lanham Act will harm commercial relations and large advertisers. The consumer giant may be attempting to rally amicus support. The readers of this publication, of course, realize that the Lanham Act, in connection with which the Court found that a four-year statute of limitation applied, has the potential to be turned into a federal cause of action for product disparagement and/or defamation. Thus, the decision of the Eighth Circuit in *Porous* and Judge Gilmore is important to the interest of publishers. In fact, it was hotly contested whether the Satanism rumor was a proper subject of Lanham Act jurisprudence in the first place.

Satanism Rumor is Public Concern

The former CEO of Procter & Gamble, John Smale, who later went on to be Chairman of General Motors, testified that the Satanism rumor was a matter of public concern and that his company had received over 250,000 calls from citizens concerned

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Procter & Gamble vs. Amway

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about the validity of the story. The Procter & Gamble Satanism rumor surfaced in the 1970's and focuses on Procter & Gamble's man in the moon and stars trademark which, so the story went, had satanic signs contained within it. For instance, it was said that the curly cue beard of the man in the moon were really three sixes, a sign of the devil and that the 13 stars which are meant to represent the original colonies, could be connected in such a way as to show three sixes. In addition, the man in the moon had a horn at the top of the drawing and bottom of the drawing which the rumormongers characterized as rams horns, another sign of the devil.

In addition, a flier regarding the Satanism rumor has circulated for more than 20 years saying that the president of Procter & Gamble appeared on various talk shows (Merv Griffin, Phil Donahue, Oprah) and admitted that his company contributed to the Church of Satan. When asked why he was making such a revealing statement, the president purportedly answered that "There aren't enough Christians to make a difference." The rumor is, of course, false.

Procter & Gamble v. Amway Distributors

Since 1982 Procter & Gamble has periodically sued Amway independent distributors who, upon hearing the rumor, had passed it along to each other. In all of these suits, the distributors agreed not to pass the rumor along again and the suits were dismissed. In one case, a $75,000 judgment was obtained from two Amway independent distributors but the money does not appear to have been paid. Then in late 1994 and 1995 the rumor had a resurgence with the flier being passed along the Internet. The rumor was also prevalent in churches and on college campuses. In fact, the son of Procter & Gamble's chairman even received the rumor on his computer while attending Dartmouth College.

In late April of 1995 an Amway independent distributor picked up a Satanism flier from his place of work at the Houston Police Department. The rumor contained in that flier eventually found its way to the voicemail system of Randy Haugen of Utah, a senior Amway independent distributor. Haugen, who believed the rumor at the time he heard it on his voicemail, forwarded the voicemail message to 21 people. It was this communication which was the focus of the lawsuit, first in Utah against Haugen and Amway and later in Texas.

In the Texas case, Procter & Gamble attempted to challenge Amway's business structure labeling it an illegal pyramid. The pyramid allegations were dismissed at summary judgment. In addition, the company identified 148 statements spanning the 20 year period which Amway independent distributors had purportedly made concerning the Satanism rumor and, in a few cases, Procter & Gamble's products.

Statute of Limitations & Discovery Rule

At summary judgment the Court dismissed most of these claims under the one year defamation statute of limitations which the Court applied to the tortious interference claims. The Court applied a two year statute of limitations to the common law product disparagement claims.

In a written opinion which will likely be published, the Court refused to apply the discovery rule to these defamation claims even though they were not published in the mass media. Texas law has always held that the discovery rule does not apply to publications in the mass media but only recently have the Texas courts refused to apply the discovery rule in circumstances where there is more limited publication. *See Computer Associates Int'l, Inc. v. Altai*, Inc., 918 S.W.2d 453, 455 (Tex. 1996); *Ellert v. Lutz*, 930 S.W.2d 152, 156-157 (Tex. App.--Dallas 1996, no writ).

Jackson Walker represented Amway Corporation in the Houston litigation and Chip Babcock was the lead counsel for the company and was assisted by Richard Griffin, Laura Stapleton, Carl Butzer, Linda Cole, Mary Lou Flynn-Dupart and John Edwards.

Courts Reaffirm Constitutional Protections for Debt Ratings

By Eve M. Coddon and Grace A. Carter

In a series of cases over the last decade, and culminating in two recent federal court decisions, the law has come to explicitly recognize that settled First Amendment protections apply to the expression of rating agencies — which widely publish ratings and commentary on matters of public concern, including publicly traded debt securities. When rating agencies are sued for their ratings and analysis, the claimant typically asserts that it was injured by "false" statements regarding the creditworthiness of the security or entity which is the subject of the statement at issue. Because the heart of such a claim is allegedly erroneous speech, the protections of the First Amendment are clearly implicated, as numerous courts, including most recently the Tenth Circuit Court of Appeals, have held.

> *"[A]s a publisher of publicly distributed financial ratings, analysis and commentary, S&P is, as a matter of law, deserving of the full breadth of First Amendment safeguards."*

See ,County of Orange v. The McGraw-Hill Companies, Inc., Modified Order Granting In Part and Denying In Part Defendant's Motion For Summary Judgment ("Modified Order"), United States District Court, Central District of California, Case No. SACV 96-0765 (GLT), April 21, 1999 ("actual malice" standard governs plaintiff's claims for breach of contract and professional malpractice); *County of Orange v. The McGraw-Hill Companies, Inc.*, Ninth Circuit Court of Appeals Case No. 99-80094, May 27, 1999 (denying §1292(b) certification of District Court order holding that Standard & Poor's ratings are protected by the "actual malice" standard); *Jefferson County School District No. R-1 v. Moody's Investors Services*, 1999 U.S. App. LEXIS 8460 (10th Cir. 1999) (Moody's statements regarding school district's creditworthiness are entitled to full First Amendment protections).

Reporter's Privilege Applied

The constitutional protections applicable were initially recognized in decisions involving the application of the reporters' privilege to unpublished materials gathered or created in the rating process. For example, in *In re Pan Am*, 161 B.R. 577 (S.D.N.Y. 1993), Standard & Poor's challenged a subpoena that sought unpublished information relating to meetings, correspondence and communications on the ground that such subpoena violated the reporter's privilege. The Court quashed the subpoena, finding that "S&P functions as a journalist when gathering information in connection with its ratings," and that "[a]s a publisher of publicly distributed financial ratings, analysis and commentary, S&P is, as a matter of law, deserving of the full breadth of First Amendment safeguards." *Id.* at 581, 586.

Similarly, the Court in *In re Scott Paper Co. Securities Litigation*, 145 F.R.D. 366 (E.D. Pa. 1992), recognized that Standard & Poor's — as a publisher of financial information — is a member of the press entitled to invoke the reporter's privilege. *Id.* at 369.

> "[T]he fact remains that S&P publishes information for the benefit of the general public." *Id.* at 370.

See also Stephens v. American Home Assur. Co., 1995 U.S. Dist. LEXIS 5086 (S.D.N.Y. 1995)

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(A.M. Best, which publishes ratings of insurance companies, is a publisher entitled to invoke state and federal protections against disclosure of unpublished materials).

The Orange County Suit

This year, the United States District Court for the Central District of California held in *County of Orange v. The McGraw-Hill Companies, Inc.* that Standard & Poor's ratings of public debt are expressions on matters of public concern and are therefore protected by the First Amendment. The Court specifically held that the "actual malice" standard applies to Standard & Poor's published ratings of Orange County debt offerings — regardless of the labels attached by the plaintiff to the claims (namely, breach of contract and professional malpractice).

> "Although these issues traditionally arise in libel or defamation actions, the actual malice standard applies to other causes of action when the plaintiff seeks compensatory damages arising from allegedly false statements." (Modified Order, p. 3.)

On April 21, 1999, the District Court certified its order under §1292(b) for interlocutory appeal. The Ninth Circuit promptly rejected Orange County's argument that an immediate appeal was necessary, and on May 27, 1999, denied review.

On June 15, 1999, Standard & Poor's announced that Orange County had dismissed its suit; in return for the dismissal, Standard & Poor's agreed to partially refund the County's rating fees in the amount of $140,000. Orange County had sought more than $2 billion in damages in the three-year old lawsuit.

Moody's Held to Be Opinion

A recent decision from the Tenth Circuit Court of Appeals, *Jefferson County School District No. R-1 v. Moody's Investor's Services,* 1999 U.S. App. LEXIS 8460 (10th Cir. 1999), recognized additional constitutional protections applicable to rating agencies. The Court in that case held that statements by Moody's Investors Services in an article about a school district's bonds and creditworthiness were statements of opinion that were not actionable under the First Amendment.

In 1993, the Jefferson County School District issued refunding bonds as part of a refinancing of its bonded indebtedness. In its suit, the School District contended that Moody's retaliated against it for not seeking a Moody's rating by publishing an article concerning the School District's financial condition.

The School District objected to Moody's statement that "the outlook on the district's general obligation debt is negative, reflecting the district's ongoing financial pressures due in part to the state's past underfunding of the school finance act as well as legal uncertainties and fiscal constraints under Amendment 1." 1999 U.S. App. LEXIS 8460 at *3-4. This statement was reiterated by "The Dow Jones Capital Market Reports" in an electronic communication stating that the refunding bonds had a "negative outlook." *Id.* at *4.

According to the School District, the effect of Moody's article was immediate, namely, "purchase orders ceased, several buyers canceled prior orders, and the School District was forced to re-price the bonds at a higher interest rate in order to complete the sale, thereby causing it to suffer a net loss of $769,000." *Id.* at *5.

In its suit, the School District alleged three claims: intentional interference with contract, intentional interference with business relations, and publication of an injurious falsehood. *Id.* at *5. It also sought to amend its complaint to allege antitrust violations. The School District contended that the publication was false because it erroneously conveyed to the public that the School District was not creditworthy. *Id.* at *5.

Moody's filed a motion to dismiss, which the District Court granted, holding that the statements "negative outlook" and "ongoing financial pressures"

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were statements "of opinion relating to matters of public concern which do[] not contain [] provably false factual connotation[s]" or which "cannot reasonably be interpreted as stating actual facts about an individual." *Id.* at *6 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)). Because the statements were not provably false, the Court held that they were statements of opinion that were not actionable under the First Amendment.

On appeal, the Tenth Circuit affirmed the dismissal of the complaint. The Court held that, under *Milkovich*, a reasonable fact finder could not conclude that Moody's article implied a false assertion of fact about the School District's financial condition. *Id.* at *18. In determining that Moody's statements could not be proven true or false, the Court reasoned that if an opinion is *evaluative*, the First Amendment immunizes it from liability because it is not provably false.

The Court further reasoned that Moody's statements regarding the School District's creditworthiness were analogous to a statement of a product's value that could depend on "a myriad of factors, many of them not provably true or false." *Id.* at *18-19. Thus, the statement that the bonds were "not creditworthy" is an opinion under the protection of the First Amendment.

Speech By Any Name . . .

The Court also expressly rejected the School District's assertion that the First Amendment did not apply because the claims — for antitrust violations and interference with contract in that case — were based upon conduct, not speech. The Court cited a number of well-established authorities in which the First Amendment was applied to a wide variety of tort claims in which the basis of the claim was erroneous speech, including *Unelko Corp v. Rooney*, 912 F.2d 1049 (9th Cir. 1990) (claims for trade libel and tortious interference subject to same First Amendment protections as claims for defamation); *Henderson v. Times Mirror Co.*, 69 F. Supp 356, 362 (D. Colo. 1987) (dismissing claims for disparagement and *interference* with contract); *South Dakota v. Kansas City Southern Industries*, 880 F. 2d 40, 50-54 (8th Cir. 1989) (claim for tortious interference with contract barred by First Amendment); *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 224 (D. Kan. 1996) (protected statements of opinion could not form basis for interference with contract claim).

The Court ruled that the School District's attempt to avoid the First Amendment by re-labeling its claims "is inconsistent with applicable First Amendment principles." *Id.* at *24.

Thus, the courts in *Jefferson County School District No. R-1 v. Moody's Investor's Services* and *County of Orange v. The McGraw-Hill Companies, Inc.* properly applied settled First Amendment principles and recognized the constitutional protections that squarely apply to the preparation and publication of rating agencies' analysis, commentary and ratings. Moreover, these courts have correctly rejected creative arguments by plaintiffs designed to avoid the First Amendment.

Ms. Coddon and Ms. Carter are partners in the law firm Paul, Hastings, Janofsky & Walker LLP, counsel for The McGraw-Hill Companies, Inc. in County of Orange v. The McGraw-Hill Companies, Inc., d/b/a Standard & Poor's Ratings Services (U.S.D.C. C.D. Cal. Case No. SA CV 96-0765).

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