



MEDIA LAW LETTER

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Citation Correction for *In the Matter of AMFM Radio Licenses*

In the April 2002 *MediaLawLetter*, we reported on an FCC decision to fine a radio station \$6,000 for airing the answering message from a telephone answering machine without the speaker's permission. See *LDRC MediaLawLetter*, April 2002 at 23. The story contained an incorrect West-law citation to the opinion. The correct citation is: *In the Matter of AMFM Radio Licenses, LLC*, No. 02-622, 2002 WL 416867 (F.C.C. March 15, 2002).

***En Banc* Ninth Circuit Rules that Anti-Abortion Website and “WANTED” Style Posters are True Threats Not Entitled to First Amendment Protection**

By Seth D. Berlin

On May 16, 2002, a sharply divided *en banc* Ninth Circuit ruled, 6-5, that the portions of the “Nuremberg Files” anti-abortion website and “WANTED”-style posters concerning individual doctors constituted true threats that are unprotected by the First Amendment. *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, No. 99-35320, 2002 WL 992667 (9th Cir. May 16, 2002).

The case was brought by several doctors who perform abortions and two clinics against the American Coalition of Life Activists (“ACLA”) a group of anti-abortion advocates who had prepared the posters and the “Nuremberg Files” website. The posters and website included the doctors’ names, addresses, and photographs; they urged that the doctors be persuaded not to perform abortions or that they be prosecuted for “war crimes” at some future time when abortion would be against the law.

Because of a history of violence against and murders of abortion doctors following the earlier dissemination of similar posters, the plaintiffs alleged that the posters and the website were “true threats” that violated the Freedom of Access to Clinic Entrances Act of 1994 (“FACE”), 18 U.S.C. § 248. FACE affords a private right of action against someone who:

by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining or providing reproductive health services.

18 U.S.C. § 248(a)(1). FACE expressly provides that: “[n]othing in this section shall be construed . . . to prohibit any expressive conduct (including peaceful picketing or other peaceful demonstration) protected from legal prohibition by the First Amendment to the Constitution.” 18 U.S.C. § 248(d)(1).

Although FACE does not define what constitutes a “threat,” it provides that the “term ‘intimidate’ means to place a person in reasonable apprehension of bodily harm to him- or herself or to another.” 18 U.S.C. § 248(e)(3). As a result, in applying this statute, the Ninth Circuit was required to evaluate whether the defendants’ speech constituted a “true threat.”

Prior Proceedings

At trial, the jury completed a special verdict form, finding that each of the statements was a true threat and awarding plaintiffs compensatory and punitive damages totaling \$107 million. U.S. District Judge Robert E. Jones similarly found that the speech at issue indeed constituted true

threats, and enjoined the defendants from disseminating (or, save one copy, or even possessing) the posters, websites or anything similar with the specific intent to threaten the plaintiffs. 41 F. Supp. 2d 1130 (D. Or. 1999). *See also* 945 F. Supp. 1355 (D. Or. 1996) (denying motions to dismiss); 23 F. Supp. 2d 1182 (D. Or. 1998)

(ruling on motions for summary judgment).

In March 2001, a panel of the Ninth Circuit unanimously reversed and directed the district court to enter judgment for the defendants. 244 F.3d 1007 (9th Cir. 2001). Writing for the panel, Judge Alex Kozinski emphasized that many political movements “have had their violent fringes, . . . much of what was said even by nonviolent participants in these movements acquired a tinge of menace.” *Id.* at 1014.

Relying principally on the Supreme Court’s holding in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), the panel held that “[d]efendants can only be held liable if they ‘authorized, ratified, or directly threatened’ violence,” *id.* (quoting *Claiborne Hardware*, 458 U.S. at 929), and that the district court’s jury charge, which failed to include this requirement, was fundamentally flawed as a result.

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The plaintiffs alleged that the posters and the website were “true threats” that violated the Freedom of Access to Clinic Entrances Act of 1994.

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Specifically, the panel explained, just as Charles Evers’s speeches at issue in *Claiborne Hardware* – in which Evers advocated compliance with a boycott in part with threatening statements like “if we catch any of you going in any of them racist stores, we’re going to break your damn neck” – were protected expression, the ACLU defendants’ speech is even more so because it does not contain any of the expressly threatening content included in the speeches given by Evers.

Applying this test to the facts before it, the panel concluded that it was improper for the jury and court to reach their conclusions that “the defendants’ statements were infused with a violent meaning, at least in part, because of the actions of others.

If this were a permissible inference, it could have a highly chilling effect on public debate on any cause where somebody, somewhere has committed a violent act in connection with that cause. A party who does not intend to threaten harm, nor say anything at all suggesting violence, would risk liability by speaking out in the midst of a highly charged environment.” *Id.* at 1018.

The panel found it “highly significant that all the statements were made in the context of public discourse, not in direct personal communications” and noted that the former “are given substantially more leeway under the First Amendment than privately communicated threats.” *Id.*

Ultimately, Judge Kozinski held that the First Amendment protects against “saddl[ing] political speakers with implications their words do not literally convey but are later ‘discovered’ by judges and juries with the benefit of hindsight and by reference to facts over which the speaker has no control.” *Id.* at 1019.

The Majority En Banc Opinion

In a lengthy opinion by Judge Pamela Rymer, the majority concluded that the statements at issue constituted “true threats,” which the court defined as a statement that “a

reasonable person would foresee . . . would be interpreted by those to whom the maker communicates the statement as a serious expression of intent to harm or assault.” *Id.* at *13

Although it affirmed the injunction, the court remanded the punitive damages award for consideration of whether it comported with “due process,” an inquiry the majority left to the district court in the first instance.

Standard of Review

Relying on *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), ACLU urged that this case should be reviewed *de novo* because it involved speech protected by the First Amendment. 2002 WL 992667, at **5-6. By contrast, arguing that *Bose* “independent review” is limited to the libel arena, the plaintiffs contended that the Ninth Circuit’s prior threats cases properly considered only whether the jury could reasonably have found a threat. *Id.* at *6.

After exhaustively considering *Bose* and *Harte-Hanke Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), as well as its own prior threats and defamation decisions, the majority concluded that “the proper definition of ‘threat’ for purposes of FACE is a question of law that we review *de novo*,” such that “[i]f it were clear that neither [the posters or website at issue] was a threat as properly defined, the case should not have gone to the jury.” *Id.* at *9.

However, “[i]f there were material facts in dispute or it was not clear that the posters were protected expression instead of true threats, the question of whether the posters and the [website] amount to a ‘threat of force’ for purposes of the statute was for the trier of fact.” *Id.* As stated by the court:

Given that the verdict for physicians and the injunc-

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tive relief granted in their favor restrict speech, we review the record independently in order to satisfy ourselves that the posters and the [website] constitute a ‘true threat’ such that they lack First Amendment protection. We will consider the undisputed facts as true, and construe the historical facts, the findings on the statutory elements, and all credibility determinations in favor of the prevailing party. In this way we give appropriate deference to the trier of fact, here both the jury and the district judge, yet assure that evidence of the core constitutional fact – a true threat – falls within the unprotected category and is narrowly enough bounded as a matter of constitutional law.

Id. This formulation suggests that the court will perform some degree of independent review, while at the same time deferring to the trier of fact on a number of issues; the boundaries of each of these two categories nevertheless remains less than clear despite the court’s lengthy attempt to elucidate them.

Threats v. Incitement

Turning to the merits, the majority reviewed the incitement cases of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*), *Hess v. Indiana*, 414 U.S. 105 (1973), and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), which hold that the First Amendment protects speech that advocates violence so long as it is not directed to and likely to incite imminent lawless action. 2002 WL 992667, at *10. From that precedent, the court concluded that, if “ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.” *Id.*

The court found, however, that, “while advocating violence is protected, threatening a person with violence is not.” *Id.* (citing *Watts v. United States*, 394 U.S. 705, 708 (1969) (war protester who stated at a rally that “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J.” engaged in a “very crude offensive method

of stating a political opposition to the President,” but did not utter a “true threat”)).

The majority disagreed that *Claiborne Hardware*, relied upon so heavily by Judge Kozinski in the initial panel’s decision, “is closely analogous,” even while conceding that, unlike the speeches by Evers, the posters and website at issue here “contain no language that is a threat.” *Id.* at *11.

According to the majority, *Claiborne Hardware* “did not arise under a threats statute. The court had no need to consider whether Evers’s statement were true threats of force within the meaning of a threats statute; it held only that his speeches did not incite illegal activity, thus could not have caused business losses and could not be the basis for liability to white merchants.” *Id.* at *12. According to

the majority, “[t]o the extent there was any intimidating overtone, Evers’s rhetoric was extemporaneous, surrounded by statements supporting non-violent action, and primarily of the social ostracism sort. . . . For all that appears, ‘the break your neck’ comments were hyperbolic vernacular,” comments that were not taken as a serious threat by listeners. *Id.*

Elsewhere, the majority offered a slightly different distinction, explaining that “the Supreme Court in *Claiborne* was referring to individuals who were engaging in a peaceful protest and thus were properly exercising their First Amendment rights, whereas FACE is aimed at those who themselves intend to intimidate and thereby deprive others of their lawful rights.” *Id.* at *18 (citing *United States v. Wilson*, 154 F.3d 658, 666-67 (7th Cir. 1998)).

The Standard for Establishing a “True Threat”

Relying on numerous prior threats cases, the majority concluded that the proper standard was an “objective speaker” standard – *i.e.*, “whether a reasonable person would foresee that the statement would be interpreted by

[T]he court concluded that, if “ACLA had merely endorsed or encouraged the violent actions of others, its speech would be protected.”

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those to whom the maker communicates the statement as a serious expression of intent to harm or assault.” *Id.* at *13 (quoting *United States v. Orozco-Santillan*, 903 F.2d 1262, 1265 (9th Cir. 1990).

The court concluded that every circuit now applies an objective standard, some based on a “reasonable listener” and others based on the “reasonable speaker.” *Id.* at *13 n.7. The difference, according to the majority, “does not appear to matter much because all consider context, including the effect of an allegedly threatening statement on the listener.” *Id.*

As to a defendant’s subjective intent, the court held that “[i]t is not necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement for a true threat is that the defendant intentionally or knowingly communicate the threat.” *Id.* at *13.

The majority rejected the test advocated by the ACLU Foundation of Oregon (which had filed an amicus brief both in the Ninth Circuit as well as in the trial court), that a plaintiff also show that the defendant had a subjective intent to “induce fear, intimidation, or terror; namely, that the speaker intended to threaten.” *Id.* Although the FACE statute includes a requirement that “the threat of force be made with the intent to intimidate,” the majority felt it unnecessary to include such an element among the constitutional requirements for “true threats” in general because even “an apparently serious threat” even if unintended, may cause the fear which the threats doctrine is designed to prevent. *Id.* (citation omitted).

The majority also rejected tests advocated by the dissenters that the speaker “actually intend to carry out the threat or be in control of those who will” or that would limit “true threats” to private communications, rather than the public speech before it. *Id.* at *14. Because these concerns were merely “factors [which] go to how reasonably foreseeable it is to a speaker that the listener will seriously take his communication as an intent to inflict bodily harm,” the majority rejected them as categorical limitations on what constitutes a “true threat.” *Id.*

With respect to their public nature, the court observed that the threats were “publicly distributed, but personally targeted. While a privately communicated threat is generally more likely to be taken seriously than a diffuse public one, this cannot be said of a threat that is made publicly but is about a specifically identified doctor and is in the same format that had previously resulted in the death of three doctors who had also been publicly, yet specifically, targeted.” *Id.* at *22.

Reliance on Context

The majority also emphasized that the context in which the alleged threats are disseminated is properly considered. The court cited as a “strikingly similar” example *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2000), *cert. denied*, 531 U.S. 1114 (2001), in which an anti-abortion activist was convicted of violating FACE for parking two Ryder trucks in the driveways of an abortion clinic. 2002 WL 992667, at

*16. Although there is nothing inherently threatening about a Ryder truck, the context of a Ryder truck’s role in the Oklahoma City bombing made it “a symbol of something beyond the vehicle” *Id.*

As the court explained, “without context, a burning cross or dead rat mean nothing.” *Id.* Viewed in context, therefore, the majority concluded that “the poster format itself had acquired currency as a death threat for abortion providers,” a message that “goes well beyond the political message (regardless of what one thinks of it) that abortionists are killers who deserve death too.” *Id.*

The majority concluded, therefore, that the “posters are a true threat, because, like Ryder trucks or burning crosses, they connote something they do not literally say, yet both the actor and the recipient get the message.” *Id.* at *22. As such, the court held, “no one putting” these doctors on this type of poster “could possibly believe anything other than that each would be seriously worried about being next in line to be shot and killed.” *Id.* While the court recognized

The majority also emphasized that the context in which the alleged threats are disseminated is properly considered.

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that ACLA is otherwise entitled to “stak[e] out a position for debate,” the issuance of the posters meant that these doctors “can no longer participate in the debate.” *Id.* In this context, therefore, “ACLA was not staking out a position of debate but of threatened demise. This turns the First Amendment on its head.” *Id.*

The Remedy and the Evidence

In light of these findings, the court found that the injunction issued by the trial court, which limited its prescriptions to disseminating speech of this type “with specific intent to threaten,” was properly issued and not inconsistent with the First Amendment. *Id.* at **23-24. Without reference to any cases specific to the First Amendment context, the court vacated the punitive damages award and remanded the issue to the district court, *id.* at *23, to consider whether the award comports with “due process” as articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *In re Exxon Valdez*, 270 F.3d 1215, 1241 (9th Cir. 2001).

Finally, the majority considered a host of evidentiary issues raised on appeal and motions for a mistrial that had been denied by the district court. Most significant among these issues was the admission of testimony concerning (a) the defendants’ advocacy of their “justifiable homicide” theory and (b) their public support for individuals who were tried for and convicted of murdering abortion doctors.

Although acknowledging that both sets of statements constituted protected expression, the majority rejected the evidentiary challenges, concluding that “[s]peech does not become inadmissible to show context or intent simply because standing alone it is protected.” 2002 WL 992667, at *19 (citations omitted). Rather, the court held, such testimony was “relevant to show that ACLA knew how its actions were being interpreted.” *Id.*

The Dissenters

Three of the five dissenting judges filed separate opinions, which were joined by various configurations of the other dissenters. In his dissent, Judge Kozinski readily agreed with the majority that: (a) that context may be taken into account in determining whether a statement is a true threat; (b) that intent to carry out a threat is not required to establish that a statement is a true threat; and (c) that a reviewing appellate court “defer[s] to the factfinder on questions of historical fact in First Amendment cases.” *Id.* at *25 n.1. However, he otherwise dissented based on many of the same grounds he had articulated in his opinion for the panel.

Contending that *Claiborne Hardware* places limits on menacing rhetoric expressed in a political context, Judge

Kozinski again reiterated his view that “in order for [a] statement to be a threat, it must send the message that the speakers themselves – or individuals acting in concert with them – will engage in physical violence.” *Id.* at *27.

“From the point of view of the victims, it makes little dif-

ference whether the violence against them will come from the makers of the posters or from unrelated third parties; bullets kill their victims regardless of who pulls the trigger. But it makes a difference for the purpose of the First Amendment.” *Id.*

Judge Kozinski also returned to his themes of (a) the distinction between publicly and privately communicated threats; and (b) the constitutional infirmity of categorizing as a true threat expression that is political speech and non-threatening on its face.

Asserting that the majority opinion “contradicts the central holding of *Claiborne Hardware*,” he argued that “[w] here the speaker is engaged in public political speech, the public statements themselves cannot be the sole proof that they were true threats, unless the speech directly threatens actual injury to identifiable individuals.” *Id.* at *28.

Because there is “not a scintilla of evidence . . . that

Judge Kozinski contended that the “posters can be viewed, at most, as a call to arms for other abortion protesters to harm plaintiffs,” which is protected unless it satisfies the exacting standards of Brandenburg and its progeny.

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plaintiffs or someone associated with them would carry out the threatened harm,” Judge Kozinski contended that the “posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs,” which is protected unless it satisfies the exacting standards of *Brandenburg* and its progeny. *Id.* Thus, “even when public speech sounds menacing, even when it *expressly* calls for violence, it cannot form the basis of liability unless it amounts to incitement or directly threatens actual injury to particular individuals.” *Id.* at *30.

Turning to the remedy, Judge Kozinski argued that the “crushing liability verdict” will “have a seriously chilling effect on all manner of speech, and will surely cause other speakers to hesitate, lest they find themselves at the mercy of a local jury.” *Id.* at *34.

Judge Marsha Berzon’s dissent proceeds from the premise that what makes this case so hard is that the expression at issue “is, on its face, clearly, indubitably, and quintessentially the kinds of communication that is fully protected by the First Amendment.” *Id.* at *35. As a result, as in the libel arena, Judge Berzon advocated standards “that vary with the strength of the protection of the communication” rather than a “unitary ‘true threats’ standard.” *Id.* at *38.

Again analogizing these circumstances to the libel context, where a speaker’s state of mind with respect to the truth is central to the constitutional inquiry, Judge Berzon argued that, to establish a true threat, in addition to satisfying the objective test articulated by the majority, proof of subjective intent to threaten should be required, particularly where, as here, the speech on its face is non-threatening. *Id.* at **37-38, 40-41. As she explained, “a purely objective standard for judging the protection accorded such speech would chill speakers from engaging in facially protected public protest speech that some might think, in context, will be understood as a true threat although not intended as such.” *Id.* at *41.

In addition, relying on *United States v. Kelner*, 534 F.2d 1020 (2d Cir. 1976), in which the Second Circuit affirmed the conviction for making a public threat on the life of Yasser Arafat, Judge Berzon would have required that the

threat be unequivocal or “unambiguous given the context.” 2002 WL 992667, at *41. Here, excluding the one defendant who previously “had been convicted of serious violence,” *id.* at *42 n.12, Judge Berzon would have found that the alleged threat was not unequivocal here because the prior murders were not committed by any of *these* defendants or because *these* defendants had not “put out the earlier posters,” *id.* at *42. Therefore, to Judge Berzon, the expression at issue, like the speeches in *Claiborne Hardware*, is not sufficiently unequivocal either on its face or viewed in context to support a finding of liability consistent with the First Amendment. *Id.* at **42-43.

Judge Berzon also argued that significant constitutional problems flow from the admission of evidence concerning the defendants’ advocacy of violence as proof of the context in which the posters and website were disseminated:

If we are serious about protecting advocacy of positions such as defendants’ sanctioning of violence, as we are constrained to be, then

permitting that protected speech to be the determinative ‘context’ for holding other facially protected, public protest speech – the posters and website in this case – to be a ‘true threat’ seems to me simply unacceptable under the First Amendment.

Id. at *43.

Judge Stephen Reinhardt filed a brief dissent in which he emphasized that public speech communicated in a political forum on issues of public concern warrants heightened scrutiny. *Id.* at *25. “Political speech, ugly or frightening as it may sometimes be, lies at the heart of our democratic process. Private threats delivered one-on-one do not. The majority’s unwillingness to recognize the difference is extremely troublesome.” *Id.*

The *en banc* panel of eleven does not include all the judges on the Ninth Circuit. The ACLA defendants have filed a motion, pursuant to Ninth Circuit Rule 35-3, for the full Court to rehear the case. That motion is pending.

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Judge Berzon would have required that the threat be unequivocal or “unambiguous given the context.”

Court Orders Case To Be Dismissed, Citing Absolute Protection of Rhetorical Hyperbole

By Daniel Kummer

In *Horsley v. Rivera*, No. 01-15821, 2002 WL 1058151 at *1 (11th Cir., May 28, 2002), the Eleventh Circuit recently struck a significant blow in favor of “absolute protection” under the First Amendment for a news commentator’s use of “rhetorical hyperbole” during the course of a live, unscripted televised debate.

The Eleventh Circuit, in an opinion written by Circuit Judge Cynthia Holcomb Hall, held that the commentator’s reference to his interview subject as an “accomplice to homicide” was protected from challenge in a libel action because, in the context in which the phrase was uttered, no reasonable viewer or listener would have mistaken it as a literal, factual accusation of criminal culpability. The decision represents an advance in the law in the hyperbole area, because no reported federal decision has accorded such protection to the use of a legal term of art having as specific and technical a meaning as the phrase “accomplice to homicide.” Moreover, the procedural context of the ruling, coming on an interlocutory appeal by permission under 28 U.S.C. 1292(b) from the district court’s denial of a motion for judgment on the pleadings, further vindicates the general principle that courts should resolve First Amendment issues at the earliest possible stage of the litigation.

The case arose from an October 1998 appearance by plaintiff Neal Horsley, an anti-abortion activist, as a guest on former CNBC host Geraldo Rivera’s “Upfront Tonight” program. Horsley is the founder of the “Creator’s Rights Party,” and operates various anti-abortion web sites, including a site entitled “The Nuremberg Files,” which lists the names of abortion providers and other pro-choice figures, and, in certain instances, their addresses, social security numbers and other identifying information.

The subject of Rivera’s program on the evening in question was violence against abortion clinics, and its immediate context was the shocking murder just a few days earlier of Dr. Barnett Slepian, a Buffalo, New York abor-

tion provider who was killed by a gunshot fired through the window of his home. Shortly after the murder, Dr. Slepian’s name had been crossed out on the “Nuremberg Files” web site, although Horsley claimed during the lawsuit that he had not added Slepian’s name until after the killing, and had simultaneously crossed it out.

During Horsley’s appearance on Rivera’s program four nights later, Horsley and Rivera engaged in a heated exchange concerning Horsley’s actions in maintaining the web site, in which both engaged in colorful and highly charged rhetoric.

Rivera expressed his outrage at Horsley’s conduct by twice referring to Horsley as an “accomplice to homicide.” Notably, after the first such reference, Horsley immediately retorted: “You are, too, because you’re showing exactly the same information . . . you’re a collaborator just like I am” — thereby indicating his clear understanding that he and Rivera were discoursing on a figurative, rather than literal, level.

Horsley further conceded during the debate that Rivera was “entitled to [his] opinion” and could “call me what you want to call me.” Nonetheless, Horsley brought suit against Rivera claiming that he was defamed because Rivera had allegedly accused him of committing a felony.

District Court Denies Motion

District Judge Jack T. Camp of the Northern District of Georgia denied Rivera’s motion for judgment on the pleadings, which was made on grounds of both protected opinion and rhetorical hyperbole, ruling that the statements were not protected as “rhetorical hyperbole” because “[a]s the host of a television news program and an attorney, Defendant was qualified to offer a *factual* and *legal* conclusion regarding Plaintiff’s involvement in Dr. Slepian’s murder,” and “[t]herefore a reasonable reader or listener could interpret this accusation in a literal and legal manner.”

No reported federal decision has accorded such protection to the use of a legal term of art having as specific and technical a meaning as the phrase “accomplice to homicide.”

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Court Orders Case To Be Dismissed, Citing Absolute Protection of Rhetorical Hyperbole

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The district court also ruled that Rivera's comments were not protected opinion because they "appear to imply that [Dr. Slepian's] name and address were posted on the web site prior to his murder," an implication that "is capable of being proven false because Plaintiff alleges that he did not post Dr. Slepian's name and address on his web site until after the doctor was murdered."

On the same day, the district court dismissed a companion case that Horsley had filed against officers of Planned Parenthood and the National Organization for Women, despite acknowledging that the two cases "present similar facts" and that the distinction between the statements of those defendants and Rivera's statement "is not easily drawn." The district court stated in the companion case that it had denied Rivera's motion "because the comments in question were made by a news show host known to be trained in the law."

Rivera moved for reconsideration on the ground that the district court had effectively (and incorrectly) applied a different First Amendment standard to this action by differentiating between the two cases based on Rivera's status as an attorney. In the alternative, Rivera requested certification for immediate appeal pursuant to 28 U.S.C. § 1292(b). In denying Rivera's motion for reconsideration, the district court stated that it "would reach a similar conclusion even if Defendant's legal background was removed from the equation." However, in certifying the case for immediate appeal, the district court "recognize[d] a substantial ground for difference of opinion," and, citing the former Fifth Circuit's decision in *Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969), noted "the importance of early disposition of certain First Amendment cases." The Eleventh Circuit granted Rivera's petition for permission to appeal on the same grounds, and stayed all discovery pending the appeal.

Appeal Reverses District Court

In its May 28, 2002 decision reversing the district court and remanding with instructions to dismiss the action, the Eleventh Circuit focused intensively on the context of the

challenged statements. Horsley had incorporated a verbatim transcript of the entire televised exchange with Rivera into his complaint, which the Court of Appeals quoted *in its entirety*. As it commenced analysis of the defamation claim, the court first noted that, under its recent decision in *United States v. Tieco, Inc.*, 261 F.3d 1275, 1293 (11th Cir. 2001), Horsley was bound by his proffered defamatory construction, namely "that Rivera defamed him by stating that he is chargeable with a felony," and that "it is in this context that we must consider Rivera's argument." Significantly, the ruling in *Tieco* on the binding construction issue was made under Alabama law – the Eleventh Circuit has now federalized that rule in *Horsley*.

The Eleventh Circuit based its ruling solely on the "absolute protection" for rhetorical hyperbole under both the First Amendment and Georgia law, without addressing Rivera's alternative argument of protected opinion. After surveying the case law in the hyperbole area, the court held:

The Eleventh Circuit based its ruling solely on the "absolute protection" for rhetorical hyperbole under both the First Amendment and Georgia law.

In determining whether Rivera's statement is entitled to protection as rhetorical hyperbole, we must consider the circumstances in which the statement was expressed. Examining the context surrounding the statement, we conclude that it consisted of the sort of loose, figurative language that no reasonable person would believe presented facts. A reasonable viewer would have understood Rivera's comments merely as expressing his belief that Horsley shared in the moral culpability for Dr. Slepian's death, not as a literal assertion that Horsley had, by his actions, committed a felony.

We base this determination on a number of observations. Most significant is that Horsley himself acknowledged that he understood Rivera to be speaking in a figurative rather than literal sense as soon as Rivera's statement was made. . . . Additionally, . . . [t]he fact that the parties were engaged in an emo-

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Court Orders Case To Be Dismissed, Citing Absolute Protection of Rhetorical Hyperbole

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tional debate on a highly sensitive topic weighs in favor of the conclusion that a reasonable viewer would infer that Rivera's statement was more an expression of outrage than an accusation of fact.

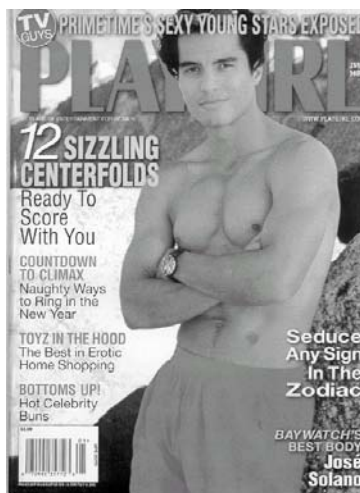
In addition to the points noted above, the Eleventh Circuit's decision is significant in several other respects. Most important is its emphasis on the critical role of context in assessing a challenged statement in the face of an asserted defense of protected rhetorical hyperbole. Also noteworthy is the degree to which the court of appeals was willing to assume the best, rather than the worst, of

the "reasonable viewer." Thus, even in the context of a recent and highly publicized murder, the court presumed the "reasonable viewer" to be able to sort out highly charged figurative rhetoric from factual assertion, and thus able to understand the charge of "accomplice to homicide," in the context in which it was spoken, as an assertion of moral outrage rather than a literal criminal accusation.

Daniel Kummer, Senior Litigation Counsel, NBC, argued the appeal for Geraldo Rivera. Joseph Bankoff of King & Spalding in Atlanta was co-counsel on the appeal.

Ninth Circuit Reinstates False Light and Misappropriation Claims Over Magazine Cover

The Ninth Circuit Court of Appeals reversed summary judgment and reinstated an actor's false light and misappropriation claims against *Playgirl* magazine for its use of his photograph on a *Playgirl* magazine cover. *Solano, Jr. v. Playgirl, Inc.*, No. 01-55443, 2002 WL 1291240 (9th Cir. June 13, 2002). In doing so the Ninth Circuit endorsed an extremely broad and potentially troubling "implied false message" theory, holding that even though there was no direct assertion on the magazine's cover that the actor, Jose Solano, Jr., was posing nude in the magazine, the cover's sexually suggestive headlines together with the magazine's sexual nature could reasonably imply he had. The court also took a generous approach to the plaintiff's burden of proving actual malice.



The court found that even though there was no evidence that *Playgirl's* senior editorial staff intended to imply that Solano posed for the magazine, there was clear and convincing evidence of actual malice to defeat summary judgment where two subordinate editors raised concerns that the cover suggested Solano was featured nude. The

court also reinstated plaintiff's statutory and common law misappropriation claims, holding that the evidence of actual malice negated the newsworthiness defense to these claims.

Playgirl Cover Featured "Baywatch" Actor

Playgirl's January 1999 issue featured plaintiff, Jose Solano, Jr., on its cover. Plaintiff was then appearing on the popular television series *Baywatch*. In the cover photo, Solano was bare chested and wearing his character's signature red life guard trunks. The photo appeared under the headline "PRIMETIME'S SEXY YOUNG STARS EXPOSED." A second headline about plaintiff at the bottom of the cover read: "Baywatch's Best Body Jose Solano. The inside article profiled Solano and ten other popular television actors, none appearing nude. Other headlines on the cover, included "12 SIZZLING CENTERFOLDS Ready to Score With You" and "BOTTOMS UP! Hot Celebrity Buns." Solano sued *Playgirl* alleging it deliberately created the false impression that he had posed nude, that he endorsed the magazine and would degrade himself by appearing in it.

District Court Judge Tevrizian Dismissed All Claims

Last year Federal District Court Judge Dickran Tevrizian granted summary judgment in favor of *Playgirl* on all

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Ninth Circuit Reinstates False Light and Misappropriation Claims Over Magazine Cover

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claims, holding that the use of the photograph on the cover of an allegedly pornographic magazine simply did not put plaintiff in a false light and dismissing the misappropriation claims under the newsworthiness exception to the California statute, Cal. Civ. Code §3344, and common law misappropriation. *Solano, Jr. v. Playgirl, Inc.*, No. CV 00-01242 (C.D. Cal., Feb. 27, 2001) (unpublished).

9th Circuit Reverses Based on Context and Nature of Magazine

The Ninth Circuit, in an opinion by Judge Raymond Fisher, joined by Judges Pregerson and Tallman, reversed on all counts. As to the false light claim, the court found that the cover photo and headlines, including those not related to Solano, combined with the sexually explicit nature of the magazine, could reasonably imply the false impression that Solano was depicted nude inside the magazine.

The court relied on two recent Ninth Circuit cases to support its “implied false impression” theory – *Eastwood v. Nat’l Enquirer, Inc.*, 123 F.3d 1249, 25 Media L. Rep. 2198 (9th Cir. 1997) and *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 27 Media L. Rep. 1142 (9th Cir. 1998) – but appeared to extend the results of both these cases by looking not just at statements about the plaintiff but also other cover text and the nature of the magazine.

In *Eastwood*, the Ninth Circuit affirmed a \$150,000 jury award against the *National Enquirer* for touting on a cover and in an article an “Exclusive Interview” with Clint Eastwood when, in fact, Eastwood never spoke to the *Enquirer* and the interview was a fabrication. The court looked at the totality of the *Enquirer’s* presentation of the interview itself – including the numerous uses of the word “exclusive” to describe it and an *Enquirer* byline on it – in concluding that it conveyed the false impression that Eastwood had spoken to the tabloid. *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036, 27 Media L. Rep. 1142 (9th Cir. 1998), involved an interpretation of a tabloid cover headline directly identifying plaintiff. It stated “COPS THINK KATO DID IT!... he fears they want him for perjury, says pals,” and the Ninth Circuit concluded it could reasonably imply that Kato Kaelin was a suspect in the murders of Nicole Brown Simpson and Ronald Goldman, even though the headline’s false insinuation was arguably cured by the story about Kaelin 17

pages inside the issue that made clear he was not a suspect in the murders. *Id.* at 1037. In an interesting footnote, before he was appointed to the Ninth Circuit, Raymond Fisher represented Clint Eastwood in his suit against the *Enquirer*.

Although the court acknowledged that being portrayed on the cover of a sexually explicit magazine was in and of itself insufficient to create a false impression, the court, in fact, relied on the context of the publication which it described as “plenty of graphic frontal male nudity” and the general sexual illusions of the cover’s headlines to conclude that the cover conveyed the false impression that Solano appeared nude in the issue though no such claim was directly made on the cover. *Solano* at 2-4. Instead the court performed a fine dissection of the cover, noting, for example, that the final letter in the headline “12 Sizzling Centerfolds” touched Solano’s shoulder, thereby suggesting that Solano was one of the centerfolds.

Conflicting Deposition Testimony of Editors Cited as Evidence of Actual Malice

In addition to adopting a broad implied false impression theory, the Ninth Circuit also found sufficient evidence that *Playgirl* intended to convey the impression. Although there was no evidence that *Playgirl’s* editorial decision-makers intended to convey the false message, two subordinate editors testified that they raised concerns that the cover implied Solano was depicted nude inside. The court concluded that because the senior editors were at least aware of these concerns and there was evidence that one senior editor wanted to “sex up” the issue to boost sales, a jury could conclude that *Playgirl* knowingly or recklessly published the misleading cover.

Misappropriation Claims Reinstated

The court also reinstated the statutory and common law misappropriation claims, holding that even though the newsworthiness exception is to be broadly construed, it does not apply where a defendant uses a plaintiff’s name or likeness in a knowingly false manner to increase sales. Thus summary judgment on the claims was inappropriate.

Kent Raygor of Sheppard, Mullin, Richter & Hampton, Los Angeles, represented Playgirl. Jonathon H. Anshell of White O’Connor Curry Gatti & Avanzado, Los Angeles, represented Jose Solano.

First Circuit Upholds Summary Judgment in Suit On “A Civil Action”

Strong Rulings on Protection for Opinion and on Private Facts

In a case growing out of the book “A Civil Action” (which later became a movie) the First Circuit affirmed entry of summary judgment in a lawsuit against the author, Jonathan Harr, and his publishers, for the book’s depiction of the plaintiff, John J. Riley, Jr., who operated a tannery in Woburn, Massachusetts and was a key figure in the book. *Riley v. Harr* No. 01-1648 (1st Cir. June 11, 2002) The court held that dismissal was proper (on First Amendment grounds, for the most part) of claims by Riley and his wife for defamation, false light, public disclosure, intentional infliction of emotional distress, and loss of consortium. The opinion was written by Judge Lipez, joined by Chief Judge Boudin and Senior Circuit Judge Rosenn.

The court noted that the book was written from the perspective of Jan Schlichtman, a lawyer representing plaintiffs claiming the tannery had caused them environmental damages. Schlichtmann and Riley were, as the court notes, the protagonists in the drama of the investigation and litigation of the claims. The author had extensive access to Schlichtmann and carries the reader through the litigation largely from the perspective of Schlichtmann. The book presents Schlichtmann’s view that the evidence tended to show that the tannery had dumped waste laced with TCE on fifteen acres in Woburn, that the TCE tainted local well water, and repeatedly suggests that Riley’s denials that such dumping had occurred were false. But, as the court notes, the book also reflected the weaknesses in Schlichtmann’s case

The book also notes Schlichtmann’s failure to find direct proof of dumping by the tannery, Riley’s steadfast denials of Schlichtmann’s allegations, the conflicting views of experts on each side of the case, and the 1986 jury verdict in federal district court which rejected the plaintiffs’ claims against the tannery.

The heart of the decision is the First Circuit’s observation:

However, and of central importance in this case, “even a provably false statement is not actionable if ‘it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts.’” *Gray v. St. Martin’s Press, Inc.*, 221 F.3d 243, 248 (1st Cir. 2000) (quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). As the Ninth Circuit has explained, “when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the

reader free to draw his own conclusions, those statements are generally protected by the First Amendment.” *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995). . . .

In sum, the basic issue before us is whether the challenged statements in *A Civil Action* implicitly signal to readers “that only one conclusion [about Riley] was possible,” and therefore do not qualify as protected opinion under *Milkovich* and *Phantom Touring*, or whether “readers implicitly were invited to draw their own conclusions from the mixed information provided,” in which case the First Amendment bars Riley’s defamation action. *Phantom Touring*, 953 F.2d at 731. In making this determination, we look not just at the specific statements complained of, but also at “the general tenor of the [Book]” and the context in which the challenged statements are set. *Milkovich*, 497 U.S. at 21. We are mindful that the subject of *A Civil Action* — a controversial law-

Repeatedly suggests that Riley’s denials that such dumping had occurred were false. But, as the court notes, the book also reflected the weaknesses in Schlichtmann’s case

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First Circuit Upholds Summary Judgment in Suit On “A Civil Action” Strong Rulings on Protection for Opinion and on Private Facts

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suit and the disputed events underlying it — “is one about which there could easily be a number of varying rational interpretations,” and that in writing about such “inherently ambiguous” subjects, an author who “fairly describes the general events involved and offers his personal perspective about some of [the] ambiguities and disputed facts” should not be subject to a defamation action. Partington, 56 F.3d at 1154. Otherwise, authors would hesitate to venture beyond “dry, colorless descriptions of facts, bereft of analysis or insight,” and the threat of defamation lawsuits would discourage expressions of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public” Id.

Other key elements of the decision included:

- the court’s refusal to accept that a court’s finding in the case precluded critics from voicing other opinions; or
- that the fact that Schlichtmann lost a point had to be conveyed to the readers immediately with the telling of the contested issue;
- that plaintiff could not support a false light claim with the same arguments that would not sustain his libel claims;
- publication of even a private fact that is not itself newsworthy will be protected if it has “substantial relevance to, or any substantial nexus with a newsworthy topic.”

To read the full text of the opinion, go to: <http://laws.lp.findlaw.com/1st/011648.html>

This note is based on one written by Bruce E. H. Johnson, Davis Wright Tremaine, Seattle, WA. Counsel on the case were Peter A. Riley for the plaintiff-appellants, and Steven M. Gordon, Shaheen & Gordon, P.A., with Lucy J. Karl of that firm and Linda Steinman of Random House on the brief for the defendants-appellees.

“Girls Gone Wild” Suit Dismissed

The producer of the “Girls Gone Wild” video series declared victory in early June after three women failed to appeal a Louisiana court judge’s dismissal of their a lawsuit alleging that their privacy was invaded when footage of them baring their breasts during Mardi Gras celebrations was included in the series. *Doe v. Mantra Films*, No. 01-12450 (La. Dist. Ct., Orleans Parish oral ruling March 8, 2002).

The decision by Judge C. Hunter King of the Civil District Court for the Parish of Orleans to grant Mantra Entertainment’s motion to dismiss was made in March. In his ruling, King said that “when you expose your body on Bourbon Street or in a club and you know there is an individual with a video [camera], certainly you must expect that this is going to shown all over the place.”

The suit, filed in July 2001 by three women using the pseudonym Jane Doe, claimed that a Mantra employee got them drunk and coerced them to disrobe. The suit sought unspecified monetary damages, a share of profits from sales of the video series, and an injunction against further sales.

In addition to the production company, the suit also named the bar in which they were photographed. The complaint alleged that at the time all three women were under 21, the legal drinking age in Louisiana.

Defendant Mantra Video was represented by James Garner, Timothy Francis and Darnell Bludworth of Sher Garner Cahill Richter Klein McAlister & Hilbert, L.L.C. in New Orleans and by Ronald Guttman of Christensen, Miller, Fink, Jacobs Glaser, Weil & Shapiro LLP in Los Angeles. Michael Whitehead of Mandeville, La. represented the plaintiffs.

A full report on the case by Ronald Guttman will appear in a future issue of the *MediaLawLetter*.

Mantra face similar lawsuits in Florida and Missouri. See *Gritzke v. MRA Holdings LLC*, No. 01-CV-495 (N.D. Fla. filed Nov. 21, 2002), and *A.B. v. MRA Holding, LLC*, Civil No 02-4103 (W.D. Mo. filed May 23, 2002). See also *LDRC MediaLawLetter*, March 2002, at 32.

A default judgment in a similar case against the producer of a different video series, “Wild Party Girls,” was vacated in late March. See *Kulhanek v. Acro Media Group, Inc.*, No. 01-0505 (tex. Dist. Ct., default vacated March 28, 2002); see also *LDRC MediaLawLetter*, April 2002, at 24.

Virginia Supreme Court Affirms Defamation Award

Reverses Award for Statutory Misappropriation

By Ashley I. Kissinger

On June 7, the Virginia Supreme Court issued a 34-page opinion affirming a jury's \$2 million defamation verdict, but reversing its \$575,000 award for violation of the Commonwealth's misappropriation statute, Virginia Code § 8.01-40(A). *WJLA-TV, et. al., v. Levin*, 2002 WL 1270607 (Va. June 7, 2002). Although the Court's decision adopts, as a matter of Virginia law, the narrow view of a civil action for invasion of privacy articulated by the New York Court of Appeals in *Messenger v. Gruner & Jahr Printing & Publ'g*, 727 N.E.2d 549 (N.Y. 2000), it also illustrates how provocative promotional announcements can, as a practical matter, serve to diminish the level of constitutional protection afforded investigative journalism.

The Broadcasts & Promotions

In November 1997, television station WJLA-TV broadcast a news report concerning complaints made by several women to the Virginia Board of Medicine that they had been sexually abused by their doctor, Stephen M. Levin, M.D., an orthopedic surgeon who performs intra-vaginal proce-

dures on female patients suffering from lower back pain.

The broadcast reported that the Board had dismissed those complaints, citing "insufficient evidence," and that one of the former patients had thereafter brought a civil action against Levin in the Circuit Court of Fairfax County. In that regard, the broadcast recounted his former patients' complaints, made to the Board, in interviews with WJLA, and in that civil action, that Levin had subjected them to "inappropriate" and "highly unusual pelvic exams."

The broadcast also included excerpts of an interview with Dr. Loren Fishman, an expert in the treatment of lower back pain, who said that he had never heard of Levin's treatment technique and that, to his knowledge, it was not described in the medical literature.

In the week prior to the broadcast, WJLA promoted it with an advertisement in the *Washington Post*, promotional announcements on local radio stations, and in two separate promotions on its television station. The promotional an-

nouncements, none of which identified Levin by name, referred to WJLA's "I-team" investigation "expos[ing] the intimate violation of women at the hands of their doctor," asked "when does a doctor's treatment become a sexual assault?" and referred to the unnamed subject of the upcoming broadcast as "the 'Dirty Doc'" and "the 'X-rated Doctor.'"

One of the televised announcements contained a brief glimpse of Levin's face, secured by a WJLA producer with a hidden camera when she visited his office posing as a patient.

Following the broadcast, Levin sued WJLA for damages arising from the broadcast, the four promotional announcements, and statements allegedly made by a WJLA producer and reporter to Dr. Fishman when they interviewed him for the broadcast. Levin asserted, *inter alia*, causes of action for defamation and violation of §

The broadcast recounted his former patients' complaints, made to the Board, in interviews with WJLA, and in that civil action, that Levin had subjected them to "inappropriate" and "highly unusual pelvic exams."

The Wind Done Gone Case Settles: Sun Trust Bank v. Houghton Mifflin

Margaret Mitchell's Estate has now settled its copyright infringement suit against Houghton Mifflin, publisher of *The Wind Done Gone*. Under the settlement, Houghton Mifflin will continue to publish the parody of *Gone With the Wind* with a label to the effect that it is an "unauthorized parody." According to press reports, Houghton Mifflin also agreed to make a contribution to Morehouse College in Atlanta.

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8.01-40(A) and sought \$30 million in compensatory damages, dropping his punitive damage claim before the case was submitted to the jury.

The Trial

During a three-week trial, Levin presented testimony from a variety of health professionals that Levin's method of intra-vaginal procedure was appropriate and satisfied a national standard of care for the treatment of back pain. He also submitted testimony that WJLA had failed to include in the broadcast information provided by other doctors, urged to contact WJLA by Levin, who asserted that his treatment technique was appropriate, used by many other doctors, and successful.

In addition, Dr. Fishman testified that, on the evening of the broadcast, after receiving a phone call from Levin, he telephoned an unidentified receptionist at WJLA and indicated that, in the wake of Levin's call, he no longer wished to appear on the broadcast. There

was, however, no evidence that Levin's message was ever communicated to anyone at WJLA responsible for airing the broadcast. Finally, Levin testified that WJLA failed to interview him prior to the broadcast despite the fact that his attorney offered to make him available for an interview if she could review any excerpts from it that WJLA proposed to air before they were broadcast.

For its part, WJLA countered with testimony from nine of Levin's former patients that they believed his treatment of them had been abusive and humiliating, including what two of them described as inappropriate breast fondling performed under the pretext of examining for breast cancer, and what others described as inducing erections in Levin.

Moreover, WJLA sponsored the expert testimony of an orthopedic surgeon that both the intra-vaginal treatment of back pain and breast exams are "completely out of the realm of orthopedics."

In addition, WJLA submitted testimony concerning both the scope of its investigation – which included interviews with two other orthopedic surgeons, in addition to Dr. Fishman, who said they had never heard of Levin's treatment technique – and its journalists' good faith belief in the truth of what they had been told by Levin's former patients.

Similarly, the WJLA employees responsible for preparing the promotional announcements testified that they had reviewed the videotape interviews of Levin's former patients, believed that he had in fact sexually abused them, and were privy to no other information gathered during the investigation conducted by the station's journalists.

Finally, Dr. Fishman testified that (1) he had never

heard of Levin before receiving a phone call from him on the eve of the broadcast, (2) that when he was interviewed by WJLA, he was told only about a hypothetical, unidentified physician who was "sexually approaching his female patients" and "digitally stimulating [them] in the vagina and causing pain to

them," and (3) that everything attributed to him on the broadcast itself was accurate.

At trial, Judge Jonathan Thacher of the Fairfax County Circuit Court adopted, over WJLA's objection, Levin's proposed verdict form, which required the jury to make a single finding with respect to whether Levin had been defamed by the six different publications considered together. The court further instructed the jury that it could award presumed damages if it concluded that WJLA disseminated the "statements" at issue with actual malice. The jury awarded \$575,000 on the misappropriation count, based on the promotional announcement that contained the hidden camera footage, awarded \$2 million on the defamation count, and responded affirmatively to a special interrogatory asking whether WJLA made the defamatory statements at issue with actual malice.

In December 2001, the Virginia Supreme Court granted WJLA's petition for appeal (there is no direct appeal as of

The jury awarded \$575,000 on the misappropriation count, based on the promotional announcement that contained the hidden camera footage, awarded \$2 million on the defamation count

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right in Virginia and, in a case such as this, no appeal to an intermediate appellate court).

The Defamation Count

On appeal, WJLA argued that, if any one of the six allegedly defamatory publications and broadcasts at issue was not actionable as a matter of law, the defamation verdict could not stand and a new trial was necessary because the verdict form did not distinguish between them and, as a result, there was no way of ascertaining whether the jury's verdict was in fact based on a constitutionally protected or otherwise nonactionable publication.

Although the court indicated that, "[u]nder different circumstances," it "well might agree with WJLA's position on this issue," it nevertheless concluded that the station had waived the argument at trial when it agreed to a jury instruction that "permitted the jury to return a verdict for Dr. Levin if 'any' of the publications were made by WJLA and were defamatory."

The court did not address WJLA's contention that this jury instruction, standing alone, was unobjectionable, and that it had objected to the general verdict form proposed by Levin, precisely because it failed to require the jury to make a separate finding with respect to each allegedly actionable publication. In addition, the court held, apparently alternatively, that, "[w]hile it is true, as WJLA points out, that each publication of a defamatory statement is a separate tort, . . . a plaintiff is not required to bring a defamation action in that fashion," and because the case "was filed and tried on one count of defamation based collectively on publications and statements by the same defendant, its agents, and its employees and all regarding Dr. Levin's treatment modality," the "use of the general verdict form was not reversible error in this particular case."

Thus, the court rejected WJLA's contention that it was entitled to a new trial with respect to Levin's defa-

mation claim if any one of the six separate publications was not actionable as a matter of law. Rather, the court held, it was "limited" to an "independent review of the record regarding . . . whether any one publication was actionable as a matter of law." As a result, although the court proceeded to consider the substantive defenses advanced by WJLA, it did not apply them separately to each distinct publication and broadcast.

For example, the court held that "statements or publications by the same defendant regarding one specific subject or event and made over a relatively short period of time, some of which clearly identify the plaintiff and others which do not, may be considered together for the purpose of establishing that the plaintiff was the person 'of or concerning' whom the alleged defamatory state-

ments were made . . . even where the publication identifying the plaintiff is made subsequent to those that do not identify him."

Therefore, because "the thrust of Dr. Levin's claim of defamation was that WJLA's publications collectively accused him of

sexually assaulting some of his female patients," and because "all of WJLA's publications concerned Dr. Levin's treatment modality and were made within a relatively short period of time," the court held that it was of no legal consequence that three of the promotional announcements did not refer to any specific doctor.

Similarly, the court concluded that the verdict was not compromised by the fact that the allegedly defamatory statements to Dr. Fishman were made weeks before the broadcasts and that he did not understand them to refer to Levin.

Because Levin sought an award of presumed damages, and the jury purported to find that the "statements" about which Levin complained were disseminated with actual malice, the court agreed with WJLA that it was obliged to conduct "an independent examination of the whole record to determine whether the evidence was sufficient to support a finding of actual malice." Never-

Although the court proceeded to consider the substantive defenses advanced by WJLA, it did not apply them separately to each distinct publication and broadcast.

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theless, the court's articulation of the required scope of its "independent review" served to limit its reach and its utility. Specifically, the court not only indicated that it was required to "view the record in a light favorable to Dr. Levin, including the jury's finding as demonstrated by its response to the special interrogatory," but also that it would "affirm the trial court's decision to submit that issue to the jury . . . unless it is plainly wrong or without support in the record."

Declining to "recount all the evidence that would support" a finding of "actual malice," the court proceeded to hold that the jury could properly have made such a finding because "in its promotional publications WJLA, directly or by implication, accused Dr. Levin of committing criminal sexual assaults while knowing that no criminal charges had been brought against him and having reason to know" that "such charges probably could not be sustained" since the Virginia Medical Board had dismissed his former patients' complaints.

In addition, the court concluded that a finding of actual malice could be based on "WJLA's use of Dr. Fishman's statement that Dr. Levin's treatment modality . . . was improper despite its knowledge" of what it described as Fishman's "retraction" of that statement on the evening of the broadcast. The court did not undertake to determine whether actual malice had been proven with respect to each publication at issue, thereby permitting it to find actual malice with respect to the promotional announcements based on information known only to the reporter and producer, who played no role in their preparation, and to ignore the undisputed testimony of the those WJLA employees who did prepare the promotions that, based on their review of videotaped interviews with Levin's former patients, they in fact believed Levin had sexually abused those women.

Finally, acknowledging that "[i]n this context, the statements made by Dr. Levin's former patients were arguably expressions of their own subjective opinions about the treatment they had received," the court nevertheless concluded that the broadcast was both capable of a defamatory meaning and not constitutionally protected

opinion because "WJLA reported the allegations contained in these statements as fact" and "simply ignored or minimized competent data and opinions that contradicted the image of Dr. Levin that it conveyed to its viewing audience."

The Misappropriation Count

Applying the "newsworthiness exception" to misappropriation claims recognized in most other jurisdictions, the Court reversed the judgment on the statutory misappropriation count. Relying on *Messenger v. Gruner & Jahr Printing & Publ'g*, 727 N.E.2d 549 (N.Y. 2000), which construed New York's virtually identical misappropriation statute, the court held that, because "the principal purpose of WJLA's announcements was to promote a report 'of [a] newsworthy event [] or matter[] of public interest,'" *i.e.*, "a physician [being] accused by his patients of sexually assaulting them," the "use of Dr. Levin's image in WJLA's promotional announcements was not an unauthorized use prohibited under Code § 8.01-40." Moreover, the court concluded that Levin's attempt to recover under the statute in these circumstances would, in effect, establish the tort of false light invasion of privacy in Virginia, a tort which, together with intrusion and publication of false facts, was "implicitly excluded" by the Legislature "as [an] actionable tort[] in Virginia" when it enacted the misappropriation statute.

Dr. Levin was represented, both at trial and on appeal, by John B. Williams, Kerrie L. Hook and Michael R. McCarthy of Collier Shannon Scott, PLLC. WJLA was represented in the Virginia Supreme Court by Lee Levine, Michael D. Sullivan and Ashley I. Kissinger of Levine Sullivan & Koch, L.L.P., William D. Dolan, III and Jennifer L. Blackwell of Venable, Baetjer & Howard, LLP., and by trial counsel David J. Branson and Alec Zacaroli of Wallace King Marraro & Branson, PLLC.

Florida Jury Finds for Radio Host in Libel Trial

Host Represents Self; Mistrial Declared for Station

It took just 25 minutes for a Florida jury to decide that radio talk show host Dick Farrel did not defame retired teacher Larry Ferrara. *Ferrara v. Farrel*, No. CL-007753-AJ (Fla. Cir. Ct., 15th Cir. jury verdict May 30, 2002).

Farrel, the professional name of Farrel Austin Levitt, leases a daily morning drive time slot on WPBR-AM in Lantana, Fla. Ferrara, who was apparently a frequent caller to Farrel's show, alleged that he was defamed when the host described him as a homosexual and a pedophile.

Farrel denied making the statements, and argued that he never referred to the plaintiff by name, instead referring to him as "Larry from Tequesta" and the "fired teacher from Tequesta."

Ferrara was a teacher at John I. Leonard High School in Lake Worth, Fla. until 1986, when he was fired for insubordination, although he alleges that he was fired in retaliation for whistleblowing. He later ran an unsuccessful campaign for a spot on the Palm Beach County School Board. Ferrara discussed his firing on the air in phone calls to Farrel's program.

Halfway through the trial, Farrel decided to represent himself; prior to that he was represented by John P. Marinelli of West Palm Beach. Acting as his own lawyer, Farrel questioned himself by moving into and out of the witness stand, and also extensively questioned his accuser and his attorney, Barry M. Silver of Boca Raton.

According to reports in the *Palm Beach Post*, liberal Silver and conservative Farrel clashed throughout the eight-day trial. In an interview, Farrel claimed that Silver had brought the case as a means of forcing him to keep quiet about his conservative opinions.

As the case was presented to the jury, Circuit Judge Thomas Barkdull ruled that by calling the program, Ferrara injected himself into the debate and was therefore a limited purpose public figure. According to Far-

rel, Ferrara also contacted businesses that advertised during the program, asking them to stop their advertising during Farrel's show.

Ferrara has until June 28 to file an appeal the verdict against him.

After the verdict, Farrel filed a motion seeking to recover his attorney's fees and those of the station. Farrel said that he must indemnify the station's expenses under the terms of his contract.

The motion was pending at press time.

The station was also named in the suit, but Judge Barkdull declared a mistrial as to the station after agreeing to allow the plaintiff to present a tape of

snippets of Farrel's program, since the station's intended defense relied on the tape not being played.

A retrial against the station is planned for the fall, although the station has filed a motion for summary judgment.

The station is represented by Valentin Rodriguez of West Palm Beach.

***Acting as his own lawyer,
Farrel questioned himself
by moving into and out of
the witness stand***

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Court of Appeals Rebuffs Former Band Manager for a Second Time

Trial court's grant of summary judgment for book's source is upheld

For the second time in seven months, the California Court of Appeals has upheld a trial court's decision against Patrick Colecchio, the manager of the 1960s soft-rock band Association. *See Colecchio v. Laster*, 2002 WL 1182807 (Cal. Ct. App. June 4, 2002). In its most recent decision, written by Justice Michael G. Nott and joined by Justices Todd and Ashmann-Gerst, the court of appeals upheld the trial court's grant of summary judgment in favor of Owen Laster, a source for the book that gave rise to Colecchio's defamation claim.

Colecchio was suing over a paragraph in *The Operator*, a biography of David Geffen. The passage detailed an unconfirmed story about how Geffen signed the Association to a record deal:

The legend went that Geffen signed the Association – a band that made it big with such songs as “Never, My Love” and “Cherish” – after having heard that the band's manager had been intoxicated at a wild party one night. Geffen was not at the party, the story went, but he called the manager the morning after and referred to ‘conversations’ they had the night before. Geffen told the manager that he had, “as requested,” drawn up the contracts to represent them at the agency. “Where does the chutzpah come from?” Owen Laster thought, upon hearing Geffen tell the story. Geffen remembered the story differently; he said he signed the group after being introduced to them by Joe Butler, the drummer in the Lovin’ Spoonful.

Specifically, Colecchio was upset with the “legend” portion of the story. Colecchio claimed he did not agree to Geffen's representation of the band under the circumstances described in the “legend.” He also claimed that the statement “damaged his reputation and caused him emotional distress.”

In November 2000, Colecchio brought a defamation action suing Laster, as well as Random House and Thomas R. King, the author of the book. The trial court

later dismissed Random House and King from the action. Last November, the court of appeals – in a decision also written by Justice Nott – affirmed the dismissal. In that decision, the court of appeals held that the passage in question would not be understood by a reasonable reader to be factual. The use of the word “legend” proved to be significant in the court's analysis. *See LDRC LibelLetter*, Nov. 2001 at 35.

Three months prior to the court of appeals' ruling – in August 2001 – Laster filed a motion for summary judgment with the trial court. His motion argued, among other things, that his statements were not actionable because they “constituted recollection and opinion rather than fact.” The trial court granted the motion and Colecchio again appealed.

Looking to the totality of the circumstances to determine whether the allegedly defamatory statement constituted opinion or fact, the court of appeals held that Laster's statements were not sufficiently factual to be actionable.

The court of appeals cited the fact that Laster's statements to King were made in a two-hour interview regarding events that occurred more than 30 years earlier. Laster had expressed his uncertainty about the story to King, and did not claim to have direct knowledge of Colecchio's intoxication on the night in question.

The court concluded that the average reader would “not credit Laster's statement about the incident as a factual account, but interpret it as an apocryphal story about Geffen's meteoric rise in the entertainment industry.” Thus, the statements were not actionable, and the grant of summary judgment was affirmed.

John J. Tasker, of Callahan, McCune & Willis in Los Angeles, represented Owen Laster. Neville L. Johnson, Brian A. Rishwain and James T. Ryan, of Johnson & Rishwain in Los Angeles, represented Patrick Colecchio.

The court concluded that the average reader would “not credit Laster's statement about the incident as a factual account, but interpret it as an apocryphal story”

Judge Finds Evidence Does Not Support Jury's Verdict in Favor of HIV+ Model

Punitive Damages Tossed and Compensatory Damages Reduced

By Victor A. Kovner and Gregory A. Welch

A state court judge in New York has ruled that an HIV-positive woman was not entitled to the full amount of damages awarded by a jury last September in a defamation case concerning defendants' use of her photograph to illustrate a character in a patient information brochure for an anti-AIDS drug. In a May 30 decision in *Doe v. Merck & Co., et al.*, No. 10786-98 (N.Y. Sup. Ct., Suffolk Co. 2002), Justice Alan D. Oshrin vacated the jury's award of punitive damages. He also ordered a new trial on compensatory damages unless the plaintiff accepts a reduced amount of compensatory damages.

The dispute in this action arose after the plaintiff, a woman in her thirties, sought modeling work through an agency in California which represents only models who are HIV-positive. She successfully auditioned for a job modeling for materials to promote the drug Crixivan, a protease inhibitor developed by defendant Merck. These materi-

als were created with the assistance of defendant Harrison & Star, an advertising agency that serves the health-care industry. The plaintiff acknowledged that she agreed to appear in materials for Crixivan, but she claimed that she did not consent to have her photograph placed next to a character sketch of "Maria," who was described as an HIV+ 19-year-old with two children, aged 3 years and 18 months, who also took a medication to control a recurring case of herpes.

Justice Oshrin was assigned to preside over the trial on damages after New York Supreme Court Justice Mary Werner granted summary judgment to the plaintiff on liability. *Doe v. Merck & Co., et al.*, No. 10786-98

(N.Y. Sup. Ct., Suffolk Co. June 13, 2001). After a two-week trial, the jury awarded plaintiff \$1,000,000 in compensatory damages and \$2,000,000 in punitive damages. In their post-trial motion, Merck and Harrison & Star argued that the evi-

dence at trial did not support the verdict. Justice Oshrin agreed.

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The authors had intended readers to understand that "Maria" and the three other characters described in the brochure were not actual people, but rather composites

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Judge Finds Evidence Does Not Support Jury's Verdict in Favor of HIV+ Model

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Punitive Damages Vacated

Justice Oshrin found that the evidence did not establish that either Merck or Harrison & Star had acted with common law malice toward the plaintiff. Under New York law, punitive damages can be awarded in a defamation case only if the defendant acted with both actual malice and common law malice. The summary judgment decision on liability held that, because defendants acknowledged the description of "Maria" was fictional, plaintiff had established actual malice. Accordingly, the only question at the damages trial was whether the plaintiff could show common law malice.

Noting that common law malice was defined as "hatred, ill will, spite, criminal mental state or a wilful, wanton and deliberate disregard of the interests of others," Justice Oshrin examined the evidence presented at trial. The evidence showed that the text of the brochure, including the description of "Maria," was completed long before plaintiff was hired and that the authors had intended readers to understand that "Maria" and the three other characters described in the brochure were not actual people, but rather composites of a number of Crixivan users who had provided information for the brochure.

Moreover, plaintiff's own agent, Keith Lewis, testified that he had consented to the use of the plaintiff's photograph in the brochure on her behalf and that he had the authority to do so under the agency's "Model/Actor" contract with the plaintiff (although admittedly no release was ever signed by the plaintiff herself).

After one of plaintiff's lawyers wrote a letter to Merck complaining about the brochure, an in-house lawyer for Merck called Mr. Lewis, who confirmed that he had given permission for the use of plaintiff's photograph. Justice Oshrin further observed that, although Merck believed it had permission to distribute the brochures, Merck nevertheless took remedial action to halt future distribution of the brochures and even reprinted brochures without plaintiff's photograph as an accommodation to her.

Justice Oshrin concluded that, while certain aspects of defendants' conduct "may constitute carelessness or negligence," it could not justify a finding of common law malice and the \$2,000,000 punitive damages award must fall.

Compensatory Damages Reduced

Turning next to the evidence supporting the jury's \$1,000,000 compensatory damages award, Justice Oshrin found that, although there was conflicting evidence of the extent of plaintiff's emotional distress and reputational harm, there was sufficient evidence "to warrant a substantial award." Plaintiff presented testimony from one witness who believed that the description of "Maria" in the brochure was about the plaintiff and, as a result, he thought for a brief time that she was promiscuous and "a slut."

Plaintiff also presented fact witnesses and experts who testified that, prior to the publication of Merck's brochure, she had suffered and overcome several devastating events in her life, including, among other things, her husband's confession during her eighth month of pregnancy that he knew he was HIV-positive before they married; the subsequent birth of an HIV-positive son; continuing threats to her health and the health of her son; and the death of her father and the subsequent loss of the family business.

As a consequence of these personal tragedies, plaintiff was in therapy for years prior to the publication of the brochure. However, some witnesses testified that the appearance of her photograph in the Merck brochure was at least as devastating to plaintiff as these other events, and had a terrible effect on the course of plaintiff's recovery.

While observing that such testimony "warrants concern," Justice Oshrin acknowledged that issues of witness credibility were for the jury to decide. However, he ultimately found that the jury's award was "excessive in some degree due to passion, prejudice or sympathy rather than a reasoned assessment of the evidence of injury," and that reasonable compensation for plaintiff's injury could not exceed \$650,000. Therefore, he ordered that, unless plaintiff agreed to reduce the compensatory damages award to \$650,000, it would be necessary to conduct a new trial on compensatory damages alone.

Plaintiff has thirty days from the date of Justice Oshrin's order to make her election.

Victor A. Kovner, Gregory A. Welch and Constance M. Pendleton of Davis Wright Tremaine LLP, which was engaged after Justice Werner granted summary judgment to plaintiff, together with Sara Edelman of Davis & Gilbert LLP, represented Merck & Co. and Harrison & Star, Inc. Joseph A. Tranfo and Meredith C. Braxton of Tranfo & Tranfo represented the plaintiff.

Three Judge Common Pleas Panel Grants J.N.O.V.

Plaintiff Relied On Dismissed Theory At Trial

By Amy B. Ginensky and Brian T. Donadio

On May 29, 2002, a specially convened *en banc* panel of Court of Common Pleas judges – consisting of Judges Barry F. Feudale, Emanuel A. Cassimatis and Alexander Endy – granted the motion for judgment notwithstanding the verdict of defendant Philadelphia Newspapers, Inc., in a defamation action filed by Municipal Court Judge Ronald B. Merriweather against the publisher of *The Philadelphia Daily News*. *Merriweather v. Philadelphia Newspapers, Inc.*, No. 0987-0771 (Ct. Common Pleas). A state court jury had previously awarded Merriweather \$500,000 in the suit, which arose out of a 1987 article concerning the federal indictment of former Philadelphia Common Pleas Judge Kenneth Harris. The case has already involved two appeals from the granting of summary judgment.

While Harris' indictment on extortion and racketeering charges was premised on his actions in 14 cases, the 1987 article at issue, entitled "Feds: Court Reporter's Pot Trial Fixed" -- one of a number of Harris related articles published that day -- focused on a drug possession case against Harris' court reporter. The article reported that Harris had been indicted for conspiring with Massey's attorney to fix the case.

The article went on to report that, the court reporter, Loretta Massey, appeared at trial with politicians and lawyers who attested to her good character in support of her defense that she did not know that a box she brought back from a trip to Jamaica contained nearly a pound of marijuana and hashish. Basing his decision on the testimonials and his "everyday common sense," presiding Judge Merriweather cleared Massey of the charges.

The article about the case specifically stated, "Neither Judge Merriweather or Massey is accused of wrong doing."

In 1992, on appeal from the granting of summary judgment in defendants' favor on fair report, the Superior Court recognized that plaintiff's action was based

on two theories: (1) that the article implied that the federal government accused, but did not charge, Judge Merriweather of fixing Massey's trial and (2) that the headline and article taken together implied that Judge Merriweather fixed Massey's trial. *Merriweather v. Philadelphia Newspapers, Inc.*, No. 01365 PHL 1991, slip op. (Pa. Super. Oct. 23, 1992).

While the Superior Court held that the second theory was viable and could be tried, the Court dismissed the first theory, finding that "the article clearly states that Judge Merriweather was *not accused* of any wrongdoing." *Id.*; see also *Merriweather v. Philadelphia Newspapers, Inc.*, 684 A.2d 137 (Pa. Super. 1996) (recognizing, on appeal from grant of summary judgment on actual malice, only cause of action arising out of alleged implication that Judge Merriweather fixed Massey's trial).

In 2000, the case finally went to trial.

In its motion for post-trial relief, PNI argued that in an effort to avoid litigating his role in the acquittal,

Merriweather actually tried the wrong case. PNI maintained that the plaintiff relied at trial on a theory that the headline of the article depicting the Massey trial as fixed, along with the mention in the article of his identity as the trial judge, suggested that the federal govern-

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The article about the case specifically stated, "Neither Judge Merriweather or Massey is accused of wrong doing."

LDRC would like to thank summer interns — Rhoda K. Nkojo, George Washington Law School, Class of 2003; Kimberly Rose, Fordham University School of Law, Class of 2004; and Adam Schwartz, Stanford Law School, Class of 2004 — for their contributions to this month's *LDRC MediaLawLetter*.

Three Judge Common Pleas Panel Grants J.N.O.V.

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ment was accusing him of being involved in fixing the trial -- the theory that the Pennsylvania Superior Court had rejected as not actionable. The *en banc* Common Pleas panel agreed, holding that “the plaintiff chose to proceed to trial on a claim that the record on post-trial relief reflects, was contrary to the law of the case, as rendered and reiterated by two Superior Court panels.”

In granting judgment notwithstanding the verdict following the February, 2000, jury verdict, the *en banc* panel rejected Merriweather’s arguments that (1) the Superior Court’s prior rejection of the theory eventually invoked at trial was non-binding *dicta*; (2) the Supreme Court in *MacElree v. Philadelphia Newspapers, Inc., 674 A.2d 1050 (Pa. 1996)* had implicitly overruled the Superior Court’s decision; and (3) Merriweather actually presented evidence supporting other allegedly defamatory implications that could have been the basis of the jury’s verdict in his favor.

First, the *en banc* panel held that in the first appeal in the case, the Superior Court expressly rejected Merriweather’s assertion that a jury could conclude that the article was an abuse of the fair report privilege because it implied that federal authorities had accused Merriweather of participating in the conspiracy to fix the Massey case. The *en banc* panel found that the Superior Court’s ruling was not *dicta*.

Second, the *en banc* panel held that the Pennsylvania Supreme Court holding in *MacElree* had no effect on Merriweather’s case. Merriweather argued that the Supreme Court’s analysis in *MacElree* would support a claim that notwithstanding the fact that the article expressly stated that he was not accused of wrongdoing, other portions of the article could have led a reader to draw the opposite conclusion.

The *en banc* panel rejected Merriweather’s reading of *MacElree*. It found instead that *MacElree* holding that “specific language may be defamatory even though

the subject of the defamatory language is not the focus of the article [and that] a publication may be sympathetic towards its subject overall while particular portions have a defamatory meaning” did not apply where, as in Merriweather’s case, an article expressly refutes the defamatory implication.

The *en banc* panel further noted that Merriweather’s reading of *MacElree* was contrary to the axiom of libel law that an allegedly defamatory statement must be read within the context of the article as a whole.

Finally, the *en banc* panel rejected Merriweather’s contention that there was evidence presented at trial to support multiple theories of recovery, including the

theory that the article implied a direct accusation that Merriweather was involved in a conspiracy to fix Massey’s trial, a theory that had survived appeal to the Superior Court. Contrary to Merriweather’s argument, the *en banc* panel found that the

trial court’s initial and closing jury instructions, given with Merriweather’s approval, charged the jury to consider only one theory -- the theory twice rejected as inactionable by the Superior Court. Noting that a jury verdict could not be upheld on the basis of a legal theory on which the jury had never been instructed, the *en banc* panel therefore granted judgment notwithstanding the verdict in favor of PNI.

Merriweather is represented by Geoffrey Johnson of Sprague & Sprague. Philadelphia Newspapers, Inc., is represented by Robert Heim, Amy Ginensky and Brian Donadio at Dechert Price & Rhoads.

Amy Ginensky is Chair of Dechert’s Media Practice and Vice Chair of its Litigation Department. Ms. Ginensky and Robert Heim, Chair of the Litigation Department, tried the case. Brian Donadio is an Associate in the Media and Litigation Department and is working on this matter.

Merriweather’s reading of MacElree was contrary to the axiom of libel law that an allegedly defamatory statement must be read within the context of the article as a whole.

Summary Judgment Granted In Internet Libel and Privacy Case On Ground That Actress Was Public Figure

Matchmaker Service Not Protected by CDA Immunity

By Timothy L. Alger

A federal judge in Los Angeles granted summary judgment to Lycos, Inc. and a subsidiary, Metrosplash.com, Inc., in a lawsuit brought by television actress Chase Masterson (“Leeta, the D’abo girl” in *Star Trek: Deep Space Nine*) over a false profile posted on Lycos’ Matchmaker service. *Carafano v. Metrosplash.com, Inc.*, Case No. CV 01-0018 DT (CWx) (C.D. Cal. Mar. 11, 2002)

Federal district court judge Dickran Tevzizian rejected defendants’ argument that they were immune from suit under the Communications Decency Act of 1996, 47 U.S.C. § 230 (“CDA”).

The court concluded that the Matchmaker service was an “interactive computer service,” as defined by the CDA, but it held that the process by which the member profiles are created—through the use of specific questions—made Matchmaker an “information content provider,” and unable to claim immunity from publisher liability under section 230(c)(1).

But the court did agree with defendants that Masterson (whose legal name is Christianne Carafano) was a general purpose public figure because of her chosen profession. Summary judgment was appropriate, then, because Masterson was unable to show that defendants knew or should have known that the profile was false when it was posted by an unknown person on the Matchmaker service in late October 1999. The court dismissed Masterson’s claims for defamation, negligence, appropriation of the right of publicity, and invasion of privacy by disclosure of private facts.

The Profile

Matchmaker.com is a service, accessed from the World Wide Web, that permits members to search a

database comprised of profiles posted by other members. Members may then contact each other by e-mail and, if they wish, make arrangements to meet. To become a member, a person must select a “community” (focusing on a particular city or special interest) and complete a questionnaire of up to 62 multiple-choice questions. A member also must answer at least one of a series of essay questions, and may post up to 10 photographs. The answers to the questions, and the optional photographs, become the data that makes up the member’s “profile.” Membership is anonymous.

Matchmaker does not review the text of profiles prior to posting. As soon as a member completes his or

The court found that the profiles on Matchmaker were “created” from Matchmaker’s questions, some of which were multiple-choice, and this made Matchmaker an information content provider.

her questionnaire, the profile is made available to other members of the community. Matchmaker relies on its members to report abuses. Whenever a member complains about inappropriate content posted by others, the system operator in charge of that community investigates and, if appropriate, edits

or removes the offending profile.

On October 23, 1999, an unknown person posted a profile, under the name “Chase529,” on Matchmaker’s Los Angeles community. Matchmaker’s records show that the profile was posted, and subsequently modified one time, by a person using computer terminals in Europe. The profile included four photographs of Masterson. The answer to an essay question contained plaintiff’s home address. Masterson alleged that other essay answers and the answer to a multiple-choice question falsely characterized her as licentious. The profile also included an e-mail address which, when contacted, sent out an automatic reply that included a sexual taunt and Masterson’s home telephone number.

Masterson testified at deposition that she learned of the Chase529 profile on November 4, 1999, and re-

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Summary Judgment Granted In Internet Libel and Privacy Case On Ground That Actress Was Public Figure

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ported it to the police the following day. She did not contact Matchmaker. An associate of Masterson testified that she contacted Matchmaker by telephone, apparently over the weekend of November 6-7, 1999, and informed a representative that the Chase529 profile was false. The profile was made inaccessible to Matchmaker members on Monday, and purged from Matchmaker's servers that night. Masterson testified that she received harassing telephone calls and an anonymous threatening fax.

One year after the profile was posted and removed, plaintiff sued Lycos, Inc. and Metrosplash.com, Inc., which developed the Matchmaker service before it was acquired by Lycos in the summer of 2000, in California state court.

Defendants removed the action to federal court, and then moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, primarily on the ground that the profile was third-party content and defendants were immune from suit under the CDA. The motion was denied without hearing by Judge Carlos Moreno on February 8, 2001, on the basis that CDA's immunity applied only to Internet service providers, and did not extend to interactive web sites such as Matchmaker.com. (Judge Moreno was subsequently appointed to the California Supreme Court, and the case was reassigned to Judge Tevrizian.)

The Motion

After discovery, defendants moved for summary judgment, arguing: (1) the entire action was barred by the CDA; (2) the injurious falsehood claims failed because Masterson was a public figure and could not establish, by clear and convincing evidence, that defendants acted with actual malice; and (3) plaintiff could not maintain a private facts claim because the disclosure of her address was newsworthy, was not highly offensive, and was not made with reckless disregard for its offensiveness.

In opposition, Masterson contended that the CDA did not bar her claims because Matchmaker participates in the creation of website content by presenting members with questions that "directly shape the content of each member's profile." This, Masterson argued, distinguished the Matchmaker profiles from the CDA-protected bulletin board postings in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), and reader reviews in *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001).

Masterson also argued that she was not a public figure because she had not achieved pervasive fame or notoriety, and was merely "a working actress" who was well-known

only among "Trekkies." She contended that her negligence claim stood on its own, and should survive any dismissal of her defamation claim, on the ground that defendants did not adopt screening procedures for profiles and allegedly delayed in removing the Chase529 profile after her associate contacted Matchmaker. Finally, she asserted that she could maintain a

private facts claim based on the disclosure of her home address because she had endeavored, by using a stage name, to keep such information out of the public eye.

She's a Public Figure

Judge Tevrizian agreed with defendants' public figure argument. "Courts often have found that there is a public interest which attaches to people who by their professional calling, such as actors, create a legitimate and widespread attention to their activities." In his 37-page order, the court quoted Masterson's complaint, where she described herself as a "successful actress who works in television, motion pictures, and live theater," and reviewed, in detail, her public appearances and her acting roles. The court was persuaded by Masterson's regular appearances at fan conventions and cruises, her use of websites, managers and agents

The court was persuaded by, among other things ... her assertion that she had "a worldwide following" and one of the largest Star Trek fan clubs, and the fact that her name was the answer to a question on the television game show, Jeopardy.

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Summary Judgment Granted In Internet Libel and Privacy Case On Ground That Actress Was Public Figure

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to promote her career, her assertion that she had “a worldwide following” and one of the largest Star Trek fan clubs, and the fact that her name was the answer to a question on the television game show, *Jeopardy*.

The court went on to find that Masterson had failed to establish a genuine issue of fact that defendants acted with actual malice. To meet this requirement, Masterson would have to show that Matchmaker knew at the time the profile was posted that it was false, and this she could not do because member profiles are immediately accessible after they are posted on the service. Judge Tevrizian also pointed out that there was no evidence that Matchmaker ever received the automatic e-mail reply, which Masterson had contended put Matchmaker on notice of the profile’s probable falsity.

Lack of actual malice doomed the defamation claim, the right of publicity claim (*see Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180 (9th Cir. 2001) (applying actual malice rule to right of publicity claim brought by movie actor)), and the negligence claim, which the court agreed merely duplicated the defamation claim (*see Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177, 232 Cal. Rptr. 542 (1986) (First Amendment protections extend to “all claims whose gravamen is the alleged injurious falsehood of a statement”)).

No CDA Immunity

Judge Tevrizian agreed with defendants’ argument that Matchmaker was an interactive computer service, as defined by the CDA – in sharp contrast to Judge Moreno’s earlier decision denying defendants’ motion to dismiss. But the court found that the profiles on Matchmaker were “created” from Matchmaker’s questions, some of which were multiple-choice, and this made Matchmaker an information content provider, as defined in 47 U.S.C. § 230(f) (3), and therefore not immune from liability as the publisher of third-party content. Left unaddressed by the court was the fact that virtually all of the statements in the Chase529 profile complained of by Masterson were included in answers to open-ended essay questions, making the statements seemingly indistinguishable from the reader reviews in *Schneider v. Amazon.com, Inc.*

The court rejected Masterson’s private facts claim with the same reasoning used in its public figure analysis. “[T] here can be no doubt that plaintiff voluntarily assumed a position of public notoriety by becoming an entertainment celebrity,” and this, in combination with plaintiff’s “public discussion of her home life and entertaining of fans who visit her in Los Angeles,” created intense interest in details about her personal life and made her home address newsworthy. Masterson also had failed to create a triable issue as to whether the disclosure was made with reckless disregard for its offensiveness, as required in *Briscoe v. Reader’s Digest Assn.*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971), given that defendants were unaware of the contents of the profile when it was posted.

Mr. Alger is of counsel at Quinn Emanuel Urquhart Oliver & Hedges LLP in Los Angeles. He represented defendants Lycos, Inc. and Metrosplash.com, Inc. in the Carafano case. Plaintiff was represented by Gregory J. Aldisert of Greenberg Glusker Fields Claman Machtinger & Kin-sella LLP in Los Angeles.

Court Finds Consumer Reports Did Not Defame Lightbulb Manufacturer

No statement rendered false because Lights of America’s preferred test method wasn’t used

In June, the California Court of Appeals upheld a trial court’s dismissal of a defamation and trade libel claim brought by Lights of America, Inc., based on a *Consumer Reports* article recommending consumers “avoid” certain lightbulbs made by Lights of America. In a decision by Associate Justice Earl Johnson, and joined in by Judges Woods and Perluss, the court found that the article did not “cast aspersions on LOA’s business character,” nor did it contain any false statements of fact. *See Lights of America, Inc. v. Consumers Union of United States, Inc.*, 2002 WL 1272843 (Cal. Ct. App. June 10, 2002).

The case was based on an article published by Consumers Union in the January 1999 edition of *Consumer*

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Court Finds *Consumer Reports* Did Not Defame Lightbulb Manufacturer

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Reports. The article reviewed certain compact fluorescent lightbulbs, including lightbulbs made by Lights of America. For the review, tests were conducted on the lightbulbs and the results were compared to the information regularly included with the lightbulbs.

One aspect tested was the average time that it takes for each type of lightbulb to burn out – referred to as the “rated life.” The article reported that Lights of America’s lightbulbs “consistently fell far short of their rated life.” The article also reported on each type of lightbulb’s light output. The article reported that LOA’s lightbulbs achieved less light output than stated on the packaging.

The article concluded by saying: “We recommend that you stick with bulbs from General Electric, Osram Sylvania, and Philips. Avoid bulbs from Lights of America; in our experience, they don’t provide as much light, nor do they last as long as the package claims.”

After the article was published, Lights of America received a letter from The Home Depot expressing concern over the “not recommended” rating. Lights of America thereafter demanded that Consumers Union print a retraction of the article, including an admission that the tests performed “failed to use industry testing procedures, and as a result, the testing that was performed on LOA’s products was false and inaccurate.”

Consumers Union agreed to print a clarification, stating that the test results pertained only to six of Lights of America’s light bulbs, not its entire line. It did not concede anything on the veracity of the tests.

After Lights of America filed suit, Consumers Union demurred to the complaint. The trial court sustained the demurrer without leave to amend. The court of appeals affirmed that decision, which dismissed the action.

Specifically, the court of appeals found that the statements in the article were not defamatory as to Lights of America. Citing the Restatement (Second) of Torts, the

court said that when a statement “reflects merely upon the quality of what the plaintiff has to sell or solely on the character of his business, then it is injurious falsehood [also referred to as trade libel] alone.” A cause of action for defamation as to the company would be appropriate only if the article implied that the plaintiff was “dishonest or lacking in integrity” or “perpetuating a fraud upon the public by selling something that he knows to be defective.”

The court found that the article did “not cast aspersions on LOA’s business character,” and in fact, did not comment on LOA’s business character at all. Thus, the defamation claim failed, and the trial court had correctly sustained the demurrer.

As to the trade libel claim, the court found that the article was protected opinion. However, Lights of America claimed that the article supported a claim for trade libel because *Consumer Reports* had “failed to indicate to readers that the testing used in the article was not based on industry standard testing methods, procedures or protocols, nor was the testing done in the same manner in which LOA and other manufacturers had used to develop the claims made about their product.”

The court of appeals dismissed this contention for two reasons. First, Lights of America conceded there was no universally accepted “industry standard” for testing the lightbulbs. Second, and more importantly, the court said that “no statement in the article was rendered *false* because CU did not publish results based on the tests LOA wanted CU to use.” (Emphasis original.)

Thus, the court of appeals found that Lights of America could not allege that Consumers Union had published any false statement about Lights of America’s lightbulbs, and the trial court was correct in sustaining the demurrer as to the trade libel claim.

Corey E. Klein, of Gaims, Weil, West & Epstein in Los Angeles, and Michael N. Pollet, of Pollet & Felleman in New York, represented Consumers Union. Hari S. Lal, John Noble and Atul Kumar, of Hari S. Lal & Associates, represented Lights of America.

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Editor's Note: The following article inaugurates a new feature of the *MediaLawLetter*. The LDRC's Advisory Committee on New Legal Developments has undertaken to periodically publish a piece of legal commentary that takes a deeper look at some of the cases or events we cover, and relates them to potential new developments in media law. This month's article is written by Nathan Siegel of ABC, Inc., the Chair of the LDRC's Advisory Committee on New Legal Developments.

Libel-By-Implication and Actual Malice

Two Doctrines Passing in the Night

By Nathan Siegel

Last month's decision in *New Times v. Isaaks* raised eyebrows throughout the media community. The conclusion that an article intended to satirize a public official is actionable flies in the face of contemporary First Amendment jurisprudence. Discussion about *New Times* has naturally focused on its impact on satire and other forms of ironic humor.

However, even if the decision is ultimately reversed, it may also be an important sign of problems media defendants may encounter with suits brought under a different theory: the increasingly popular doctrine of libel-by-implication. Libel-by-implication has received a lot of attention lately, both from the judiciary and the media bar. *See, e.g., Green v. CBS*, 286 F.3d 281 (5th Cir. 2002); *Rubin v. U.S. News & World Report, Inc.*, 271 F.3d 1305, 1309 n.11 (11th Cir. 2001); *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000). Most of that attention has focused on the threshold issue in any libel case: whether a publication's alleged defamatory meaning may be gleaned not from the plain meaning of words, but from their alleged implications.

However, far less attention has been paid to a related, critically important issue. If the defendant loses the defamatory meaning issue and an implication claim is recognized, how should the "actual malice" fault standard be applied? As implication cases become more common, this question will almost certainly arise more often. Yet though "actual malice" has been a staple of defamation law for almost four decades, the answer has not been clearly settled.

Why Actual Malice Creates Unique Challenges in Libel-By-Implication Cases

The problem arises because cases involving implications or ironic humor differ from most libel cases in one important respect. In most cases, the meaning of what was published is usually obvious. Disputes normally focus on whether that meaning is defamatory, true, or privileged.

However, in cases involving implications or ironic humor, the core dispute arises because the meaning the plaintiff ascribes to the publication is very different than the meaning the defendant purports to have intended. Yet with one exception, none of the many United States Supreme Court cases defining "actual malice" involved facts where the fun-

damental dispute was over the meaning of the words used. As a result, the concept of "actual malice" was neither invented nor developed with the particular rubric of implication cases in mind. Rather, the concept was defined within more typical cases where disputes focused on truth and other issues. So when the Supreme Court defined malice as making a "statement . . . with knowledge that it was false or with reckless disregard" for its truth, there was no serious question about what "statement" and hence what "truth" the Court or the parties were talking about. *New York Times Co. v. Sullivan*, 376 U.S. 264, 280 (1964).

However, if applied literally to cases where there is a serious dispute about the very meaning of the "statement" at issue, the standard definition of malice may appear to be problematic. What "statement" should be used to test reckless disregard for its alleged falsity?

The problem is compounded because most lawyers and judges are trained to think about the progress of defamation cases in a certain logical order.

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The literal words used? The defendant's alleged interpretation of the statement? The court (or jury's) ultimate interpretation?

The problem is compounded because most lawyers and judges are trained to think about the progress of defamation cases in a certain logical order. First the court resolves any dispute about the actionability of words by deciding what they potentially mean and whether they are actionable. Once the court has interpreted the words at issue, the falsity of that statement is examined, and if falsity is contested (as it often is) defenses of privilege and fault are applied to that interpretation.

While this construct works in most cases, it breaks down when the constitutional malice standard is applied

to libel-by-implication. If the defendant does not believe the statement implies what the plaintiff says it does, it often follows that the defendant does not believe the alleged implication would be true. After all, the defendant never meant to say it in the first place.

Yet if the court ultimately adopts the plaintiff's version of the statement, and then inquires into the defendant's state of mind about that "statement", a literal application of the definition of constitutional malice would seem to require an automatic finding of liability.

Some libel-by-implication cases with different facts do not present as acute a problem, but the traditional definition of malice still does not fit comfortably. Consider the following hypothetical. A newspaper reports that a stockbroker facilitated a lucrative investment transaction for a United States Senator. It also reports that the following month the Senator supported the stockbroker's appointment to the SEC. The broker and the Senator allege the article implies an unethical quid pro quo, and the court agrees. The reporter testifies that she did not intend to imply misconduct by just reporting the facts, but she did in fact believe there was wrongdoing.

In this type of case, the traditional malice standard

does not appear to present an absolute bar, since the journalist testified to belief in the truth of the alleged defamatory implication. Nevertheless, the standard remains awkward, since it forces the defense to rest on the proposition that a journalist believed what he or she did not mean to say.

Both scenarios illustrate the basic problem with applying the traditional actual malice analysis to an implication case. Malice is supposed to be a purely subjective inquiry designed to punish only "calculated falsehoods". *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). But how can a journalist be said to utter a subjective, calculated falsehood when he does not believe he is even saying the supposed false implication?

Some libel-by-implication cases with different facts do not present as acute a problem, but the traditional definition of malice still does not fit comfortably.

How Actual Malice Should Be Applied: A Two-Part Intent Test

While the Supreme Court has never explicitly addressed these questions, it came close in *Bose Corp v. Consumers Union*, 466 U.S. 485 (1984). In *Bose*, the

Court held that if the defendant mistakenly communicated something he did not mean to say through poor choice of language, actual malice could not be established. Both *Bose* and the inherent logic of a subjective test point to the conclusion that the defendant's state of mind about it what intended to say must be the critical focal point of the malice inquiry in implication cases. After all, to knowingly make a false statement of fact, a person must have intended to state the fact in the first place.

Thus, where libel-by-implication is at issue, actual malice is better understood as a two-part, "dual scienter" standard. The first part asks what the defendant intended to say. The second part then asks whether the defendant knew or believed what it intended to say was false. The clear and convincing evidence standard of proof should be applied to both prongs of this inquiry, since both are equally integral elements of determining whether a calculated falsehood was published. The

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process of determining the objective meaning of the “statement” for purposes of defamatory meaning or objective falsity is irrelevant to the malice inquiry.

A few courts have adopted a dual intent standard. The Ninth Circuit has explicitly done so, first in *Newton v. National Broadcasting Cos., Inc.*, 930 F.2d 663 (9th Cir. 1990) and more recently in *Dodds v. American Broadcasting Cos., Inc.*, 145 F.3d 1053 (9th Cir. 1998). The Texas court in *New Times*, however, rejected an intent standard on the grounds that “intent to mislead or deceive” is not the same thing as “knowing or reckless disregard.” In fact, the two are essentially the same thing. Calculated falsehoods have scant constitutional value precisely because they have no plausible purpose other than to mislead people.

Misapplying Actual Malice

However, despite *Bose*, the logic of the concept of malice, and cases like *Newton*, courts still cannot reach agreement on the proper standard. The case law reveals that some courts have adopted at least two standards to apply actual malice in implication cases that may sometimes deviate from an intent test. Given the rise in implication claims, it is important for media attorneys to seek more uniform adoption of a two-part test focusing on the defendant’s intent.

THE TRADITIONAL STANDARD

One standard is to simply ignore the difference between implication/irony suits and most other defamation cases. These cases ignore what the defendant intended to say, and merely ask whether the defendant believed that the court or jury’s interpretation of the words at issue was probably false. The court in *New Times*, while purporting to apply a slightly modified standard, actually applied something very close to this traditional test, with very troubling results.

The classic example of this genre of cases may be *Bindrim v. Mitchell*, 155 Cal. Rptr. 529 (Cal. App. 2d

Dist. 1979). In *Bindrim*, a novelist attended a group therapy session, and then published a profanity-laced, fictionalized account of group therapy. The real-life therapist sued, and the court and jury found that people could understand the book to describe his actual sessions. The court held that a finding of malice could result virtually automatically, because the author obviously knew the facts in the book did not accurately portray the real sessions. Though there were facts in the record suggesting intent, whether the author intended for people to connect the book and the actual sessions did not even factor into the court’s legal analysis.

However, the traditional malice standard does not always inexorably lead to a plaintiff’s verdict in these cases. Sometimes, the facts permit the media defendant to defend the case under the traditional standard. Often, courts in these cases apply that standard without needing to address the issue.

A good example is *Levan vs. Capital Cities/ABC, Inc.*, 190 F.3d 1230 (11th Cir. 1997). In *Levan*, the parties vigorously disputed what, if any, implied meaning or “gist” the publication carried. The Court adopted a meaning somewhere in between the positions of the two parties. Turning to actual malice, it did not first consider whether what ABC thought it was saying might be different than the Court’s interpretation. Rather, it just analyzed whether there was significant evidence that ABC doubted the meaning the Court adopted, and found none.

However, one can easily imagine a different set of facts in which the analysis applied in cases like *Levan* would pose a problem. If there were evidence the defendant journalists did not believe in the truth of the “statement” as interpreted by the court, a finding of malice as a matter of law would seem to follow. Thus, in future implication cases, it may be necessary to distinguish cases like *Levan* by pointing out the court never had to consider the interplay between malice and implication doctrines, because the facts did not present the question.

In Bindrim, a novelist attended a group therapy session, and then published a profanity-laced, fictionalized account of group therapy.

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PREDICTING THE EFFECT ON THE READER

Several courts have adopted a modified actual malice test that primarily focuses on the defendant's subjective belief about how readers would understand the publication. This test asks whether the journalist actually foresaw that readers could likely misunderstand the intended meaning of the statement. If so, and if the journalist believes the meaning readers may perceive is probably false, actual malice is established.

One problem with this test is that as a practical matter it is easily confused with objective recklessness or even negligence. For example, in *Hoppe v. The Hearst Corp.*, 770 P.2d 203 (Wash. App. 1989) the court noted in *dicta* that malice could be established by showing that a journalist "recklessly failed to anticipate" how readers

would react to a publication. And even the Ninth Circuit suggested in *dicta* that malice could be established by evidence that "editors knew or should have known their statements would be misleading," *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1256 (9th Cir. 1997). The *Hoppe* formula seems

to lay out a test for objective recklessness, while *Eastwood* describes simple negligence. Neither court actually applied these tests. In fact, later in the same opinion the *Eastwood* court disavowed a negligence test and applied an intent standard. 123 F.3d at 1256 n. 20. Nevertheless, the confusion surrounding malice in implication cases tends to produce loose language that trial courts may mistakenly read as endorsing an objective test.

Other courts have articulated a standard that is clearly subjective. For example, the definition of malice adopted by the Texas Supreme Court in *Turner* and purportedly followed in *New Times* asks whether the defendant "knew or strongly suspected that the publication as a whole could present a false and defamatory impression of events." 38 S.W.3d at 120.

This test comes closer to correctly adapting the malice standard to implication or fictionalization cases, but it still falls short. There is a big difference between uttering a calculated falsehood, on the one hand, and saying something you believe to be true, but recognize some people "could" take the wrong way. For example, satirists and comedians routinely recognize that portions of their audience may misunderstand the subtleties of their humor. Yet that reality should not be a basis for depriving the rest of us of a good spoof. In effect, the rule allows people with no sense of humor to determine what is funny.

Similarly, the hypothetical journalist who reports the Senator-stock broker relationship described above may well recognize that some readers could infer misconduct,

even if the journalist does not intend to make that explicit accusation. Yet that inevitable reaction should not chill the reporting of facts believed to be accurate.

The correct test should focus on what the journalist actually intended to say, rather than what the journalist may have predicted

about reader reaction. Reader reaction issue may be relevant, but only because it may provide evidence of the defendant's intent. For example, evidence that the defendant believed that almost all reasonable readers would infer the alleged implication might be persuasive evidence of intent to mislead, depending on the facts. Indeed, that is what the Ninth Circuit recently found in *Solano v. Playgirl, Inc.*, 2002 U.S. App. LEXIS 11437 (9th Cir., June 13, 2002), when it concluded that magazine editors deliberately meant to convey the false impression that the plaintiff had posed nude for *Playgirl*. However, evidence that a comedian thought some people could misunderstand a joke would not likely establish malice. Ultimately, what the defendant actually intended to communicate should always be the governing standard.

There is a big difference between uttering a calculated falsehood, on the one hand, and saying something you believe to be true, but recognize some people "could" take the wrong way.

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Some Tough Strategic Choices

The interplay between malice and implication theories poses one additional wrinkle, at least in some jurisdictions. In a few jurisdictions, an intent standard has already been engrafted onto implication cases as part of the test for defamatory meaning. Following the D.C. Circuit's seminal opinion in *White v. Fraternal Order of Police*, 909 F.2d 512 (D.C. Cir. 1990), a few courts have required plaintiffs to point to evidence apparent from the face of the publication that the publisher "intends or endorses the defamatory inference." *Id.* at 520. This test applies to cases brought by private figures as well, and ameliorates some of the questions raised by the traditional definition of malice.

In jurisdictions where the *F.O.P.* test has been or might be adopted, the potential relevance of intent to both defamatory meaning and malice presents media attorneys with difficult strategic choices. Should intent be argued as a matter of defamatory meaning, malice, or both? And at what point(s) in the case should the issue(s) be raised?

The best strategy in any particular case will depend on an initial assessment of the facts. For example, because defamatory meaning is a threshold issue of law, the issue may usually be joined with no discovery. However, the wisdom of raising this issue with a threshold motion will depend heavily on the particular words at issue, since the publication itself will likely be the only permissible evidence of intent. Moreover, the normal preponderance of the evidence standard usually applies to the issue of defamatory meaning. And there is always the risk that if the plaintiff prevails on the issue initially, a court may be reluctant to reverse course later when the issue shifts from defamatory meaning to actual malice.

Presenting intent as a question of malice will usually require discovery and more prolonged litigation. However, depending on the facts, testimony and other extrinsic evidence may more effectively establish the defendant's true intent than the publication itself. Moreover, the tougher clear and convincing standard applies. Fi-

nally, in some cases it may be more effective to present both the defamatory meaning and malice issues at once, rather than through piecemeal motions. Extrinsic evidence technically relevant only to malice may nonetheless influence a court's assessment of defamatory meaning as well.

In summary, the actual malice standard may be comfortably applied in libel-by-implication cases. But it will require particular vigilance by media defense attorneys to elevate substance over form, and seek application of the standard in a way that remains faithful to the intent of *N.Y. Times v. Sullivan*.

UPDATE: Appellate Court Affirms Dismissal of Natural Born Killers Suit

On June 5, 2002, the Louisiana Court of Appeal for the First Circuit affirmed a trial court's grant of summary judgment in favor of defendants Time Warner and director Oliver Stone, producers and director of the film *Natural Born Killers*, in an on-going negligence and intentional tort claim brought by the estate of Patsy Byers, the victim of a robbery and shooting. *Byers v. Edmonson*, 2002 WL 1200768 (La.Ct. App. 2002).

In 1997, Ms. Byers filed a suit alleging that the film incited the violent incident. While the suit was pending, she died from complications that her family attributed to the shooting. The Louisiana Court of Appeal had previously reversed the trial court's First Amendment-based decision to dismiss the actions against the defendants, finding that, because the film was not before the court, the trial court was constrained to accept as true the allegation that the defendants intended to incite imminent unlawful conduct, which would strip the film of its First Amendment protection. *Byers v. Edmonson*, 712 So. 2d 681, 689, *writ denied*, 98-1596 (La. 1998), 726 So. 2d 29, *cert. denied, sub nom Time Warner Entertainment Co., L.P. v. Byers*, 526 U.S. 1005 (1999).

The case returned to the trial court for discovery on

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UPDATE: Appellate Court Affirms Dismissal of Natural Born Killers Suit

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the issue of the defendants' intent. After the plaintiffs' deposed director Oliver Stone and took additional discovery, the defendants prevailed on their motion for summary judgment in March 2001. The Byers family appealed.

After examining the film on the case's second appeal, and the lack of any direct evidence of an intent by the filmmakers to incite violence, the Court of Appeal found that the First Amendment does protect *Natural Born Killers* because the film does not incite individuals to lawless action. Rejecting the plaintiffs' second basis for challenging the film's First Amendment protection, the court, in an opinion by Circuit Judge Carter, held that there is no legal basis to extend the obscenity standard established under *Miller v. California*, 413 U.S. 15 (1972) to depictions of violence in motion pictures.

Incitement Not Found

In opposing summary judgment in the trial court, and on appeal, Byers argued that *Natural Born Killers* was not entitled to First Amendment protection because it was inciteful. Setting forth a test for constitutional restraint of inciteful speech, the Louisiana Court of Appeal held that if speech is directed or intended toward the goal of producing lawless conduct and was likely to produce such imminent conduct then the speech loses First Amendment protection. The court reasoned that while *Natural Born Killers'* imagery was saturated with violence, the film never directed or urged the viewer to commit any type of imminent lawless activity. The film, the court held, was within the realm of fantasy never urging nor entreating the commission of the portrayed violent activity. The court concluded that, as a matter of law, the film could not be considered inciteful speech unprotected by the First Amendment.

The Court of Appeal found that the First Amendment does protect Natural Born Killers because the film does not incite individuals to lawless action.

Obscenity Extension Not Appropriate

Arguing for an extension of the obscenity exception to the First Amendment to cover the speech in *Natural Born Killers*, Byers claimed that the violent imagery was per se obscene. Noting the Louisiana Supreme Court's recognition that the First Amendment does not permit a violence-based notion of obscenity, the court declined to extend the obscenity exception to First Amendment protection to cover the speech of the film. The court concluded by emphasizing that constitutional protection of free speech survives upon the basis of the belief that societal benefits reaped from the free flow of ideas far outweigh the potential harm such freedom might create.

Joseph Simpson, Rick Caballero and Ron Malcuso represented Plaintiff-Appellants, Patsy-Ann Byers, et. al. Timothy Schafer represented Defendant-Appellees, James and Suzanne Edmonson.

Alton Lewis of Cashe, Lewis, Moody & Coudrain, L.L.P. and Walter Dellinger, Robert Schwartz, and Victor Jih of O'Melveny & Myers, Los Angeles, represented Time Warner Entertainment Company, L.P. and Oliver Stone. David Wood, Los Angeles, also represented Mr. Stone.

***Any developments you think other
LDRC members should know about?***

Call us, send us an email or a note.

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New Jersey Appellate Division Affirms Summary Judgment for ABC in Hidden Camera Case

By Mary-Rose Papandrea

A New Jersey state appellate court affirmed summary judgment in favor of ABC and 18 individuals involved in the production of *Driving While Black* (“DWB”), a November 1996 report about racial profiling on the ABC newsmagazine program *PrimeTime Live*. See *Hornberger v. American Broadcasting Cos., Inc.*, __ A.2d __, 2002 WL 1058515 (N.J. App. Div. May 21, 2002). Judges Michael P. King, Mary C. Cuff, and Barbara Byrd Wecker held the broadcast was not defamatory and that the use of hidden cameras did not violate the New Jersey wiretapping statute or constitute fraud.

As part of a report on racial profiling, *PrimeTime Live* producer Joan Martelli arranged for three young African-American men to drive around New Jersey in an expensive car to see whether they would be stopped and how they would be treated. To document any stop that occurred, ABC rigged the car with hidden cameras. Three police officers in the town of Jamesburg stopped the car for allegedly failing to change lanes without signaling, removed the young men from the car and frisked them, searched the car’s interior, and released the young men without a warning or ticket. ABC broadcasted portions of the incident as part of a 12-minute segment on racial profiling.

Based on the broadcast, the three officers who conducted the stop and search – Louis Hornberger, Robert Tonkery, and James Mennuti – alleged claims for defamation, false light, fraud, and violations of the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 to 34. The trial court (Garruto, J.) granted ABC’s motion for summary judgment on all counts, and the Appellate Division affirmed.

The Broadcast

On November 27, 1996, ABC broadcast a news report on racial profiling titled “DWB” or “Driving While Black.” The report consisted of a variety of elements, including

comments from several young African-Americans about their experiences; videotaped footage of traffic stops in Florida and South Carolina that had been filmed from cameras mounted inside police cruisers; statistics gathered from various jurisdictions, including New Jersey, where profiling had been alleged or proven; hidden camera footage from the Jamesburg traffic stop and search; and comments on the stop and search by Professor Ogletree of Harvard Law School and Chief Victor Knowles of the Jamesburg Police Department.

John Quinones introduced the portion of the broadcast pertaining to the Jamesburg traffic stop by explaining that profiling “can happen anywhere, we are told.” He stated that ABC sought to test this premise by installing hidden cameras inside a Mercedes and asking “the owner’s son and two of his friends” to drive through various small towns.

After footage of the young men driving and getting pulled over, the report showed Officer Hornberger approaching the driver, explaining that he

had changed lanes without signaling, and asking the passengers for identification. When the rear-seat passenger says he did not have any, the officer asks him to get out.

The report then showed two officers searching the interior of the car. During this footage, Quinones’s narration states that “they were stopped for a minor traffic violation” and “separated, questioned, and even frisked . . . And their car is searched, although the police never asked for permission.” Then Professor Ogletree commented about the traffic stop and search, saying that a traffic violation was “not a basis” to conduct a “complete search, going into packages.” Quinones then narrated, “What it appears they’re doing, says Ogletree, is conducting an illegal search.”

The broadcast next showed Officer Hornberger attempting to open a cosmetic case in the backseat of the vehicle, remarking that it was locked, and Tonkery stating, “probably dope.” Ogletree commented: “Why would he say that? Hunch? Evidence? Because they’re black men, probably, in a late-model car at night and that’s all he needs. The rest he can fill in the blanks. It’s sad.”

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The use of hidden cameras did not violate the New Jersey wiretapping statute or constitute fraud.

NJ Appellate Division Affirms Summary Judgment for ABC in Hidden Camera Case

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The report then turned to Chief Knowles, who stated, “It’s profiling.” In response to Quinones’s questions, Chief Knowles presented his opinion on Plaintiffs’ conduct, stating that “I personally didn’t see anything wrong with that, okay? The search was incidental to the individual officer’s protection. It didn’t appear to me that they went into any areas that they shouldn’t have gone.” When asked whether the officers should have asked permission to conduct the search, Chief Knowles responded, “I think it could be borderline.” Chief Knowles also said that “there’s a possibility that this fit the criteria of profiling.” In response to Quinones’s question whether the young men should get an apology, Chief Knowles responds, “Police officers don’t apologize for doing their job. That is what they get paid for.”

The Broadcast Was Not Defamatory

Plaintiffs claimed that the broadcast falsely stated that the car was searched illegally and without consent and falsely implied that they were racists. The plaintiffs argued that the broadcast contained incorrect statements by Professor Ogletree that the search was illegal and racially motivated and that his statements were not protected opinion because they were based on an edited version of the tape of the incident that had material facts deleted. In addition, plaintiffs complained that Chief Knowles’s statement “it’s called profiling” was taken out of context, and that the broadcast omitted several exculpatory factors. The Appellate Division rejected all of these arguments.

The Appellate Division first concluded that the officers lacked consent to search the car, that the officers had no other legal justification for searching the car, and that Ogletree’s opinion that the search was illegal was correct.

The panel also held that Ogletree’s statement that the search of the car appeared illegal was a protected expression of legal opinion. The court explained that Ogletree’s opinion was not based on false or incomplete facts simply because the ABC defendants showed him the edited ver-

sion of the hidden camera footage. This edited version did not mention that (1) the officers had received a tip that the Mercedes was “suspicious”; (2) the young men lacked a valid insurance card; (3) the backseat passenger lied when he told the officers that he had no identification; (4) the front-seat passenger said the backseat passenger’s name was John when in fact it was Raymond; and (5) one of the young men had acted in “a surly manner” to the police officers. The court explained that Professor Ogletree maintained his opinion in his deposition after he was apprised of all of these allegedly exculpatory circumstances and after he saw the full unedited videotapes of the stop.

The court also rejected plaintiffs’ claim that ABC used Chief Knowles’s statement “it’s called profiling” out of context. The court agreed that when Chief Knowles made this statement in his interview, he was referring to the practice of profiling in general and not to this particular incident. But the court disagreed that ABC had used this comment inappropriately.

The court explained that because Chief Knowles went on to explain the practice of profiling and stated that he did not agree with it, his comment “it’s called profiling” appears to refer to the general practice. In any event, the court held, the broadcast accurately represented Chief Knowles’s position through his other statements in the piece. By including these statements, the court explained, ABC gave the impression that Knowles did not believe that the plaintiffs were guilty of profiling.

The court also rejected plaintiffs’ claims based on the exclusion from the broadcast of several allegedly exculpatory factors. The court held that these factors were not significant and “did not justify the search, soften its impact, or rehabilitate plaintiffs’ reputation” because the search was unreasonable “notwithstanding these circumstances.” The court concluded that “[t]he improper police action, not the omission of extraneous or minimally ameliorating circumstances, was the conduct which potentially lowered the plaintiffs’ reputation in the community.”

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The court held, the broadcast accurately represented Chief Knowles’s position through his other statements in the piece.

NJ Appellate Division Affirms Summary Judgment for ABC in Hidden Camera Case

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The Appellate Division explained that because it had concluded that the broadcast was true, it did not have to reach the issue of actual malice.

No Violation of the N.J. Wiretapping Act

The Appellate Division next affirmed the dismissal of plaintiff's wiretapping claim. This claim was based on that portion of the hidden camera footage that recorded the officers searching the car after the young men had been removed from the vehicle and were out of earshot. During this portion of the tape, one of the officers stated that there was "probably dope" in the locked cosmetic case and expressed a desire to find a "Tech-9" machine gun. The Appellate Division concluded that the recorded statements at issue were not "oral communications" protected by the New Jersey wiretapping statute because the plaintiffs did not have an expectation of privacy in those statements.

Under the New Jersey wiretapping statute, "oral communications" are defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an interpretation." The Appellate Division noted that this definition was identical to the definition of "oral communication" in the federal wiretapping statute. The court explained that most courts interpreting this definition have adopted the reasonable-expectation-of-privacy standard of *Katz v. U.S.*, 389 U.S. 347 (1967). A few courts, however, have distinguished between an expectation of privacy and an expectation that one's conversation will not be recorded. The Appellate Division adopted the majority view, explaining that an expectation-of-non-interception standard would be "too restrictive" because few conversations occur in which the participants expect that their speech will be intercepted.

The Appellate Division concluded that the plaintiffs lacked a reasonable expectation of privacy in the communications they had while searching the vehicle. The court

noted that the search took place in an open, accessible place (a busy public highway), the doors to the vehicle were wide open, and automobiles afford a lower expectation of privacy than homes and offices. The court also explained that it was "reluctant" to recognize the plaintiffs' expectation of privacy claims given their failure to honor the testers' right to freedom from unreasonable searches and seizures, and that police officers conducting their official duties in a public place have a diminished expectation of privacy.

Fraud Claim Rejected

The Appellate Division also rejected plaintiffs' fraud claim. This claim was based on the defendants' failure to disclose the purpose of the stop and the presence of hidden cameras and the misrepresentation of the rear-seat passenger Raymond Campbell that he did not have identification.

The officers argued that the trial court incorrectly dismissed their claim under *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999), because their fraud claim was based on pre-broadcast speech. The Appellate Division held that the inquiry under *Food Lion* is not whether the pre-publication tort claim is based on pre-broadcast conduct, but whether the alleged damages resulted from the broadcast and were the same damages available for defamation. In this case, the plaintiffs' alleged fraud damages were almost entirely for injury to reputation and for emotional distress that resulted from the publication. Under *Food Lion* and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the plaintiffs were not entitled to recover these damages without showing that the publication contained a false statement of fact that was made with actual malice, which the plaintiffs had failed to do.

Kevin T. Baine, Steven M. Farina, and Mary-Rose Pappandrea of Williams & Connolly LLP represented ABC in the appeal.

The Appellate Division concluded that the plaintiffs lacked a reasonable expectation of privacy in the communications they had while searching the vehicle.

More On Prior Restraints

Kansas City Judge Lifts Order Prohibiting Star From Publishing Letter Utah Judge Orders Standard-Examiner to Not Publish Child Custody Story

As we have reported in the past two months, stories on prior restraints have become more prevalent – even when the speech in question has nothing to do with national security or any other topic related to September 11. See *LDRC MediaLawLetter*, May 2002 at 20 and 22. See also *LDRC MediaLawLetter*, April 2002 at 16, 37, 42 and 55.

This month, two newspapers were ordered not to print information about pending cases. In one case, the order was lifted the next day – but only after an appeal was filed.

The Kansas City Star

In Missouri, a circuit court judge barred *The Kansas City Star* from publishing the contents of a newsworthy letter, but then lifted the restraining order the next day after the *Star* appealed to the Missouri Court of Appeals.

The letter contained information related to the prescription drug dilution case of Kansas City pharmacist Robert Courtney. In February, Courtney pleaded guilty to charges of diluting more than 72 chemotherapy drugs made by Eli Lilly and Co. and Bristol-Meyers Squibb Co. and selling the diluted drugs to at least one area doctor. Since then, several hundred victims have filed civil suits against Lilly and Bristol-Meyers, claiming that they knew or should have known of Courtney's scheme.

The letter, written by a plaintiffs' lawyer to several of his clients, states that Eli Lilly knew since 1998 that Courtney was selling more drugs than he was buying, but chose not to alert authorities and may have even tried to cover it up.

On Friday, June 7, Senior Jackson County Circuit Judge Lee Wells issued the restraining order barring the *Star*, which had a copy of the letter, from publishing its contents. Wells claimed that publishing the privileged contents could result in irreparable harm to the parties involved. According to reports, the letter contained information that Wells considered to be privileged under the attorney-client privilege.

The *Star* appealed that afternoon, and a two-judge panel of the Missouri Court of Appeals gave Wells until noon the following day to respond. Wells lifted the order on Saturday, with the consent of both plaintiffs' and Lilly's attorneys.

The *Kansas City Star* is represented by Curtis Woods, of Sonnenschein, Nath and Rosenthal in Kansas City, Missouri.

The Ogden Standard-Examiner

In Utah, a juvenile court judge barred the *Ogden Standard-Examiner* from publishing a story regarding a child who was removed from her home pending investigation of her injuries, and the related custody story.

Reporter Cheryl Buchta had been pursuing the story with the consent of the child's mother and the obvious encouragement of the state Division of Child and Family Services which viewed it as an opportunity

to educate the public on its operations and to highlight some of the problems it faced. The reporter had signed a written agreement to keep the family members' identities confidential.

During a custody hearing, however, the mother's public defender became upset that a reporter was involved in the case, citing concerns for the family's privacy. After a brief conference from which Buchta was excluded, Second District Juvenile Court Judge L. Kent Bachman told her that the mother no longer consented to the story, and that Buchta was not allowed to write about the child's case.

This particular order, issued verbally, is troubling because there was no hearing to determine whether irreparable harm would come to the parties involved. The *Standard-Examiner* dropped its story because the parents no longer wanted to be involved and no appeal is anticipated.

The *Standard-Examiner* is represented by Randy Dryer of Parsons, Behle & Latimer, PC of Salt Lake City, Utah.

***This month, two newspapers
were ordered not to print information
about pending cases.***

Right of Publicity Claim Trumped by Ancillary Use Exception

Photographer and model lose claim against artist and museums

By Michael H. Bierman

In 1960, a German photography magazine published a photograph of a model, showing the model from the waist up, holding a large magnifying glass over her right eye. The eye fills the lens of the magnifying glass, and the lens covers a large portion of the model's face. After publication, the photographer took no steps to protect the copyright in his photograph.

In 1990 an American artist created a silkscreen work by cropping and enlarging the photograph and superimposing the words "It's a small world but not if you have to clean it." The silkscreen was purchased by a museum and displayed as part of an exhibition of the artist's work. The silkscreen was reproduced in the exhibition catalog. It was also reproduced as five-story-high "billboard art," on promotional and advertising materials, and on museum gift shop items such as notepads and refrigerator magnets.

The photographer sues the artist and the museums for copyright infringement. The model sues the same parties for violation of her right of privacy under New York law. Who wins?

The answer to this law school examination question is set forth in detail in the opinion of United States District Judge Alvin K. Hellerstein in *Hoepker, et al. v. Kruger, et al.*¹ The court dismissed the claims of the photographer, Thomas Hoepker, and the model, Charlotte Dabney, against both the artist, Barbara Kruger, and the museums, the Museum of Contemporary Art, Los Angeles and the Whitney Museum in New York.

Although both claims are purely statutory in nature, the court's analysis is radically different for each. The court's analysis of the copyright claim was driven by a literal, if not complicated, application of the wording of four interrelated copyright statutes. The analysis of the privacy claim, by contrast, essentially ignored the literal meaning of the statutory language in order to construe the statute as constitutional. The right of privacy analysis, in particular, is an important discussion of the interface between the right of pri-

vacy and the First Amendment in the context of artistic expression.

The Copyright Claim

Resolution of the photographer's claim required sequential analysis of (1) the Universal Copyright Convention; (2) the Copyright Act of 1909; (3) the Berne Convention Implementation Act of 1989 (the "BCIA"); and (4) the copyright restoration provisions of the Uruguay Round Agreements Act of 1994.

When the photograph was published in 1960, the United States and Germany were both signatories to the Universal Copyright Convention ("U.C.C."). Article II(1) of the U.C.C. provides that when the national of one country first publishes a work in his own country, this work simultaneously obtains the same protection in other member countries that the works of nationals of those countries would have. Under the Copyright Act of 1909, the photograph obtained a statutory copyright with an initial term of 28 years, together with a right to a 28-year renewal term. The photographer took no steps to protect his United States copyright. The copyright was therefore not renewed and the photograph entered the public domain in 1988.

In 1989, Congress passed the BCIA, which was intended to bring United States copyright law into compliance with the Berne Convention by eliminating the need to comply with formalities such as copyright notice and renewal application in order to obtain domestic copyright protection. One provision of the BCIA specified that works that had fallen into the public domain in the United States by the effective date of the BCIA would remain in the public domain. Therefore, bodies of works that had copyright protection in their home countries, but had lost copyright protection in the United States before enactment of the BCIA, remained in the public domain in the United States. In 1994, Congress amended the Copyright Act to correct this problem by adding Section 104A as part of the Uruguay Round Agree-

The photographer took no steps to protect his United States copyright. The copyright was therefore not renewed and the photograph entered the public domain in 1988.

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First Amendment Sensitive Analysis of Misappropriation Privacy Claim in New York Federal Court

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ments Act of 1994. Section 104A “restored,” as of January 1, 1996, the copyright of works that were not in the public domain in their source countries, but were in the public domain in the United States. The United States copyright of the photograph in the *Hoepker* case was therefore restored as of January 1, 1996, for a term lasting until 2055.

Copyright restoration would create a problem for those who had exploited the restored works while they were in the public domain. To protect those parties, Congress included two sets of safeguards in Section 104A. First, it provided a remedy only for those acts of infringement occurring after restoration. Second, it limited the remedies available against “reliance parties,” those parties who would otherwise be infringers and who were deemed to have “relied” on a restored work’s prior public domain status by creating, acquiring, or exploiting a derivative work of the restored work. Under Section 104A, a reliance party (1) cannot be sued for acts of infringement occurring within a year after they have received a notice from the owner of the restored copyright and (2) will have their liability limited in suits concerning restored works to a compulsory license-type payment for subsequent infringements.²

In 1990, when Kruger created her silkscreen (the “Kruger Composite”), Hoepker’s photograph was in the public domain and remained in the public domain until January 1, 1996. Because the Kruger Composite was a derivative work of the Hoepker photograph, Kruger was a reliance party under Section 104A. Because the *Museum of Contemporary Art*, Los Angeles was both a successor in interest to Kruger and a licensee with respect to her work, it was also a reliance party. The Whitney Museum was also a reliance party because it was alleged to have “exploited” the Kruger Composite. The court held that while the term “exploitation” is not defined in the Copyright Act, it must “at the very least . . . include the right to license that work to others for display . . . and reproduction” and might also include the right to create new derivative works from the existing derivative work.”³

Since Hoepker had not given the statutorily-required

notice to any of the defendants, he could not seek remedies against the defendants for their exploitation of the Kruger work after the restoration of his copyright.

The Right of Privacy Claim

The court noted that the two relevant statutes pertaining to a privacy claim are Sections 50 and 51 of New York Civil Rights Law.⁴ These sections prohibit the non-consensual use of a plaintiff’s name, portrait, picture or voice “for advertising purposes or for the purposes of trade.” The court started its analysis from the proposition that constitutionally-protected speech is deemed not to be “for advertising purposes or for the purposes of trade” and therefore could not violate Sections 50 and 51.⁵ This premise led the court to conclude (1) that advertising of art was not “advertising” and that the commercial sale of artwork was not “for purposes of trade” under the statute.

Despite what might otherwise seem the Alice-in-Wonderland nature of this statutory construction, the Court enunciated an insightful standard for balancing rights of privacy against the rights of free expression in the context of artistic works. The court consid-

ered two alternative approaches to the question of when art is entitled to First Amendment protection in the face of right of privacy claims. Using either analysis, however, the court found the right of privacy claim barred by the First Amendment.

The first, derived from *Simeonov v. Tiegs*,⁶ was characterized as the position “that art is speech, and, accordingly, that art is entitled to First Amendment protection vis-à-vis the right of privacy.”⁷

The second was the standard announced in the California Supreme Court case of *Comedy III Productions, Inc. v. Saderup, Inc.*⁸ In that case, the California Supreme Court held that only sufficiently “transformative” art was entitled to First Amendment protection against right of privacy claims. Influenced by these decisions, Judge Hellerstein stated the central inquiry is “whether the celebrity likeness is one of the ‘raw materials’ from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.”⁹

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Because the Kruger Composite was a derivative work of the Hoepker photograph, Kruger was a reliance party under Section 104A.

First Amendment Sensitive Analysis of Misappropriation Privacy Claim in New York Federal Court

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In analyzing Dabney's right of privacy claims, the court grouped the various allegedly-unauthorized representations of Dabney's likeness into three groups, each of which had different free speech characteristics.

The first group consisted of the Kruger Composite itself and the reproduction of that work in the exhibition catalog. The court held that both of these uses were "pure First Amendment speech" in the forms, respectively, of artistic expression and discussion and commentary on Kruger and her work. As such they were protected against right of privacy claims.¹⁰

The second and third groups of uses were the reproductions of the Kruger Composite in materials to advertise and promote the Kruger exhibition and the gift shop merchandise. Although the advertising materials appeared to be explicitly "for advertising purposes" and the gift shop merchandise appeared equally to be "for purposes of trade," the court found that both groups of uses were exempt from the New York statute. It did so by analogizing to cases that created First Amendment

exemptions from the statutes for advertising and trade relating to "newsworthy events." The advertising and promotional materials were exempted under the "ancillary use" or "incidental use" exception created by the New York courts in cases such as *Stern v. Delphi Internet Services Corp.*¹¹ and *Namath v. Sports Illustrated*¹² that exempted advertising for "newsworthy" newspaper articles, books, and magazines from the reach of the New York statutes.¹³ The court expanded this exception to cover advertising of artistic works and any other expression protected by the First Amendment, holding that under the ancillary use exception, "advertising that is undertaken in connection with the use protected by the First Amendment falls outside the statute's reach." The court held that the billboard art reproduction of the Kruger Composite was either "art," in which case it was "pure" First Amendment speech, or it was an advertisement for the Kruger Exhibit, and therefore fell within the ancillary use exception.

The final group of uses, the museum gift shop items, were the most difficult to analyze. The court started from

the proposition that "art" is exempted from the statute, even if it is created for purposes of trade, i.e., to be sold for a profit. The court then had to determine what would constitute "art."¹⁴ It rejected the approach of *Simeonov and Stefano*, which focused on the "underlying nature of the work itself," because "using such a test invites judges to decide what constitutes art or expression – and what does not – thus asking them to draw up potentially artificial lines." Instead, the Court, drew on the cases of *Titan Sports, Inc. v. Comics World Corp.*¹⁵ and *Quezada by De Lamota v. Daily News*¹⁶ that considered whether there was a "real relationship" between the challenged use and the "newsworthy article."¹⁷ Again, the Court extended the "newsworthiness" exception to art.

The court found that there was a real relationship between the artistic expression of the Kruger Composite and the sales of the gift shop items. It held "Here, Dabney's image was affixed to various gift items not to flaunt her visage, but because the gift items reproduced the Kruger Composite, a work of art displayed by the Whitney in its museum galleries. Borrowing language from the California Supreme Court, '[Dabney's] likeness appeared in the [gift merchandise] for precisely the same reason [it] appeared on the original [Kruger Composite].'"¹⁸ The court noted that museum gift shop merchandise "enabl[es] the museum to distribute art in a common and ordinary form that can be appreciated in everyday life." The formats and quantities of that art do "not change the essential nature of the artistic expression that is entitled to First Amendment protection."¹⁹

Hoepker v. Kruger establishes that art has the same First Amendment protection against right of privacy claims as news. Not only is the art itself protected, but advertisements of the art and reproductions of the art are also protected, just as are advertisements and reproductions of news.

Michael H. Bierman, Ian Wallach and Mitchell L. Lathrop with Luce, Forawrd, Hamilton & Scripps LLP, New York City, represented defendants.

Michael H. Bierman is an associate at Luce, Forward, Hamilton & Scripps LLP in New York City.

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The court found that there was a real relationship between the artistic expression of the Kruger Composite and the sales of the gift shop items.

First Amendment Sensitive Analysis of Misappropriation Privacy Claim in New York Federal Court

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¹ 2002 U.S. Dist. LEXIS 7966 (SDNY, May 3, 2002).

² 17 U.S.C. § 104A(d)(3).

³ *Hoepker*, 2002 U.S. Dist. LEXIS 7966 at *18.

⁴ *Id.* at *19.

⁵ *Id.* at *20.

⁶ 159 Misc. 2d 54, 602 N.Y.S. 2d 1014 (NY City Civ. Ct. 1993).

⁷ *Hoepker*, 2002 U.S. Dist. LEXIS 7966 at *23.

⁸ 25 Cal. 4 387, 21 P.3d 797 (Cal. 2001), *cert. den.*, 151 L.Ed. 2d 692, 122 S.Ct. 806 (2002).

⁹ *Hoepker*, 2002 U.S. Dist. LEXIS 7966 at *23.

¹⁰ *Id.* at *25 - *26.

¹¹ 165 Misc. 2d 21, 626 NYS 2d 694, 700 (N.Y. Sup. Ct. 1995).

¹² 48 A.D. 2d 487, 371 NYS 2d 10, 11-12 (1st Dep't 1975).

¹³ *Hoepker*, 2002 U.S. Dist. LEXIS 7966 at *28.

¹⁴ *Id.* at *33.

¹⁵ 870 Fd. 2d 85 (2d Cir. 1989).

¹⁶ 479 N.Y.S. 2d 682, 685 (N.Y. Civ. Ct. 1984).

¹⁷ *Hoepker*, 2002 U.S. Dist. LEXIS 7966 at *36.

¹⁸ *Id.* at *37.

¹⁹ *Id.* at *38.

Beanie Babies” and the “Beanie Babies Collectors Guide.” As the titles suggest, the books were aimed at collectors of the miniature plush toys; they featured, for each “baby,” a picture of the toy, and some text, the nature of which differed as between the two books. As discussed below, Judge Posner found these differences significant to the analysis. The plaintiff, Ty, Inc., is the creator of Beanie Babies. Ty claimed PIL’s books featured – and infringed on – its copyrighted original soft sculptures, and its trademarks associated with the products. It was established in the litigation that Ty had licensed other companies to publish collectors’ guides and magazines about Beanie Babies.

The District Court

The district court’s preliminary injunction held “[t]he press, like others interested in publishing, may not publish copyrighted material without obeying copyright laws,” and “reject[ed] the bald claim that the injunctive relief sought violates the First Amendment,” finding the fair use doctrine “is adequate protection of the defendants’ constitutional right to comment upon and criticize the Beanie Babies. . . .” 81 F. Supp. 2d at 901-2. As to fair use, the court found, on balance, PIL’s book would not qualify for the defense, relying upon such cases as *Castle Rock*. *Id.* at 904-6.

Ty then moved for summary judgment. PIL conceded that the photographs of the Beanie Babies in its books were derivative works that could only be used under license from Ty (which PIL did not have); its principal defense was fair use. The district court rejected that defense (along with the First Amendment argument PIL reprised) and entered summary judgment for Ty on its copyright claim. *See Ty, Inc. v. Publications International, Ltd.*, 2001 Copr.L.Dec. ¶ 28,192, 2000 WL 1499449 (N.D. Ill. Oct. 6, 2000). Permanent injunctive relief and a profits award were granted. This was the posture in which the Seventh Circuit reviewed the case.

Posner’s Decision

Judge Posner’s opinion begins with some general observations about the fair use defense which are fairly far afield from the case at hand. For some reason, he focuses his attention on the distinction “between parody (fair use) and burlesque (often not fair use).” *Ty*, 2002 WL 1068020 at *3.

A parody, which is a form of criticism (good-natured or otherwise), is not intended as a substitute for the

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Seventh Circuit Opines on Fair Use in “Beanie Babies” Case

By Samuel Fifer and Gregory R. Naron

When last we visited the case of *Ty, Inc. v. Publications International, Ltd* in these pages, in the Winter of 2000, the United States District Court for the Northern District of Illinois had rejected defendant PIL’s claim that the First Amendment precluded issuance of an preliminary injunction against PIL’s alleged copyright and trademark infringement. *Ty, Inc. v. Publications International, Ltd.*, 81 F. Supp. 2d 899 (N.D. Ill. 2000). The case has now produced an opinion by Seventh Circuit Chief Judge Richard Posner, which, setting aside some errant dicta, displays a perceptive sensitivity to the First Amendment underpinnings of the fair use doctrine. *Ty, Inc. v. Publications International, Ltd.*, ___ F.3d ___, 2002 WL 1068020 (7th Cir. May 30, 2002). Judge Posner’s opinion also questions aspects of the Second Circuit’s fair use analysis in *Castle Rock Entertainment, Inc. v. Carol Publishing Group*, 150 F.3d 132 (2d Cir. 1998).

At issue in *Ty, Inc.* were two books – “For the Love of

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work parodied. But it must quote enough of that work to make the parody recognizable as such, and that amount of quotation is deemed fair use. . . . A burlesque, however, is often just a humorous substitute for the original and so cuts into the demand for it: one might choose to see Abbott and Costello Meet Frankenstein or Young Frankenstein rather than Frankenstein, or Love at First Bite rather than Dracula, or even Clueless rather than Emma. Burlesques of that character, catering to the humor-loving segment of the original's market, are not fair use. . . . The distinction is implicit in the proposition . . . that the parodist must not take more from the original than is necessary to conjure it up and thus make clear to the audience that his work is indeed a parody. If he takes much more, he may begin to attract the audience away from the work parodied, not by convincing them that the work is no good (for that is not a substitution effect) but by providing a substitute for it. *Id.*

This dicta is suspect in positing a “humor-loving segment of the original’s market” that, if appealed to, would remove a work from the realm of fair use parody and make it an infringing “burlesque.” Attempting to parse out what is parody and what is burlesque would seem to be a hopeless task. And while Mel Brooks probably doesn’t have to worry about being sued by Mary Shelley, Judge Posner’s mode of analysis, if followed, might well have produced a different result in the “Wind Done Gone” case, *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001); after all, the parody at issue there no doubt appealed to the “humor-loving segment” of *Gone With the Wind* readers.

Also troubling is the court’s related suggestion that parody needs to, in essence, be labeled as such for the audience (parodist must “make clear to the audience that his work is indeed a parody”). The fair use doctrine should not protect only ham-fisted parody. The court is on firmer ground in simply reminding would-be parodists that they

cannot appropriate more than is necessary to make their parodic point.

More to the point is Judge Posner’s observation that book reviews — which “quote or otherwise copy from copyrighted works” — nevertheless “constitute fair use because they are complements of (though sometimes negative complements, as in the case of a devastating book review) rather than substitutes for the copyrighted original.” *Id.* at *4.

Were control of derivative works not part of a copyright owner's bundle of rights, it would be clear that PIL's books fell on the complement side of the divide and so were sheltered by the fair-use defense. A photograph of a Beanie Baby is not a substitute for a Beanie Baby. . . . But remember that photographs of Beanie Babies are conceded to be derivative works, for which there may be a separate demand that Ty may one day seek to exploit, and so someone who

without a license from Ty sold photographs of Beanie Babies would be an infringer of Ty's sculpture copyrights. The complication here is that the photographs are embedded in text, in much the same way that quotations from a book are embedded in a review of the book. Ty regards the text that

surrounds the photographs in PIL's Beanie Baby books as incidental; implicitly it compares the case to one in which a book reviewer quotes the whole book in his review. *Id.*

The court found the “proper characterization” of PIL’s Beanie Baby books was the kind of fact-laden issue generally inappropriate for summary judgment; specifically, there were profound differences among the books at issue. On one hand, “For the Love of Beanie Babies,” a “large-print book with hard shiny covers . . . directed at a child audience,” was “essentially just a collection of photographs of Beanie Babies, and photographs of Beanie Babies are derivative works from the copyrighted Beanie Babies themselves.” *Id.* On the “opposite extreme” was the “Beanie Babies Collector's Guide,” a “small paperback book with small print, clearly oriented toward adult purchasers-indeed, as the title indicates, toward collectors.” *Id.* at *5.

Of particular salience was that some of the text in

The court was unimpressed with Ty's argument that PIL's books “copied (more precisely, made photographic copies of) the entire line of Beanie Babies

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Seventh Circuit Opines on Fair Use in “Beanie Babies” Case

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“Beanie Babies Collector’s Guide” was “quite critical, for example accusing Ty of frequent trademark infringements.” Judge Posner pointedly notes that “Ty doesn’t like criticism, and so the copyright licenses that it grants to those publishers whom it is willing to allow to publish Beanie Baby collectors’ guides reserve to it the right to veto any text in the publishers’ guides”; citing the concurring opinion in *Suntrust Bank v. Houghton Mifflin*, he draws the “analogy to a publisher’s attempting to use licensing to prevent critical reviews of its books—an attempt that the doctrine of fair use blocks.” *Id.* “Indeed,” the court observes,

a collectors’ guide is very much like a book review, which is a guide to a book and which no one supposes is a derivative work. Both the book review and the collectors’ guide are critical and evaluative as well as purely informational; and ownership of a copyright does not confer a legal right to control public evaluation of the copyrighted work. *Id.* at *6.

The court was unimpressed with Ty’s argument that PIL’s books “copied (more precisely, made photographic copies of) the entire line of Beanie Babies, just like the book reviewer who copies the entire book”; the court observed that “the cases are clear that a complete copy is not per se an unfair use.” *Id.*, citing, e.g., *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Moreover, Ty’s argument “overlooks the fact that a collectors’ guide, to compete in the marketplace, has to be comprehensive. Given that Ty can license (in fact has licensed) the publication of collectors’ guides that contain photos of all the Beanie Babies, how could a competitor forbidden to publish photos of the complete line compete?” *Id.*

In the court’s view, Ty essentially sought to confer upon itself “a monopoly of Beanie Baby collectors’ guides,” even though such guides are not themselves derivative works, but rather, “very much like a book review.” Even more problematically, it appeared that “Ty wants to suppress criticism of its product in these guides.” Thus, the nub of the fair use question — and one which presented fact issues precluding summary judgment — was “whether it would be unreasonable to conclude, with reference to one or more of the en-

joined publications, such as the Beanie Babies Collector’s Guide, that the use of the photos is a fair use because it is the only way to prepare a collectors’ guide.” *Id.* at *7.

Finally, in remanding, the court provided its view of *Castle Rock, supra*, one of the key cases on which Ty and the district court relied. *Castle Rock* involved a book, “The Seinfeld Aptitude Test,” which was a “collection of trivia questions testing viewers’ knowledge of obscure details of the series’ plot and characters.” Judge Posner noted that “[t]here was evident complementarity: people who bought the book had to watch the show in order to pick up the answers to the questions in the book; no one would read the book in lieu of watching the show”; but the Second Circuit “nevertheless held that the book wasn’t insulated from copyright liability by the doctrine of fair use.” *Id.* at *8.

The holding seems to rest in part, and very dubiously we must say, on the court’s judgment that the book was frivolous. . . . But the fair-use doctrine is not intended to set up the courts as judges of the quality of expressive works. . . . That would be an unreasonable burden to place on judges, as well as raising a First Amendment question. *Id.*

In the court’s view, Ty essentially sought to confer upon itself “a monopoly of Beanie Baby collectors’ guides,”

The Seventh Circuit acknowledged that there was “more to the court’s decision” in *Castle Rock*, namely that “The Seinfeld Aptitude Test may have been a subterfuge for copying the script of the television series—and the script was a derivative work.” *Id.* The “facts” tested by the SAT were “in reality fictitious expression created by Seinfeld’s authors,” and not, for example, “true facts” about the Seinfeld actors, etc. See *Castle Rock*, 150 F.3d at 139. “A similar judgment might be possible here with regard to For the Love of Beanie Babies, which we described as basically just a picture book; and the pictures are derivative works from Ty’s copyrighted soft sculptures.” *Ty*, at *8.

Circuit Judges Joel M. Flaum and Ilana Diamond Rovner were also on the Seventh Circuit panel. There was no dissent. Counsel on the appeal were James P. White and Laurie A. Haynie of Welsh & Katz, Chicago, Illinois, for Ty Inc.; and William Patry of Skadden Arps Slate Meagher & Flom, New York, New York, for PIL.

Samuel Fifer is a partner, and Gregory R. Naron is of counsel at Sonnenschein Nath & Rosenthal, Chicago, Illinois.

Hyperlinks Do Not Render a Website “Interactive” for Personal Jurisdiction

Eastern District of Virginia Denies Personal Jurisdiction Over Website Owner

By **B. Brett Heavner, Lisa P. London, and Daniel B. Binstock**

In a recent case involving personal jurisdiction and the Internet, *Newspaper Association of America, Inc. v. Mancusi*, Civ. No. 01-1635A (E.D. Va. May 8, 2002), Judge Ellis of the United States District Court for the Eastern District of Virginia held that a website consisting of a collection of hyperlinks to hundreds of newspaper websites around the country was merely “passive.”

Plaintiff, the Newspaper Association of America (“NAA”), a trade association for the nation’s newspaper industry, operates an online service called “NEWSPAPERLINKS” (located at www.newspaperlinks.com), which groups its member newspapers by state and provides hyperlinks to the newspapers’ websites. Defendant Michael Mancusi, a Florida resident, began operating a strikingly similar online service called “NEWSPAPERLINK” (located at www.newspaperlink.com), which also groups newspapers by state and provided hyperlinks to the newspapers’ websites. NAA brought suit, claiming that Mancusi’s use of the mark NEWSPAPERLINK on his website and in several domain names (newspaperlink.com, newspaperlink.net, and newspaperlink.org) constituted federal and state trademark infringement and unfair competition, and deceptive advertising.

NAA based its argument that Mancusi was subject to personal jurisdiction in Virginia on several facts: (1) the accused website contained hyperlinks to seventy-four different newspapers throughout the state of Virginia; (2) Mancusi registered the objectionable domain names with Network Solutions (now VeriSign, Inc.), which is located in Virginia; (3) Mancusi operated interactive websites under other domain names, unrelated to the parties’ suit; and (4) Mancusi acted intentionally to injure NAA, which is located in Virginia. Defendant countered that his only contacts with Virginia were through a website that did nothing

more than offer a collection of hyperlinks to newspapers in every state, including Virginia.

The court agreed with NAA that Mancusi’s conduct fell within the reach of the Virginia long-arm statute, which allows the exercise of jurisdiction over a non-resident (i) who causes tortious injury (ii) in Virginia (iii) by an act or omission outside of Virginia if that person (a) regularly does or solicits business in Virginia, (b) engages in any other persistent course of conduct in Virginia, or (c) derives substantial revenue from goods or services rendered in Virginia. *See* Va. Code. § 8.01-328.1(A)(4).

The court also recognized that Mancusi’s operation of an allegedly infringing website, based on a Florida server, could cause tortious injury in Virginia by confusing Virginia consumers. Finally, the court noted Mancusi’s registration and use of a number of domain names and their corresponding websites, including a few interactive websites that were accessible to Virginia residents around the clock.

Defendant countered that his only contacts with Virginia were through a website that did nothing more than offer a collection of hyperlinks to newspapers in every state, including Virginia.

Complying with the jurisdictional requirements of the Virginia long-arm statute was not sufficient, however, as the court held that exercising personal jurisdiction over Mancusi would violate Constitutional guarantees of due process. The court began its analysis by noting that the registration of a domain name with Network Solutions/VeriSign and the use of a passive website did not establish the requisite minimum contacts with Virginia.

Analyzing the interactivity of Mancusi’s website under the “sliding scale” test established in *Zippo Mfg. Co. v. Zippo DotCom, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), the court deemed Mancusi’s website merely passive in nature, as it only provides links to online newspapers. The court emphasized that Mancusi’s website did not request users to submit information, nor did it sell any goods or services. The court further noted that Mancusi did not attempt to sell the objectionable domain names to NAA, but also stated that an offer to sell would have made the website’s use no longer passive.

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District of Maryland Finds Website Insufficient for General Jurisdiction

Website deemed an active website, but court found that to be of “limited significance”

The U.S. District Court for the District of Maryland declined to assert jurisdiction over a California-based company, saying the fact that the company’s website was “available for access by residents of the forum state, and contains advertising for the defendant’s goods or services” was not sufficient to subject the company to the general jurisdiction in Maryland. *See Robbins v. Yutopian Enterprises, Inc.*, 2002 WL 1020652 (D.Md. May 14, 2002).

Instead of asserting jurisdiction, District Judge Catherine Blake found the proper course of action was to transfer the case to the District Court for the Central District of California.

The suit was brought by Charles Robbins, the assignee of a copyright royalty for a software package being sold by the defendant, Yutopian Enterprises. Robbins alleged that Yutopian had failed to make the required royalty payments and threatened to continue selling the software past the expiration of the original agreement.

Robbins, a citizen and resident of Pennsylvania, tried to base personal jurisdiction on Yutopian’s use of a website to sell the software to third parties, though neither Robbins nor Yutopian put forth any evidence as to the amount of busi-

ness Yutopian conducts over the Internet.

Yutopian admitted that it entered into 46 transactions with Maryland residents during a 10-and-a-half month period. Robbins submitted an affidavit of a Maryland resident who claimed he purchased between \$500 and \$1,000 of products from Yutopian each year for the past five years, and that he regularly received flyers and advertisements from Yutopian.

However, none of the evidence showed these transactions involved the software for which Robbins was receiving royalties. For this reason, the court held that Robbins’ cause of action had not arisen from the defendant’s contacts with Maryland, and thus specific jurisdiction was not appropriate.

Turning to general jurisdiction, the court found that there was likewise insufficient contacts for an exercise of general jurisdiction. Here, prior Fourth Circuit decisions proved to weigh against Robbins’ assertions that jurisdiction was proper.

The court cited *Nichols v. G.D. Searle & Co.*, 991 F.2d 1195 (4th Cir. 1993), a decision where general jurisdiction was deemed inappropriate despite the fact that the defendant conducted between \$9 and \$13 million worth of sales in the forum state, and employed residents as sales representatives and as a district manager. The court said Yutopian’s contacts with Maryland “pale in comparison” to the contacts cases such as *Nichols*, where general jurisdiction was found to be improper.

Robbins argued, however, that general jurisdiction was still appropriate by virtue of Yutopian’s website. The court disagreed.

The court cited the increasingly common “sliding scale” analysis first adopted in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997). *Zippo*, and its analysis for asserting jurisdiction based on a website, was recently cited by two courts that declined to assert jurisdiction – *Efford, et. al v. The Jockey Club*, 2002 Pa.Super. 100 (Pa. Super. April 5, 2002), *see also LDRC MediaLawLetter*, May 2002 at 12; and *iAccess, Inc. v. WEBcard Techs.*, 182

Instead, Judge Blake put great emphasis on the lack of a connection between the cause of action and the types of transactions performed via Yutopian’s website.

Hyperlinks Do Not Render a Website “Interactive” for Personal Jurisdiction

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Lastly, the court did not address NAA’s argument that under *Calder v. Jones*, 465 U.S. 783 (1984), Mancusi should be subject to personal jurisdiction in Virginia because the “effects” of the trademark infringement were felt in Virginia, NAA’s place of operation.

NAA was represented by Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., Washington, D.C. Michael Mancusi was represented by Jonathan Bender, Washington, DC, and Robert Walker, Herndon, Virginia.

The authors are attorneys with Finnegan, Henderson, Farabow, Garrett & Dunner, L.L.P., Washington, D.C.

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District of Maryland Finds Website Insufficient for General Jurisdiction

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F.Supp.2d 1183 (D.Utah Jan. 24, 2002), see also *LDRC Letter*, Feb. 2002 at 23.

Judge Blake, however, did not rely on the "sliding scale" analysis to decline jurisdiction. Judge Blake recognized that websites can be placed upon a spectrum depending upon their level of interactivity. Where a website is used for conducting business, it is an active website, for which jurisdiction may be proper. Without much analysis, Judge Blake deemed the Yutopian website an active website.

Instead, Judge Blake put great emphasis on the lack of a connection between the cause of action and the types of transactions performed via Yutopian's website – a requirement that would seem more appropriate under the analysis of specific jurisdiction. Judge Blake, nevertheless, found that jurisdiction was not proper because Robbins had not alleged a "connection between the cause of action in this case and a specific transaction with a Maryland resident." Therefore, the conclusion that Yutopian's website was active was "of limited significance."

Judge Blake opined on the practical effect of finding jurisdiction in a case such as this, saying:

To rule here that a mere presence on the Internet, regardless of the nature and extent of the transactions conducted thereon, is sufficient in itself to subject defendant to the general jurisdiction of the Maryland courts "would mean that it would presumably be subject to general personal jurisdiction in every jurisdiction in the country, thereby allowing a plaintiff to sue it for any matter anywhere in the nation. This the constitution does not permit." *Atlantech Distrib.*, 30 F.Supp.2d at 537.

Thus, general jurisdiction was not proper because Robbins had not alleged that his cause of action arose from a particular transaction with a Maryland resident, or shown that the scope of Yutopian's transactions with Maryland residents was sufficient to satisfy the standards of due process.

Steven E. Tiller, of Whiteford, Taylor & Preston in Baltimore, represents Charles Robbins. Clement Cheng, of Clement Cheng Law Offices in Irvine, Ca., and David M. Melnick, of David M. Melnick Law Offices in Rockville, Md., represent Yutopian Enterprises.

Eighth Circuit Considers Physical Presence Requirement for Search Warrants Directed to Internet and E-mail

By David J. Porter

Does the Fourth Amendment guarantee against unreasonable search and seizure require the physical presence of law enforcement officials any time an Internet service provider collects e-mail and Internet Protocol information in response to a search warrant? The United States Court of Appeals for the Eighth Circuit will answer that question in *United States v. Bach*, No. 02-1238, a novel case with potentially far-reaching consequences for firms that provide Internet services.

Last summer, Yahoo! Inc. received a faxed search warrant from Minnesota state court requiring it to send information about the account of one of its subscribers, Dale Robert Bach. Responding to the search warrant, Yahoo searched Bach's account and provided e-mails and a list of Internet Protocol addresses to the City of St. Paul police department. Yahoo's search for and collection of responsive materials was conducted entirely by Yahoo personnel, unaccompanied by any law enforcement officials.

On the basis of material obtained from the Yahoo search warrant and other evidence, Bach was indicted and charged with possession, transmission, receipt and manufacturing of child pornography. Bach filed a motion to suppress the evidence obtained from the Yahoo search warrant. Two arguments raised by Bach were rejected by the trial court, but United States District Judge Paul A. Magnuson was persuaded by Bach's Fourth Amendment argument. Judge Magnuson held that although the Yahoo search warrant was not rendered unreasonable by the "mere assistance" of Yahoo employees, the fact that they searched and seized of information from Bach's account alone, without the active supervision of law enforcement officials, rendered the search unreasonable.

The district court based its conclusion on the fact that police officers have taken an oath to uphold federal and state Constitutions and are trained to conduct a search lawfully and in accordance with the provisions of a warrant. By contrast, the district court reasoned, no safeguards ensure that the Yahoo employees conducting the search of

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Eighth Circuit Considers Physical Presence Requirement for Search Warrants Directed to Internet and E-mail Providers

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Bach's e-mail would abide by the terms of the warrant. Thus, while civilians may assist the police in the execution of a search warrant, they may not do so outside the physical presence of a law enforcement officer.

On appeal, the Eighth Circuit will be confronted with two questions. First, does the Fourth Amendment require a police officer to be physically present in connection with the execution of a valid search warrant? It does not. The Supreme Court has stated that the standard for evaluating compliance with the Fourth Amendment is one of reasonableness. *See, e.g., Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Whether a search is reasonable is determined by examining the totality of the circumstances, not by application of bright-line rules. *Id.* What constitutes reasonable conduct under the Fourth Amendment is "not susceptible of Procrustean application," but must take into account various and changing factual circumstances. *Ker v. California*, 374 U.S. 23, 27 (1963).

Second, under the circumstances presented by the Bach investigation, was it reasonable for the St. Paul police department to rely upon the unaided assistance of Yahoo personnel to retrieve from Bach's account Internet Protocol addresses and e-mails between Bach and possible victims of sexual conduct? The Eighth Circuit should answer that question affirmatively. A strict physical presence rule would place significant burdens upon ISPs and e-mail providers, but would not meaningfully increase the Fourth Amendment rights of suspected criminals.

Sent and received e-mails and Internet Protocol address evidence of a user's Internet activity are stored on computer servers in such a way that often requires searches to be conducted by highly skilled technicians. The training and experience of most law enforcement officers cannot enhance the technicians' ability to safeguard criminal suspects' rights as the retrieve such electronic information. Even if a police officer were physically present, he would not be providing constitutional safeguards, but simply ob-

serving. That in itself could result in the infringement of suspects' rights, because the police officer looking over the technician's shoulder could observe and examine information that is beyond the scope of the subpoena. Regular police presence at ISPs could also chill users' exercise of their First Amendment rights, once the practice became widely known to the Internet community.

Large ISPs such as Yahoo and others receive thousands of search warrants, subpoenas and other requests for information each year. They already employ subpoena and search warrant compliance teams, typically supervised by the General Counsel's office. A physical presence rule would subject ISPs to a constant stream of law enforcement officers on their premises. It would also unnecessarily complicate and add expense to the process. For example, instead of faxing a search warrant to Yahoo, the St. Paul police department would have had to fly one of its officers to Sunnyvale, California to sit at Yahoo's facility

while the technician retrieved the requested information. Such inconvenience would be tolerable if it were necessary to secure Fourth Amendment guarantees, but under the circumstances in *Bach* the police officer's physical presence was not necessary to safeguard criminal suspects' rights.

The briefing of this appeal should be completed by June 28, 2002. It is expected that the Eighth Circuit will hear oral argument and decide the case later this year. The United States is represented by Bridgid E. Dowdal, Esquire and Paul H. Leuhr, Esquire, Assistant U.S. Attorneys in Minneapolis. Mr. Bach is represented by William M. Orth, Esquire, of Minneapolis. Several *amici curiae*, including the Computer & Communications Industry Association, NetCoalition and the United States Internet Service Providers Association are represented by Jonathan Band, Esquire and Lois K. Perrin, of Morrison & Foerster.

David J. Porter is a shareholder at Buchanan Ingersoll P.C. in Pittsburgh.

A strict physical presence rule would place significant burdens upon ISPs and e-mail providers, but would not meaningfully increase the Fourth Amendment rights of suspected criminals.

Federal Panel Invalidates Federal Restrictions on Internet Access in Public Libraries

By Daniel Mach and Luke C. Platzer

Dealing yet another blow to Congressional attempts to regulate Internet content, a three-judge federal court in Philadelphia on May 31st invalidated the Children's Internet Protection Act (CIPA), ruling that the government's interest in limiting the availability of sexually oriented materials on the Web cannot justify forcing public libraries to block constitutionally protected speech through the mandatory use of blocking or "filtering" software. *American Library Association v. United States*, No. CIV.A. 01-1303, *Multnomah County Public Library v. United States*, CIV.A. 01-1322, 2002 WL 1126046 (E.D. Pa. May 31, 2002).

In a 195-page unanimous decision, the court – comprising Chief Judge Edward R. Becker of the Third Circuit Court of Appeals, and Eastern District of Pennsylvania

Judges Harvey Bartle III and John P.

Fullam – struck down CIPA on First Amendment grounds and permanently enjoined its enforcement against libraries. CIPA conditions federal funding to public libraries and schools on the mandatory use of blocking soft-

ware; despite its name, CIPA requires the use of filters on all computers in public libraries, regardless of whether they are used by children, adults, or library staff. The court's decision came after a two-week trial in two consolidated cases brought by a broad coalition of plaintiffs, including the American Library Association, numerous state library associations, web publishers, individual libraries, and library patrons. The plaintiffs challenged only those provisions applicable to public libraries, and did not challenge CIPA's school library restrictions.

In its extensive findings of fact, the court noted that filtering software makes it impossible to access a great deal of constitutionally protected material. The software is highly inaccurate, erroneously blocking sites about topics ranging from health to politics and religion, several of which the court listed in its opinion. Even when functioning properly, the software blocks "vast amounts of Web pages that are neither child pornography nor obscene," *id.* at *43, because they use definitions of "pornography" or "sex" that are much broader than the legal categories of constitutionally unprotected speech. The court found that "no presently conceivable technology" could make these distinctions. *Id.* at *44.

The government had argued that allowing only selective access to the Web in public libraries was unobjectionable because it was analogous to exercising discretion in the acquisition of print sources. The court rejected the analogy, invoking public forum doctrine to hold that "the more broadly the government facilitates private speech . . . the less deference the First Amendment accords to the government's content-based restrictions." *Id.* at *53. In light of the "virtually unlimited number of topics, from a virtually unlimited number of speakers," *id.* at *56, made available through the Internet, the selective content-based blocking effected by "filtering" software was subject to strict scrutiny.

CIPA could not survive such scrutiny, the court held. While skeptical of the state's interest in protecting unwilling bystanders from exposure to indecent materials and rejecting outright the government's asserted interest in preventing

criminal behavior by patrons, the court accepted as compelling the interest in preventing the use of library computers to access illegal material (such as obscenity and child pornography in the case of adults, and material harmful to minors in the case of children).

Nonetheless, when drawing content-based distinctions on speech, the court explained, "the First Amendment demands the precision of a scalpel, not a sledgehammer," *id.* at *72. The amount of constitutionally protected speech blocked by the software filters was too extensive, the court concluded, particularly when libraries could adopt a series of less intrusive measures such as holding Internet users to an acceptable use policy, reviewing Internet logs for inappropriate activity, and placing terminals where librarians can supervise them. The court also noted that patron's ability to request to have sites "unblocked" for "bona fide research purposes" could not save the statute, as patrons' embarrassment and unwillingness to make such requests placed too much of a burden on constitutionally protected speech.

Because the use of filters in public libraries always violates the First Amendment rights of adult and child patrons by denying them access to protected material, the court held, it is facially unconstitutional to force libraries to use them as a condition of federal funding. Given that broad holding, the court did not rule on several additional theories raised by the

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Federal Panel Invalidates Federal Restrictions on Internet Access in Public Libraries

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plaintiffs, including unconstitutional conditions, prior restraint, and vagueness challenges. An appeal from the decision is expected, which, under CIPA's provisions, would be heard directly by the Supreme Court, most likely in the fall.

Daniel Mach is an associate and Luke C. Platzer is a summer associate at the Washington, DC office of Jenner & Block, which represented the American Library Association plaintiffs in this case.

Farm Bill Passes with FOIA Exemption Intact

By Kevin Goldberg

A controversial section passed as part of the Agriculture, Conservation, and Rural Enhancement Act of 2001 severely limits access to key information regarding farm conservation programs. The newly enacted law still allows access to information about recipients of subsidies as part of farm conservation programs, including the amounts received by individual and corporate farmers, but prevents access to proprietary information that is submitted to the Department of Agriculture as part of an application for a farm conservation subsidy or information concerning denied applications. The bill was enacted into law on May 13, 2002.

Section 204(g) of the bill contains the offending provisions. Originally thought to prohibit access to *all* information regarding farm conservation subsidies, effective lobbying by environmental groups ensured that lists of those who received conservation subsidies would still be available through FOIA. This was a high-profile issue as the Environmental Working Group, made public via its website the fact that "family" farmers such as Ted Turner, Chase Manhattan's David Rockefeller, NBA star Scottie Pippen, and Enron CEO Ken Lay were collecting farm subsidies.

A number of press organizations publicly opposed Section 204(g) by sending a letter criticizing the bill to members of the Conference Committee negotiating its final lan-

guage. The April 30, 2002 letter generated a sharp response from staffers from the House Committee on Agriculture, who argued that the bill would not change the status quo with respect to access to farm conservation subsidy documents. They stressed that information regarding subsidy recipients would be accessible. While agreeing that proprietary information contained in the applications themselves, and copies of the actual government denials of applications, would be withheld under FOIA, these staffers argued that the Department of Agriculture, citing personal privacy and trade secrets as concerns, currently does not release these documents. The argument that this codified the withholding of such documents, making it unlikely, if not impossible, to change that policy, was made to no avail.

The basis for Section 204(g) was explained as a policy decision intended to encourage farmers to seek subsidies. The following example was offered as an illustration:

A hog farmer has a waste runoff problem, which is polluting a local stream. There exists the possibility that this may be violating certain environmental regulations. As such, the farmer does not seek a conservation subsidy to help fix the problem, fearing that application would make public his transgression. Section 204(g)'s exemption covering the application materials is intended to give the farmer anonymity in the event that he does not receive a subsidy to fix the problem.

Congressmen and staffers who balanced competing policies concluded that the greater good would be served by encouraging farmers to step forth, take responsibility for existing problems, and get them remedied. Whether one agrees, or believes that the opposite is true (that the greater good is served by knowing precisely which farmers sought subsidies and were denied, leaving existing hazards affecting the local environment untreated), one thing is for certain: the ability for the public to oversee the implementation of this process and truly determine whether this policy decision was correctly analyzed is severely hampered by the passage of this bill.

Kevin Goldberg is with Cohn & Marks LLP, outside counsel for ASNE in Washington, D.C.

Four Philadelphia Reporters Found in Contempt

Court holds journalists in contempt for contacting jurors

On June 17, four *Philadelphia Inquirer* reporters were found in contempt by New Jersey Superior Court Judge Theodore Z. Davis for violating a trial court order that prohibited the identification of any juror and barred all reporters from contacting or attempting to interview any juror – including post-trial interviews. The order had been issued by Superior Court Judge Linda G. Baxter, who was presiding over last year's well-publicized trial of Rabbi Fred J. Neulander, who was accused of arranging the murder of his wife.

Judge Davis found that three reporters – George Anastasia, Emilie Lounsberry and Dwight Ott – had violated the order by contacting jurors after the trial, which ended in a hung jury last fall. Judge Davis found Anastasia, Lounsberry, Ott and a fourth reporter, Joseph Gambardello, all violated the order by publishing a juror's name after the trial.

All four reporters were fined \$1000. Anastasia, Lounsberry and Ott were also ordered to perform five to 10 days of community service. A 180-day jail term was suspended, provided each complete the community service.

The maximum penalty for contempt is a six-month jail sentence and a \$1000 fine.

There is an automatic stay of five days for contempt sentences. The reporters' attorneys intend to file an appeal, which will further delay imposition of the sentences.

After the original order was issued by Judge Baxter, efforts seeking an interlocutory appeal of the order were unsuccessful. In April, the New Jersey Supreme Court entered an order vacating the injunction to the extent that it prohibited the reporting of juror information during trial, so long as the information was in the public record. The state supreme court also vacated the order as to reporting information after the return of a verdict at retrial. See *LDRC MediaLawLetter*, May 2002 at 27.

However, the state supreme court ruled that Judge Baxter had the authority to bar reporters from contacting jurors following the mistrial. The court also expanded the reach of the order, saying the trial court's order covered communications between the media and the jurors that had been initiated by the jurors themselves.

Two of the seven supreme court justices, Justice Virginia Long and Chief Justice Deborah T. Poritz, dissented. They found the restriction on juror interviews to be a prior restraint, and noted that other alternatives existed to protect the fairness of the retrial.

Before the state supreme court ruled on the order, the *Inquirer* published a report describing the deadlock among the jurors. The article also disclosed the name of the jury foreperson and presented facts suggesting that she may have been a Philadelphia resident, not a resident of New Jersey.

The contempt proceedings were filed against the four reporters, who were listed as co-authors, a month later – after the New Jersey Appellate Division upheld Judge Baxter's order. The initial contempt citation charged the reporters with violating the order by naming the juror. The charge for contacting the jurors was added later – more than four months after the article was published.

At the contempt proceeding, the reporters argued that the contempt charges for publication of the juror's name was inappropriate given that the state supreme court struck down the injunction against the use of identifying juror information in the trial record. New Jersey Deputy Attorney General Eric Schweiker argued that the reporters should nevertheless be held in contempt because the order was in effect at the time the article was printed.

Judge Davis ruled that the reporters' conduct "strongly suggests an arrogance which should not and must not be judicially digested." Judge Davis also cited the court's "constitutional responsibility to maintain a viable, fair and operational judicial system" as further reason to impose sanctions.

The *Philadelphia Inquirer* was represented in its appeal to the New Jersey Supreme Court by Warren Faulk of Brown & Connery in Westmont, N.J. Emilie Lounsberry was represented by Carl D. Poplar, of Turnersville, N.J. Joseph Gambardello was represented by Amy B. Ginensky, of Dechert in Philadelphia. Dwight Ott was represented by Morris Pinsky, of Westmont, N.J. George Anastasia was represented by Thomas J. Cafferty, of McGimpsey & Cafferty in Somerset, N.J.

Judge Davis ruled that the reporters' conduct "strongly suggests an arrogance which should not and must not be judicially digested."

Reporter Ordered to Testify in Arkansas

Court limited the questioning after in camera hearing

Arkansas Democrat-Gazette reporter Sandy Davis' motion to limit the scope of her testimony in the criminal trial of *U.S. v. Hively*, 2002 WL 1052045 (E.D. Ark. March 4, 2002) was denied by the Federal District Court for the Eastern District of Arkansas. Responding to Davis' claim of a reporters' privilege, the court found the questions at issue did not require Davis to reveal confidential sources and were asked in good faith without an intent to harass Davis.

Defendant Claims a Conspiracy

Defendant J.T. Hively is an elected official on trial for alleged corruption. A major argument in his defense is that his political opponents, in concert with the local media, created a smear campaign against him that led to his prosecution. Hively subpoenaed Davis to testify regarding the time she wrote articles published in the *Arkansas Democrat-Gazette*, her presence at certain places, whether or not accompanied by other members of the media, and the identification and accuracy of quotes appearing in Davis' published articles. Davis, claiming a reporter's privilege, moved to limit the scope of her testimony to no more than attesting to the truth and accuracy of her articles in the *Democrat-Gazette*.

An Open Question on a Privilege From Branzburg

Judge Moody concluded that in the absence of any showing from Davis that the information in question was sought in bad faith or for purposes of harassment, there was no constitutional privilege concerning testimony that does not disclose confidential information or sources. The court reviewed some of the case law in and outside the Eighth Circuit post- *Branzburg v. Hayes*, 408 U.S. 665 (1972), concluding that the Eighth Circuit has yet to establish whether or not the Supreme Court decision created a qualified reporter's privilege.

The court saw no need to take a position on *Branzburg* because it felt that even if the Court recognized *Branzburg*

to create a constitutional privilege, Davis would likely fail the subsequent balancing test because Hively's Sixth Amendment right to present a defense outweighed Davis' interest in a qualified journalist privilege to withhold non-confidential information.

The reporter did not appear before the court prior to the issuance of the opinion, nor, according to the opinion, did she submit any specific information to the court, apart from general arguments as to the value of confidentiality in the journalistic process, that would have supported her claim of privilege. Judge Moody noted that Davis' absence from the court to explain a need for a privilege made him

The court found the questions at issue did not require Davis to reveal confidential sources and were asked in good faith without an intent to harass Davis.

“somewhat troubled by the procedure to this point.” *Hively*, 2002 WL 1052045, at *2. And while Judge Moody had acceded to the suggestion of counsel for the reporter that the defense counsel in the case submit questions in writing in advance, the

refusal of the reporter to answer all but three of the written questions and her failure to say no more than that answering the others would be “inconsistent with [her] professional responsibilities as a journalist,” obviously left the court frustrated to the point that he states in the opinion that the court would not likely again allow a journalist to see questions before testifying. *Hively*, 2002 WL 1052045, at FN4. Counsel for the reporter would argue, however, that this process, initially proposed because the defense counsel indicated that he only had a few questions, ultimately limited the examination of the reporter and areas of dispute.

Yet, the court was willing to conduct an *in camera* hearing to allow Davis to offer a more detailed showing to support a privilege claim. The tone of Judge Moody's decision suggests that he believed a qualified reporters' privilege to exist, but was narrowly applicable in criminal cases.

The court did not find the basis for a reporter's privilege under *Federal Rule of Evidence 501*, which authorizes federal courts to define new privileges through interpreting “common-law principles.” The court noted that all *Fed. R. Evid. 501* privileges are based on the need for confidence

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College Board of Trustees Fails In Effort to Require Journalists to Identify Members who “Ratted Them Out”

By Michael A. Giudicessi

On June 12, The Iowa Supreme Court reversed a lower court ruling ordering two editors to reveal confidential sources and unpublished information obtained from individuals who attended secret meetings of a community college board.

In its opening paragraph, the court described the litigation in language with a tabloid flair: “A local community college wants newspaper editors to tell who ratted them out.”

Quoting from H.L. Mencken, Justice Michael Streit then wrote that the editors, who stood “firm . . . would be solaced by the words of a past newsperson:

If your editorial writer . . . “takes the fence,” thinking of the dangers of antagonizing somebody or other, including the publisher’s wife, he can’t write anything worth reading and it is not worth while hiring him

In *Waterloo/Cedar Falls Courier v. Hawkeye Community College et. al*, 2002 WL 1288764 (Iowa June 12, 2002), the *Waterloo/Cedar Falls Courier* brought an

open meetings statute case against the local community college’s elected board of trustees after they held closed sessions to discuss the firing of the school’s president.

Once the access lawsuit was filed, the *Courier’s* editor and managing editor each spoke to persons present at the closed sessions and made promises of confidentiality to the sources.

As the first and only discovery effort in the access litigation, the college’s attorney took depositions of the journalists during which he asked them to identify their sources, disclose what was said in the “off the record” conversations and turn over their notes.

When the journalists declined, the college filed a motion to compel, which the trial court granted. The journalists were ordered to appear for an *in camera* examination by the court during which they would be required to identify their confidential sources, reveal unpublished information and produce their notes.

The *Courier* filed a request for interlocutory appeal and the journalists filed an original certiorari action with the Iowa Supreme Court. The high court granted the request for interlocutory appeal, issued a writ of certiorari and consolidated the matters for briefing and argument.

In its June 12 ruling, the Iowa Supreme Court held

- Despite the college’s new assertions on appeal that the editors were acting as litigants not journalists, the record was sufficient to show they were engaging in newsgathering and thereby were entitled to a constitutional reporter’s privilege under the First Amendment and the Iowa Constitution.

The court wrote

The College has done nothing more than merely suggest the editors took their hats off as reporters to act instead as litigants. In the absence of anything more than a mere assertion the editors acted in dual roles—one as litigant and the other as journalist—we cannot conclude the privilege does not apply.

- Because the reporter’s privilege is personal to the journalists, it could not be waived by their newspaper when it instituted the access litigation.

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Reporter Ordered to Testify in Arkansas

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and trust. As there was no risk of breach of confidence between Davis and her sources from her testimony, the court failed to acknowledge a general common-law reporters’ privilege. Finally, the court noted that the Arkansas shield law, *Ark. Code Ann.* § 16-85-510 would not apply in federal court.

After issuing the opinion, the court held an *in camera* hearing to give Davis the opportunity to present a more detailed showing to support a privilege claim under the First Amendment or *Fed. R. Evid. 501*, the result of which was that the court limited the questions that Davis ultimately was asked and answered at the trial.

Counsel for Sandy Davis was Jess Askew of Williams & Anderson of Little Rock, Arkansas. Counsel for T.J. Hively is Samuel Perroni of Perroni & James of Little Rock, Arkansas.

College Board Fails In Effort to Require Journalists to Identify Members who “Ratted Them Out”

(Continued from page 53)

The court wrote:

The *Courier* is not the holder of the reporters’ privilege, but the privilege is strictly held by the editors and is subject to waiver only by their actions.”

- Journalists do not automatically forfeit their constitutional privileges in litigation when they have not placed the confidential material in issue.

The court wrote:

Even if we concluded the editors were parties to this action, their mere status as litigants is not sufficient to constitute a waiver of the privilege. . . . Rather, a party must do something to waive the privilege. The editors are not parties to this action and their talking to people at the meetings is not an issue in the litigation concerning the meetings

- The college failed to satisfy the proof requirements under the prevailing Iowa reporter’s privilege standard, as enunciated in *Lamberto v. Bown*, 326 N.W.2d 305 (Iowa 1982).

The court wrote:

The College did not prove the disputed material is critical to its defense and is unavailable from any other non-privileged source. As such, it failed to meet the *Lamberto* requirements necessary to force the editors to reveal their informants. Accordingly, we vacate the trial court’s order for an in camera inspection.

The new case made clear that the Iowa reporter’s privilege can withstand discovery attempts that seek only collateral or impeachment evidence. “It appears the only reason the College seeks this information is to find out who told on them. If this is the case, we are left also to assume the College would attempt to use this information for the purposes of impeachment. Although a legitimate use, this is an insufficient reason for compelling disclosure of the sought-after material.”

Further, for the first time, the Iowa court summarized the broad scope of the reporter’s privilege in the state: “The privilege protects confidential sources, unpublished information, and reporter’s notes.”

The Supreme Court remanded the case to the trial court with instructions to enter a protective order “preventing the College from obtaining the names of the informants and the information they disclosed to the *Courier’s* editors.” Additionally, the court left held open the possibility that attorney’s fees for the interlocutory appeal could be recovered by the *Courier*, should it prevail on remand in the underlying open meetings litigation.

Michael Giudicessi and William Hunnicutt of Faegre & Benson, LLP, Des Moines represented the Waterloo/Cedar Falls Courier and its editors in the appellate proceedings. David H. Correll of Correll, Sheerer, Benson, Engels, Galles & Demro, PLC, Cedar Falls, also represented the Waterloo/Cedar Falls Courier. Hawkeye Community College and its board members were represented by Matthew Novak and Thad J. Collins of Pickens, Barnes & Abernathy, Cedar Rapids.

SAVE THE DATE

DCS BREAKFAST MEETING

**Friday
November 15, 2002**

Pennsylvania Court Affirms Order Requiring Reporters To Testify in Criminal Trial About Unpublished Information

Strikes Down \$40,000 Fines As Excessive

By Robert C. Clothier and Amy B. Ginensky

The Pennsylvania Superior Court has vacated a Philadelphia trial court's order imposing a \$40,000 fine on two Philadelphia reporters for their refusal to testify in a criminal prosecution about unpublished information provided by a criminal defendant, calling the fine a "steep sanction" that was "harsh and excessive" and "unprecedented in Pennsylvania."

At the same time, however, the Superior Court affirmed the trial court's underlying order compelling the reporters, Mark Bowden of *The Philadelphia Inquirer* and Linn Washington of the *Philadelphia Tribune*, to testify. It held that the Pennsylvania Shield Law was inapplicable to the case and that the requirements of the First Amendment reporter's privilege were met. *Pennsylvania v. Tyson* 2002 WL 1060484 (Pa. Super. May 29, 2002).

The Criminal Trial, Reporters' Motions to Quash, and Trial Court's Orders

The events leading up to the Superior Court's decision were described fully in a prior Libelletter article (see January 1, 2001 Libelletter at 27) and will be summarized here as briefly as possible.

The trial court's orders came during the criminal prosecution of defendant Brian Tyson, who was charged with the first-degree murder of 23-year-old Damon Millner. After his arrest but years before trial, defendant Tyson was interviewed by both reporters and told them that he shot Millner in self-defense, portraying himself as a law-abiding resident of a drug-infested neighborhood who tried to discourage the illegal activities of drug dealers.

The prosecutors, however, contended that defendant Tyson was an urban vigilante who harassed the drug dealers and deliberately shot Millner without provocation. The prosecutors sought to contradict defendant Tyson's assertion of self-defense by subpoenaing the

reporters for any statements made by defendant Tyson about the incident or about his relations with the neighborhood drug dealers.

Bowden and Washington filed motions to quash the subpoenas, which the trial court granted in part and denied in part. The trial court ruled that the Pennsylvania Shield Law does not protect non-confidential source information, making it inapplicable to the case. Then, applying the First Amendment reporters' privilege, the trial court ordered the reporters to testify about any "verbatim or substantially verbatim statements of the defendant involving the incident itself or such statements of the defendant which speak to his relationship to drug dealers in the neighborhood."

The trial court explained

Because only the reporter and defendant were privy to the conversations, these statements would not be obtainable from any other source.... Certainly the statements are relevant and necessary ... [because they] are statements of the defendant and go directly to his guilt or to impeach his defense that the killing was justified.

In other words, the trial judge believed that *any* statements of the defendant about the incident were crucial, regardless of the nature of those statements.

After the reporters' efforts to obtain a stay from the Pennsylvania Superior and Supreme Court were ultimately unsuccessful, the reporters refused to testify about unpublished statements by defendant Tyson while agreeing to testify about Tyson's statements published in their articles. Rejecting the prosecution's request that the reporters be jailed, the trial judge imposed what it called a "nominal" fine of \$100 per minute until the prosecution rested its case. Subsequently, Bowden took the stand and testified about published information; the prosecutor did not call Linn Washington to testify. The prosecution rested, and the trial court, based upon the time that ran, fined each of the reporters \$40,000. The jury later returned a verdict of guilty of third-degree

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Penn. Ct. Affirms Order Requiring Reporters To Testify in Criminal Trial About Unpublished Info

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murder and possession of the instrumentality of a crime; it rejected, however, the charge of first-degree murder. The reporters appealed the contempt order and posted a bond staying any obligation to pay the fine.

The Pennsylvania Superior Court's Decision

In a two-to-one decision written by Judge Peter Paul Olszewski, the Superior Court affirmed the trial court's order requiring the reporters to testify, but reversed the trial court's \$40,000 fines. See *Commonwealth v. Tyson: Appeal of Mark Bowden and Linn Washington, Jr.* (Nos. 3322 EDA 2000, 3334 EDA 2000, 150 EDA 2001 & 294 EDA 2001 (Pa. Super. May 29, 2002)).

THE FIRST AMENDMENT PRIVILEGE

The Superior Court began by discussing the evolution of the First Amendment reporters privilege from its inception in *Branzburg v. Hayes*, 408 U.S. 665 (1972) to the Third Circuit and Pennsylvania court decisions adopting and applying the privilege. Citing *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997), the Superior Court reiterated that a party seeking disclosure must establish the following to overcome the privilege: "(1) it exhausted attempts to obtain the information from other sources; (2) the information sought is 'material, relevant and necessary;' and the information sought is 'crucial' to its case." In so doing, the Superior Court rejected the prosecution's argument, which was not made to the trial court, that no such privilege exists in Pennsylvania.

But the Superior Court quickly held that the prosecution had "satisfied these three requirements." It found that even though Tyson was an alternative source -- an obvious point repeatedly stressed by the reporters in their appellate briefs -- that was nonetheless insufficient. It reasoned that Tyson might well deny making the statements to the reporters, leaving the prosecution "without

the actual prior inconsistent statements both for purposes of impeachment and substantive evidence." And even if Tyson "were completely forthcoming," the prosecution would still not have "the specific verbatim statements that would be 'useful for impeachment purposes,'" citing *United States v. Cuthbertson*, 630 F.2d 139, 148 (3d Cir. 1980) (noting the verbatim statements made by a witness are "unique bits of evidence that are frozen at a particular place and time"). The Superior Court concluded that "the only true source of Tyson's statements" was the reporters' notes.

The Superior Court apparently found nothing wrong with the trial court ordering the reporters to provide the statements *before* defendant Tyson had testified and, therefore, *before* anyone knew whether or not Tyson would disavow anything he told the reporters. Nor did the Superior Court find it insufficient that the prosecutor only once asked Tyson at trial whether he made a statement attributed to him in the reporters' articles. In other words, the prosecutor never bothered to exhaust Tyson as an alternative source of the published statements.

In so doing, the Superior Court rejected the prosecution's argument, which was not made to the trial court, that no such privilege exists in Pennsylvania.

THE BASIS FOR FINDING IT CRUCIAL

The Superior Court also concluded that Tyson's statements regarding the incident and his dealings with the neighborhood drug dealers were relevant and crucial. Here the Superior Court, as did the trial court, simply *assumed* that Tyson's statements to the reporters were inconsistent with his self-defense theory. It never identified a single one of Tyson's published statements about the incident that belied Tyson's self-defense theory; perhaps for that reason the prosecution did not bother to mention any of the published statements at closing argument. Nor did the Superior Court provide any reason why it was likely that the unpublished statements would somehow prove more relevant to the case and reveal any such inconsistencies.

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Penn. Ct. Affirms Order Requiring Reporters To Testify in Criminal Trial About Unpublished Info

(Continued from page 56)

In his dissent, Judge Stevens agreed with the reporters' contention that the record was "devoid" of evidence that the information sought was crucial. He specifically noted that the trial court, upon requiring the reporters to turn over the information, said that it was "up to [counsel for the Commonwealth] to determine how crucial [these statements] are." The trial court later added that after the statements were disclosed, the prosecutor "could 'decipher whether she wants to use these statements or not ...'" Judge Stevens concluded that the trial court's own statements made it amply clear that the prosecutor had not shown that any of defendant Tyson's statements were crucial.

THE PENNSYLVANIA SHIELD LAW

The Superior Court further "rejected the applicability of the Shield Law to this case," relying on *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987). In *Hatchard*, the Pennsylvania Supreme Court "narrowed the scope of the Shield Law in defamation cases, to protect only those unpublished statements that might reveal a confidential informant." The Superior Court found that the prosecutor's "constitutional need" for defendant Tyson's statements about the incident was "as important as the interest implicated in *Hatchard*," which was the right to reputation that is expressly enshrined in the Pennsylvania Constitution. That "constitutional need," the Superior Court felt, was not outweighed in this case by the reporters' interest in the free flow of information where Tyson was not a confidential source and where there was "no danger that disclosure of [Tyson's] unpublished statements would reveal any confidential informants."

Judge Steven's disagreed with the majority's reliance on *Hatchard*, a civil case, and asserted that the majority "fails to follow the law as enunciated" in *In re Taylor*, 193 A.2d 181 (Pa. 1963), a criminal case. In *Taylor*, the Pennsylvania Supreme Court held that the Shield Law protects all unpublished information, even if that information would not reveal the identity of a confidential source. The dissent concluded that *Taylor* applied and protected all unpublished information sought from the reporters.

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Compulsory Fingerprinting of Anonymous Source

By William Robinson

On April 4, 2002, Magistrate Judge Swartwood of the United States District Court for the District of Massachusetts issued an Order requiring one of the parties in a civil action to undergo fingerprinting. *Harris v. Athol-Royalston Regional School District Committee*, 206 F.R.D. 30 (2002). This unusual form of discovery was sought as part of the plaintiffs' continuing efforts to determine who had anonymously provided certain documents to the local newspaper. (The plaintiffs allege that their civil rights were violated when portions of the personnel records of plaintiff Robert Harris and some other documents were provided to the local newspaper.) It should be noted that the Magistrate Judge declined to order DNA testing, which the plaintiff had also sought.

At an earlier stage in discovery in the same case, the same Magistrate Judge had ordered the defendants and certain third parties to provide handwriting exemplars to the plaintiff, also for the purpose of determining who may have anonymously furnished the documents to the local newspaper. *Harris v. Athol-Royalston Regional School District Committee*, 200 F.R.D. 18 (D. Mass. 2001).

Although the newspaper which received the documents in an anonymous manner, *The Athol Daily News*, was not named as a defendant in the case, these two opinions by Magistrate Judge Swartwood have potentially deleterious implications for the media in general. There is a long journalistic tradition of reliance upon anonymous sources. See generally *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 357 (1995) ("Anonymity is a shield from the tyranny of the majority."). Certainly, if aggressive discovery techniques of this sort were to be widely employed, the chilling effect on many potential sources would be real.

William Robinson is a member at Edwards & Angell, LLP in Providence, RI.

Penn. Ct. Affirms Order Requiring Reporters To Testify in Criminal Trial About Unpublished Info

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THE \$40,000 FINE

Having upheld the trial court's order compelling disclosure of Tyson's statements to the reporters, the Superior Court turned to the reporters' contention that the \$40,000 sanction was "extraordinarily harsh and punitive." While the Court rejected the reporters' claim that the contempt fine was improperly a punitive, criminal contempt sanction because the trial court conceded that it would likely have no coercive effect, the Court agreed that the sanction was "harsh and excessive." It stated:

Such a steep sanction on reporters is unprecedented in Pennsylvania, and we have little difficulty in ruling this an abuse of discretion. What is more shocking is that these fines of a \$100 per minute accumulated during less than seven hours of trial."

The Superior Court remanded to the trial court "so that it can determine a more appropriate dollar amount." As of this writing, no decision has been made about whether to appeal the Superior Court's decision to the Pennsylvania Supreme Court, and the trial court has not taken any action on remand.

What does the Superior Court's Decision Mean for Pennsylvania Journalists?

The Superior Court's decision is a mixed bag for the press. On one hand, the Superior Court affirmed that there is, in fact, a First Amendment reporter's privilege in Pennsylvania. Its rejection of the trial court's \$40,000 fine also reflects a respect for the values underlying the First Amendment and suggests that large fines and incarceration should not be imposed on reporters exercising their constitutional and statutory rights.

On the other hand, the Superior Court's reliance on speculation and guesswork fell far short of the rigorous analysis and evidentiary record required by the three-part First Amendment test. Moreover, the Superior Court ruling that the Shield Law was inapplicable to the case represents a further weakening of the Shield Law that was begun in *Hatchard*.

Fortunately, the Superior Court did not hold that the Shield Law, in all cases, protects only confidential source

information, as the trial court had held. Rather, its holding is expressly limited to the unique facts of the case where the prosecution has an overriding "constitutional need" for incriminating, on-the-record statements made by a defendant about the incident at issue. As a result, this decision should not provide much value to most litigants trying to obtain unpublished information in the hands of the press.

Robert C. Clothier and Amy B. Ginensky are partners at Dechert, Philadelphia, Pa.

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Mixed Ruling in California Search Warrant Access Fight

California Court of Appeals Upholds Partial Disclosure of Affidavits

By Scott A. Wahrenbock

California Penal Code section 1534 provides that after execution of a search warrant, the documents and records relating to that warrant shall be open to the public as a “judicial record.” In interpreting this statute, the California Fourth District Court of Appeal affirmed a San Diego trial court’s partial disclosure of search warrant affidavits in the David Westerfield capital murder case, refusing to apply a First Amendment right of access. *Westerfield v. Copley Press, Inc.*, D039640 (Cal. Ct. App. May 3, 2002).

Westerfield’s arrest and prosecution for the kidnap and murder of a seven-year-old girl have drawn massive public attention, largely as a result of the girl’s parents’ participation in a sexually promiscuous lifestyle.

Prior to his arrest, Westerfield, the victim’s neighbor in a middle-class San Diego subdivision, was the subject of seven search warrants. At the request of the police, the search warrants and supporting affidavits were sealed. The Copley Press, Inc., publisher of *The San Diego Union-Tribune*, subsequently filed a motion to unseal the warrants and supporting affidavits, arguing the First Amendment right of access, as applied to Section 1534, mandated their release. The trial court ordered the release of the warrants and supporting affidavits, except for any material that would be “clearly inadmissible at trial.” As for that material, the trial court ordered it be redacted by the prosecutor.

The defense filed a writ in the appellate court seeking complete closure of the documents, claiming their release would violate Westerfield’s Sixth Amendment right to a fair trial. Copley countered by arguing the First Amendment right of access required the release of all material unless the court made the requisite findings under the *Press-Enterprise* line of cases.

In reviewing the trial court’s order, the appellate court initially considered whether the First Amendment

or common law right of access was the appropriate standard governing disclosure. Acknowledging the public right of access mandated by Section 1534, the court nevertheless declined to apply the First Amendment and instead opted for the less stringent common law test, finding there was no historical basis for open access to search warrant materials. The court also found that the rationales supporting First Amendment access to criminal proceedings did not apply to search warrant affidavits.

Applying the common law standard, the court concluded that Westerfield’s right to a fair trial outweighed any statutory or common law pretrial access to public records. In a rather confusing analysis, the court issued a “somewhat broader sealing than that ordered by the

trial court.” It then went on to state that “[m]ost of the material should be made public now.” Finally, the court concluded that the sealing order did not extend to testimony or exhibits admitted in open court at the preliminary examination. As

for the sealed material, the court authorized its release after the conclusion of the trial. Although the court found the First Amendment did not apply, it inexplicably closed its opinion by applying the *Press-Enterprise* factors in support of its sealing order.

The defense has petitioned the California Supreme Court for a stay and review of the order releasing any search warrant material. Copley is requesting depublication of the opinion. The Supreme Court should decide whether to review the case by July 2, 2002.

David Westerfield is represented by Laura G. Schaefer and Steven E. Feldman of San Diego.

Scott A. Wahrenbrock represented Copley Press, as well as Judith L. Fanshaw, Guylyn Cummins and Hal Fuson.

The court nevertheless declined to apply the First Amendment and instead opted for the less stringent common law test.

The War Turns To Information

While the recovery effort was declared over at “Ground Zero” in New York and the exterior facade of the Pentagon has been restored to its appearance before Sept. 11, the courts continue to deal with the First Amendment implications of the terrorist attacks and the policies implemented in their aftermath.

DOJ, Courts Spar Over Open Hearings

One week after the Justice Department imposed new regulations regarding the closure of immigration hearings and the sealing of sensitive information used in such proceedings, a federal judge in New Jersey enjoined the department’s previous policy of closing immigration hearings in “special interest” cases.

The new rules were put into effect on May 21, although they were not published in the *Federal Register* until a week later. See 67 Fed. Reg. 36799 (May 28, 2002) (to be codified at 8 C.F.R. §§ 3.27, 3.31 and 3.46). Comments are being accepted regarding the rules until July 29.¹

Under the new provisions, immigration proceedings may be closed by immigration judges if they may involve material that the Immigration and Naturalization Service can show is likely to harm the national security or law enforcement interests of the United States. Motions to close hearings must describe the allegedly sensitive material, but the material itself may be disclosed only to the judge – and not to the person who is the subject of the proceeding.

Aliens who themselves or whose lawyers or representatives disclose any information subject to such an order may be denied all forms of discretionary relief, except bond, unless the alien cooperates with an investigation of the disclosure, and that investigation shows by clear and convincing evidence that the disclosure was due to extraordinary circumstances or was beyond the alien’s control. Lawyers and representatives who disclose sealed information may be subject to suspension of their privilege to appear in immigration proceedings.

One week after the Justice Department issued the new rules – and one day after they were published in the Federal Register – Federal District Court Judge John W. Bissell issued a preliminary injunction against the department’s prior policy. *North Jersey Media Group, Inc. v. Ashcroft*, Civil No. 02-0967 (D.N.J. May 29, 2002) (granting preliminary injunction), opinion available at lawlibrary.rutgers.edu/fed/html/ca02-967-1.html (visited June 14, 2002). Both Judge Bissell and the 3rd Circuit refused to stay the order while the government appeals. See *North Jersey Media v. Attorney General*, Civil No. 02-2524 (3rd Cir. filed June 4, 2002).

The case was brought by the ACLU on behalf of the *New Jersey Law Journal* and the North Jersey Media Group to challenge a policy imposed administratively via a Sept. 21 memo from Chief Immigration Judge Michael Creppy. See *LDRC MediaLawLetter*, March 2002, at 41. The memo, which is available online at www.aclu.org/court/creppy_memo.pdf (visited June 13, 2002), required the closure of immigration hearings in “certain cases” designated by Creppy’s office.

A separate suit challenging the policy was brought by immigration detainee Maliek Zeidan, but was dismissed as moot after the government removed the “special interest” designation from his immigration case. See *Zeidan v. Ashcroft*, Civil No. 02-843 (D.N.J. dismissed April 16, 2002). At the court’s request, Zeidan’s attorney appeared as *amicus* in the *North Jersey Media* case.

“The Court has determined that the Creppy Memo violates plaintiffs’ right of access to [deportation hearings designated as [special interest cases],” Bissell wrote in his opinion granting the injunction. “Without an injunction, the government could continue to bar the public and press from deportation proceedings without any particularized showing of justification. This presents a clear case of irreparable harm to a right protected by the First Amendment.”

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Lawyers and representatives who disclose sealed information may be subject to suspension of their privilege to appear in immigration proceedings.

The War Turns To Information

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The media plaintiffs' lead lawyer is Lawrence S. Lustberg of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. in Newark. Assistant U.S. Attorney Michael A. Chagares is representing the government.

The New Jersey decision is in accord with a decision by a Michigan federal court holding the closure policy under the Creppy memo to be unconstitutional and issuing a preliminary injunction against its application to hearings in the immigration case involving the founder of the Islamic charity, the Global Relief Foundation.² See *Detroit Free Press v. Ashcroft*, 195 F.Supp.2d 937, 30 Media L. Rep. 1598, (E.D. Mich. April 3, 2002), *reconsideration denied*, (April 9, 2002); see also *LDRC MediaLawLetter*, April 2002, at 31.

Oral argument in the government's appeal of this decision is scheduled for Aug. 6. Previously, the appeals court had lifted a stay it had initially imposed on the district court's order. See *Detroit Free Press v. Ashcroft*, No. 02-1437 (6th Cir. filed April 10, 2002);

see also *LDRC MediaLawLetter*, April 2002, at 31.

Name Disclosure Order Reversed

Meanwhile, another newly-promulgated federal regulation led an New Jersey appeals court to unanimously overturn a lower court decision holding that local jails in the state were required by the state's freedom of information law to release names of those detained as the federal government pursues deportation proceedings. See *ACLU v. County of Hudson*, No. A-4100-01T5 (N.J. Super. Ct., App. Div. June 12, 2002), available at www.judiciary.state.nj.us/opinions/a4100-01.pdf (visited June 14, 2002) (reversing No. HUD-L-463-02 (N.J. Super. Ct. April 12, 2002)). Earlier, the appellate court had issued a stay of the lower court's ruling. See *LDRC MediaLawLetter*, April 2002, at 62.

Although the detainees are held by the Immigration and Naturalization Service (INS), many are routinely are

held at criminal detention facilities operated by local governments. Many of the detainees held since the terrorist attacks have been held in local jails in New Jersey, particularly Hudson and Passaic counties.

In its decision, the appeals court cited a new, interim regulation published in the *Federal Register* on April 22. See 67 Fed. Reg. 19508 (April 22, 2002) (to be codified at 8 C.F.R. § 236.6).

The new rule provides that public or private detention facilities that hold immigration detainees under a contract with the federal government may not publicly disclose the identity or any other information regarding any detainee. It further provides that it applies to "all requests for public disclosure of such information, including requests that are

the subject of proceedings pending as of April 17, 2002." *Id.* at 19511.

The explanation of the rule in the Federal Register states that "it would make little sense for the release of potentially sensitive information concerning [Immigration and Naturalization] Service

detainees to be subject to the vagaries of the law of the various States within which these detainees are housed and maintained.... This interim rule supersedes State of local law relating to the release of such information." *Id.* at 19510.

The new rule went into effect on April 17 under the same "good cause" provision as the new rules regarding openness of immigration hearings, discussed *supra*. Comments regarding the rule were to be accepted until June 21.

While the court noted that cases are typically remanded for reconsideration in light of new developments occurring after a lower court ruling but before appellate court consideration, it said that there is an exception in cases where the issue could not have been raised at the lower court, and where the issue is of "great public interest." *ACLU v. County of Hudson*, slip. op. at 25.

The court then proceeded to hold that the new regula-

(Continued on page 62)

The new rule provides that public or private detention facilities that hold immigration detainees under a contract with the federal government may not publicly disclose the identity or any other information regarding any detainee.

The War Turns To Information

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tion pre-empted state freedom of information law. The court also rejected arguments that the new regulation was beyond the authority of the INS Commissioner, that it was adopted improperly, that it should not apply to the case before it because of the timing of its adoption, and that it violated the Tenth Amendment.

Thus, the court concluded, “it is of no consequence ... whether the disclosure is required as a matter of State law. ... [T]he federal regulation must be seen as pre-empting State law bearing upon its subject matter.” Slip op. at 49.

The ACLU said that it would appeal to the New Jersey Supreme Court.

Requirement for Journalist Interviews

While the Justice Department was adopting regulations and arguing in court to limit disclosure regarding immigration detainees, at least one INS office was requiring journalists who wish to interview detainees to sign an agreement stating that the journalist will notify the agency of allegations made against it by the detainees. The document, which was being required by the Las Vegas INS office, states that the purpose of this requirement is that the agency “may have the opportunity to respond prior to publication.”

The agent in charge of the Las Vegas office said that the requirement was policy handed down from INS headquarters in Washington, and has been in place since 1999. But the “Visitation” section of the INS’s *Detention Operations Manual* only suggests that parties to an allegation be allowed to respond as a requirement of “professional ethics.” § III. 1. 5., “Visitation” chapter at 18, in *Detention Operations Manual*, available at www.ins.gov/graphics/lawsregs/visit.pdf (visited June 14, 2002).

The Nevada ACLU has threatened to challenge the requirement in court.

Security Office Exempt From FOIA?

Back in court, the government is arguing that the Office of Homeland Security created by President Bush is exempt from the federal Freedom of Information Act because it is not an “agency” of the federal government.

The government’s argument is that the new office is akin to the National Security Council, which was held to be exempt from FOIA in *Armstrong v. Executive Office of the President*, 90 F.3d 553 (D.C. Cir.1996), cert. denied, 520 U.S. 1239 (1997).

The argument was made in the government’s motion for dismissal of a lawsuit filed by the Electronic Privacy Information Center, seeking information on any proposals for a national ID system. See *Electronic Privacy Information Center v. Office of Homeland Security*, No. 02-CV-620 (D.D.C. filed April 2, 2002), documents available at www.epic.org/open_gov/homeland (visited June 14, 2002).

¹The department justified the immediate imposition of the rule, with a post-promulgation public comment period, under laws allowing agencies to disregard normal rulemaking procedures upon finding “just cause.” See 5 U.S.C. §§ 553(b)(3)(B) and (d)(3).

²The foundation has filed its own defamation suit against various news organizations over statements that the foundation’s assets were frozen by the federal government. See *Global Relief v. New York Times Co.*, Civil No. 01-8821 (N.D. Ill. filed Nov. 15, 2001); see *LDRC Libel-Letter*, Dec. 2001, at 52. The various defendants in the suit have filed motions to dismiss.

The government’s argument is that the new office is akin to the National Security Council, which was held to be exempt from FOIA in Armstrong v. Executive Office of the President

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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Editors Note: LDRC'S Ethics Committee will be writing a periodic column for the MediaLawLetter on legal ethics issues. They would like to get feedback, however, from the LDRC membership, with comments on issues they have addressed or that the committee should consider addressing in the future. You should feel free to send your views or questions to LDRC (LDRC@LDRC.com) or to the Committee membership directly (a partial list is in your Defense Counsel Section Directory).

Ethics Corner: Confidentiality and Phone Conversations

By Robert C. Bernius

Those of us who have not been in a cave for the past few years know about *Bartnicki*, *Peavey*, and similar cases. We are passingly familiar with wiretap laws, and are convinced that cell phone conversations enjoy essentially the same level of legal protection from interception as do land line conversations. So, since our time is of great value, we confidently make cell phone calls to clients in airports, trains, cars and, probably more than occasionally, from the golf course. No ethical issues, right?

Right -- as long as you are in Delaware. A recent Delaware Bar ethics opinion concludes that it is ethically proper to use the internet, cellular phones and cordless phones to discuss client confidences.

Elsewhere, however, there remain at least the remnants of an ethical issue. One should therefore be acutely careful before discussing client secrets or other sensitive information over cordless or cellular phones, pending further ethics rulings.

This is so because technology has out-sprinted (so to speak) the law. Recall that cell phone technology is of three principal types: cordless phones (used in your kitchen), which transmit conversations over FM frequencies that can be heard by your next door neighbor or the kid down the street; analog cell phones, which transmit conversations that can be picked up fairly readily by scanners; and digital cell phones, which are thought to be considerably more secure. Based on the older technology (i.e. cordless and analog cell phones), some ethics and judicial opinions concluded that there is no reasonable expectation of privacy for conversations conducted on portable phones; hence, according to those authorities, use of portable phones risks waiver of the attorney client privilege. The Electronic Com-

munications Privacy Act, which until 1994 did not protect cordless phones, generally supported the reasoning of those earlier holdings.

The recent Delaware opinion recognizes the technological evolution and the amendment of the ECPA. Other states' opinions are, however, not as contemporary. Thus, for example, Massachusetts and New Hampshire advise against any use of cellular or cordless phones by attorneys to discuss client information. See Mass. Ethics Op. 94-5 (1994) (concluding that confidential information should not be discussed on a cellular phone if there is any non-trivial

risk that such information may be overheard by a third party; and even if the attorney concludes that there is no risk, the conversations should only occur after full disclosure of the dangers involved and client consent); N.H. Ethics Op. 1991-92/6 (1991) (advising attorneys not to discuss client confidences or any other matter

related to representation without client consent unless a scrambling device is used). New York City advises lawyers to obtain the client's informed consent prior to using cellular or cordless phones to discuss client matters. See N.Y. City Ethics Op. 1994-11 (1994). North Carolina (Op. 215), Illinois (Op. 90-07) and Iowa (Op. 90-44) are to the same effect.

One must be practical in these situations, but should still remain sensitive to the confidentiality issue. There are ways to minimize potential problems. For example, talking with a client euphemistically, or re-dialing a call to undertake a new conversation devoid of identifying information, may be the most prudent way to handle a particular discussion. For highly confidential information, the use of a land line would be the only prudent course. Because of its technological deficiencies, it would seem very risky to use a cordless (as distinct from a cellular) phone to talk with a client. And, it is always appropriate to caution cli-

For highly confidential information, the use of a land line would be the only prudent course.

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Ethics Corner

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ents about cell phone use.

Finally, the following observation by the Delaware ethics committee bears repetition. (Anyone who has listened to the cell phone clamor on the Metroliner between New York and Washington D.C. — or between Wilmington, Delaware and either of those cities — will appreciate the evident source of the committee’s concern):

The extraordinary instances in which mobile phone communications might be electronically intercepted are far less likely than the problem presented when lawyers and clients share confidential communications on mobile phones while in public places within earshot of others. Lawyers therefore should take precautions not to discuss confidential matters with clients while in a public place, such as on a train or in an airport, if others may overhear the conversation. Likewise, lawyers should advise their clients to take similar precautions when speaking to counsel on mobile phones.

You can read the Delaware opinion at <http://www.dsba.org/2001-2.pdf>.

Rob Bernius is a partner in the Washington, D.C. office of Nixon Peabody.

Swiss Magazine Liable for Satirical Cartoon

A satirical photomontage of Princess Stephanie of Monaco cost the Swiss news magazine *Facts* more than \$8000 in fines for defamation and invasion of privacy in a recent judgment by a Zurich trial court. See P. Studer, “Satire darf nicht alles, aber vieles” (March 20, 2002) (available through <www.weblaw.ch/jusletter>).

In March 2001 the magazine published a computerized photo montage showing Princess Stephanie in bed with her boyfriend Franco Knie – who is a circus director and elephant trainer. Knie was depicted wearing an elephant tusk g-string and the caption read: “Princess Stephanie of Monaco is hot for Franco Knie’s new elephant act.” Stephanie’s father, Prince Rainer of Monaco, was also depicted in the montage gawking through a window.

In February 2002, the Zurich district court found that the cartoon was defamatory, was offensive to an average reader and that it invaded the couple’s privacy – despite their status as well know public figures. The offenses, according to the court, outweighed the constitutional protections for the press and the expression of opinion. The magazine has appealed the case.

To Be Published in July

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Dow Jones Seeks Declaratory Judgment Versus Harrods

Dow Jones has filed an action for declaratory judgment in the U.S. District Court for the Southern District of New York against Harrods and its chairman Mohamed Al Fayed (defendants) in connection with an article about Harrods published by *The Wall Street Journal* in April. Harrods had threatened to sue Dow Jones in England and Dow Jones' complaint, filed on May 24, asks the U.S. court to relieve Dow Jones "from the uncertainty, insecurity, and controversy arising from the threatened ... defamation action" in the U.K. In fact, Harrods did file suit against Dow Jones in London just days after Dow Jones sued in federal court in New York. Dow Jones' declaratory judgment action was assigned initially to Chief Judge Michael Mukasey, but was reassigned to Judge Denny Chin.

U.S. Jurisdiction

To support U.S. jurisdiction, the complaint states that the differences in U.S. and U.K. defamation laws are so significant that any British judgment is likely to be unenforceable in the U.S. (e.g. *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1977)). Dow Jones

notes, for example, that in the U.K. a media defendant must overcome a presumption of falsity; defamation is a strict liability tort and there is no special fault standard for matters involving public figures or public officials; and the fair comment exception is much weaker than in the U.S. If the judgment will be unenforceable, it is unjust to make Dow Jones bear the expense of litigating the U.K. claim.

Further, Dow Jones claims it is unable to get complete relief in the U.K. because there is no single publication rule there. Harrods could file multiple suits for each time the article appeared in the U.K. and for publications of the article outside of the U.K., and has already requested disclosure of the number of U.S. print editions sold in the U.K., the number of web site subscribers, and the number of "hits" to the web site since the April 5 article appeared.

The Article

The article at issue ran on April 5, 2002, and concerned a Harrods publicity stunt. On March 31, Harrods announced it would be selling its stock to the public on April 1. *WSJ* published the item as a factual story on April 1. Later that day,

Harrods stated that the announcement had been an April Fool's ploy to drive traffic to a re-launch of Al Fayed's website, and that the company did not plan to go public. *WSJ* ran a correction the next day. On April 5, in its "Bids and Offers" column, *WSJ* ran a short article about the prank that carried the headline "The Enron of Britain?" and began:

If Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure.

The article recounted the publicity stunt in a humorous tone ("Not exactly Monte Python-level stuff"), then stated that Harrods, as a private company, had not violated any U.K. securities regulations. The article ran in U.S. print editions and on *WSJ*'s subscription-based web site, www.wsj.com.

Harrods Reaction

Harrods claimed that the April 5 article damaged its worldwide reputation by comparing it to Enron. The retailer demanded damages and a published apology from *WSJ*'s publisher Dow Jones, and threatened suit if the apology was not forthcoming. Dow

Jones maintained that the article was a humorous comment on Harrod's bogus press release and that there was nothing inaccurate in the article that would require an apology, and subsequently filed a complaint with the U.S. District Court for the Southern District of New York.

The U.S. Complaint

Dow Jones states that, as a matter of U.S. law, defendants are unable to prove that the article contained any provably false statements of fact and that it constitutes a protected expression of opinion.

Dow Jones also claims that it did not act with any degree of actionable fault because the article was opinion based on true and disclosed facts. Therefore, defendants would not be able to meet the actual malice standard that is required for public figures or, in the alternative, the gross irresponsibility standard required under New York law if defendants are considered private figures.

Jack M. Weiss, of Gibson, Dunn & Crutcher in New York, represents Dow Jones.

Further, Dow Jones claims it is unable to get complete relief in the U.K. because there is no single publication rule.

Mugabe Versus the Internet

Zimbabwe's trial of a Guardian reporter could undermine its own view of national sovereignty

By Geoffrey Robertson

Andrew Meldrum is on trial in Harare, accused of 'publishing falsehoods' in the Guardian's online service. His case is important, not only as the first test of the Mugabe government's repressive media laws, but because the internet basis of the prosecution amounts to an attempt to inflict these laws on the rest of the world. The Guardian newspaper is unavailable in Zimbabwe, but the prosecution insists that its criminal courts have jurisdiction over editors and journalists abroad whenever their 'falsehoods' are downloaded at police headquarters by the intelligence officers who spend their days surfing the net for criticisms of their country.

"Abusing Journalistic Privilege"

The crime of 'abusing journalistic privilege' by publishing falsehoods carries up to 2 years imprisonment. It is found in section 80 of the 'Access to Information and Protection of Privacy Act' – a dis-

ingenuously titled piece of legislation which in reality provides for the licensing, controlling and punishing of editors and journalists, ten of whom have been charged so far. The Act was rushed through parliament in January, and these charges relate to stories which discomfited Zanu-PF government in the run-up to the election.

The prosecution contends that the crime is one of strict liability – i.e. that the journalist is guilty if the allegation he reports later turns out to be false, however credible or newsworthy it was at the time of publication. (Meldrum, for example, merely recounted a widely published opposition claim that a woman had been executed by Zanu-PF supporters, without giving this allegation any particular credibility.) On this basis, of course, it will become risky to report any allegation made against the government, lest it subsequently turn out to be unfounded. Editors and reporters convicted under the Act

may not only be jailed but may also lose the licence to practice their profession that the Act now requires them to obtain.

Key: Where Was it Published

The Meldrum case is being tried, before a magistrate who must decide the crucial question of where the website story is published: in London, where it was uploaded onto the 'Guardian Online' webserver, or in Harare where Sergeant Blessmore Chishaka downloaded it last month at the Central Intelligence Organization. If the crime of false publication was committed in London, the Zimbabwe court should have no jurisdiction. But if committed on downloading in Zimbabwe, the court would have

jurisdiction to punish not only Meldrum but the editor of the Guardian and anyone else responsible for the uploading who comes within its clutches. (Mr Rusbridger, like General Pinochet, would have his travels truncated: no family holidays at Victoria Falls, or in countries like

China and South Africa which have easy extradition arrangements with Zimbabwe.)

The prosecution (which likens the world wide web to television broadcasting) sought to demonstrate how 'Guardian Online' is published in Zimbabwe. A demonstration arranged at police headquarters was cancelled (perhaps because too many official secrets would have been on show) and the city's internet cafes were scoured before the court moved to the business centre at the Sheraton Hotel. There, Sergeant Blessmore quickly accessed Guardian Online and called up every article written by Andrew Meldrum – except the offending piece. 'Possibly it has been deleted', he concluded. In which case, of course, President Mugabe's laws would have already caused the censorship of information which would otherwise be available now in Britain, and throughout the world.

Editors and reporters convicted under the Act may not only be jailed but may also lose the licence to practice their profession that the Act now requires them to obtain.

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Mugabe Versus the Internet

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Defense of Pull, Not Push, Technology

The prosecution relied on a copy of the webpage downloaded last month. The magistrate may dismiss the charge on the ground that the story on that page is not false at all – it accurately reports an opposition allegation and correctly attributes it to the local newspaper which first broke the story. If the defence is called upon, it proposes to produce expert evidence to explain the difference between ‘push’ technologies like broadcasting which transmit or direct information to particular areas and the ‘pull’ technology of the world wide web, by which information reaches Zimbabwe only as a result of an electronic message sent from that jurisdiction which pulls the copy off the web server in London – the place where, as a matter of common sense, it is made available to the public.

A Worldwide Issue

Courts throughout the world are currently grappling with the legal consequences of publication on the ubiquitous and directionless web. A Paris court ordered ‘Yahoo’ to disband its website offering Nazi memorabilia for sale or else erect a firewall (an electronic barrier) to stop it being accessed from France. But firewalls are ineffective and a US court has declared that the French order cannot override Yahoo’s First Amendment rights. Australia’s High Court is deciding whether it has jurisdiction in civil defamation over a Wall Street Journal website in New Jersey. But the Meldrum case is the first to assert local criminal jurisdiction over foreign web postings, and countries with more barbaric laws against seditious writing (Iran and Libya for example) would doubtless welcome a precedent.

But this prosecution may prove an ‘own goal’ for Robert Mugabe. He claims that his laws, however repugnant to other countries, are of concern only to Zimbabwe: they provide no warrant for the international community to interfere in his internal affairs. But by giving these laws extraterritorial effect, asserting jurisdiction over web publishers wherever they may be located because their criticisms of his regime can be downloaded by his secret policemen, then his laws are attacking freedom of speech abroad as well as at home. Even on his own outdated theory of national sovereignty, this would entitle other countries to take action against Zimbabwe to protect the freedom of

speech of their own citizens.

For the present, press freedom in Zimbabwe must rest in the fragile hands of its judiciary. Some magistrates have displayed notable courage in risking reprisals by convicting war veterans, but a shadow hangs over recent Zanu-PF appointees to the higher courts. The new media laws are blatant infringements of the country’s constitutional guarantee of freedom of expression: the acid test of the country’s judiciary will be whether, in subsequent proceedings, it has the integrity to say so.

Geoffrey Robertson QC of Doughty Street Chambers, London, England attended the Meldrum trial at the request of the Guardian..

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Hague War Crimes Tribunal Rejects Reporter's Privilege Request

In the first decision on reporter's privilege by an international criminal tribunal, the International Criminal Tribunal for the former Yugoslavia (ICTY), sitting in The Hague, rejected arguments that free expression and public policy interests require the court's recognition of a qualified reporter's privilege. See *Prosecutor v. Brdjanin and Talic* ("Krajina" Trial Chamber II Section A) (Judges Agius, Janu and Taya), Decision on Motion to Set Aside Confidential Subpoena to Give Evidence (June 7, 2002). Available through www.un.org/icty.

A three judge panel presiding over the trials of two accused Bosnia Serb war criminals rejected a reporter's motion to set aside a witness subpoena, finding that the testimony sought – which the court described as authenticating a published article – did not involve confidential sources or unpublished information and the reporter's evidence was necessary. While generally sympathetic to the free expression interests involved in compelling reporters to testify – particularly as to confidential sources and unpublished information – the court was not persuaded by policy arguments that routine compellability of reporters testimony would endanger the independence and safety of war reporters. Nor did it analyze the consequences of allowing a defendant to challenge a reporter's authentication – an avenue that might indeed lead to a reporter's unpublished material and sources. Instead the court emphasized the unique public interest in the Tribunal's role in seeking justice for the genocide and war crime claims from the former Yugoslavia.

Washington Post Reporter Interviewed Accused War Criminal

As reported in last month's *MediaLawLetter* the ICTY subpoenaed now retired *Washington Post* reporter Jonathon Randal at his home in Paris to testify in the trial of Radoslav Brdjanin who is on trial before the ICTY for genocide and war crimes. In 1993, while covering the Bosnia conflict for the *Post*, Randal interviewed Brdjanin, who was then Minister for Housing, about his involvement in ethnic cleansing operations. See *MediaLawLetter* May 2002 at 31. The interview resulted in a lengthy *Washington Post* article in which

Brdjanin was quoted saying, among other things, that Serbs should "create an ethnically clean space through voluntary movement" and that he was preparing a laws to expel non-Serbs from government housing. Decision at § 28.

Court Rejects Privilege Under Facts of Case

While the court cited with approval the case of *Goodwin v. United Kingdom*, [1996] 22 EHRR 123, a decision by the European Court of Human Rights that recognized a reporter's right to protect the identity of confidential sources – indeed the court referred to *Goodwin* as a baseline for protecting journalists – it found the privilege request here "misconceived" since no confidential sources or unpublished information was involved. Rather it upheld the prosecution's right to introduce into evidence Randal's article and require Randal's testimonial authentication of it, and the defendant's right to challenge that he never said what was attributed to him.

Without considering whether the prosecution had other means of proving the truth of the statements in the article – or noting the apparent weakness of a prosecution based on admissions to a reporter – the court concluded that "once the decision to publish Brdjanin's alleged declarations was taken and implemented by him, Randal has no right to pretend that he cannot be questioned on what he published giving as a reason that as a journalist he would rather not testify." Decision at § 32. The court declined to adopt a higher threshold need for a reporter's testimony, rejecting the argument that a reporter's testimony should only be compellable if it would be of crucial importance to the court's determination of a defendant's guilt or innocence. Randal was granted leave to appeal the decision.

Geoffrey Robertson QC and Steven Powles, of Doughty Street Chambers appeared at the ICTY on behalf of Jonathon Randal. They were instructed by Mark Stephens and Fiona Campbell of Finers Stephens Innocent in London.