

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

Reporting Developments Through June 20, 2003

***IN THIS ISSUE***

***PAGE***

**MLRC**

- Report on Legislative Affairs** 53  
*Cameras in the courtroom; FOIA; Freedom to Read Protection Act; Right to Know Act*
- Ethics Corner: Proposed Regulations on Attorney Advertising in Kentucky** 79  
*State bar association's proposal opens Pandora's box*

**SUPREME COURT**

- S. Ct. Cert Denied in *North Jersey Media Group, Inc. v. Ashcroft*** 5  
*Denial ensures split among circuits on access to immigration proceedings*
- S. Ct. Hangs Up on Fraudulent Telemarketing Schemes** 61  
*Charity calls with "intentionally misleading statements" can constitute fraud  
Illinois ex rel Madigan v. Telemarketing Associates, Inc.*
- S. Ct. Impact of *Dastar Corp. v. Twentieth Century Fox Film Corp.* Uncertain** 71  
*Court takes away one remedy for false attribution, but others remain*

**LIBEL & PRIVACY**

- Va. Cir. Ct. Jury Awards \$10 Million For Erroneous Drug Bust Story** 7  
*Award is highest trial verdict ever in Virginia in *Shecker v. Virginia Broadcasting Corp.**
- N.D. Ohio *New York Times* Wins Jury Verdict in Ohio in *Sweeney v. New York Times*** 9  
*Case brought by state Supreme Court justice over Sam Sheppard Murder Story*
- Kansas Criminal Defamation Charges Against Newspaper Dismissed** 11  
*Case may be retried, or end up in civil court*
- S.C. Ct. C.P. Jury Awards \$9 Million For Libel By Former News Director** 12  
*Station, owner dismissed in directed verdict in *Murphy v. Jefferson-Pilot Communications**
- La. App. Suit Against Web Site Dismissed Under Anti-SLAPP Provision** 14  
*Criticism of university administrator is public concern in *Baxter v. Scott**
- 9th Cir. Split en banc Court Denies Rehearing in *Suzuki Motors v. Consumers Union*** 15  
*Over Vigorous Dissents, forces case to trial despite thin actual malice record*
- N.H. Dist. Libel Suit Against Barricade Books Dismissed** 19  
*Court finds no jurisdiction in *Christian v. Barricade Books**
- N.Y. App. Div. Allows Republication Claim in Web Case in *Firth v. State II*** 21  
*Publication was moved to new Web address*
- Fla. Cir. Ct. Court Dismisses False Light Claim – Again, in *Heeking v. CBS Broadcasting Inc.*** 22  
*Plaintiff sues over domestic-violence broadcast*

(Continued on page 2)

*(Continued from page 1)*

<b>Wash. Ct. App.</b>	<b>Court Recognizes Defamation by Omission in <i>Mohr v. Grant</i></b>	<b>23</b>
	<i>Broadcast omitted prior events by disabled man arrested in store</i>	
<b>Cal. Ct. App.</b>	<b>Affirms Denial of Anti-SLAPP Motion Seeking to Strike Defamation Claim</b>	<b>25</b>
	<i>"Survivor" legal saga continues in <i>SEG, Inc. v. Stillman</i></i>	
<b>Canada</b>	<b>Web Site Is a "Broadcast" For Purposes of Ontario Libel Legislation</b>	<b>27</b>
	<i>Libel claim by city official dismissed as time barred in <i>Bahlheda v. Santa</i></i>	
<b>Canada</b>	<b>Quebec Court Allows Libel Class Action in <i>Malhab vs. Metromedia C.M.R. Montreal Inc.</i></b>	<b>29</b>
	<i>Creates conflict with common law in other provinces</i>	
<b>Cal. Ct. App.</b>	<b>Finds Right of Publicity in Pseudonym in <i>Ackerman v. Perry</i></b>	<b>31</b>
	<i>"Name" includes nicknames and pen names under state statute</i>	
<b>Iowa</b>	<b>State Supreme Court Reinstates Defamation Case</b>	<b>31</b>
	<i>Claim arose from statement plaintiff had "spirit of Satan"</i>	
	<i><i>Kliebenstein v. Iowa Conference of the United Methodist Church</i></i>	
<b>California</b>	<b>The Publicity Rights Worm Turns in <i>Winter v. DC Comics</i></b>	<b>35</b>
	<i>Ruling limits use of "transformative" doctrine to force jury trials</i>	
<b>Ohio</b>	<b>Jury Returns Defense Verdict in Hidden Camera Case</b>	<b>43</b>
	<i>Station and reporter argue true report, no negligence</i>	
	<i><i>AAA All City Heating Air Conditioning v. New World Communications of Ohio</i></i>	

**NEWSGATHERING**

<b>D.C. Cir.</b>	<b>Lets DOJ Withhold Information Regarding Detainees on U.S. Soil</b>	<b>5</b>
	<i>Information held to fall under FOIA exemption for criminal investigations</i>	
	<i><i>Center for National Security Studies v. U.S. Department of Justice</i></i>	
<b>2d Cir.</b>	<b>Buffalo Freelancer Wins New Hearing in <i>Kern v. Clark</i></b>	<b>37</b>
	<i>Prosecuted twelve times in five years</i>	
<b>UK</b>	<b>Criminal Charges Dropped Against Reporter Testing Airport Security</b>	<b>40</b>
	<i>Subterfuge in the public interest okay</i>	
<b>Arizona</b>	<b>Reporter Convicted of Trespassing While Seeking Comment</b>	<b>41</b>
	<i>Ruling not supported by precedent on "No Trespassing" signs</i>	
<b>Ohio Ct. App.</b>	<b>Conviction of Photographer of Cincinnati Morgue Affirmed in <i>State v. Condon</i></b>	<b>44</b>
	<i>Court upholds photographer's conviction for shooting corpses with inanimate objects</i>	
<b>2d Cir.</b>	<b>Denies Reporter's Privilege to Credit Rating Service, <i>In re Fitch, Inc.</i></b>	<b>45</b>
	<i>Fitch, Inc. can't assert N.Y. shield law over financial transactions</i>	
<b>N.J. Super. Ct.</b>	<b>Agrees to Release Secret Bail Transcripts in <i>State v. El-Atriss</i></b>	<b>47</b>
	<i>Trial judge defends original decision after appellate order</i>	
<b>W.D. Wash.</b>	<b>Strikes Down Statute Protecting Personal Information, <i>Sheehan v. Gregoire</i></b>	<b>49</b>
	<i>Statute created cause for disseminating information related to police officers, others</i>	
<b>Wash., D.C.</b>	<b>HIPAA and the Silencing of the Press</b>	<b>51</b>
	<i>Medical privacy law prevents coverage of health industry</i>	
<b>Wash., D.C.</b>	<b>Camera Bill Passes Senate Judiciary</b>	<b>55</b>
	<i>Sunshine in the Courtroom Act</i>	

*(Continued on page 3)*

*(Continued from page 2)*

**Wash., D.C. FOIA Fights Continue** 55  
*NSA exemption; Wen Ho Lee report; ATF gun records*

**Wash., D.C. Iraq, Military Access Issues Continue** 57  
*Leak enforcement; "over-classification"; press code; missing ITN crew; tribunal access*

**Cal. Sup. Ct. California Shield Law Ruling** 60  
*Subpoena of small-town journalist quashed*

**INTERNET**

**Canada Web Site Is a "Broadcast" For Purposes of Libel Legislation in *Bahlheda v. Santa*** 27  
*Libel claim by city official dismissed on summary judgment*

**E.D. Va. Addresses Novel Questions of Liability for Third-Party Content** 67  
*Chat room not place of "public accommodation" in *Noah v. AOL Time Warner Inc.**

**Cal. Sup. Ct. Dismisses Libel, Unfair Business Claims against Ebay in *Grace v. Neeley*** 68  
*Reaffirms previous rulings on immunity provisions of Communications Decency Act*

**S.D. Fla. E-mail Marketing Group Sues Anti-Spammers, *E marketers America v. Spews.org*** 70  
*Allegations include libel, blocking of mass e-mails, contractual interference*

**NEWS & UPDATES**

**N.Y. Sup. When Spike met Spike: *Lee v. Viacom, Inc.*** 33  
*Spike Lee wins preliminary injunction against Viacom over Spike TV*

**Cal.Sup.Ct. Review Granted in *Gates v. Discovery Communications*** 33  
*Court to review law on publishing criminal past*

**New York Criminal Investigation Against Jayson Blair Dropped** 39  
*U.S. Attorney inquired about wire, mail fraud*

**Tennessee DJ Sentenced for April Fools' Hoax, *State v. Brimmer*** 40  
*Crowd finds candy no substitute for rapper*

**FTC The FTC's Telemarketing Sales Rule** 63  
*What media companies should know*

**8th Cir. Strikes Down Restriction on Dissemination of "Violent" Video Games to Minors** 73  
*Depictions of violence in video games fully protected by First Amendment*  
*Interactive Digital Software Ass'n v. St. Louis County*

**5th Cir. Upholds Rule 11 Sanctions Against Lawyer For Using Media** 76  
*Lawyer invited press to watch attempted asset seizure at Kmart outlet*  
*Whitehead v. Food Max v. Minor*

**REPORT ON LEGISLATIVE AFFAIRS, PAGE 53.**

MLRC asked the Chair of its Legislative Affairs Committee, Kevin Goldberg, Cohn & Marks, Washington D.C., to identify some of the key legislative matters in Washington that affect the media including, where pertinent, key deadlines and comment dates. Kevin and his Committee are planning to continue these updates, and they will be an element of their Committee page on the MLRC website in the future.

**MLRC will bestow its WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD on**

**Howard H. (“Tim”)Hays, Jr.,  
former owner and publisher of the Press-Enterprise of Riverside, CA.**

Tim Hays was in charge of the Press-Enterprise when the newspaper not once, but twice, convinced the Supreme Court of the United States to recognize and expand rights of access to America’s court-rooms. *Press-Enterprise Company v. Superior Court of California* was argued 20 years ago this October and decided in January 1984. Its sequel, generally known as *Press-Enterprise II*, was decided in June 1986.

For his strength and courage of conviction, and, of course, his willingness to spend what it took of his own money to take the cases all the way to the top of the legal system, Mr. Hays deserves the profound gratitude and honor of the public and the media.

The Award will be presented to Mr. Hays by Gary B. Pruitt, Esq., Chairman of the Board, President and Chief Executive Officer of The McClatchy Company.

Following the Brennan Award, the Dinner will feature another sequel, a continuation of the discussion begun last year regarding government secrecy’s impact on military and security coverage – an issue that threatens to overwhelm the principles Tim Hays championed.

**IN THE TRENCHES REVISITED:  
WAR REPORTING AND THE FIRST AMENDMENT – PART II  
A Panel of Journalists  
Moderated by  
Brian Williams  
NBC News**

## D.C. Circuit Rules that Justice Department May Withhold All Information Regarding Detainees on American Soil

By Jeffrey L. Fisher

The D.C. Circuit on June 17, 2003 issued a 2-1 decision holding that the Department of Justice need not release the names or any other information regarding the hundreds of individuals the government has detained on American soil during its post-9/11 terrorism investigation. The decision appears to be the first ever by an American court permitting the government to keep secret all information regarding individuals that it has detained. *Center for National Security Studies v. U.S. Department of Justice* (D.C. Cir. June 17, 2003).

The Center for National Security Studies and various other public interest groups brought the case, asserting that FOIA, as well as the First Amendment and the common law, entitled them to rudimentary information concerning the detainees. Last summer, the local district court ordered the government to release the detainees' names and their lawyers' names but had allowed it to withhold the dates of arrest and release, locations of arrest and detention, and the reasons for detention. The court then stayed its decision pending resolution of the parties' cross-appeals.

On appeal, a coalition of media entities, led by the Washington Post Company, filed an *amicus* brief arguing that permitting the government to keep secret the names and other basic information regarding the detainees would raise serious First Amendment problems in light of the lengthy and unbroken history of making arrest records public and the importance of those records as a check on governmental abuses of power. The Washington Legal Foundation and the Jewish Institute for National Security Affairs also filed an *amicus* brief, arguing that national security trumps any public need for information regarding the government's terrorism investigation.

### **Exempt From FOIA**

Judge Sentelle, joined Judge Henderson, held for the D.C. Circuit panel that all of the requested information was exempt from FOIA under Exemption 7(a) because its release could reasonably be expected to interfere with a criminal investigation.

In so holding, the majority afforded great deference to the government's affidavits and noted that courts are "in an extremely poor position to second-guess the executive's judgment in this area of national security." Although the Administration already has publicized information regarding a small number of detainees, such as Zacharias Mous-

*(Continued on page 6)*

## U.S. Cert Denied in North Jersey Media Group, Inc. v. Ashcroft

### **Denial Ensures Split Among the Circuits On Access to Immigration Proceedings**

On May 27, the Supreme Court denied cert. without comment in *North Jersey Media Group et al v. Ashcroft* (02-1289) (2003 WL 1191395). The decision lets stand a Third Circuit ruling that upheld the government's blanket exclusion of the media and public from deportation hearings. 308 F. 3d 198 (3d Cir., 2002). With the Sixth Circuit's grant of access in *Detroit Free Press v. Ashcroft*, the Court's denial leaves intact a split among the circuits on the issue of media access to immigration proceedings and the application of the *Richmond Newspapers* test. The government had asked the Court not to accept the case for review.

The Third Circuit had held that the media does not enjoy a First Amendment right of access to the hearings. Applying the history and logic test in *Richmond Newspapers*, the court ruled that there was no history of media access to immigration proceedings. Furthermore the threat of terrorism and national security outweighed the logic in permitting access. *(For a more in-depth discussion of the Third Circuit's opinion, see LDRC MediaLawLetter October 2002 at 11.)*

The Sixth Circuit reached a different conclusion in *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (C.A.6 (Mich.), 2002). In *Detroit Free Press*, the court held that the media did enjoy a First Amendment right of access to deportation hearings and interpreted the history and logic test in favor of the media. *(For a more in-depth discussion of the Sixth Circuit's opinion, see LDRC MediaLawLetter September 2002 at 3.)* The Sixth Circuit denied a government petition to rehear the case en banc. *(For more, see MLRC MediaLawLetter February 2003 at 11.)*

## Justice Department May Withhold Information

(Continued from page 5)

saoui, the majority deferred in particular to the Administration's assertion that supplying the requested information regarding *all* detainees would allow terrorists to create a "mosaic" of the ongoing investigation and thereby to impede it in the future.

The majority also rejected the argument that the First Amendment required DOJ to disclose the requested information. Although it acknowledged earlier in its decision, as the media maintained, that arrest records "have traditionally been made public," the majority, in contrast to many state courts to address the issue under state public records laws (see, e.g., *Hengel v. City of Pine Bluff*, 821 S.W.2d 761, 764-65 (Ark. 1991), characterized such records "investigatory documents" instead of information reflecting deprivations of liberty and, thus, the beginning of the adjudicative process.

### No Rights to Arrest Records

The majority then construed the right-to-access doctrine of *Richmond Newspapers, Inc. v. Virginia*, 478 U.S. 555 (1980), and its progeny as a "narrow" First Amendment rule that pertains only to "criminal judicial proceedings" and not to "information compiled during an Executive branch investigation." This result seemingly creates a conflict with prior decisions of the Vermont and Wyoming Supreme Courts, each of which have held that the First Amendment requires police departments to make their arrest logs public. See *Caledonian Record Publishing Co. v. Walton*, 573 A.2d 296, 299 (Vt. 1990); *Sheridan Newspapers, Inc. v. City of Sheridan*, 660 P.2d 785, 793-96 (Wyo. 1983).

Finally, the majority brushed aside the plaintiffs' claim that the common law right of access to public records entitled them to information regarding the detainees. Congress has provided a carefully calibrated statutory scheme [FOIA]," the majority stated, "balancing the benefits and harm of disclosure. The scheme preempts any preexisting common law right."

Judge Tatel dissented, arguing that the

"the court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness that FOIA embodies."

He added a particularly severe critique of the majority's refusal to require the government to release the detainees' attorneys' names. Judge Tatel termed the majority's reasoning, among other things, "flatly inconsistent with lawyers' roles as advocates and officers of the court in our fundamentally open legal system." Judge Tatel concluded that while the Administration's reasons for withholding "some" information concerning the detainees might be legitimate, the Administration fell "far short" of justifying its blanket refusal to provide any information regarding the detainees.

Judge Tatel did not reach the plaintiffs' First Amendment or common law claims.

Press reports issued shortly after the decision indicate that the plaintiffs are planning on seeking further review of the D.C. Circuit's decision.

The Plaintiffs were represented by Kate A. Martin of the Center for National Security Studies; Daniel L. Sobel of the Electronic Privacy Information Center; Elliot M. Minberg of the People for the American Way Foundation; and Arthur B. Spitzer, Steven R. Shapiro, and Lucas Guttentag of the ACLU.

The Defendants were represented by Gregory G. Katsas, Deputy Attorney General, as well as Roscoe C. Howard, Mark B. Stern, Robert M. Loeb, and Eric D. Miller, all attorneys in the Department of Justice.

The Washington Legal Foundation and the Jewish Institute for National Security Affairs were represented by Daniel J. Popeo and Paul D. Kamenar.

*The media coalition was represented by Laura R. Handman and Jeffrey L. Fisher of Davis Wright Tremaine LLP.*

---

**Although it acknowledged earlier in its decision, as the media maintained, that arrest records "have traditionally been made public," the majority characterized such records "investigatory documents"**

---

## **Jury Awards \$10 Million For Erroneous Drug Bust Story** ***Award Is Highest Trial Verdict Ever in Virginia***

A Virginia man who was acquitted in 2001 of charges that he was part of a drug conspiracy won \$10 million in compensatory damages in late May for a television news story that erroneously reported that federal agents had seized cocaine from his home and business. *Shecker v. Virginia Broadcasting Corp.*, Law No. 02-60 (Va. Cir. Ct., City of Charlottesville jury verdict May 23, 2003).

The award is the largest verdict ever to result from a Virginia media trial; in 1999, a state court awarded \$33.5 million in a case against *Izvestia* after the newspaper defaulted by failing to respond to a libel suit. See *LDRC LibelLetter*, January 2000, at 28.

Throughout the trial, plaintiff's lawyers repeatedly invoked the Jayson Blair episode at *The New York Times* to argue that journalists sometimes make up "facts."

### ***Arrest and Acquittal***

In 1999, Jesse Sheckler of Stanardsville, Virginia, lent Samuel Rose \$37,000 to finance a construction project. Rose was subsequently arrested on federal drug charges, and convicted. Sheckler says that he was unaware of Rose's drug activity when he loaned him the money.

In April 2001, Sheckler was indicted and arrested on one federal count of conspiracy to distribute cocaine. In her stories on the indictment broadcast on April 9 and 10, WVIR-TV reporter Melinda Senadeni reported that federal authorities had found cocaine in a raid of Sheckler's home and adjacent auto repair business. In fact, no raid had taken place, and no drugs had been found. Also, on April 9 the 11 p.m. newscast included a graphic showing a man being arrested in front of a house, over the term "Drug Bust"; the man shown was not Sheckler, who had not been arrested at his home.

Shortly after the reports aired, Sheckler's criminal defense attorney, Denise Y. Lunsford of Charlottesville, asked Senadeni for her source on the alleged drug seizure and was told that the information came from Assistant U.S. Attorney Bruce Pagel. But Lunsford says that when she called him, Pagel denied having told the TV reporter that any drugs were found. Lunsford then called the station again and spoke to a weekend anchor, but her concerns were not addressed by the station.

Sheckler's criminal trial began in late October 2001. After consulting the station's archived story, WVIR reporter Pedro Echevarria repeated the erroneous statement regarding the alleged drug seizure at Sheckler's home in a story that aired on Oct. 29, 2001.

Sheckler was acquitted at trial.

### ***Suit Filed Against Station***

In March 2002, Sheckler hired attorney J. Benjamin Dick of Charlottesville. According to the Sheckler's lawyer in the libel trial, Dick demanded a retraction but was refused. The station contended that Dick was satisfied because the story had stopped running.

*(Continued on page 8)*

**Register now to ensure a place!**

**MLRC LONDON CONFERENCE**  
**SEPTEMBER 22-23, 2003**  
**STATIONERS HALL**  
**AVE MARIA LANE, LONDON EC4**

***DEVELOPMENTS IN UK &***  
***EUROPEAN LIBEL, PRIVACY &***  
***NEWSGATHERING LAWS***

***Registration forms are attached to this***  
***newsletter and are available at***  
***www.medialaw.org***

**for more information contact**  
**Dave Heller at**  
**dheller@ldrc.com**

## Jury Awards \$10 Million For Erroneous Drug Bust Story

*(Continued from page 7)*

Sheckler then hired yet another attorney and filed suit against the station and its corporate parent on March 21, 2002. The suit, which sought \$10 million in compensatory damages and the statutory maximum – \$350,000 – in punitive damages, alleged that WVIR's erroneous reports in April 2001 had ruined his business and caused him emotional distress. Claims based on the Oct. 2001 stories were later added to the suit.

Prior to trial, Judge Edward L. Hogshire of the Charlottesville Circuit Court dismissed Sheckler's claims for punitive and presumed damages, finding no evidence of malice.

### ***Assistant U.S. Attorney Testifies***

The three-day trial in the case began on May 21, 2003, with testimony from plaintiff's expert witness, Virginia Commonwealth University mass communications professor Ted J. Smith. Smith, who testified on the "standard of care" exercised

by the TV station, said that a call from a lawyer regarding facts in a story was the most "bone-chilling" call that a newsroom can receive, other than a call from the FCC.

In video testimony, Senadeni restated her claim that she was told of the drug seizure by Pagel. Pagel himself then testified that he was not the source of the seizure information, and alleged that WVIR reporter Senadeni lied in order to obtain the case file, then cried when confronted about her subterfuge. Pagel's assistant gave similar testimony.

The plaintiff's case ended with Sheckler and his wife and two daughters testifying about the effect of the news stories on their lives.

The defense case began with testimony from the DEA agent who handled the Rose and Sheckler investigations. On cross-examination, agent Stan Burroughs stated his belief that Sheckler was guilty of conspiracy to distribute cocaine, despite his acquittal.

### ***Defense Shows Mistaken Identity***

The defense then called a former reporter for *The [Charlottesville] Daily Progress*, Keri Schwab. While prosecutor Pagel had testified that WVIR reporter Senadeni had confessed to obtaining the case file by lying, Schwab said that she was actually the reporter who Pagel had confronted and accused of lying to obtain the Sheckler criminal case file. While stating that Pagel accused her of lying, Schwab contended that she simply asked for the file, without any deception.

Finally, the station presented a forensic psychiatrist who testified that Sheckler's physical and mental ailments preceded WVIR's reports, and were likely inflamed by the arrest and trial.

---

***In a post-trial interview with defense counsel, one juror said that the large award was meant to punish the station for not responding to Lunsford's complaints and for archiving the story without any notations on the complaints.***

---

### ***Juror Calls Verdict Punishment***

The seven-member jury deliberated for three hours before awarding Sheckler \$10 million in compensatory damages. In a post-trial interview with defense counsel, one juror said that the large award was meant to punish

the station for not responding to Lunsford's complaints and for archiving the story without any notations on the complaints.

WVIR planned to file motions to set aside the verdict and for a new trial before June 13, and to argue these motions on July 21.

Matthew B. Murray of Richmond & Fishburne in Charlottesville represents Sheckler in the libel action. WVIR is represented by Thomas E. Albro of Tremblay & Smith, LLP in Charlottesville.

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

Call us, send us an email or a note.

Media Law Resource Center, Inc.  
80 Eighth Avenue, Ste. 200  
New York, NY 10011

Ph: 212.337.0200  
ldrc@ldrc.com

## The New York Times Wins Jury Verdict in Libel Case Brought by Justice of the Ohio Supreme Court

By George Freeman

After a two-week trial, a unanimous 12-person jury rejected a libel claim by Ohio Supreme Court Justice Francis Sweeney and returned a verdict on May 23rd in favor of *The New York Times*. The case is an object lesson in the importance of many of the practical trial hints discussed at prior libel conferences, including the importance of jury instructions and a special verdict form. The victory keeps *The Times* record intact of never having lost an American libel case (or settling one for money) since well before *Times v. Sullivan*.

### The Facts

The case had its origins in the notorious Dr. Sam Sheppard trials some 50 years ago. In 1954 Sheppard was convicted of killing his wife while his then 7-year-old son slept next door. As media lawyers know, his conviction was reversed by the U.S. Supreme Court on grounds of excessive publicity.

In a second trial in 1966 – which was critical to the current libel case – Sheppard was found not guilty, but he died a few years later. In the 1990s, DNA and other evidence appeared to exonerate Dr. Sheppard and point the finger at the family window washer, a convicted murderer in whose home a ring of Mrs. Sheppard's was found.

The son, Sam Reese Sheppard, in or around 1996, began an action to get a declaration of innocence for his father and to recover monies from the State.

Interestingly, at first the County Prosecutor's Office openly said that a new investigation was a good idea and that it was certainly possible that Sheppard was not guilty. However, it then made an abrupt about-face and took the position that Sheppard was clearly guilty and began fighting the son's case at every turn. This included filing a "Writ of Prohibition" in the Ohio Supreme Court in which the prosecutors moved to prevent the case from going to trial on some technical legal grounds. In December 1998, the Ohio Supreme Court, 4-3, allowed the trial to go forward, with Justice Francis Sweeney dissenting.

*The Times* and reporter Fox Butterfield ran some nine articles over a four-year period, from March 1996 to April 2000, about this battle, with a theme that this very visible,

emotional and political battle regarding the guilt or innocence of Sam Sheppard, which had played out in the 50's and 60's, was still roiling Cleveland today, and that some of the same political crosscurrents that existed 40 years ago still were at the fore in today's Cleveland.

Ultimately, in an April 13, 2000 article which reported on the jury's rejection of Sam Reese Sheppard's claims, a story which ran on page 20 of *The Times*, included these last two paragraphs:

"One of the abiding mysteries of the case is why the prosecutors fought so hard. Privately some of them had said earlier that they now believed Dr. Sheppard was innocent and that Mr. Eberling was the real killer. But decades after the murder, the case still divided Cleveland and Mr. Sheppard and his supporters maintained that some of the earlier generation of prosecutors had brought pressure on the current team of prosecutors. For example, Francis Sweeney, who was an assistant prosecutor in Dr. Sheppard's second trial, is now a justice on the Ohio Supreme Court. He voted unsuccessfully last year to block Mr. Sheppard's lawsuit from going forward in court. Despite his involvement in the earlier case, he declined to recuse himself."

### The Libel Claim

Plaintiff Justice Francis Sweeney claimed this passage was false and defamatory for three reasons:

- Though Sweeney was in the County Prosecutor's Office in 1966 at the time of the second trial, he was not actively involved in the case. He claimed that the factual statement was false, and *The Times* ultimately ran an Editor's Note correcting this. At trial, *The Times* argued that it was substantially true, since the office had only 12-15 lawyers and hence all prosecutors in the office, in Cleveland's most notorious case in a century, were emotionally invested of the case.
- Sweeney claimed that he had not declined to recuse himself, since, he argued, he never had been asked to recuse himself. Nonetheless, two letters were entered into evidence which went to him on the recusal issue,

(Continued on page 10)

### **The Times Wins Jury Verdict in Libel Case**

(Continued from page 9)

one from Sam Reese Sheppard as an amicus to the Writ of Prohibition proceeding (the State was the moving party in that proceeding against the trial judge) seeking recusal, the other opposing the recusal. Sweeney contended he never received either letter, just as he contended he never was given messages of the two phone calls Reporter Butterfield made to him when he was first mentioned in a *Times* story in 1998.

- Plaintiff claimed he had in no way pressured anyone, much less the current prosecutors, to take a position on the case. *The Times* argued that its report merely gave Sweeney's non-recusal as an example of one of the "pressures" Sam Reese Sheppard and his supporters believed had been put on the current prosecutors to win the case. Sweeney argued that this accused the judge of unethical and even criminal behavior, while *The Times* argued it was simply reporting on Sheppard's feelings and that "pressure" was used vaguely to indicate the political heat being put on the case.

Ohio Supreme Court Justice Sweeney did not ask for a correction. Rather, the first notice *The Times* had of an error in its report was when he sued – in state court – for defamation. Not surprisingly, *The Times* removed to federal court, where the case was assigned to Federal District Judge Donald Nugent, himself a former County Prosecutor. Judge Nugent denied *The Times* motion for summary judgment on the grounds of no evidence of actual malice without an opinion. A later memorandum opinion, issued the week before trial, did not give any substantive discussion of the actual malice contention.

#### **The Trial**

At trial, Fox Butterfield was heroic in rebutting the aggressive – and usually screaming – attacks of Plaintiff's attorney Don Iler. Butterfield was the only *Times* witness who appeared at trial, which had the advantageous consequence of the Defendant truly being personified by its reporter with the giant institution pretty much kept out of the jurors'

minds. (The trial began the day after *The Times* published its 14,000 word account of the Jayson Blair fiasco.) Moreover, since Justice Sweeney sat angry and distant at the trial and was not an especially sympathetic witness, the case appeared to be personified as Plaintiff's Attorney v. *The Times* Reporter.

Plaintiff's main arguments on actual malice were (i) that Butterfield had used the word "improbable" in a prior draft of an article about Justice Sweeney's non-recusing himself, thereby showing that he didn't believe it, as opposed to ascribing a meaning that the reporter just thought that it was strange; (ii) that Butterfield's mistake with respect to Sweeney's role in the prosecutor's office in 1966 could have been avoided if he had not "worn blinders," and he

could have looked at the 37-year-old trial transcript or asked a number of other people with better knowledge than Sheppard's team; (iii) that he relied for the accusation of "pressure" on Sam Reese Sheppard, who had emotional trauma and psychological illness

because of the murder of his mother and incarceration of his father, and hence, should not have been believed; and (iv) the reporter knew his story was false, but decided to twist the otherwise mundane story to attack Justice Sweeney so as to sensationalize his coverage.

On the other hand, *The Times* argued that there was no actual malice since Butterfield thought what he printed was true and certainly should be allowed to print what the loser of a hard-fought case "maintained" after the verdict came in. *The Times* also noted that Butterfield had reported essentially the same things about Justice Sweeney on two occasions in 1998, but had never received any call or other indication that such reporting was wrong. The reporter testified that in 1998 he had attempted to reach Sweeney for comment, but that his two calls went unreturned.

Moreover, the testimony showed that there was no reputational damage for Justice Sweeney. No one in Ohio legal circles had heard of the article, or thought less of Justice Sweeney because of it. Neither his own secretary at the Ohio Supreme Court nor the County Prosecutor nor many

(Continued on page 11)

---

**Since Justice Sweeney sat angry and distant at the trial and was not an especially sympathetic witness, the case appeared to be personified as Plaintiff's Attorney v. The Times Reporter.**

---

### **The Times Wins Jury Verdict in Libel Case**

*(Continued from page 10)*

in-the-loop Cleveland attorneys in between had been aware of the article. In addition, Justice Sweeney testified that only his family heard about the article and that, although no one talked to him about it, “people looked at me differently” after the article, and therefore his reputation had been destroyed “in one fell swoop.” The trial judge blocked most of the testimony concerning the fact that after similar articles had run in 1998, Justice Sweeney easily won a statewide election, and that though his opponent had criticized him on numerous grounds, the matters at issue here never came up.

### **The Jury**

Over *The Times*’s objection, the Judge allowed expert witnesses to testify with respect to journalistic standards, something seemingly irrelevant in a public official case where subjective state of mind is key. Moreover, at three different hearings at the end of the trial, the Judge rejected *The Times*’s urging that the jury instructions include the *St. Amant and Garrison v. Louisiana* definitions of actual malice, preferring to keep the actual malice instruction almost unreasonably short.

After the jury deliberated for four hours they sent a note asking for the definition of “probable” and “falsity” in the actual malice definition they were given which included the phrase “reckless disregard of probable falsity.” *The Times* again urged that the jury should be given instructions as to “serious doubts as to the truth” or “high degree of awareness of probable falsity”, but the judge again refused, preferring to give them dictionary definitions of those two words.

Shortly thereafter, the jury came back again with a question about whether actual malice required intentional conduct. Again *The Times* urged giving the jury the *St. Amant and Garrison v. Louisiana* definitions of actual malice and, finally, late Friday on Memorial Day weekend eve, the Judge read those definitions to them. Shortly thereafter, the jury returned its special verdict form finding that Plaintiff had made out a case of falsity and defamatory meaning, but not of actual malice.

*The New York Times* was represented by Lou Colombo and Jim Wooley of Baker & Hostetler in Cleveland, assisted by the author of this article, George Freeman, Assistant General Counsel of *The Times*. Plaintiff was represented by Don Iler and John Halbauer, Cleveland, Ohio.

## **Criminal Defamation Charges Dismissed in Kansas**

### **But Case May Be Refiled, Or End Up In Civil Court**

By Sam Colville

Criminal defamation charges against *The Baxter Springs [Kansas] News* were dismissed May 9, although the dismissal was without prejudice and some city officials said that they may seek to refile the charges.

The charges stemmed from a political ad and an editorial, both published on March 11, pertaining to upcoming municipal elections. The ad, placed by City Council candidate Charles How, stated that mayoral candidate Art Roberts had voted to hire Donna Wixon as City Clerk and asked: “You folks want two more years of this hateful city clerk?” The editorial, written by columnist Ron Thomas, stated that Roberts, when on the city council, had made the motion to hire Wixon without posting the job as required by law and was critical of her job performance. Two days later, Wixon filed complaints of criminal defamation against *News* publisher Larry Hiatt and against How and Thomas. See *MLRC MediaLawLetter*, March 2003, at 3.

The charges were brought under Baxter Springs Municipal Ordinance 762 Art. 3, § 3.9a, which is identical to the Kansas defamation statute, Kan. Stat. Ann. § 21-4004. Municipalities throughout the state have adopted this statute as part a model city public offense code promulgated by the League of Kansas Municipalities. See *MLRC MediaLawLetter*, March 2003, at 4.

The sitting municipal judge recused himself from hearing these complaints, and Frederick Smith, a city judge from Pittsburg, Kansas, was appointed as a judge pro tem. At the first hearing, on April 18th, Baxter Springs city attorney Robert Myers recused himself from prosecuting the complaints and advised the court that the city would appoint a special prosecutor.

Smith ordered that the special prosecutor be appointed within 30 days.

No prosecutor was appointed within that time, and motions to dismiss all complaints with prejudice were filed. On June 3, 2003, the court dismissed each complaint without prejudice. Judge Smith also specified that

*(Continued on page 12)*

## **Criminal Defamation Charges Dismissed in Kansas**

*(Continued from page 11)*

before the complaints could be refiled, a prosecuting attorney had to be appointed and had to sign the complaints.

In an article in the nearby *Joplin [Missouri] Globe* reporting on the dismissals, Myers is reported to have said he expects to soon obtain a special prosecutor to refile the charges. Wixon was reported as saying that she was considering filing a civil suit against Hiatt, How and Thomas.

In the same article, Hiatt and How were reported as saying that they may file a civil suit for malicious prosecution.

*Sam Colville, of Homan Hansen & Colville in Overland Park, Kansas, represented the defendants in the criminal case.*

---

## **Jury Awards \$9 Million For Libel By Former News Director Station, Owner Dismissed in Directed Verdict**

A Charleston, S.C. jury found in mid-May that a former television news director libeled attorney Elizabeth Murphy when he falsely accused her of making slanderous statements about another attorney. The jury awarded \$9 million to Murphy and her husband. *Elizabeth Murphy v. Jefferson-Pilot Communications*, No. 01-CP-10-1115 (S.C. Ct. C.P., Charleston County jury verdict May 21, 2003); *Chris Murphy v. Jefferson-Pilot Communications*, No. 01-CP-10-2161 (S.C. Ct. C.P., Charleston County jury verdict May 21, 2003).

The defendant's former employer, WCSC-TV in Charleston, and owner Jefferson-Pilot Communications Co., were removed from the suit in a directed verdict issued by Circuit Judge Thomas Hughston immediately before presenting the case to the jury.

The libel suit stemmed from a letter written in July 1999 by Donald Feldman, WCSC's news director at the time, accusing attorney Elizabeth Murphy of being drunk and "loudly and publicly" making inappropriate statements regarding another attorney, Sandra Senn, on a Delta flight from Charleston to Atlanta. Murphy presented evidence at trial showing that she was not actually on the flight.

The letter, written to Murphy but not sent to her, was printed on WCSC stationery and stated that the station "has a moral as well as a financial interest in protecting [Senn's] reputation," since she was a frequent guest on the station's "Carolina Gang" public affairs panel show. It told Murphy that Jefferson-Pilot Communications could be forced to "take legal action against you and your law firm" for the alleged statements.

Feldman also wrote a fake settlement agreement in which Murphy appeared to apologize for the comments.

### ***Love Led to Letter***

Feldman apparently created the documents to show to and to curry favor with Senn with whom he was infatuated. Senn and Elizabeth Murphy had worked together at a law firm founded by Elizabeth Murphy's father, but Senn left after a dispute with the firm.

Murphy learned of the letter and alleged settlement in November 1999, when Senn's attorney mentioned the documents and later faxed them to Murphy's attorney during the arbitration of a fee dispute between Senn and her former firm. Murphy knew the letter and agreement were a hoax.

But Murphy refused to give the television station's attorney the names of the people who could vouch that she was not on the flight, because she was convinced that Senn was behind the "conspiracy" with Feldman to destroy her. She refused give up the names until Feldman was deposed and made his allegations under oath. Feldman hired his own personal attorney and never gave a deposition, and Murphy only revealed the names in discovery after she filed her lawsuit in March 2001.

Feldman is currently serving three years in federal prison after pleading guilty in 2001 to mail fraud and embezzlement of almost \$2.4 million from WCSC during 12 of the 15 years he worked at the station. Because Feldman is in prison and destitute, Murphy sought to show that the station and its corporate parent should be held responsible for his actions.

During the eight-day trial, the Murphys' lawyers

*(Continued on page 13)*

**Jury Awards \$9 Million For Libel By Former News Director***(Continued from page 12)*

tried to show that Feldman was authorized to act on behalf on the station, and that the letter constituted an actual threat of litigation by WCSC and its owner. WCSC countered with evidence that neither the station nor its owner knew or approved of Feldman's actions, including a deposition from the station's general manager denying all prior knowledge of the letter. The defense also argued that he was employed by the station, not the parent company.

During 90 minutes of testimony Feldman invoked the Fifth Amendment whenever he was questioned about his actions regarding Murphy or his embezzlement conviction, according to the Charleston's local newspaper, *The Post and Courier*. In closing arguments, his lawyer said Feldman never intended for the accusations against Elizabeth Murphy to become public.

***Directed Verdict for Station***

Immediately before submitting the case to the jury, Judge Hughston granted the station's and parent company's motion for a directed verdict, stating from the bench that "If there is any principle guiding the common law, it is reason. There is no reason or public policy to extend the principle of vicarious liability to the facts of this case."

The jury deliberated for 90 minutes before finding that Feldman had libeled Elizabeth Murphy, and awarded her and her husband a total of \$9 million: \$6 million to Elizabeth Murphy and \$3 million to Chris Murphy. Half of the award to Elizabeth Murphy, \$3 million, was in punitive damages.

In an interview with *The Post and Courier*, one juror who refused to give his name said that the station should have been held accountable, and that the jury was "sending a message" with the large damage award. "The case was all about Channel 5," the juror told the paper. "From what I heard, they had an obligation to do something." On the other hand, a female juror called the attorney for the television station and stated that she did not think the station was at fault and thought the judge did the right thing.

The Murphys' lawyers said that they would appeal the directed verdict.

WCSC was represented by John J. Kerr and Henry E. Grimball of Buist Moore Smythe & McGee in Charleston, while Feldman was represented by Coming B. Gibbs, Jr. of Gibbs & Holmes in Charleston. The Murphys were represented by John E. Parker and Ronnie Crosby of Peters, Murdaugh, Parker, Eltzroth & Detrick in Hampton, S.C.

***To Be Published in July! Order Now!*****50 State Survey  
2003-2004:****MEDIA PRIVACY  
AND RELATED LAW***With a special report on privacy  
and related law in the Federal  
Courts of Appeals.*

**TOPICS INCLUDE:** *False Light • Private Facts • Intrusion • Eavesdropping • Hidden Camera • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Damages and Remedies • Relevant Statutes*

**\$175**

## **Suit Against Web Site Dismissed Under Anti-SLAPP Provision Site's Criticism of State University Administration Was Public Concern, Court Says**

A Louisiana appellate court dismissed a defamation lawsuit under the state's anti-SLAPP statute, holding that a Web site critical of the University of Louisiana at Monroe (ULM) was a matter of public interest and that the plaintiff could not show he was likely to succeed on his claim. *Baxter v. Scott*, 2003 No. 37,092, WL 21108458 (La. App., 2nd Cir. May 16, 2003).

The ruling came a week after the North Dakota Supreme Court upheld a \$3 million verdict to a University of North Dakota professor defamed on the site. *Wagner v. Miskin*, 660 N.W.2d 593, 2003 ND 69 (N.D. May 6, 2003); see *MLRC MediaLawLetter*, May 2003, at 10. North Dakota does not have an anti-SLAPP statute.

The Louisiana case was brought by ULM Vice President of External Affairs Richard L. Baxter against the anonymous operator of the Web site "Truth at ULM," which was hosted by free Web site provider Homestead Technologies, Inc. ULM economics professor John Scott identified himself as operator of the site after Baxter obtained a court order requiring the company that hosted the site to reveal the site owner's identity. See *In Re Baxter*, No. 01-MC-26 (W.D. La. order Oct. 18, 2001) (magistrate's discovery order), *aff'd*, No. 01-MC-26 (W.D. La. order Jan. 23, 2002) (affirming magistrate's order), *appeal withdrawn*, No. 02-30189 (5th Cir. Nov. 5, 2002).

Both Baxter and Scott have since changed positions. Scott now teaches in Arkansas, while Baxter has returned to teaching mass communications at ULM. The "Truth at ULM" site has been removed.

The suit alleged that the site made several references

to Baxter, saying he was involved in a "cover-up" of mismanagement by the administration of ULM President Lawson Swearingen, who retired in 2002. The school was criticized for alleged financial mismanagement during Swearingen's tenure.

After Baxter amended his complaint to name Scott as the defendant, Scott filed a motion to dismiss the case under La. C. Civ. P. art. 971, Louisiana's anti-SLAPP statute. He argued that Baxter was a public figure, the issues discussed on the Web site were matters of public concern, and Baxter could not show a possibility of succeeding in his claims. Baxter argued that art. 971 was inapplicable because Scott was not a member of the media, and that Baxter had shown a probability of success in obtaining the federal court order to reveal Scott's identity.

Trial Court Judge Alvin R. Sharp denied the motion, saying Baxter had indeed shown a probability of success on the claim.

On appeal, the Second Circuit Court of Appeal reversed, granting the motion to strike under art. 971. The court, in an opinion by Judge James E. Stewart, held that the Web site's subjects, operation of a public university and conduct of its administrators were matters of public interest. It also rejected Baxter's argument that art. 971 was limited to the news media, and concluded that Baxter was unlikely to succeed on the merits of his claims since he was unlikely to be able to show actual malice.

Scott was represented by J. Michael Rhymes on Monroe, La., while Baxter was represented by Shelly D. Dock of Forrester, Jordan & Dick, LLC of Baton Rouge.

***Save the Date!***

**MLRC ANNUAL DINNER 2003**

**WEDNESDAY, NOVEMBER 12**

**DCS ANNUAL BREAKFAST MEETING 2003**

**FRIDAY, NOVEMBER 14**

## Over Vigorous Dissent by Judge Kozinski, Ninth Circuit Denies Rehearing in *Suzuki Motors v. Consumers Union*

### *Forces Case to Trial Despite Thin Actual Malice Record*

By Bruce E.H. Johnson and Eric M. Stahl

On May 19, 2003, a sharply divided Ninth Circuit denied rehearing en banc in *Suzuki Motors Corp. v. Consumers Union of United States, Inc.*, No. 00-56043, 2003 U.S. App. LEXIS 9565 (9th Cir. May, 2003), and confirmed the reversal of summary judgment in favor of Consumers Union ("CU"). Eleven Ninth Circuit judges dissented from the denial of rehearing en banc. In a scathing opinion for the dissenters, Judge Alex Kozinski deemed it a "sad day" for consumer reporting and the public.

The case stems from CU's 1988 testing of the Suzuki Samurai and its subsequent reporting that the vehicle tended to roll over. Suzuki sued CU for product disparagement. The district court had granted summary judgment for CU, but the Ninth Circuit reversed last year in *Suzuki Motor Corp. v. Consumers Union*, 292 F.3d 1192, 30 Media L. Rep. 1897 (9th Cir. 2002). That result was confirmed in last month's amended panel decision, in which each of the three judges wrote separately. Judge Kozinski, dissenting from the denial of rehearing en banc, found it "incomprehensible" that CU

---

***Judge Kozinski, dissenting from the denial of rehearing en banc, found it "incomprehensible" that CU could be deemed to have acted with actual malice and predicted the majority decision will be "the death of consumer ratings."***

---

could be deemed to have acted with actual malice and predicted the majority decision will be "the death of consumer ratings."

### ***Malice Standards***

CU has stated that it will petition the U.S. Supreme Court to review the case, which raises at least two significant First Amendment issues for business and consumer reporting. First, the panel majority found that the "independent examination" rule – an important procedural safeguard mandating independent appellate evaluation of the evidence in First Amendment cases – did not permit the court, on an appeal of a grant of summary judgment, to evaluate or weigh the evidence of actual malice in a case. Rather, the majority held, the court need only apply the usual summary judgment standard of review, without

determining at this stage whether the evidence is sufficient to prove actual malice. As Judge Kozinski noted, "The practical effect of the panel's decision is that our review for sufficiency at summary judgment is now governed by one standard, while our review after a jury verdict is governed by another. Cases will now often proceed to trial, even though the court can tell ahead of time that the plaintiff's evidence will not support a jury verdict...."

Second, the case presents the question of what sort of evidence suffices to support a finding of actual malice in the context of consumer reporting. The basis for CU's opinion that the Samurai was unsafe was fully disclosed in the article. Nevertheless, the Ninth Circuit found evidence of actual malice existed because CU designed a test with the apparent goal of accentuating the vehicle's propensity to roll over, and because some of its testers appeared pleased when that result was achieved.

### **Amicus Sought On Cert Petition in *Suzuki Motors***

As noted in the accompanying article, Consumers Union has decided to file a cert. petition in the Suzuki case. In light of the importance of the case, Consumers Union is seeking media amicus support for its petition. Levine Sullivan Koch & Schulz, L.L.P. is undertaking to prepare an amicus brief on behalf of the Associated Press, The New York Times, and other media entities. MLRC members interested in joining the amicus effort are encouraged to contact Lee Levine or Dave Schulz for further details.

*(Continued on page 16)*

## Ninth Circuit Denies Rehearing in *Suzuki Motors*

(Continued from page 15)

### ***Samurai Tests***

In 1988, CU tested the Suzuki Samurai SUV as part of its annual evaluation of new vehicles. Previously, the vehicle's propensity to tip over had been the subject of news stories and public debate. Indeed, before CU began its testing, a CU employee driving the Samurai to the test track rolled the vehicle on a snow-covered road while traveling at 15 miles per hour.

CU initially subjected the Samurai to its standard lane-change avoidance test. In tests by professional test drivers, the vehicle exhibited no rolling. When a CU employee who was not a professional driver tested the vehicle, however, it tipped. In an effort to replicate these results, CU subsequently modified the test by reducing the distance in which the driver would have to switch lanes. On the revised test, the Samurai tipped over at relatively low speeds. CU subjected other SUVs in the Samurai's class to the same revised test, and none showed any tendency to tip.

CU announced its findings in a press conference and, subsequently, in the July 1988 issue of *Consumer Reports*. The published article rated the Samurai "Not Acceptable," and warned that the vehicle was unsafe and "unfit for its intended use."

CU subsequently asked the National Highway Traffic Safety Administration to act to reduce the risk of SUV roll-overs. The NHTSA issued an opinion disputing that the Samurai was dangerous and criticizing CU's testing protocols as unduly susceptible to human error.

Between 1988 and 1996, CU referred to its Samurai report in numerous other publications, including its 60<sup>th</sup> Anniversary issue. Suzuki filed suit in 1996, claiming CU's ongoing publication of the negative Samurai rating constituted product disparagement. The district court granted CU's motion for summary judgment.

### ***"Independent Examination" on Summary Judgment?***

On appeal, the parties agreed that Suzuki was a public figure and needed to prove CU acted with actual malice.

(The Supreme Court has left open the question of whether the First Amendment requires an actual malice standard in product disparagement cases. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 513 (1984). Although *amicus curiae* Washington Legal Foundation urged the Ninth Circuit to hold that a heightened standard of fault is not constitutionally required in disparagement claims, the court declined to address the issue because it was not raised by the parties.)

In reversing the grant of summary judgment, Judge Tashima's majority Ninth Circuit opinion stated that the court was required to apply the ordinary summary judgment standard, and to determine only whether the evi-

---

***Judge Tashima's opinion does not seem to account for Anderson's requirement that the evidence of actual malice – even on summary judgment – must meet the "clear and convincing" standard of proof.***

---

dence plausibly would permit a jury to find that "CU 'rigged' a test to achieve a predetermined result in order to serve its own pecuniary interests."

Citing recent Ninth Circuit authority (e.g., *Solano v. Playgirl, Inc.*, 292 F.3d 1078,

1082 (9<sup>th</sup> Cir.), *cert. denied*, 123 S. Ct. 557 (2002)), Judge Tashima suggested that even in actions governed by First Amendment standards, judges are not permitted, on summary judgment motions, to engage in the same searching, independent inquiry that appellate courts undertake after a trial verdict for the plaintiff.

Notably, Judge Tashima read *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) as supporting this view, but his opinion does not seem to account for *Anderson's* requirement that the evidence of actual malice – even on summary judgment – must meet the "clear and convincing" standard of proof.

The majority opinion rejects the notion that the "independent examination" rule of *New York Times v. Sullivan*, 376 U.S. 254 (1964), requires the appellate court to weigh the evidence of actual malice. According to Judge Tashima, the independent examination rule merely required that the appellate court independently evaluate "the lower court's opinion, rather than granting it any deference."

(Continued on page 17)

## Ninth Circuit Denies Rehearing in *Suzuki Motors*

(Continued from page 16)

### Dissents

In his dissenting panel opinion, Judge Ferguson accused the majority of undermining procedural protections mandated by the First Amendment and *New York Times v. Sullivan*. The independent judgment rule requires the court, even on summary judgment, to assure itself that the judgment does not impermissibly intrude on free expression, he wrote. The majority opinion concedes the rule applies, Judge Ferguson stated, but “this concession is empty” because as applied by the majority it differed in no meaningful way from the ordinary summary judgment standard.

Judge Kozinski, writing for the 11 judges dissenting from the denial of rehearing en banc, echoed this criticism. The independent examination rule, he wrote,

“calls for us to do something more than we would normally do....First Amendment independent examination is an *additional* protection that the constitution affords publishers.”

The “sufficiency” standard required by *Anderson* and *Bose*, among other cases, requires determining whether the record establishes actual malice with convincing clarity, and that “*does* involve weighing the evidence. If it did not, the independent examination rule would be meaningless.”

The majority’s crabbed view of independent examination, Judge Kozinski writes, “treats the rule as nothing more than de novo review of the trial judge’s sufficiency ruling,” which is exactly what appellate courts do in any case. What the case law requires, he continued, is “de novo review of the underlying question whether the defendant acted with actual malice.”

The majority’s refusal to “conflate” the independent examination rule with the summary judgment standard, Judge Kozinski continued, would lead to the bizarre result of defendants in First Amendment cases being required to forego summary judgment, and to stand trial, even where the evidence is legally insufficient to support a verdict. He concluded that “the [Supreme] Court would do us all a great favor by explaining that it intended no such absurdity.”

### *Thin Evidence of Malice Enough to Force Trial?*

On the substantive issue of whether CU acted with actual malice, Suzuki argued that the evidence was sufficient to show the Samurai testing was essentially rigged to produce a desired result. Its evidentiary basis for this is, first, that after the Samurai failed to tip over in initial testing, a CU editorial employee remarked to a test driver, “If you can’t find someone to roll this car, I will.” After this comment, a CU employee who was not a test driver decided to drive the vehicle, and eventually tipped it. Some CU onlookers apparently cheered when the tipping occurred, making comments like, “That’s it. That looked pretty good,” and “All right, Ricky baby,” after the Samurai failed a particular driving test.

Another item of proof that the court suggested supported an inference of actual malice was evidence offered by Suzuki that CU was “financially over-extended” and “needed a blockbuster story” to increase its revenues. In a footnote, the court also seems to permit courts to consider expert witness testimony on the issue of

actual malice.

Additionally, Suzuki argued the decision to modify its regular course to replicate the tipping problem was evidence that CU was aware of the probable falsity of its testing results. Separately, Suzuki alleged that CU purposefully avoided dispelling doubts about the accuracy of its reporting when it failed to do anything in response to the NHTSA criticisms of CU’s testing procedures in prior articles. (The NHTSA prefers “static” tests, but CU decided to use a “dynamic” test to determine the risks of tipping.)

In what was described as the “majority” opinion by the panel, Judge Tashima found all of this evidence adequate to permit a reasonable jury to conclude that CU had reason to doubt the truthfulness of its subsequent reports.

### *Garber Concurr Only on Two Statements.*

In his concurring opinion, however, Judge Graber found most of CU’s statements were not actionable, either because they were time-barred or because they “fail to meet the ex-

(Continued on page 18)

---

***Kozinski, J: The “sufficiency” standard required by Anderson and Bose, among other cases, requires determining whether the record establishes actual malice with convincing clarity, and that “does involve weighing the evidence.”***

---

### Ninth Circuit Denies Rehearing in *Suzuki Motors*

(Continued from page 17)

acting summary judgment standards used in a First Amendment case.” Two of the statements made in 1996, however, were actionable, in his view:

- (1) that CU developed its revised test course “because we discovered” the Samurai’s propensity to roll over (which he said was false by suggesting CU had discovered a propensity for rollover before it developed its “short course” for testing), and
- (2) that the Samurai “easily rolls over in turns” (Judge Graber concluded that some “coaxing” was involved in the way the tests were run).

### Judges Ferguson and Kozinski Dissent

In his dissent as a member of the panel that heard the case, Judge Ferguson wrote that the majority had failed to read CU’s statements in the context of a consumer reporting entity that had reason to believe the Samurai was unsafe. In his view, CU had complete justification for subjecting the vehicle to more rigorous testing. The majority, Judge Ferguson noted, was confusing CU’s “intractable, ‘bulldog’ mentality” with actual malice. Judge Ferguson concluded that “the majority’s reasoning will allow *any* deficiency in a consumer group’s test to become the grounds for litigation.”

Judge Kozinski also took the panel majority to task for the thinness of the actual malice “evidence.” Altering its testing procedures could not be evidence of malice, he wrote, because CU’s article fully disclosed its testing procedure, including the reasons for subjecting the Samurai to an altered test. Specifically, when CU’s non-professional driver tested the vehicle, he “made a slight steering misjudgment” that caused it to rise a foot off the pavement. The revised test was meant to replicate the conditions under which the Samurai had initially tipped, and to see how other SUVs would react in the same setting.

Judge Kozinski also disputed the relevance of evidence that some CU employees appeared eager to make the Samurai tip: “The fact remains that the Samurai *did* tip – several times – while every other vehicle run through the same course did not tip even once.”

Moreover, Judge Kozinski wrote, CU cannot be tagged with actual malice simply because it chose a method of testing that Suzuki now claims is unfair:

“What the majority calls ‘actual malice’ is really just one side of a long-running debate over how to test rollover propensity most effectively.”

Although scientific bias may suggest actual malice where the defendant engages in “an *extreme* departure from *standard* investigative techniques,” *Church of Scientology Int’l v. Behar*, 238 F.3d 168 (2d Cir. 2001) (emphasis added), Judge Kozinski found that the majority Ninth Circuit opinion permits a finding of actual malice based on “*any* departure from *past* technique.”

Judge Kozinski concluded with dire predictions of the effect the majority opinion will have on consumer reporting:

I have read CU’s review of the Samurai and Suzuki’s criticism of its methodology. After all that, I can only say I would

long hesitate before letting anyone I care about drive or ride in one of these vehicles. If Suzuki wanted me to disregard CU’s conclusions, it should have taken the money it spent on this lawsuit and hired an independent agency to run tests showing that CU’s criticisms are unfounded. It could also have tried to improve its product to moot criticism in the future. But, until today, I had thought the one option not available to a company in Suzuki’s position was to use its vast financial resources to drag its critics through the gauntlet of our immensely expensive litigation machine. I continue to hope I’m right, or this will be a sad day indeed for consumer organizations and those who rely on them for information vital to their health and safety.

Michael Pollet of Pollet & Felleman argued the appeal for CU. Robert Fiske of Davis, Polk & Wardell appeared for Suzuki.

*Mr. Johnson and Mr. Stahl are affiliated with Davis Wright Tremaine’s Seattle office.*

---

**The majority, Judge Ferguson noted, was confusing CU’s “intractable, ‘bulldog’ mentality” with actual malice.**

---

## Libel Suit Against Barricade Books Dismissed in New Hampshire

### Federal Court Finds No Jurisdiction

By William L. Chapman

The federal district court in New Hampshire on May 15, 2003 dismissed a libel and false light suit against Barricade Books for lack of personal jurisdiction. *Christian v. Barricade Books*, No. 02-408-B, 2003 U.S. Dist. LEXIS 8555 (N.H. Dist. May 15, 2003).

The plaintiff, Tonya Christian, a New Hampshire resident and daughter of Linda Kasabian, a one-time follower of Charles Manson, complained about two paragraphs in the book, *Sharon Tate and the Manson Murders*, published by Barricade Books. The paragraphs stated that the plaintiff was known to the Tacoma, Washington police as “Lady Dangerous,” and that they had searched her apartment and found

“suspected rock cocaine and a large bundle of cash . . . a .45 caliber semi-automatic handgun, ammunition, electronic scales, a plate with cocaine residue, and another bundle of cash.”

---

***Barricade Books, with headquarters in New Jersey, has no offices, employees or agents in New Hampshire.***

---

The account went on to report that the plaintiff had been found guilty of possession of controlled substances and sentenced to a year in state prison.

The plaintiff claimed that the charges were false and had confused her with her sister. She brought suit against Barricade Books in July 2002.

#### ***Few Ties to New Hampshire***

Barricade Books, with headquarters in New Jersey, has no offices, employees or agents in New Hampshire. In 2000 it published *Sharon Tate and the Manson Murders*, “the first biography of Sharon Tate . . . [that] follows her from childhood and adolescence, through her Hollywood life and marriage to Roman Polanski, to her untimely death,” and explores the “[s]trange connections between Sharon Tate, the Hollywood elite, and Charles Manson’s so-called ‘family.’” The book was written by Greg King.

Some 8,700 copies of the book were sold through national book chains, book wholesalers, book jobbers, and selected independent book stores. None of the book chains,

wholesalers, or jobbers was based in New Hampshire.

The court found that Barricade Books did not target New Hampshire readers in its marketing efforts. It did not control the manner in which or where distributors sold the book. Further, it had shipped only a single copy of the book to New Hampshire, but that copy had not been sold and had been returned.

#### ***Issue of Due Process***

The court began its analysis by noting that in a diversity case it sits as a state court in the forum state. As such, the plaintiff had the burden of demonstrating that Barricade Books’ contacts with New Hampshire satisfied both the New Hampshire long-arm statute and the due process clause.

Because the long-arm statute is co-extensive with due

process, the issue for the court was whether the requirements of due process had been met. The plaintiff argued that specific — as opposed to general — jurisdiction existed. Under well-established First Circuit law, the

court used a three-part test to determine whether Barricade Books’ contacts with New Hampshire were sufficient.

#### ***Relatedness***

The first component of the test is “relatedness,” which requires the plaintiff’s cause of action to arise directly out of, or relate to, the defendant’s in-state activities, ensuring that “the element of causation remains in the forefront of the court’s due process inquiry.”

The plaintiff argued that relatedness existed because, as the Supreme Court held in *Keeton v. Hustler Magazine*, 465 U.S. 770, 776 (1984), “the tort of libel is generally held to occur wherever the offending material is circulated.” The plaintiff demonstrated that two copies of the book had been sold in New Hampshire, but made no showing whether those sales had caused her injury. However, the court ruled that neither of those sales satisfied the relatedness component “because Christian does not claim that either sale resulted in damage to her reputation.” Nor, according to the court, did

*(Continued on page 20)*

## Libel Suit Against Barricade Books Dismissed

(Continued from page 19)

the “two sales, by themselves, justify an inference that other injurious books sales must have occurred in the state.”

Addressing the single copy shipped by Barricade Books to New Hampshire, the court ruled that it did not demonstrate relatedness “because the book was unsold, uncirculated, and ultimately was returned to Barricade.” For these reasons, the court held that the plaintiff had not satisfied the relatedness component.

### “Purposeful Availment”

Nevertheless, the court went on to analyze the second component of the test, “purposeful availment.” Under First Circuit law, “[t]he two cornerstones of purposeful availment are voluntariness and foreseeability.” As to the former, for a defendant’s contacts with the forum to be voluntary “they must not be the ‘unilateral activity of another party or a third person.’” (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

In *Gray v. St. Martin’s Press, Inc.*, 929 F. Supp. (D.N.H. 1996), the court held that the activities of the publisher in selling books

in New Hampshire could be attributed to the non-resident author based on the author’s interest in those sales through her royalty agreement with the publisher. Relying on *Gray*, the plaintiff argued that Barricade Books’ “sale on return” clause in its distributor agreements — permitting the distributors to return unsold copies of the book — gave it “a sufficient interest in books sold by its distributors to justify the attribution of their New Hampshire book sales to Barricade for jurisdictional purposes.”

The court rejected this argument, however, finding that the relation between Barricade Books and its distributors was not “so close that the distributor’s acts in the forum state will support a claim of personal jurisdiction over the producer.” For example, the plaintiff did not claim that Barricade Books had an ownership interest in any of the distributors or had exercised any control over where they offered the books for sale, or that the distributors were acting as Barricade Books’ agents or had engaged in a joint marketing effort. Absent such evidence, the court ruled that “the mere existence of sale on return agreements between

Barricade and its national distributors is not sufficient to satisfy the voluntariness requirement.”

### Foreseeability

The court finally held that the plaintiff had not satisfied the foreseeability cornerstone of purposeful availment, which requires a showing that the defendant’s in-forum activities are such that it “should reasonably anticipate being haled into court there.” This requirement was not satisfied, the court ruled, by the claim “that Barricade should have foreseen the possibility that copies of the Sharon Tate book might be sold in New Hampshire.” Nor could the plaintiff rely on the two sales of the book in New Hampshire she had demonstrated because the court refused to attribute those sales to Barricade Books.

This left only the unsold and returned copy that Barricade Books had shipped to New Hampshire, which the court stated “could not have alerted Barricade to the possibility that it might later be subject to suit for defamation in a New Hampshire court because of statements con-

tained in the book.”

Dismissal of the case against Barricade Books is a timely reminder that under the due process clause the evaluation of a defendant’s minimum contacts with the forum state is, as the court observed, “fact-specific, ‘involving an individualized assessment and factual analysis of the precise mix of contacts that characterize each case.’” (quoting *Pritzker v. Yari*, 42 F.3d 53, 60 (1st Cir. 1994)). That individualized assessment means that even when presented with seemingly contrary authority — here, *Gray v. St. Martin’s Press, Inc.*, 929 F. Supp. 40 (D.N.H. 1996), and *Faigin v. Kelly*, 919 F. Supp. 526 (D.N.H. 1996), where the court had exercised jurisdiction over non-resident authors — media counsel should still consider whether a successful personal jurisdiction argument can be made.

*Charles G. Douglas, III of Douglas, Monziona, Leonard & Garvey, P.C., represented Tonya Christian, and William L. Chapman of Orr & Reno, P.A. and David Blasband of McLaughlin & Stern, LLP represented Barricade Books.*

---

**[Foreseeability] was not satisfied, the court ruled, by the claim “that Barricade should have foreseen the possibility that copies of the Sharon Tate book might be sold in New Hampshire.”**

---

## New York Appellate Court Allows Republication Claim in Web Case

A New York appellate court in June took a step back from earlier decisions applying the single publication rule to Internet publications. *Firth v. State*, No. 93031 2003 N.Y. App. Div. LEXIS 6666 (N.Y. App.Div. June 12, 2003).

The Appellate Division, Third Department, upheld a lower-court decision declining to dismiss the second of two defamation claims by George Firth, former director of the Division of Law Enforcement (DLE) in the state's Department of Environmental Conservation. The appellate court, in an opinion by Justice Anthony Kane, denied summary judgment to New York State, holding that Firth could bring a cause of action for republication based on the fact that the state had moved the information in question to a new Web directory.

An investigation into Firth's management of the DLE led to a December 1996 report by the state Inspector General that accused Firth of mishandling weapons purchases for the DLE. The 99-page report was printed in hard copy, and an executive summary and a link to the full text were posted on the Web site of the state Education Department. Firth sued in March 1998, well past the one-year statute of limitations for defamation actions in New York.

The Court of Claims, Appellate Division and Court of Appeals all rejected Firth's argument that the state had republished the report by leaving it on the Web site, thus extending the statute of limitations every day the report

remained online. The Court of Appeals affirmed dismissal of the claim last year, holding that the single-publication rule applies to the Internet as well as print publications. *Firth v. State*, 98 N.Y. 2d 365 (N.Y. 2002). The rule, traditionally applied to such media as books and newspapers, allows only one defamation claim for the initial publication, subject to the statute of limitations. *See Gregoire v. Putnam's Sons*, 298 N.Y. 119 (N.Y. 1948).

In December 2000, the New York State Library, a division of the Education Department, moved the report to a new address within the department's network of Web pages. The site is still active (<http://www.nysl.nysed.gov/edocs/ig/execsum.htm>, an executive summary with links to downloadable versions of the full report). Firth claimed that amounted to republication,

and the state moved for summary judgment on this second claim. The Court of Claims in March 2002 denied that motion, and the Appellate Division affirmed: "[A]llegations that the report was moved to a different Internet address are sufficient to state a cause of action for republication to a new audience akin to the repackaging of a book from hard cover to paperback." *Firth*, 2003 N.Y. App. Div. LEXIS 6666, at \*3. Affidavits submitted on behalf of the state by an attorney and a state employee were insufficient, the court held, and an affidavit later submitted by the Web coordinator of the State Library was inadmissible because it wasn't included with the state's summary-judgment motion.

---

***The appellate court, in an opinion by Justice Anthony Kane, denied summary judgment to New York State, holding that Firth could bring a cause of action for republication based on the fact that the state had moved the information in question to a new Web directory.***

---

## Florida Court Dismisses False Light Claim – Again

By Ashley I. Kissinger

"If at first you don't succeed, try, try again." The old adage proved true once again last month in a case pending in Sarasota County Circuit Court in Florida. On May 28, the court dismissed, for a second time, and from the bench, the plaintiff's sole cause of action for false light invasion of privacy in *Heekin v. CBS Broadcasting Inc.*, Case No. 99-5478-CA.

### *The Plaintiff's Beef*

In April 1995, CBS aired a broadcast on *60 Minutes* about the justice system's response to domestic violence. Plaintiff Charles Heekin's former spouse, Judy Dickinson, was interviewed for the broadcast and stated that she feared for her life and the lives of her children. Correspondent Lesley Stahl reported that a restraining order had issued against Mr. Heekin, who was identified by name in

(Continued on page 22)

## Florida Court Dismisses False Light Claim – Again

*(Continued from page 21)*

the broadcast. She also read on the air a portion of a letter that he wrote declining to be interviewed.

Four years after the broadcast, Mr. Heekin, a lawyer practicing in and around Sarasota County, sued CBS for false light invasion of privacy, complaining not about any statements made in the broadcast, but about the “juxtaposition” in the broadcast of his ex-wife and their children “with pictures and stories covering women who had been abused, battered, and in at least one case, killed.” He alleged that CBS “intended to and did in fact create in the viewing public the impression that the Plaintiff had battered, abused and injured his then-wife and children in the same fashion.”

Mr. Heekin further alleged that CBS disseminated the broadcast with “actual knowledge or with reckless disregard of the effect that the broadcast would have.”

### ***The First Dismissal***

In March 2000, the trial court dismissed the plaintiff’s false light claim because (1) the plaintiff’s claim for injury to his reputation allegedly arising from the broadcast is, in fact, one for defamation, and it is barred by the two-year statute of limitations for such claims; (2) the plaintiff failed to plead actual malice; and (3) the information in the broadcast about which the plaintiff complained was contained in public records. In February 2001, however, the Second District Court of Appeals reversed that decision on the grounds that (1) the statute of limitations for defamation does not apply to the plaintiff’s false light claim because he conceded that all of the statements made about him in the broadcast were true and, instead, complained only of an alleged “false impression” arising therefrom; (2) the plaintiff is not required to plead and prove actual malice because he alleged that he is a private individual, not a public figure; and (3) the common law fair report privilege does not protect the broadcast because plaintiff’s claim is not one for publication of private facts. CBS’s petition for discretionary review filed in the Florida Supreme Court was unsuccessful.

---

***The broadcast did not convey the “false impression” that Mr. Heekin abused his spouse and children in the same fashion as did the two other men discussed in the broadcast.***

---

### ***The Second Dismissal***

Up to this point in the proceedings, no court had yet reviewed the broadcast itself because CBS’s defenses were not based on its content. Accordingly, following remand, CBS filed a Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment, attaching the broadcast and seeking dismissal of the plaintiff’s action on the grounds that the broadcast did not convey the “false impression” the plaintiff alleged; that CBS did not intend or endorse such an “impression;” that, given the plaintiff’s concessions that all statements made about him in the broadcast were accurate, the alleged impression arising therefrom was substantially true and was not “highly offensive” as a matter of law;

that any such impression created was constitutionally protected opinion based on accurate disclosed facts; and that the broadcast is privileged as a matter of law under the First Amendment as an accurate report of public proceedings.

On May 28, after hearing argument, Chief Judge Robert B. Bennett, Jr. granted CBS’s motion for judgment on the pleadings from the bench, expressly ruling that (1) the broadcast did not convey the “false impression” that Mr. Heekin abused his spouse and children in the same fashion as did the two other men discussed in the broadcast; and (2) to the extent that Mr. Heekin contended that the broadcast falsely reported that he abused his spouse and children, his claim was in fact one for defamation and was barred by the two-year statute of limitations.

### ***The Horse Is Not Dead Yet***

The plaintiff is expected to appeal yet again once the trial court enters its final written order. Stay tuned.

*CBS Broadcasting Inc. is represented in this matter by Susanna M. Lowy of CBS, Lee Levine and Ashley I. Kissinger of Levine Sullivan Koch & Schulz, L.L.P., and David M. Snyder of David M. Snyder, P.A., Tampa, Florida.*

## Defamation By Omission in Washington State

By Allison P. Howard

On May 20, 2003, Division Three of the Washington Court of Appeals recognized a claim of defamation by omission in a case arising out of a broadcast news series about the prosecution of a man with Down's syndrome. The opinion by Judge Dennis J. Sweeney in *Mohr v. Grant*, 68 P.3d 1159 (May 20, 2003), reversed the summary judgment in favor of the broadcasters and permitted the plaintiff to pursue his claim that material omissions made an otherwise true story false and defamatory.

### *News Report Omits Prior Events*

The three-day series on KXLY-TV in Spokane focused on the prosecution of Glen Burson, a 40-year-old man with developmental disabilities who was facing prosecution for trespass and harassment. He was arrested after refusing to leave an interior design store and then threatening the owners, Eliot and Louise Mohr.

According to police reports, Burson had made slashing motions across his throat and told the Mohrs he would shoot them. The charges against Burson were dismissed after he was found incompetent to stand trial.

KXLY reporter Tom Grant got copies of the court file, police reports and an incident history. He was told that Burson had no history of making threats or being violent; the court files did not show a criminal record. He interviewed Burson, Burson's family and the public defender. The prosecutor declined to comment, and Eliot Mohr did not respond to a request for an interview.

The broadcast included an interview with Burson, who said Mohr hit him and showed how Mohr grabbed his arm to escort him from the store when Burson refused to leave. It included interviews with people who described Burson as gentle, childlike and harmless.

It did not refer to the previous instances in which the Mohrs had contacted the police about Burson's disorderly conduct at their business and threats he had made. It did not refer to the police's previous warning to Bur-

son that he was trespassing and would be arrested if he returned to the Mohrs' business. It did not name the Mohrs but did identify and show their store. After complaining to Grant about the first installment of the series, Eliot Mohr appeared in one of the later installments. He described his earlier interactions with Burson and said he had not wanted to press charges against him. Nevertheless, more than 30 viewers called his business to complain and say they would boycott the store.

### *Defamation Claims Dismissed by Trial Court*

Eliot Mohr and his business sued Grant and the station for defamation, claiming that the reports included false statements and created a false impression of Eliot Mohr as a bully who assaulted Burson and pursued criminal charges against him. Mohr claimed the broadcasters created this false impression by omitting important material facts, including the police reports describing earlier threats from Burson.

Mohr offered a statement from a viewer who said that if she had known "the actual history between Glen Burson and the Mohrs I would not have been so upset with Eliot Mohr." He also offered a public statement the prosecutor's office issued after the first installment of the series that described Burson's previous threats against the Mohrs and characterized the broadcast as "one-sided."

The Spokane County Superior Court found no issue of material fact about the substantial truth of the broadcasts and granted KXLY's motion for summary judgment. The Court of Appeals reversed.

### *On Appeal, Claims Reinstated*

A Washington defamation plaintiff has the burden of proving each of the four *prima facie* elements of a defamation claim: (1) a false and defamatory statement, (2) an unprivileged communication, (3) fault and (4) damages. The appellate court held that Mohr, as a private figure, had to prove that the "defendants knew,

---

***Mohr also relies on a later Eighth Circuit case that interpreted Minnesota law to place the burden on defendants to defend the omission of allegedly material facts.***

---

(Continued on page 24)

## Defamation By Omission in Washington Square

(Continued from page 23)

or in the exercise of reasonable care should have known, that the statement was false or would create a false impression.”

The court rejected Mohr’s claim that statements in the broadcast were false. It was true that Burson had no criminal history; he had no prior arrests or convictions. The report also truthfully reported the description of an eyewitness, Burson, of how Mohr twisted Burson’s arm.

The court then addressed Mohr’s claim of defamation by omission. After recognizing that, “[n]o Washington case directly addresses the problem of material omissions,” the court pulled from other jurisdictions. Relying on the Texas Supreme Court’s opinion in *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103 (Tex. 2000), the court held,

“A story that contains only truthful statements may nonetheless be false and defamatory as it relates to the plaintiff if it omits material facts.”

The *Turner* decision held that a person could sue for defamation

“when discrete facts, literally or substantially true, are published in such a way that they create a substantially false or defamatory impression by omitting material facts or juxtaposing facts in a misleading way.”

The Washington court also cited the Minnesota Supreme Court decision in *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990), as an example of a jurisdiction that “readily accepted defamation by omission where, as here, the plaintiff is a private individual suing a media defendant.” In *Diesen*, however, the court ruled in favor of the press defendants, finding that any omissions “would have had no material effect in changing the thrust and tenor of the articles” and that “even if facts were omitted from the published articles, arguably such organizing and editing of the articles were within the Newspaper’s discretion.” The *Mohr* decision contains no such recognition of editorial discretion.

*Mohr* also relies on a later Eighth Circuit case that interpreted Minnesota law to place the burden on defendants to defend the omission of allegedly material facts.

Under the Eighth Circuit’s decision in *Toney v. WCCO Television, Midwest Cable & Satellite, Inc.*, 85 F.3d 383 (8th Cir. 1996), if the defamation plaintiff alleges material omissions, the defendant cannot obtain summary judgment by showing the published statements were true. Instead, it must defend the omissions.

### *Falsity, Express or Implied*

Returning to Washington case law, the *Mohr* court pointed to cases that appeared to hold that falsity could be express or implied. The opinion did not include other Washington case law, such as *Lee v. The Columbian, Inc.*, 64 Wn. App. 534, 826 P.2d 217 (1991), which held that the state Supreme Court’s explanation of the negligence standard as requiring the plaintiff to show the defendant “knew or, in the exercise of reasonable care, should have known that the statement was false, or would create a false impression in some material respect” established only that private figures need not show actual malice in defamation cases, not that a plaintiff can claim defamation by implication when the literal statements are not false.

In *Mohr*, the court noted that a defamatory publication “must state or imply provable facts that are demonstrably false” and not just contain an overall negative message. Here the court held that Mohr pointed to “discrete, provable, historical facts, known to KXLY and crucial to the context of the Mohrs’ involvement in the Burson incident.”

The court found that a jury could reasonably find the broadcasts omitted several material facts, all of which were in the police reports that the reporter had. These included the fact that:

- Burson had made numerous “unwelcome visits” to the store;
- the Mohrs had complained to the police about threats Burson made, including a threat to “put a bullet into Mr. Mohr’s head”;
- the police had warned Burson he would be arrested for trespass if he returned to the Mohrs’ store;
- Burson had admitted to police that he had made threats.

(Continued on page 25)

### **Defamation By Omission in Washington Square**

*(Continued from page 24)*

The court found this could affect the sting of the reports. It described the critical question as “whether the story as broadcast would have a more negative effect on the mind of the viewer – result in greater public opprobrium – than would the alleged truth.” Holding that a reasonable jury could find that a report that did not include these facts would be more damaging to Mohr than a report that included them, the court reversed summary judgment for the broadcast defendants.

Laurel H. Siddoway of Spokane represented the media defendants. Ryan M. Beaudoin of Witherspoon, Kelley, Davenport & Toole PS in Spokane represented Mohr.

*Alison P. Howard is an associate in the Seattle office of Davis Wright Tremaine LLP.*

---

## **California Court Of Appeal Affirms Denial Of Anti-SLAPP Motion Seeking To Strike Defamation Claim**

### **“Survivor” Legal Saga Continues**

**By Frederick F. Mumm**

On May 22, 2003, a California Court of Appeal affirmed in full an order granting in part and denying in part a special motion to strike claims asserted by SEG, Inc., the producer of the popular “Survivor” television program, against a former contestant, Stacey Stillman. The court held that SEG’s claims for breach of contract and breach of an implied covenant had been properly dismissed because SEG presented no evidence of any breach. The court also held that a claim for defamation withstood Stillman’s challenge because SEG had presented sufficient evidence of constitutional malice to create a triable issue. *SEG, Inc. v. Stacey E. Stillman*, 2003 WL 21197133 (Cal.App. 2 Dist.), 2003 Cal.App.Unpub. Lexis 5067.

After undergoing an extensive application process, Stillman, a practicing attorney, was selected as one of sixteen contestants for the Spring 2000 shooting of “Survivor” in Malaysia. Prior to her acceptance, Stillman entered into a written agreement promising not to disclose any information concerning the show and its production. The rules of the contest provided for the reduction in number of contestants by having the contestants vote each other off the program. Stillman was the third person voted off the show.

### **Stillman Cries “Foul”**

Stillman contended that within a few months of the conclusion of the contest, she learned from two other contestants that they had been told by SEG executive producer,

Mark Burnett, to vote to evict her from the program. Stillman thereafter began communicating with an individual who was writing a book about “Survivor.” Among other things, she told this writer that she had information that established a federal offense of game show “rigging” by the producer.

Stillman then hired an attorney who sent a demand letter to CBS and Mark Burnett. The letter sought unspecified damages and requested a “pre-filing settlement” conference.

Stillman followed this letter by filing a complaint against CBS, SEG and Burnett alleging fraud, breach of contract and violation of California Business and Professions Code section 17600. After filing her complaint, Stillman distributed copies to newspapers and she spoke to media outlets.

SEG then filed its complaint alleging, among other things, breach of contract, breach of implied covenant of good faith, and defamation. SEG alleged that Stillman breached her written agreement with SEG by disclosing information and trade secrets to the book author. SEG also alleged that Stillman orally and in writing falsely stated that SEG had rigged the program, that the writer published a book including these falsehoods, and that Stillman repeated these falsehoods in numerous public appearances beginning February 5, 2001.

### **Applicability of Anti-SLAPP Statute**

Finding that the alleged acts of Stillman were based on conduct arising from her exercise of free speech and petition

*(Continued on page 26)*

---

### Denial Of Anti-SLAPP Motion Affirmed

*(Continued from page 25)*

rights, the appellate court ruled that the California Anti-SLAPP statute was applicable. The court then examined the evidence submitted by SEG to determine if SEG had met its burden of demonstrating facts sufficient to support a *prima facie* case.

With respect to the breach of contract and implied covenant claims, the lower court found, and the court of appeal agreed, that SEG had failed to present evidence that Stillman had breached any agreement. All of the alleged disclosures by Stillman related to her claim that SEG had manipulated the outcome of the show. Finding that all of these disclosures related to “discreditable facts,” the court concluded that any agreement prohibiting the disclosure of such facts would be void as against public policy.

The court reasoned that if Stillman’s disclosures were accurate, the agreement could not legally prevent her from making them. On the other hand, if the disclosures were false, they could not have constituted the disclosure of “information obtained or learned as a result of her participation in the Series.”

#### **The Defamation Claim**

Finally, the appellate court addressed the defamation claim. The court found that the alleged statements were susceptible to a number of defamatory meanings that would tend to injure SEG in its business reputation and thus were defamatory *per se*.

Assuming that SEG would be deemed a public figure, the court concluded that SEG had presented sufficient evidence of malice. In particular, SEG submitted the declarations of the four participants whose votes resulted in Stillman’s ouster. These individuals all confirmed that their votes were the result of their own determination and not the result of any manipulation or influence by anyone involved in the production of the show. The court found that such evidence supported an inference that Stillman knowingly and deliberately fabricated false statements and that such deliberate fabrications

were sufficient, in and of themselves, to support an inference of malice.

The court rejected Stillman’s reliance on the litigation privilege, finding that the statements made prior to the litigation were not protected and that the statements made after she filed her complaint similarly were not protected by the privilege. Without conducting any analysis of the statements themselves or inquiring how they related to the litigation, the court simply stated that “attorneys who ‘litigate in the press’ are not protected by the litigation privilege.”

The case now returns to the Superior Court in Los Angeles for a trial on the merits of the defamation claim.

White, O’Connor, Curry and Avanzado, LLP, Andrew M. White and Melvin M. Avanzado represented plaintiff SEG, Inc. Cheong, Denove, Rowell, and Antablan and Bennett, John F.

Denove and John D. Rowell and the Law Offices of Mark Goldowitz and Mark Goldowitz represented defendants.

*Frederick F. Mumm is a partner at the Los Angeles office of Davis Wright Tremaine.*

---

***The court rejected Stillman’s reliance on the litigation privilege, finding that the statements made prior to the litigation were not protected and that the statements made after she filed her complaint similarly were not protected by the privilege.***

---

***JUST PUBLISHED!***

**MLRC BULLETIN 2003:1**

**CRIMINALIZING SPEECH  
ABOUT REPUTATION:**

**THE LEGACY OF CRIMINAL LIBEL IN THE  
U.S. AFTER SULLIVAN & GARRISON**

***Visit our website for ordering information  
or contact us at [ldrc@ldrc.com](mailto:ldrc@ldrc.com)***

## Canadian Case Rules Internet Website Is a “Broadcast” For Purposes of Libel Legislation

By Brian MacLeod Rogers

An Ontario case, *Bahlieda v. Santa*, [2003] O.J. No. 1159 (Ontario Superior Court, Pierce J.; April 2, 2003), has ruled that an Internet Web site should be treated as a broadcast for purposes of the province’s *Libel and Slander Act* (“the *Act*”). As a result, a libel claim by a city official over a Web site posting by a city councillor was dismissed on summary judgment because the plaintiff failed to provide notice within the required time.

This goes a step further than an Ontario Court of Appeal ruling, *Weiss v. Sawyer*, [2002] O.J. No. 3570, which held that an online edition of a magazine still qualifies as a “newspaper” for purposes of the *Act*. On that basis, the court dismissed a libel claim for failing to give any notice prior to commencing the action. However, it ducked the issue of whether Internet publication could also amount to “broadcasting”, on the basis that it was not necessary to do so and there was insufficient evidence on the point. That issue will now be squarely before the Court of Appeal since the plaintiff has filed an appeal in *Bahlieda v. Santa*.

### “Broadcast” Broader Than “Newspaper”

Both newspapers and broadcasts, as defined by the *Act*, qualify for certain statutory defences and for special libel notice and limitation periods. However, the definition of “newspaper” requires it to be printed for distribution to the public and published at least twelve times a year, which means many magazines and newsletters (let alone websites) do not qualify.

For libel arising in a “newspaper” or “broadcast”, a plaintiff must serve written notice “specifying the matter complained of” on all potential defendants (media and non-media) within six weeks of learning of it. Such a notice then triggers a retraction provision through which a defendant can limit a plaintiff to actual damages. There is also a three-month limitation period for commencing an action

for libel in a newspaper or broadcast. Both the notice and limitation periods begin running as soon as the plaintiff has knowledge of the alleged libel, and if they are not met, any action is statute-barred. Under a provision that may be open to constitutional challenge, the *Act* limits these benefits to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.

The plaintiff, Elaine Bahlieda, was the city clerk in Thunder Bay, Ontario, and the defendant, Orville Santa, was a city councillor. The alleged libel was posted on Santa’s own Web site on May 10, 2001, and was discovered by Bahlieda on July 15. Notice was given on November 14, 2001, and a statement of claim issued on January 8, 2002. The impugned material remained available directly on the website until mid-June 2002 and was then archived.

### Experts’ Reports

Expert reports on whether the Internet is a broadcast medium, as defined in the *Act*, were filed by both sides. The *Act*’s definition is:

“broadcasting” means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

- (a) any form of wireless radioelectric communication utilizing Hertzian waves including radiotelegraph and radiotelephone, or
- (b) cables, wires, fibre-optic linkages or laser beams, and “broadcast” has a corresponding meaning;

The plaintiff’s expert, Dr. Sunny Handa, attempted to distinguish Internet website transmission from broadcasting on the basis that the former is “pull” technology and the latter “push”. Further, its availability means that Internet users may access information for future reference at will, more like a newspaper or book than a broadcast.

---

***This “blurring of the use of technologies” led the judge to focus on the infrastructure used by the Internet and the effect of dissemination through it.***

---

### Web site Is “Broadcast” For Libel Legislation Purposes

(Continued from page 27)

However, on cross-examination, he admitted that: Video on demand was now available through cable television; streaming video or audio transmissions permitted the Internet to carry live concerts and other events, just like radio or television; and VCRs meant television broadcasts could be recorded for future viewing. This “blurring of the use of technologies” led the judge to focus on the infrastructure used by the Internet and the effect of dissemination through it.

There was little disagreement over infrastructure, which was summed up by the defendant’s expert, Ron Riesenbach: “Today, television and radio signals are distributed over the same cable, fibre, microwave and satellite networks as the Internet.”

The judge then referred to an 1897 paper by Oliver Wendell Holmes, Jr., “The Path of the Law” (10 *Harvard Law Review* 457) decrying “blind imitation of the past.” She found that “broadcasting” under the *Act* was intended to encompass information transmitted to mass audiences with the maximum potential harm to reputation. That, she held, is the underlying purpose of the legislation’s notice and limitation provisions. Accordingly, placing material on the Internet, via a Web site, where it may be accessed by a large audience, should be viewed as “broadcasting” for purposes of the *Act*, even though the federal *Broadcast Act*’s definition excludes transmission of alphanumeric text. Presumably, e-mail directed at specific individuals, for example, would not qualify.

### Loutchansky Rejected

The judge went on to consider *Loutchansky v. Times Newspapers Ltd.*, [2002] E.W.J. No. 5622; 1 All E.R. 652 (C.A.), in respect of the timing for the applicable notice and limitation periods under the *Act*. The plaintiff argued that the availability of the material on the Web site amounted to continuing republication; therefore, the belated libel notice should at least apply to the alleged libel for the period beginning six weeks before the notice was given.

The judge rejected this, pointing out that “the English limitation period for defamation arises from the accrual of the cause of action, not from the date it was discovered, as is the case in Ontario law”. While the U.S. single publication approach, where the initial publication in any medium triggers the limitation period, was not applicable, neither was the

English approach that a new cause of action, and new limitation period, arises for each down-loading from the Internet.

Once a plaintiff has knowledge of the alleged libel, the clock starts ticking in Ontario, whether that publication was in a newspaper, television broadcast or Internet Web site.

Theoretically, an alleged libel can be discovered by a plaintiff at any time after publication or broadcast. This adds uncertainty for media defendants, but the longer the plaintiff’s apparent delay in learning of the libel, the less credible will be his or her claim of its devastating impact. Courts may also apply an objective component and find that, through exercising reasonable diligence, the plaintiff could or should have known of the material facts earlier than claimed. *Bhaduria v. Persaud* (1998), 40 O.R. (3d) 140 (Gen. Div.). In *Bahlheda*, however, the plaintiff had identified the date she discovered the Web site posting and could not escape from her failure to give prompt notice. Therefore, her claim for libel for the Web site posting was struck as statute-barred.

Unhappily, only the provinces of Manitoba and Newfoundland in Canada have identical definitions of “broadcasting” in their *Defamation Acts*, reflecting amendments intended to include cable television. Most other provinces still define broadcasting as being “radio-electric communication” transmitted by way of “Hertzian waves”, or in similar language, without reference to cable or wires in any form. Still others (Saskatchewan and Quebec) offer protection only to newspapers, and British Columbia has no libel notice requirement. The patchwork quilt of provincial libel laws could create real headaches where the plaintiff can bring an action in more than one jurisdiction.

Counsel for the plaintiff was Stephen G. Kovanchak, Kovanchak, Ferris, Ross, and counsel for the defendant was Lorne Honickman, Goodman and Carr LLP.

*Brian MacLeod Rogers, Barrister and Solicitor, practices media law in Toronto, Ontario and was founding president of Ad IDEM (Advocates In Defence of Expression in the Media) in Canada (www.adidem.org).*

## Libel Can Be Pursued Through Class Action, Quebec Court of Appeal States

By Marc-André Blanchard

The Quebec Court of Appeal, in a ground-breaking decision in *Malhab vs. Métromédia C.M.R. Montréal Inc.* (C.A.Q. 500-09-011219-011, 2003-03-24), has recognized that a class action may be certified in a matter of libel.

It had always been the state of the law in Canada, including Quebec, that you could not defame an entire class of people and a claim for defamation could only be entertained if each and every individual member of a group was identifiable. This is no longer true in Quebec.

### **Radio Host Slurs Cab Drivers**

The plaintiff, Mr. Malhab, wishes to exercise a class action for persons who, on November 17, 1998, were owners of taxi permits in Montreal and whose mother tongue is either Arabic or Créole.

On the same date, André Arthur, a controversial radio talk show personality for CKVL radio, property of Métromédia C.M.R. Montréal Inc., made defamatory and racist remarks concerning Arab and Haitian taxi drivers as a group.

Mr. Arthur stated that the language of use in taxis in Montreal was either Créole or Arabic and that most of the taxi drivers do not know the city. He suggested that the way of obtaining permits for those drivers was corruption. He stated that the poor quality of the taxi service in Montreal was attributable to that fact. He also stated that the taxis were malodorous and that to be understood in a taxi in Montreal, you had to be able to speak “ti-nPgre” (literally “little nigger”).

What is claimed in the class action is an award of \$750.00 per class member for moral damages and \$200.00 per member in punitive damages.

### **Importance of Group Size**

The Superior Court justice (Marcelin J.) had found that even though the comments of Mr. Arthur were un-

acceptable, she was of the opinion that a class action recourse and a recourse in defamation were incompatible. She stated that if defamation was aimed at some individuals in particular, those persons could sue, but if defamation was so diffused as to not constitute a personal attack, there could be no claim in defamation. The Court of Appeal reversed the judgment and certified the class action, which will now proceed to trial.

Madam Justice Rayle, writing for the unanimous Court of Appeal, first pointed out that the recourse in defamation of the plaintiff was serious in regard to the particular nature of group defamation. She stated that the individualisation of the prejudice could stem from the relatively small size of the group that was the object of the comments, taking into account the specificity of the attacks.

She stated that it was up to the court of first instance to determine in what measure the individual character of the attack on reputation was reduced or even in-existent because of the size of the group that was the object of the attacks, taking into account the nature of the words spoken and the circumstances in which the defamation had occurred. She noted that in this case, to feel personally attacked for incompetence, corruption or

*(Continued on page 30)*

---

***In the rest of Canada, the common law does not recognize the right to a class action recourse for similar facts.***

---

***Order Now!***

**MLRC 50 State Survey:  
EMPLOYMENT LIBEL  
AND PRIVACY LAW 2003**

**\$150**

**For ordering information on the  
most current editions,  
go to [www.medialaw.org](http://www.medialaw.org).**

### **Libel Can Be Pursued Through Class Action, Quebec Court of Appeal States**

*(Continued from page 29)*

uncleanliness, it was sufficient for a Montreal taxi driver to be Haitian or Arab.

She continued by saying that each and every Arab or Haitian taxi driver who was operating a taxi on November 17, 1998 in Montreal was necessarily, according to Mr. Arthur, unclean, incompetent and corrupt. She mentioned that where the worker is Haitian or Arab, there is no possibility other than to be stained in the public opinion and hurt in his personality integrity.

She then affirmed that nothing in our civil law, in theory, would prevent individual victims of defamation, having each individually suffered a moral prejudice, from seeking redress by way of a class action if they were able to show that they meet each and every requirement of our law, both substantively and in terms of procedure.

The court went on to state that a class action is only a procedural matter that does not add anything to substantive law, i.e. civil law, in this instance.

The fact that the appreciation and evaluation of moral damages suffered on an individual basis is difficult cannot constitute a preliminary obstacle to a class action.

She went on to state that the number of Haitian and Arab taxi drivers (around 1,000) makes it difficult to obtain an individual mandate to pursue this matter before the courts.

The Court of Appeal stated that the defamatory nature of the words spoken must be analysed in regard to an objective norm (a criteria of the ordinary reasonable citizen) and that the appreciation of the fault must be done in context. This double exercise would be entertained by the court seized of the merits of the matter when it would have to weigh the impact that the right to reputation can reasonably impose on freedom of expression.

### ***Conflict With Other Provinces***

As we noted earlier, in the rest of Canada, the common law does not recognize the right to a class action recourse for similar facts. The Court of Appeal of Quebec did discuss the matter of *Kenora (Town) Police Ser-*

*vices Board v. Savino* (20 C.P.C. (4th) 13), of the Court of Appeal of Ontario, where the alleged defamatory comment was that members of the Kenora Police Services had performed racist acts.

The Court of Appeal of Ontario in that matter refused certification as a class action since each member of the Kenora Police Services was required to disclose a cause of action in the pleadings as a condition to certification. Also, the Court of Appeal of Ontario stated that freedom of expression requires that criticisms of unspecified members of a public body in a general way not be proscribed by use of a class action defamation suit.

Surprisingly, with respect, the Court of Appeal of Quebec stated that it does not see any incompatibility in the principles stated in *Kenora v. Savino* and its decision in the Malhab matter.

Madam Justice Rayle stated that each member of the police force of Kenora was incapable of stating that they were personally the object of the allegations of having performed racist acts. Madam Justice Rayle stated that, to the contrary, in the Malhab affair, it would be sufficient for a Montreal taxi driver to be Arabic or Haitian to be defamed. Literally translated, she stated: “(The words) do not reproach what he has done but we reproach what he is!”

### ***Ruling Could Encourage Libel Suits***

This decision by the Court of Appeal of Quebec could open the gate to a series of class actions in libel matters. Also, our experience in doing pre-publication or pre-broadcast review tells us that a group as large as the one present in the Malhab affair, around 1,000, was such a large group that defamation was no longer an issue to consider in similar circumstances. Unfortunately, we cannot say that any more in Quebec since now any group will be able to bring a matter to trial and it will be up to the judge at trial to decide if each and every member has suffered a damage.

It will be interesting to see what a new judge seized of the merits of this matter will decide. Obviously, we will report then.

*Marc-André Blanchard, Gowling Lafleur Henderson LLP, Montreal, Quebec.*

## California Court Finds Right of Publicity in Pseudonym

In an unpublished opinion recently discovered by MLRC, a California appeals court became the first California authority to extend the state's right of publicity statute to include pen names and nicknames. *Ackerman v. Perry*, 2002 WL 31506931 (Cal.App., 2d Dist. Nov. 12, 2002). The case was not appealed to the California Supreme Court.

### **Brief Sci-Fi Partnership**

Forrest Ackerman has been heavily involved in the science fiction world as a literary agent, collector of memorabilia, and founding editor of the magazine, *Famous Monsters of Filmland*, which he ran from 1958 to 1982. In the magazine he wrote a column, "You Axed For It," signed editorials and answered fan mail using the pseudonym "Dr. Acula," which he used as a pen name since he invented it in 1939.

Starting in 1990, Ackerman embarked on numerous business ventures with Ray Ferry and his company, Dynacomm Productions. One such venture was the revival of *Famous Monsters of Filmland*. Ackerman edited ten issues of the revived magazine before resigning, alleging that Ferry was not paying him the contracted amount.

After resigning, Ackerman continued to use the Dr. Acula moniker, as well as the "You Axed For It" and *Famous Monsters of Filmland* names, on his Web site, on T-shirts that he sold on the Sci-Fi Channel, and in connection with "Monster Bash," a convention honoring Ackerman. Ferry claimed that his company owned these trademarks, and in 1996 demanded that they be removed from these ventures.

Ackerman filed suit in January 1997, alleging various claims including breach of contract, fraud, defamation, violation of the California right of publicity statute, and trademark infringement. After a trial commencing April 12, 2000, a jury returned a verdict for Ackerman on various counts, including breach of contract, fraud, conversion, and defamation, and awarded damages of \$724,500. The jury further found that Ackerman was the owner of the trademark "Dr. Acula."

On July 7, 2000, the judge granted in part and denied in part Ferry's motion for judgment notwithstanding the verdict, reducing the damage award to \$475,499, includ-

ing \$77,000 for the right of publicity claim. [The trial was not included in the MLRC Report on Trials and Damages because the right of publicity claim was ancillary to the primary business and contractual claims.]

Ferry appealed, and a unanimous Court of Appeals panel upheld the trial court result in an opinion by Associate Justice J. Gary Hastings.

### **Trademark Infringement**

The appellate court found sufficient evidence to support trademark infringement by Ferry's use of the "Dr. Acula" name. There was ample evidence, the court said, to support the jury's finding that Ackerman was the first to use "Dr. Acula," and the trial court did not abuse its

*(Continued on page 32)*

## Iowa Supreme Court Reinstates Defamation Case Stemming From Claim Plaintiff Had "Spirit of Satan"

By Michael A. Giudicessi

Finding that the scope of the ecclesiastical privilege was exceeded when a minister's letter was sent to community members outside the congregation, the Iowa Supreme Court has remanded for further proceedings a case stemming from a statement that the plaintiff had the "spirit of Satan."

In *Kliebenstein v. Iowa Conference of the United Methodist Church, et al.*, No. 10/02-0011, 2003 Iowa Sup. LEXIS 118, (Iowa, June 11, 2003), the high court ruled that the summary judgment entered below was improvident because:

[T]he phrase 'spirit of Satan' has a secular, as well as a sectarian, meaning and because the accusatory phrase was used by defendants to describe Jane Kliebenstein in a communication published to more than just church members.

The Iowa Supreme Court, which more than 100 years

*(Continued on page 32)*

### California Court Finds Right of Publicity in Pseudonym

(Continued from page 31)

discretion in determining that Ackerman had not given Ferry an “implied license” to use the moniker.

Damages could therefore be recovered in a common-law tort action or as unfair competition under the Lanham Act, the appeals panel concluded. In a footnote, the court pointed to *Chamberlain v. Columbia Pictures Corp.*, 186 F.2d 923, 925 (9th Cir. 1951), which found that a pen name can be a trademark.

### Right of Privacy/Publicity

California Civil Code § 1344 imposes liability on anyone who uses another’s “name, voice, signature, photograph, or likeness” for commercial purposes without consent. Despite an earlier judicial trend of construing § 1344 more narrowly than the corresponding common law, the court determined that “name” includes nicknames and pen names, the first such ruling by a California authority.

The court first pointed to several Ninth Circuit decisions, such as *Abdul-Jabbar v. General Motors Corp.* 85 F.3d 407 (9th Cir. 1988), which have extended common law protection to “identity” and imply that identity would be broad enough to include pen names. The court also cited *dicta* in the California Supreme Court’s decision in *Comedy III Productions, Inc. v. Saderup*, see *LDRC LibelLetter*, May 2001, at 3, stating that the California statute “simply made liable any person who uses another’s identity...” 25 Cal.4th 387, 395, 106 Cal.Rptr.2d 126, 21 P.3d 797, 801.

The court also cited Dean Prosser’s suggestion that the author Samuel Clemens’ would have a privacy interest in the “Mark Twain,” see Prosser, *Privacy*, 48 Cal.L.Rev. 383, 389 (1960), and the 6th Circuit’s decision in *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983) that Johnny Carson’s privacy interests were violated by a portable toilet company named “Here’s Johnny.”

Based on these precedents, in the Ackerman case the appeals panel concluded that “section 3344 will protect a pseudonym such as a nickname or pen name, so long as the pseudonym has become widely known to the public as closely identified with the plaintiff,” and affirmed the trial court result.

There was no effort by either party to appeal to the California Supreme Court. Meanwhile, Ferry’s bankruptcy petition has been rejected. See *In re Ferry*, No. 0019655 (C.D. Cal. filed Oct. 26, 2000).

Ackerman was represented by Herbert H. Hiestand, Jr. of Encino and Jacqueline Connors Appelbaum of Sherman Oaks. Gregory J. Marcot and Thomas A. Brackey II of Freund & Brackey of Beverly Hills represented Ferry.

(Continued from page 31)

### Iowa Supreme Court Reinstates Defamation Case

ago was at the forefront of establishing the fair comment privilege in *Cherry v. Des Moines Leader*, 86 N.W. 323 (Iowa 1901), made no reference in its latest decision to whether the statement “spirit of Satan” in either its secular or sectarian senses was incapable of a defamatory meaning because it was not provably true or provably false.

Instead, the Court was persuaded by fact that a secular meaning could be ascribed to the term, and the Court was guided by other decisions where, among other things, it had recognized that “associating a party with Satan” presented an issue for litigation.

The Supreme Court sent the case back for further proceedings on plaintiff’s libel claim and the claim by her spouse for loss of consortium.

The adjudication of the meaning of the term “spirit of Satan” and whether plaintiff proved the statement about her was false and understood in its secular meaning no doubt will prove daunting on remand. (The difficulty of this adjudication unquestionably will be compounded because Iowa does not embrace a strict *Daubert* evidentiary standard for expert testimony.)

Additionally, whether plaintiff can prove the essential elements of her libel case and her husband’s loss of consortium claim, or whether a fair comment, opinion or *Milkovich* defense will be available on remand remain more than questions of idle curiosity — the devil will be in the details.

*Michael A. Giudicessi is with Faegre & Benson in Des Moines, Iowa*

## When Spike met Spike: Spike Lee Wins Preliminary Injunction Against Viacom over Spike TV

Spike Lee has temporarily spiked "Spike TV." Justice Walter Tolub of the Supreme Court of New York granted the filmmaker's request for a preliminary injunction preventing Viacom from proceeding with its plan to change the name of its cable channel TNN to "Spike TV." Justice Tolub held that Lee had presented a prima facie case for relief and a likelihood of success on the merits. Specifically, the court ruled that "a celebrity can in fact establish a vested right in the use of only their first name or surname." *Spike Lee v. Viacom, Inc.* (Index # 110080/03 (June 12, 2003)). The order may be accessed at [http://decisions.courts.state.ny.us/fcas/FCAS\\_docs/2003JUN/30011008020031SCIV.PDF](http://decisions.courts.state.ny.us/fcas/FCAS_docs/2003JUN/30011008020031SCIV.PDF). On June 19, a five-justice panel of the Appellate Division denied Viacom's motion to stay the injunction. Appellate arguments will take place in September.

In April, Viacom announced plans to change its TNN cable network into the "first network oriented primarily to male viewers." The newly named "Spike TV" was described by Viacom executives as "smart and contemporary with a personality that's aggressive and irreverent." According to the opinion, Albie Hecht, the President of TNN, stated that the new name was inspired by Spike Lee, along with other celebrity Spikes, such as a character on the television show "Buffy the Vampire Slayer," and director Spike Jonze. "Spike TV" was scheduled to debut June 16.

### ***Spike Lee Files N.Y. State Claims***

Spike Lee, whose legal name is Shelton Jackson Lee, filed a suit on June 3 against Viacom, MTV Networks, and TNN (both owned by Viacom), and Mr. Hecht under Sections 50 and 51 of the New York Civil Rights Law, and Section 133 of the New York General Business Law, requesting the preliminary injunction preventing Viacom from proceeding with the name change.

Section 50 makes it a "misdemeanor to use a person's name for commercial purposes without the written consent of such person," while Section 51 provides for a civil cause of action, injunctive relief and damages. An injunction will be issued under 51 when the "plaintiff has made a prima facie showing of entitlement to the relief sought and a likelihood of success on the merits."

The court explained that this right to an injunction is absolute. After a violation of Section 51 is confirmed, the injunction will be issued without a "balancing of the equities test" by the court or a requirement that the plaintiff prove irreparable injury. *See Blumenthal v. Picture Classics, Inc.* 235 A.D. 570 (1st Dept. 1932).

Under Section 133, it is a misdemeanor to misappropriate any name "with the intent to deceive or mislead the public." Injunctive relief is available under 133 when the adoption may mislead the public. Actual proof of public confusion is not necessary.

### ***Viacom: Plaintiff Cannot Prove He's the "Spike"***

Viacom argued that Spike Lee could not prove he was identifiable as the "Spike" in "Spike TV." The court noted that in earlier cases in which celebrities have sought similar injunctive relief, plaintiffs have had to prove "the presence of a combination of elements where, when taken as a whole, invoke or imply the name, image, or ideal of the celebrity." *See Allen v. Men's World Outlet, Inc.*, 679 F. Supp. 360 (S.D.N.Y. 1988). There is currently no New York precedent which holds that the use of a celebrity's first

(Continued on page 34)

### **Gates Review Granted**

On June 18, 2003, the California Supreme Court granted a petition for review in *Gates v. Discovery Communications, Inc.* 2003 WL 549347. The court will review a significant First Amendment victory: on February 21, 2003, California's Fourth District Court of Appeal struck down Steve Gates' slander and invasion of privacy claims, holding that *Briscoe v. Reader's Digest*, 4 Cal.3d 529 (1971), is no longer good law. *Briscoe's* conclusion that a former criminal was entitled to damages for disclosure of his criminal past has subject California media to liability for publishing information available in the public record. The *Gates* court relied heavily *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469 (1975), in reaching its determination. Steve Gates brought suit against the Discovery Channel for the mention of his 1988 accessory after-the fact conviction on "Deadly Commission," a 2001 episode of *The Prosecutors*.

### When Spike Met Spike

(Continued from page 33)

name, with no other reference to the celebrity, is enough to warrant injunctive relief.

Viacom also argued that “Spike” is a common name used by many other celebrities, and that the word “spike” has many established definitions.

#### ***Lee: Public Would Tie “Spike” with Spike***

To prove that the name “Spike TV” would be associated with him, Lee submitted affidavits from various friends and business associates including Bill Bradley, Ossie Davis, Edward Norton, Keith Reihand (chairman of DDB Worldwide Communications Group, Inc.), and Mildred Roxborough (a development consultant with the NAACP), who stated they initially believed Lee was involved with “Spike TV.”

The court, however, took greater notice of an affidavit from Dr. Samuel Popkin also submitted by Lee. Popkin, a professor of political science at the University of California, San Diego, and a political pollster who claimed expertise in consumer perception of mass communication, stated his belief that a survey would show the name “Spike TV” would lead a “substantial” number of African-Americans aged 18-45 (as well as a smaller percentage of young white professionals) to believe Lee was involved with the network. According to Popkin, the use of words such as “brash,” “hip” and “aggressive,” as used in Viacom press releases about the newly named network also would cause people to associate “Spike TV” with Spike Lee.

#### ***Injunction Granted Under Section 51***

The court held that Lee had sufficiently proven a prima facie case for injunctive relief, as well as a likelihood of success on the merits. Most controversially, the court found that under Section 51, Lee did not have to show irreparable harm or a tipping of the balance of equities in his favor.

Despite the lack of precedent, Justice Tolub said that, “in this age of mass communication, a celebrity can in fact establish a vested right in the use of only their first name or a surname.” Justice Tolub mentioned other celebrities who are known only by their first name, such as Cher and Madonna.

The court also said there was other evidence that Viacom “sought to exploit Lee’s persona, most notably Lee’s reputation for irreverence and aggressiveness.” Dismissing Viacom’s evidence that “spike” had multiple meanings and references, the court analyzed the word only in its relation to the film and television industries. Justice Tolub said he doubted Spike Lee could successfully prevent the use of the word “spike” in a field unrelated to the one associated with him, such as breakfast cereal.

The preliminary injunction was therefore granted, and Lee was instructed to post a \$500,000 undertaking. The court also denied Viacom’s motion to dismiss but allowed Viacom to renew the motion after discovery.

#### ***No Injunction Under Section 133***

Justice Tolub held that a preliminary injunction was not warranted under Section 133. According to the court, Lee had not presented evidence that Viacom *intended* to deceive the public by suggesting Lee was involved with “Spike TV,” as

“proof of the adoption of a similar name, without any evidence of intention, deception or damage, is an insufficient ground for summary relief.”

*See FrankRest., Inc. v. Lauramar Enterprises, Inc.*, 273 A.D. 349, 350 (2nd Dept. 2000).

In news reports TNN claimed to have lost nearly \$17 million because of the injunction, and could lose up to \$42 million if it is not permitted to change to “Spike TV.”

For Spike Lee: Johnny Cochran, Los Angeles; Jonathan W. Lubell and Robert F. Van Lierop of Van Lierop & Burns, New York City. Terry Gross of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York City

For Defendants: Victor Kovner, Marcia Paul and Peter Karanjia of Davis, Wright & Tremaine.

**REGISTER NOW!**

**MLRC LONDON CONFERENCE**

**SEPTEMBER 22-23, 2003**

**STATIONERS HALL**

**AVE MARIA LANE, LONDON EC4**

## The Publicity Rights Worm Turns

By Douglas E. Mirell & Joseph Geisman

The California Supreme Court has lifted a cloud that hung over the First Amendment right to use the images of celebrities in works of fiction. *Winter v. DC Comics*, No. S108751 Cal. 4th, 2003 Cal. LEXIS 3492, 2003 WL 21253974, 2003 Daily Journal D.A.R. 5834 (No. S108751) (Cal. June 2, 2003). The state Supreme Court's unanimous opinion dramatically limits the circumstances under which its own two-year-old "transformative" doctrine can be used to force authors, publishers and broadcasters to face a jury trial in publicity rights cases.

The *Winter* opinion also emphasizes the importance of disposing of such cases at the very earliest possible stage of litigation in order to avoid the chilling effect that the pendency of these actions has upon the exercise of free speech rights. Finally, the Court's ruling reaffirms the principle that the advertising of expressive works is as entitled to constitutional protection as the underlying works themselves, and that such marketing efforts cannot diminish the extremely high level of First Amendment protection these works deserve.

### *Musicians As Comic Book Worms?*

In the 1990s, DC Comics published a five-volume series featuring a comic book "anti-hero" named "Jonah Hex." The entire series contained a bizarre plot line involving giant worm-like creatures, singing cowboys and a ranch/emporium named for and patterned after the life of Oscar Wilde. The third volume of the series concluded by introducing two new characters -- the "Autumn Brothers." With pale faces and long white hair, brothers "Johnny and Edgar Autumn" appear on the cover of the fourth volume where they are "depicted as villainous half-worm, half-human offspring born from the rape of their mother by a supernatural worm creature that had escaped from a hole in the ground." *Winter*, 2003 Cal. LEXIS 3492, \*3-\*4.

Plaintiffs, Johnny and Edgar Winter, are well-known performing and recording musicians. The Winters sued DC Comics alleging several causes of action, including misappropriation of their names and likenesses under California Civil Code § 3344, which provides:

"Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."

Among other allegations, the Winters claimed that DC Comics

---

***"What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression."***

---

"selected the names of Johnny and Edgar Autumn to signal readers the Winter brothers were being portrayed; that the Autumn brothers were drawn with long white hair and albino features similar to plaintiffs'; [and] that the Johnny Autumn character was depicted as wearing a tall black top hat similar to the one Johnny Winter often wore." *Id.* at \*4.

### *Tortured Appellate Road*

The trial court granted defendants' motion for summary judgment and entered judgment in their favor. The Court of Appeal initially affirmed that judgment, and the Winters sought review by the California Supreme Court. Though the Supreme Court granted review, the case was held pending the Court's decision in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387 (2001).

*Comedy III* involved likenesses of the comedy team known as The Three Stooges. In that case, the registered owners of the Stooges' publicity rights sued the

(Continued on page 36)

## The Publicity Rights Worm Turns

(Continued from page 35)

artist who originally created a charcoal drawing of the three comedians which he then reproduced and sold, without permission, on lithographs and T-shirts. *Id.* at 393. Writing for a unanimous Court, the late Justice Stanley Mosk concluded that the sale of these lithographs and T-shirts was not protected by the First Amendment because the artist's "undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame." *Id.* at 409.

In reaching this result, the *Comedy III* Court

"developed a test to determine whether a work merely appropriates a celebrity's economic value, and thus is not entitled to First Amendment protection, or has been transformed into a creative product that the First Amendment protects."

*Winter*, 2003 Cal. LEXIS 3492, \*10. Key to this so-called "transformative" test is the inquiry "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness." *Comedy III*, 25 Cal.4<sup>th</sup> at 406.

Following issuance of its *Comedy III* opinion, the California Supreme Court remanded the *Winter* case back to the Court of Appeal for reconsideration. However, on this occasion, the Court of Appeal affirmed summary adjudication of all causes of action *except* the plaintiffs' right-of-publicity claim, finding that "triable issues of fact exist whether or not the comic books are entitled to protection" under *Comedy III*'s "transformative" test. *Winter*, 2003 Cal. LEXIS 3492, \*6. The Supreme Court granted DC Comics' petition for review to decide whether these comic book portrayals are sufficiently "transformative."

### Comic Book Characterizations "Transformative"

Following an extended discussion of the principles and rationale underlying its adoption of the "transformative" test in *Comedy III*, the *Winter* Court concluded that the "Jonah Hex" comic books contained significant creative elements that transformed them into something more than mere celebrity likenesses. The Autumn brothers characters

"are not just conventional depictions of plaintiffs [and] . . . do not depict plaintiffs literally. . . . [T]hey are distorted for purposes of lampoon, parody, or

caricature. And the Autumn brothers are but cartoon characters — half-human and half-worm — in a larger story, which is itself quite expressive." *Id.* at \*15-\*16.

In so holding, the *Winter* Court rejected plaintiffs' attempt to claim that the comic books were not protected because they were not a true parody. Instead, the Court concluded that "[t]he distinction between parody and other forms of literary expression is irrelevant" and that "[w]hat matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." *Id.* at \*17.

### Early Disposition Encouraged

Given the protracted duration of the *Winter* case, the California Supreme Court's opinion is particularly noteworthy for its emphasis upon the early disposition of such actions. After citing a number of decisions emphasizing the chilling effect that prolonged litigation can have upon the exercise of First Amendment rights, the *Winter* Court declared that courts should "often" be able to resolve cases such as this

"simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. . . . [A]n action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." *Id.* at \*19.

Moreover, thanks to Code of Civil Procedure Section 425.16, California's broadly applicable anti-SLAPP statute, even the work's absence from the complaint may not present an impediment to the immediate dismissal of cases involving "transformative" uses of celebrity likenesses.

### Advertising Cannot Strip Protection From Transformative Works

Finally, the *Winter* Court rejected as "irrelevant" plaintiffs' assertion that the use of the Autumn brothers characters, including their appearance on the cover of volume 4 of the series, was intended solely to "generate interest in

(Continued on page 37)

### The Publicity Rights Worm Turns

(Continued from page 36)

the comic book series and increase sales.” In language reminiscent of Section 47 of the Restatement Third of Unfair Competition, the Supreme Court noted that “[t]he question is whether the work is transformative, not how it is marketed. . . . If the challenged work is transformative, the way it is advertised cannot somehow make it nontransformative.” *Id.* at \*17-18.

Though the Supreme Court remanded the *Winter* case to the Court of Appeal to address plaintiffs’ assertion that the manner in which DC Comics advertised its “Jonah Hex” comic book series falsely implied plaintiffs’ endorsement (*id.* at \*18, n.3), it is not clear that this issue was ever properly raised or preserved.

*Douglas E. Mirell is a partner and Joseph Geisman is an associate at Loeb & Loeb LLP in Los Angeles. They urged the California Supreme Court to grant review of the Winter v. DC Comics case and subsequently authored an amicus curiae brief to the Court on behalf of the Motion Picture Association of America, the Association of American Publishers, the Authors Guild, the Publishers Marketing Association, the Comic Book Legal Defense Fund, the Dramatists Guild of America, PEN American Center, the American Booksellers Foundation for Free Expression and the Freedom to Read Foundation.*

## Buffalo Freelancer Wins New Hearing in Lawsuit Prosecuted Twelve Times in Five Years

An activist and freelance journalist in upstate New York, unsuccessfully prosecuted a dozen times in connection with his criticism of local political figures, will get a new hearing in a federal lawsuit that alleges bad-faith prosecution by the local district attorney. The activist, Richard D. Kern, alleges he was targeted by political foes in violation of his free-expression rights when he was repeatedly prosecuted on harassment, stalking and similar charges.

A federal appellate court ordered the hearing after finding the trial-court judge improperly dismissed the suit on jurisdictional grounds. *Kern v. Clark*, No. 02-7427, 2003 U.S. App. LEXIS 10837 (2d Cir. June 2, 2003).

A three-judge panel of the Second Circuit, made up of Judges Fred I. Parker, Charles Straub and Barrington D. Parker, in a per curiam opinion, ordered U.S. District Judge William M. Skretny to grant Kern an evidentiary hearing after Skretny dismissed Kern’s suit against Erie County District Attorney Frank J. Clark and two of Clark’s assistants. The appellate court held that Skretny improperly relied on the jurisdictional holding of *Younger v. Harris*, 401 U.S. 37 (1971), when the judge ruled that Kern had not established that Clark’s office pursued prosecution in bad faith.

Skretny dismissed Kern’s complaint in March after hearing oral arguments, but without conducting a hearing

at which Kern could present evidence of bad-faith prosecution. The judge relied on the “abstention doctrine” of *Younger* and progeny cases, which holds that a federal court should not exercise jurisdiction over an ongoing state criminal proceeding where the state’s claim “raises important state interests” and where “the state proceedings provide an adequate opportunity to raise . . . constitutional claims.” *Kern*, 2003 U.S. App. LEXIS 10837, at \*2 (quoting *Schlagler v. Phillips*, 166 F.3d 439, 442 (2d Cir. 1999)).

Under *Younger*, abstention is inappropriate where prosecution is “brought in bad faith or is only one of a series of repeated prosecutions.” *Kern*, 2003 U.S. App. LEXIS 10837, at \*2 (quoting *Younger*, 401 U.S. at 49). The Second Circuit panel held that Skretny failed to let Kern present evidence of bad faith. In finding a lack of bad faith, the appellate court noted, the judge apparently relied solely on affidavits from the prosecutors themselves.

### Longtime Political Critic

Kern is an advocate for housing and other political issues who has written on those topics for weekly alternative newspapers and operates an often caustic Web site tracking the business dealings of local political figures

(Continued on page 38)

## Buffalo Freelancer Wins New Hearing in Lawsuit

(Continued from page 37)

(<www.kernwatch.com>). He has faced charges including harassment and stalking 12 times in the past five years, according to reports in *The Buffalo News*. The first 11 prosecutions were based on charges filed by political figures targeted in Kern's writings and Web postings, or by their co-workers. The 12<sup>th</sup> set of charges was filed by a real estate broker mentioned on Kern's Web site.

Nine of the cases were dismissed in Kern's favor, according to his lawsuit, while two were "adjourned in contemplation of dismissal," a ruling that provides for delayed dismissal of criminal charges. *Kern*, 2003 U.S. App. LEXIS 10837, at \*4-5. The most recent case, filed after the date of Kern's suit, was pending as of early June, according to a report in *The Buffalo News*.

Kern alleges in his lawsuit that he was targeted for prosecution "because of his vigorous and zealous advocacy under the First Amendment" and Art. 1, § 8 of the New York State Constitution. *Kern*,

2003 U.S. App. LEXIS 10837, at \*4. The suit seeks preliminary and permanent injunctions barring prosecution on the 11<sup>th</sup> set of charges, filed in June 2001 by Buffalo Municipal Housing Authority Commissioner Charlie Flynn.

The commissioner accused Kern of confronting Flynn during and after public meetings; standing outside Flynn's house while his children played in the driveway; leaving phone messages at Flynn's home and office; sending 13 faxes to Flynn's office; and calling Flynn a "disgrace to the community and a liar, questioning Flynn's integrity," and telling Flynn that Kern was "watching him." *Kern*, 2003 U.S. App. LEXIS 10837, at \*3-4. That prosecution was dismissed in September 2001, after a Buffalo city judge agreed with Kern's argument that he was pursuing a freelance story about Flynn at the time of the alleged incidents. The district attorney's office has appealed the city judge's decision.

## String of Failed Prosecutions

Previous charges, all dismissed at the trial-court level, were filed by a Buffalo police officer and former member of the Niagara Common Council, two Common Council staff members, and the Buffalo city treasurer. The 12<sup>th</sup> case involves the owner of an apartment building who claims Kern threatened him outside his office three times in August 2002. That case was sent to an alternative dispute resolution program, but a city judge issued a warrant for Kern's arrest on June 2, when Kern failed to appear for a hearing.

Kern, a retired social worker who began his career as a gadfly more than 15 years ago, has faced other legal battles in the Buffalo courts. He received a fine and jail time for failing to care for two rundown properties he owned, and probation on misdemeanor trespassing charges that stemmed from a 1992 protest of public-housing conditions in Buffalo. Efforts to stifle his frequent speeches at public meetings also date back at least a decade:

---

***Kern alleges in his lawsuit that he was targeted for prosecution "because of his vigorous and zealous advocacy under the First Amendment" and Art. 1, § 8 of the New York State Constitution.***

---

In 1994, after he pleaded guilty to violating the terms of his probation, he was temporarily barred by a city judge from speaking at board meetings of the Buffalo Municipal Housing Authority without providing advance notice of his proposed comments, according to *The Buffalo News*.

Kern accused the police officer and former Niagara Common Council member of harassing him in 1999, but the council member was acquitted; an acquaintance of the council member was convicted of second-degree harassment for punching Kern in the face.

Michael Kuzma, Esq., in Buffalo was appellate counsel for plaintiff Richard D. Kern. Erie County Assistant County Attorney Kristin Klein Wheaton, along with Erie County Attorney Frederick A. Wolf in Buffalo served as appellate counsel for the defendants, Erie County District Attorney Frank J. Clark III, Assistant District Attorney G. Michael Drmacich and Assistant District Attorney Barry A. Zavah.

## Criminal Investigation Against Jayson Blair Dropped

The Manhattan U.S. Attorney's office apparently sought to investigate Jayson Blair for wire fraud. *The New York Times* did not immediately comply with a prosecutor's request to furnish information about Blair. Spokesman Catherine Mathis explained,

"The *Times* does not voluntarily provide documents or testimony that we believe to be protected by the First Amendment,"

Benjamin Weiser, *U.S. Prosecutor Asks for Data on Reporter Who Resigned*, *New York Times*, May 14, 2003 at B3. This lack of cooperation, according to the *New York Post*, led prosecutors to drop the inquiry. John Lehmann, *Gray Lady's No Comment Kills Fraud Probe*, *New York Post*, May 22, 2003, at 5.

While hardly victimless, the U.S. Attorney's efforts to turn Blair's misconduct into a crime suggests a wide-open reading of federal wire fraud provisions. A former Manhattan chief assistant U.S. Attorney, Matthew Fishbein, told the Associated Press that a criminal prosecution would be unusual, given the circumstances. Associated Press, *Prosecutors Seek Documents from Times on Former Reporter*, (May 14, 2003) <<http://www.cnn.com/2003/LAW/05/14/nytimes.investigation.ap/index.html>>.

### **Mail and Wire Fraud: Background**

18 U.S.C. § 1343 sets out the criminal cause of action for wire fraud, which contains the elements of (1) devising a "scheme or artifice to defraud," (2) transmission of any writings, etc., (3) through television, radio, or wire, (4) for the purpose of executing the scheme.

In 1988, Congress passed 18 U.S.C. § 1346, which amended the definition of "scheme or artifice to defraud" to include one "to deprive another of the intangible right of honest services." The amendment was made in response to *McNally v. United States*, in which the Supreme Court held that the parallel mail fraud provision of 18 U.S.C. § 1341 was "limited in scope to the protection of property rights." 483 U.S. 350, 360 (1987). In a recent decision, the Second Circuit held that actual or intended economic harm to the

victim are not necessary elements of mail and wire fraud. *United States v. Rybicki*, 287 F.3d 257, 262 (2d Cir., 2002).

### **Defrauding Employers**

The wire fraud statute can criminalize breaches of duty (where accompanied by a misrepresentation), including breaches of duty of fidelity on the part of the employee toward the employer. *United States v. Lermire*, 720 F.2d 1327, 1335-6 (D.C.Cir. 1983). However, not every workplace lie or violation of company regulations constitutes fraud; most courts have instituted limits.

*United States v. Jain* found that many private-sector convictions were limited by the principle that "the essence of a scheme to defraud is an intent to harm the victim." 93 F.3d 436, 442 (8<sup>th</sup> Cir. 1996). *Jain* is not alone in its requirement that the nondisclosure must be "material." *Id.* at 442. The Second Circuit, for its part, adopted a standard of "reasonably foreseeable harm," specifically economic or pecuniary harm that is greater than *de minimis*. *Rybicki* 287 F. 3d at 266.

Applying these standards to an errant reporter may be unusual, but is not without precedent. *Wall Street Journal* columnist R. Foster Winans was convicted of wire fraud for early release of his "Heard on the Street" financial column to two stockbrokers, despite the *Journal's* policy of prepublication confidentiality. *Carpenter v. United States*, 484 U.S. 19 (1987). The court rejected the argument that the conduct, as "no more than a violation of workplace rules," fell outside the provinces of the wire fraud statute. *Id.* at 27.

### **Wire Fraud and Jayson Blair**

Blair's situation, however, is much less clear than Winans'. Prosecutors could argue that Blair deprived the *Times* of his "honest services," according to white-collar criminal defense lawyer Richard Greenberg, but he said he worries that such a case could establish a constitutionally alarming trend. Anthony Lin, *'Times' Reporter Creates Liability Issues*, *New York Law Journal*, (May 16, 2002) <<http://www.law.com>>. Greenberg said he feels Blair's case is an internal matter that should not be considered a federal crime. *Id.*

---

**Prosecutors could argue that Blair deprived the Times of his "honest services," according to white-collar criminal defense lawyer Richard Greenberg, but he said he worries that such a case could establish a constitutionally alarming trend.**

---

## **Criminal Charges Dropped Against English Reporter Testing Airport Security**

### ***Subterfuge In the Public Interest Okay***

The UK Crown Prosecution Service announced last month that it was dropping criminal charges against a *London Evening Standard* reporter who applied for a job as a cleaner at Heathrow Airport as part of a newspaper investigation into post-9/11 airport security.

Last year the reporter, Wayne Veysey, was charged with the crime of “dishonestly attempting to gain pecuniary advantage” for submitting a false resumé that did not disclose he was a reporter. The reporter’s father was charged with the same crime for providing his son with a false employment reference. The pair were arrested in April 2002 after airport security checks determined the job application was false.

Dismissing the case at the request of the prosecution, Harrow Crown Court Judge Barrington Black noted sympathetically that the decision to drop the prosecution was “realistic,” adding:

“It is clearly in the public interest that the poor standard of safety and security should be liable to exposure by the free press in the same way that bully boys and the greedy are liable to exposure.... Therefore it is acceptable if some subterfuge is used, provided that the aim is in the public interest.”

*Quoted in* Ciar Byrne “Standard reporter walks free,” the *Guardian*, May 29, 2003. (available at <[www.guardian.co.uk](http://www.guardian.co.uk)>).

The prosecution’s decision is consistent with the Press Complaints Commission standards which state that reporters may use subterfuge “only in the public interest and only when the material cannot be obtained by other means.” The *Evening Standard* described the decision as a “major victory for press freedom” and serious undercover reporting.

## **DJ Sentenced for April Fools’ Hoax Crowd Finds Candy No Substitute for Rapper**

Morning radio DJ Shannon Brimmer of WXXJ-FM in Chattanooga, Tenn., was found guilty of disorderly conduct and received 10 days of community service and a suspended 30-day jail sentence stemming from an April Fools’ Day prank. *State v. Brimmer*, No. 1031579 (Tenn. Gen’l Sess., Hamilton County bench verdict May 16, 2003). The court dismissed charges against another WXXJ disc jockey, Thompson “Riggs” Riddle.

Brimmer, known on the air as Troy Shannon, falsely announced that the rap star Eminem would make an unscheduled appearance in Chattanooga, leading 500 people to come to the parking lot of a miniature golf course. Instead, the station planned to have a staff member dressed as a M&M give away candy and CDs. But the costumed station employee never made it to the parking lot because of all the traffic.

Brimmer and Riddle were arrested when the crowd became unruly after being told that Eminem would not appear. After they were placed in a police car, the crowd surrounded it and began beating on the windows. The two spent about six hours in jail before they were released.

Their one-day bench trial took place May 16 before Judge Michael Carter of the Hamilton County General Sessions Court. The prosecution presented three witnesses, including the arresting officer, who said that several people in the crowd threatened the DJs upon learning of the hoax. Carter found Brimmer guilty, but dismissed the charges against Riddle because all he did was carry equipment at the scene.

Brimmer and Riddle were represented by solo practitioner Alvin H. Reingold of Chattanooga, who said he would appeal the conviction to the Tennessee Court of Criminal Appeals.

**MLRC would like to thank summer interns — Carter Nelsen, University of Michigan Law School, Class of 2005 and Lauren Perlgut, Columbia University School of Law, Class of 2005 for their contributions to this month’s *MLRC MediaLawLetter*.**

## Thou Shalt Not Trespass Against Police Officers Indicted for Murder

By Daniel C. Barr

On May 21, 2003, a Chandler, Arizona, Municipal Court judge found *East Valley Tribune* reporter Bryon Wells guilty of first degree criminal trespass for his attempt to interview a Chandler Police Officer at his home.

The misdemeanor conviction followed a half-day trial on May 1, 2003. Wells was sentenced to one year of unsupervised probation and ordered to pay a \$300 fine. The judgment has since been stayed pending Wells' appeal to the Maricopa County Superior Court.

The conviction arises from Wells' 15-second attempt to interview Chandler Police Officer Dan Lovelace at his home on November 6, 2002. Three weeks earlier, Officer Lovelace had fatally shot an unarmed woman, Dawn Rae Nelson, in a shopping center parking lot while her 14-month-old son watched in the back of her car.

On November 6, Wells knew that the Maricopa County Attorney was on the verge of announcing the indictment of Lovelace on "very serious charges" in connection with Ms. Nelson's death. Indeed, the following day, the County Attorney held a press conference to announce Lovelace's indictment for second-degree murder.

### Interview Attempt

The May 1 trial yielded the following undisputed facts about Wells' attempt to interview Officer Lovelace on November 6:

The front courtyard of the Lovelace residence is enclosed and separated from the street-facing "common area" by a three-foot high fence. Shortly after the shooting death of Ms. Nelson, the Lovelace family posted a two-foot by two-foot "No Trespassing" sign on the gate opening onto the sidewalk leading to the front door of their residence. On November 6, Wells drove to Lovelace's address, saw the sign, opened the unlocked gate, walked on the sidewalk to the front door of the home and rang the doorbell.

Lovelace's wife, Tricia Debbs, a Chandler Police Department radio dispatcher, walked out of the house from a side entrance and approached Wells, who remained standing at

the front door. Wells identified himself as an *East Valley Tribune* reporter and informed Debbs that he wanted to give Lovelace every opportunity to make a statement concerning the shooting of Ms. Nelson.

Debbs told Wells that Officer Lovelace had no comment for the media, pointed to the "No Trespassing" sign, and asked Wells to leave the property. Wells apologized for the intrusion, took the sidewalk back to the front gate, exited the courtyard area, got into his car and drove away from the neighborhood. According to Ms. Debbs, the entire incident on her property lasted about 15 seconds.

After Wells left, Debbs called the Chandler Police to complain of a criminal trespass. The Chandler Police responded with a police lieutenant and an officer within minutes of Wells' departure. The two policemen spent 20 minutes talking with Ms. Debbs about the 15-second incident.

Even though Wells covers the Chandler Police Department for the *East Valley Tribune*, and spends at least four days a week at the police department, it took the Chandler Police more than six weeks to attempt to contact Wells for his statement about the November 6 incident. It took another two months, until February 20, 2003, for Wells to be charged with criminal trespass in the first degree under A.R.S. § 13.1504(A)(1).

### "No Trespassing" Signs

In his 1 1/2 page Findings of Fact and Conclusions of Law accompanying his guilty verdict, Chandler Municipal Court Judge Ronald Karp found that by posting a "No Trespassing" sign on the unlocked gate of their three-foot high patio wall, the Lovelaces put Wells on notice that he would trespass if he opened the gate, walked on a sidewalk to the front door and rang the doorbell.

No reported Arizona case, however, supports this ruling. On the contrary, states that have addressed this issue agree with the Oregon Court of Appeals that posting a

"No Trespassing" sign on [a] boundary fence, alone, [is] inadequate to exclude visitors" from lawfully "mak[ing] contact with the occupants of the house. A

(Continued on page 42)

---

***Judge Ronald Karp found that by posting a "No Trespassing" sign on the unlocked gate of their three-foot high patio wall, the Lovelaces put Wells on notice that he would trespass if he opened the gate, walked on a sidewalk to the front door and rang the doorbell.***

---

### Thou Shalt Not Trespass

(Continued from page 41)

reasonable visitor could have assumed that that sign was intended only to exclude those who might put the property to their own uses, but that it did not apply to visitors who desired to contact the residents.” *Oregon v. Gabbard*, 877 P.2d 1217, 1221 (Or. App. 1994).

Like many cases concerning the legal effect of posting a “No Trespassing” sign, the issue in *Gabbard* was whether the state could use evidence obtained by law enforcement officers as a result of entering private property regardless of a “No Trespassing” sign at the criminal trial of the property owners.

Notwithstanding the Fourth Amendment and state constitutional restrictions on unreasonable police searches, which obviously do not apply to newspaper reporters, these cases hold that posting a “No Trespassing” sign does not give a property owner a reasonable expectation of privacy that police officers will not enter the property without a warrant. *Michel v. State*, 961 P.2d 436, 438 (Alaska App. 1998) (holding rural property owner should reasonably have expected Alaska State Troopers to pass four “No Trespassing” signs posted along his 300-yard-long driveway and knock on the door of his home, which was not visible from the highway); *Gabbard*, 877 P.2d at 1221 (holding that “No Trespassing” sign posted on a boundary fence, and “Do Not Enter” and “Beware of Dog” signs posted at the entry to a driveway leading to a residential yard, did not create a reasonable expectation that police would not park in the yard and wait until a resident appeared); *Washington v. Gave*, 890 P.2d 1088, 1091 (Wash. App. 1995) (holding that lessee had no expectation of privacy that police officers investigating tip that lessee was growing marijuana would not disregard five “No Trespassing” signs that the lessee did not post and obtain lessee’s agreement to open his front door on the pretext that they were coming to repossess a fictitious car); *Idaho v. Rigoulot*, 846 P.2d 918, 923 (Idaho App. 1992) (holding that a posted “No Trespassing” sign did not create a reasonable expectation of privacy that police would not enter a residential yard from a trail in the woods, and knock at a sliding glass door).

Each of these decisions is based on the principle that posting a “No Trespassing” sign

“cannot reasonably be interpreted to exclude normal, legitimate, inquiries or visits by mail carriers, newspaper deliverers, census takers, neighbors, friends, utility

workers and others who restrict their movements to the areas of one’s property normally used to approach the home.” *Rigoulot*, 846 P.2d at 923; *accord Michel*, 961 P.2d at 438

(“The law presumes that a homeowner generally consents to ‘allow visitors to take reasonable steps to make contact with the occupant.’”) (quoting *Gabbard*, 877 P. 2d at 1221); *Gave*, 890 P.2d at 1091 (“[T]he detectives . . . directly approached the house without departing from the accessway. . . . Moreover, . . . the detectives here conducted their investigation at mid-morning rather than the middle of the night.”) (citations omitted).

In the case of Bryon Wells, it was agreed at trial that Wells never departed from the areas of the Lovelace property “normally used to approach the [Lovelace] home” or used unreasonable methods to contact Lovelace for the legitimate—indeed, constitutionally protected—purpose of questioning a public official about the exercise of his duties. While the city prosecutor argued that Wells should have known that he was unwelcome at the Lovelace home, it can be safely assumed that in *Michel*, *Gabbard*, *Rigoulot* and *Gave*, the police knew they were unwelcome on the homeowner’s property.

### Reporter Testifies

To convict Wells of first degree criminal trespass, the Chandler Municipal Court had to find that Wells “knowingly . . . [e]nter[ed] or remain[ed] unlawfully” in Lovelace’s “fenced residential yard” [A.R.S. § 13-1504(A) (1)] and that Wells “was aware that his entry or remaining was unlawful.” *State v. Malloy*, 131 Ariz. 125, 130, 639 P.2d 315, 320 (1981); *State v. Kozan*, 146 Ariz. 427, 429, 706 P.2d 753, 755 (Ct. App. 1985). The Court was silent concerning Wells’ intent. At trial, Wells testified as follows:

- He saw the “No Trespassing” sign but believed that to commit trespass, a person must enter another person’s property with the intent to commit a crime, and that he had no such intent when he entered the Lovelaces’ property to request a statement from Officer Lovelace.
- He had visited the Lovelace home three weeks earlier, but was told Officer Lovelace was not at home. No one at the Lovelace home indicated to Wells on October 15, 2002 that he was trespassing or unwelcome to return.

(Continued on page 43)

### Thou Shalt Not Trespass

*(Continued from page 42)*

- Based on his familiarity with trespassing complaints as they appear in Chandler Police Department booking slips, which Wells reviews on a daily basis, he had no reason to believe that taking the sidewalk to knock at the

front door of the Lovelaces' home in broad daylight constituted trespassing.

Wells' appeal has yet to be assigned to a Maricopa County Superior Court Judge.

*Daniel C. Barr, along with Ann Hobart, of Brown & Bain, P.A. in Phoenix represent Bryon Wells.*

## Ohio Jury Returns Defense Verdict In Hidden Camera Case

By **Kenneth A. Zirm**

After seven years of litigation and a two-week trial, a Cuyahoga County, Ohio, jury returned a unanimous defense verdict May 15 in favor of Cleveland television station, WJW-FOX 8, and its former "I-Team" reporter, Carl Monday, in a lawsuit over a hidden-camera investigation of heating contractors.

At issue in the case was a two-part investigative report broadcast in February 1996 entitled "Furnace Repair or Scare." Launched in the wake of numerous tragic deaths from carbon monoxide poisoning, the hidden-camera investigation caught a number of heating contractors exploiting public concern over carbon monoxide by using scare tactics in an attempt to sell furnaces to homeowners when new furnaces were not really needed.

### *Plaintiff on Hidden Camera*

One of the contractors caught on hidden camera was the plaintiff, David Benson, a subcontractor for Plaintiff AAA All City Heating, Air Conditioning and Home Improvement, Inc. Benson told the homeowner that there was a big hole in her furnace, that it was leaking a "bad amount" of carbon monoxide into her home, and that it was dangerous to even operate. He told the homeowner he was required by law to shut her furnace off and have her sign a release that said she was "on her own" if she turned the furnace back on and it killed her. Three other contractors, including one contractor cooperating with the station, all disagreed with Mr. Benson's statements, and assured the reporter that the furnace was safe and was operating properly.

When Mr. Benson was later interviewed by the I-Team, he denied ever telling the homeowner that her furnace was leaking carbon monoxide, and insisted that he merely told her there was a potential of carbon monoxide leakage and that she should consider purchasing a new furnace. Benson insisted that, in a separate conversation with the homeowner

that took place in the kitchen and was not captured by the hidden cameras in the basement, he told the homeowner she could continue to operate the furnace safely as long as she purchased a carbon monoxide detector.

The initial complaint, filed in April 1997, asserted defamation, fraud, invasion of privacy, tortious interference, intentional and negligent infliction of emotional distress, and illegal wiretapping. Only defamation and fraud survived summary judgment, and the fraud claim was dismissed by the court at the close of plaintiffs' case at trial.

### *True Report, No Negligence*

FOX 8 and Monday asserted that the gist of the broadcast, i.e., that plaintiffs had used scare tactics to frighten the homeowner into the purchase of a new furnace when a new furnace was not necessary, was substantially true. Defendants also argued that the evidence did not support a finding that the station was negligent in investigating and preparing the report.

Defendants emphasized at trial that three other contractors had inspected the furnace a total of five different times, and that each contractor told the I-Team after each inspection that the furnace was fine. Defendants also successfully barred the testimony of plaintiffs' journalism expert, arguing that such testimony would not be helpful to the jury because Ohio has adopted the reasonable man standard for private figure defamation cases, and specifically rejected the use of a professional negligence standard.

Probably the strongest evidence for defendants was from the Better Business Bureau, establishing the prior bad reputation of the plaintiff company as one of the factors leading to its selection as a target for the I-Team investigation. The BBB documents showed that AAA All City had the worst complaint record of any company in the heating and air conditioning industry in the Cleveland area in the three-year period leading up to the broadcast.

*(Continued on page 44)*

### Jury Returns Defense Verdict In Hidden Camera Case

*(Continued from page 43)*

Because AAA All City had disagreed with the contents of the BBB reports, there were numerous letters in the BBB file explaining exactly why those reports were so bad. None of those letters or reports were helpful to the Plaintiffs, who tried unsuccessfully to keep the BBB records out of evidence.

### *Outtakes Don't Help Plaintiff*

The hidden camera outtakes were introduced as evidence in the case, as were the outtakes of the I-Team interview with Mr. Benson. Plaintiffs' counsel played them extensively to the jury, and argued that the actual broadcast had been unfairly edited to make the plaintiffs look worse than they really

were. Although the outtakes did contain some favorable evidence for the plaintiffs, the jury was ultimately unpersuaded by the Plaintiffs' unfair editing arguments.

After only 1-½ hours of deliberations, the jury returned with a defense verdict, answering all three jury interrogatories on falsity, negligence and causation/damages unanimously in favor of the defendants. In interviews with the jurors afterwards, they pointed primarily to the plaintiffs' prior bad reputation as the reason for the defense verdict.

Defendants WJW-FOX 8 and Carl Monday were represented by Michael McMenamin, Kenneth Zirm and Susan Zidek of Walter & Haverfield LLP in Cleveland. The plaintiffs were represented by Charles Gruenspan, of Charles Gruenspan Co, LPA, also of Cleveland.

## Conviction of Photographer of Cincinnati Morgue Affirmed

By John Greiner

On May 9, 2003, The Hamilton County, Ohio, Court of Appeals affirmed the conviction of Thomas Condon, the photographer who'd been convicted of eight counts of gross abuse of a corpse stemming from his photographing corpses posed with inanimate objects at the Hamilton County morgue in early 2001. *State v. Condon*, No. C-020262 (Ohio App. Dist. Opinion May 9, 2003).

On appeal, Condon argued that the conviction violated the First and Fourteenth amendments. The Appellate Court, however, viewed the case essentially as a reasonable "time, place and manner" restriction. While Condon was granted limited access to the morgue to explore the making of a training film, the court found that he'd been informed he could take photos of corpses only with next of kin's consent or with a court order. Condon had received neither at the time he took the photos.

The court found that, while photographers may take pictures of the dead on the battlefield or at public tragedy (the court used September 11 as an example) there is no such license to take photos in a place not open to public inspection. The morgue, the court found, is "a place of private repose, not of public display." Thus the court noted that the "case is about the manner in which Condon took the photographs and his treatment of the corpses in doing so; it is in no way a prosecution based upon the message he sought to express." To illustrate its point, the court noted that an art museum could not be prosecuted for displaying the photos. The court did chide the prosecution for certain comments made

during the trial. The prosecutor at one point described the pictures as a "bullshit project."

But the court considered these comments harmless error. The court did find that the trial court erred by imposing the maximum prison term for all counts. The appellate court imposed the minimum sentence for each count, thereby reducing the sentence from 30 months to 18.

In a companion case, the appellate court reversed the conviction of Jonathan Tobias, a junior pathologist found guilty of aiding and abetting Condon. The court found insufficient evidence that Tobias assisted Condon in any way.

In a concurring opinion, one judge noted that Tobias's motion to sever his trial should have been granted in the first instance. He deemed Tobias's conviction a "spillover."

On April 29, 2003, Condon had filed a motion with the court of appeals asking that the prosecutor's opinion be unsealed, and that the record be reopened to allow for the introduction of the opinion into evidence.

Condon contended that the opinion actually stated that permission was not required to photograph corpses if the photos did not reveal the corpses' identities. Condon argued that the fact that the prosecutor had given the opinion constituted a conflict of interest with the prosecutor's handling of the prosecution.

On the same day it handed down the decision in the case, the court of appeals also denied the motion to reopen the record.

*John Greiner is with Graydon, Head & Ritchey in Cincinnati, Ohio.*

## Second Circuit Denies Reporter's Privilege to Credit Rating Service

By Floyd Abrams, Adam Zurofsky, Brian Markley

### *Narrow Ruling*

On May 21, 2003, the Second Circuit, in *In re Fitch, Inc.*, 2003 WL 21185690 (2d Cir. 2003), held that Fitch, Inc., a credit rating agency, was not entitled to assert the journalist's privilege under the New York Shield Law with respect to its work on a series of financial transactions. The Second Circuit had never before considered the applicability of the Shield Law or the First Amendment to rating agencies.

Although the Court (consisting of Chief Judge John M. Walker and Judges James L. Oakes and Robert A. Katzman) rejected Fitch's claims that it acted as a "professional journalist" under the Shield Law, it was careful to limit the reach of its opinion and cited, with approval, two district court opinions that did extend First Amendment protection to a rating agency. The Court stated that it was "not deciding the general status of a credit rating agency like Fitch under New York's Shield Law," and that it would "leave for another day" the question of whether "Fitch, or one of its rivals, could ever be entitled to assert the newsgathering privilege." *Id.* at 6 (emphasis in original).

### *Fitch Rejects Discovery Subpoenas*

In the underlying litigation arising out of the District of Hawaii, plaintiff, American Savings Bank ("ASB"), issued subpoenas to Fitch (a non-party) for documents and testimony concerning Fitch's communications with the defendant, UBS PaineWebber ("PaineWebber"). Fitch had rated certain securities issued by PaineWebber, and, according to ASB, had "extensive communications" with PaineWebber about certain other transactions that Fitch ultimately did not rate. *In re Fitch, Inc.*, 2003 WL 21185690, at \*5.

Fitch refused to produce any documents or submit to any depositions, claiming that it deserved protection under the Shield Law and the federal journalist's privilege because it "conducts research, fact-gathering, and analytical activity that is directed towards matters of general public concern, just like any journalist," and "makes its information available on its web site to the general public." *In re Fitch, Inc.*, 2003 WL 21185690, at \*4.

Following Fitch's refusal to comply with the subpoenas,

ASB filed a motion to compel in the Southern District of New York, while Fitch moved to quash. On December 16, 2002, the district court, in an Opinion and Order by Judge John F. Keenan, held in favor of ASB, finding that Fitch was not entitled to the journalist's privilege under the Shield Law or federal common law, and that, in any event, ASB had overcome those qualified protections. *See American Savings Bank, FSB v. UBS PaineWebber, Inc.*, 31 Media L. Rep. 1444, 2002 WL 31833223 (S.D.N.Y. Dec. 16, 2002). When Fitch again refused to comply, Judge Keenan, in an Order and Judgment dated January 16, 2003, held Fitch in contempt.

### *New York Shield and Common Laws*

The New York Shield Law (first enacted in 1970 and amended in 1975, 1981 and 1990) provides an absolute privilege for journalists against disclosure of confidential information and a qualified privilege for non-confidential materials. The law protects any "professional journalist," which it broadly defines as

"one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, . . . or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public." N.Y. Civ. Rights Law § 79-h(a)(6).

Independent of the Shield Law, federal common law also provides a qualified privilege for confidential and non-confidential information. *See Gonzales v. National Association of Broadcasters*, 194 F.3d 29 (2d Cir. 1999). In this case, the Court applied the Shield Law because New York law applied in the underlying action and both parties agreed that the Shield Law is "more journalist-protective" than the federal privilege.

### *Precedents for Protection for Ratings Agencies*

In support of its argument to the Second Circuit that it was entitled to protection as a journalist, Fitch cited two district court opinions in which the federal journalist's privi-

(Continued on page 46)

## 2nd Cir. Denies Reporter's Privilege to Credit Rating Service

(Continued from page 45)

lege was extended to Standard & Poor's ("S&P"), another rating agency.

In one such case, *Pan Am Corp. v. Delta Airlines, Inc.*, 161 B.R. 577 (S.D.N.Y. 1993), the district court quashed a subpoena seeking documents from S&P (a non-party) related to meetings, correspondence and other communications between S&P and the plaintiff, for whom S&P had performed ratings work.

Applying the test set forth by the Second Circuit in *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), the court set out to determine whether S&P was "professionally engaged in newsgathering" at the time it received the information sought to be discovered." *Pan Am*, 161 B.R. at 580. The court concluded that the First Amendment shielded S&P from the subpoena because S&P had the "requisite newsgathering intent" when it gathered the information sought. *Pan Am*, 161 B.R. at 581-82.

Specifically, the court found that,

"[t]he record allows no other conclusion but that S&P functions as a journalist when gathering information in connection with its ratings process and specifically that it was functioning as a journalist, viz., with the intent to use the material to disseminate information to the public, when it gathered the information sought here. . . ." *Id.* at 581-82.

In support of its holding, the court took "particular interest" in certain specific characteristics of S&P, namely:

"(i) S&P's gathering of a wide range of information from a variety of sources — including the issuer on both a confidential and nonconfidential basis — for the purpose and with the intent of publishing a rating, (ii) analysis of that information, (iii) internal consultation in formulation of a rating, and (iv) publication of the rating with accompanying analysis and commentary." *Id.* at 581.

Fitch also relied on *In re Scott Paper Co. Securities Litigation*, 145 F.R.D. 366 (E.D. Pa. 1992), where the district court quashed a subpoena seeking information related to internal operating procedures and deliberations of S&P analysts. Like the court in *Pan Am*, the *Scott Paper* court

found that S&P acts as a journalist when it receives information about the companies and debt issues it rates. *Scott Paper*, 145 F.R.D. at 370 ("S&P's publications have all the attributes identified by the Supreme Court . . . as indicative of the press.").

### **Second Circuit Finds Fitch is Different**

In this case, the Second Circuit found that the analysis in *Pan Am* and *Scott Paper* was "compelling," but nevertheless held that, "subtle differences in the facts of this case mandate a different outcome." In particular, the Court pointed to two factors that distinguished the instant case from *Pan Am* and *Scott Paper*.

First, the Court found that "[u]nlike a business newspaper or magazine, which would cover any transactions deemed newsworthy, Fitch only 'covers' its own clients" and that such a practice "weighs against treating Fitch like a journalist." *In re Fitch, Inc.*, 2003 WL 21185690, at \*5. The Court observed that "the district court in *Pan Am* based its holding that S&P was a journalist in part upon the fact that S&P rated virtually all public debt financing and preferred stock issues whether they were done by S&P clients or not." *Id.* Though it was careful not to "suggest that an ostensible newsgathering organization is required to cover all events in order to qualify as journalists," the Court nevertheless found that "Fitch's information-disseminating activity does not seem to be based on a judgment about newsworthiness, but rather on client needs." *Id.*

Secondly, the Court found that "Fitch played an active role in helping PaineWebber decide how to structure the transaction." *Id.* at 6. While it did not find Fitch's involvement with PaineWebber to be improper, the Court found that there was "a level of involvement with the client's transactions that is not typical of the relationship between a journalist and the activities upon which the journalist reports" and that such evidence "counsels strongly against finding that Fitch may assert the privilege for this information." *Id.* Due to a protective order in place in the litigation, the Court used only general terms when discussing the evidence demonstrating Fitch's level of involvement with PaineWebber.

(Continued on page 47)

**2nd Cir. Denies Reporter's Privilege to Credit Rating Service***(Continued from page 46)*

Finally, the Court concluded that it need not reach the question of whether ASB had overcome the Shield Law's qualified protections. The Court also concluded that it need not decide whether Fitch waived those protections by disclosing some of the contested information to federal regulators or by failing to produce a privilege log.

American Savings Bank, FSB was represented by Adrienne B. Koch of Esanu Katsky Korins & Siger, LLP, New York, N.Y. (Paul Alston, Alston Hunt Floyd & Ing, Honolulu, HI, on the brief). Fitch, Inc. was represented by Evan A. Davis of Cleary, Gottlieb, Steen & Hamilton, New York, N.Y. (Anil Kalhan, of counsel, on the brief).

---

## NJ Trial Judge, In Reluctant Reversal, Agrees to Release Secret Bail Transcripts

**By Bruce S. Rosen**

After sealing her courtroom for an ex parte bail hearing concerning a man suspected of supplying phony identification to two September 11 hijackers, a New Jersey trial court judge June 3 ordered transcripts of that hearing released under instructions from the N.J. Appellate Division, but she sharply defended her sealing order. *State v. El-Atriss*, No. W3337476 (N.J. Super. Ct. 2003).

Superior Court Judge Marilyn Clark had informed the lawyer for Mohammed El-Atriss, who returned from his native Egypt to face proceedings in the matter, that she would close part of a January 8 bail hearing in which she planned to discuss the grand jury presentation with prosecutors. After the hearing, she told his lawyer that the hearing would remain sealed because the county prosecutor had "alluded to confidential information" and described the investigation as ongoing. El-Atriss, whose bail was increased from \$250,000 to \$500,000 during the public portion of the hearing despite his inability to raise the lower bail amount, appealed the order.

On January 15, the Appellate Division remanded the matter back to Clark stating that without the federal government's input, there was inadequate basis for holding the hearing in camera, and requiring Judge Clark to articulate

standards for closing the hearing. See *MLRC MediaLawLetter*, Feb. 2003, at 45.

Two weeks later, before the trial court acted on the Appellate Division Order, the defendant agreed to plead guilty to reduced charges of sales of simulated documents for which the prosecution agreed to a sentence of time served, probation, and a \$15,000 fine. The prosecutor also agreed that bail should be reduced to \$50,000, with a 10 percent cash alternative.

---

***The Appellate Division remanded the matter back to Clark stating that without the federal government's input, there was inadequate basis for holding the hearing in camera, and requiring Judge Clark to articulate standards for closing the hearing.***

---

After the Appellate Division order but before the plea deal was announced, a *New Jersey Law Journal* reporter asked the court to unseal the transcript of the hearing. The trial court refused, and after making initial unsuccessful informal inquiries, Louis Pashman of Pashman Stein in Hackensack

filed an order to show cause to release the transcripts on behalf of the *Law Journal*, *The Record* of Hackensack, *The Star-Ledger* of Newark, *The Herald News* of West Paterson, *The New York Times* and *The Washington Post*. See *MLRC MediaLawLetter*, March 2002, at 47. This time, although county prosecutors did not oppose the unsealing of the application and the U.S. attorney for New Jersey declined to file a response, the defendant opposed release, citing due process concerns.

Judge Clark then ordered a copy of the transcript be provided to Miles Feinstein, a Passaic solo practitioner

*(Continued on page 48)*

**NJ Trial Judge Agrees to Release Secret Bail Transcripts***(Continued from page 47)*

representing El-Atriss, so he could prepare a defense to the media's motion. Feinstein, citing *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) and *North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002) [*cert. denied*, 2003 WL 1191395, 71 USLW 3731, 71 USLW 3734 (U.S. May 27, 2003)], argued that the defendant's plea agreement, his inability to cross-examine the witnesses who had testified, the presence of extensive hearsay in the sealed transcripts and the potential harm to the defendant's reputation all mitigated against release.

The media entities argued that New Jersey court rules and a state Supreme Court decision, *Hammock v. Hoffman La Roche*, 142 NJ 356 (1995), require that all judicial proceedings be open unless "an important state interest is at stake." The party with the burden of proof must show why access to the documents should be denied at the time of the motion for access, as distinct from when the protective order was initially entered. They also argued that under Third Circuit interpretations of *Richmond Newspapers*, there was a First Amendment right of access, that no national security concerns were implicated, and that, under state law, pretrial proceedings were to remain public unless a realistic likelihood existed that adverse pretrial publicity would render defendant unable to secure a fair trial.

Judge Clark, a onetime assistant county prosecutor and a judge for almost 14 years in Passaic County, ruled from the bench on June 3 that the transcript should be released but gave Feinstein until June 19 to file an appeal, as he said he would. Clark maintained in her bench opinion that not only did the Appellate Division misperceive the fact that she had done everything it had said she should do, but that her use of *ex parte* consideration of confidential information was widespread in statutory and non-statutory contexts. She did say the decision to seal the courtroom was the hardest decision she had made as a judge.

Nevertheless, Clark, citing *Richmond Newspapers* and Third Circuit law, said that "experience" and "logic" dictated release, rejected any consideration of his cooperation with prosecutors, declared that *North Jersey Media*, which applied to access the deportation proceedings, did not apply to a bail hearing in a criminal matter, and rejected claims that El-Atriss' reputation could be damaged be-

cause of his plea. She also said that keeping the transcripts sealed effectively denied prosecutors the ability to respond to criticism of the closing of the bail hearing and "why they were so concerned about Mr. El-Atriss."

Louis Pashman of Stein Pashman, Hackensack, represented the media entities. Miles Feinstein of Clifton represented the defendant Mohammed El-Atriss. Steven Brizek, senior assistant prosecutor, Passaic County, represented the state.

*Bruce S. Rosen is a DCS member practicing in Chatham, N.J. with McCusker, Anselmi, Rosen, Carvelli & Walsh, P.A.*

**MLRC MediaLawLetter Committee**

David Bralow (Chair)  
 Mike Giudicessi (Vice Chair)  
 Bruce Rosen (Vice Chair)  
 Robert Balin  
 Jim Borelli  
 Jay Ward Brown  
 Peter Canfield  
 Thomas Clyde  
 Robert Dreps  
 Jon Epstein  
 Charles Glasser, Jr.  
 Richard M. Goehler  
 Karlene Goller  
 Steven D. Hardin  
 S. Russell Headrick  
 David Hooper  
 Elizabeth B. Johnson  
 Jonathan Katz  
 Debora Kristensen  
 Eric Lieberman  
 Daniel Mach  
 John Paterson  
 Deborah H. Patterson  
 Mark J. Prak  
 William Robinson  
 Madeleine Schachter  
 Laurence B. Sutter  
 Charles D. Tobin  
 Paul Watler

## Federal Court in Washington Strikes Down Statute Protecting Personal Information

### *Statute Created a Cause of Action for Dissemination of Information Relating to Police Officers and Others*

By Elena Luisa Garella

A federal district court judge granted a Seattle area man's motion for summary judgment, holding that a state law prohibiting the disclosure of personal information relating to law enforcement officers and court-related personnel was unconstitutional.

Under the statute, Rev. Code of Wash. §§ 4.24.680-700, any person who publishes the addresses, telephone numbers, birthdates and social security numbers of the protected classes of person was subject to permanent injunction, damages, and attorneys fees and costs if he or she had "the intent to harm or intimidate." In a strongly-worded opinion, Judge John C. Coughenour held that the statute is facially unconstitutional under the First and Fourteenth Amendments of the United States Constitution. *Sheehan v. Gregoire, et al.*, Case NO. C02-1112C (W.D. Wash. May 22, 2003).

#### **Web Site Posts Info on Cops**

In early 2001, William Sheehan launched a Web site that listed the names, ranks, pay, and other information of law enforcement officers from various Washington cities and departments. By doggedly examining various public documents, such as land titles, bankruptcy court pleadings, and voter registrations, Sheehan was able to assemble the addresses, birthdates, social security numbers and spouse's names of many officers, particularly those in the City of Kirkland. Sheehan supplemented his research by paying small amounts to commercial services that sell credit information over the internet.

On the resulting Web site, [www.justicefiles.org](http://www.justicefiles.org), Sheehan posted not only the collected information but also a number of articles critical of police malfeasance. He encouraged site visitors to use the identifying information for any legal purpose that would advance his cause of

"police accountability," such as serving process on police officers, researching their criminal history, and picketing their homes. Law enforcement agencies, however, questioned Sheehan's motives and bitterly denounced the perceived infringement of their privacy.

#### **Government Goes after Site**

Ultimately, various branches of state and local governments made four attempts to censor the Web site. First, the City of Kirkland charged Sheehan with misdemeanor harassment of a police officer. The charge was ultimately voluntarily dismissed after an appellate court remanded the case to the trial court for specific findings on whether Sheehan's activities included any proscribable true threats.

Second, several police officers and the City of Kirkland brought a tort action against Sheehan, alleging invasion of privacy, intentional and negligent infliction of emotional distress, civil conspiracy, and related claims. Plaintiffs moved for a preliminary injunction to remove the addresses, phone numbers, spouse's names and birthdates from the Web site. The King County Superior Court denied the motion with the exception of the social security numbers. *Kirkland v. Sheehan*, 29 Media L. Rep. 2367, 2002 WL 1751590 (Wash. Super. Ct. 2002). After an unsuccessful interlocutory appeal, the plaintiffs voluntarily dismissed their claims.

Third, King County sued Sheehan to enjoin him from obtaining the names of King County Sheriff's employees. Sheehan's method is to obtain the names of officers by requesting the information from the various agencies under the aegis of Washington's broad public disclosure act, Rev. Code of Wash. 42.17. Sheehan then uses the names to track down each individual's specific information.

King County argued that the names of its officers should be withheld because the names could lead to

---

***He encouraged site visitors to use the identifying information for any legal purpose that would advance his cause of "police accountability"***

---

(Continued on page 50)

## Federal Court in Washington Strikes Down Statute Protecting Personal Information

(Continued from page 49)

“private” information becoming available from other sources. The Court rejected this “linkage” argument, noting that

“[i]t is a fact of modern life in this age of technology that names can be used to obtain other personal information from various sources, but we conclude that this is not sufficient to prevent disclosure of the names of police officers under the act.” *King County v. Sheehan*, 57 P.3d 307, 317-18 (Wash. 2002).

Finally, bowing to intense lobbying by various law enforcement organizations, the campaign to stop Sheehan culminated with the enactment of RCW §§ 4.24.680-700 in the spring of 2002. To avoid litigation under the new law, Sheehan removed the Web site the day before the law became effective. He then brought suit in the Western District of Washington Federal Court for declaratory and injunctive relief for violation of his federal civil rights.

### **Florida Star as Precedent**

In his decision, Judge Coughenour relied heavily on *The Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), noting that the state may not impose a selective ban on publication of lawfully obtained information. Sheehan obtained his information legally, most of it from governmental sources. In addition, “for profit commercial entities remain perfectly free to sell, trade, give or release personal identifying information to third-parties.” Therefore, it is impossible for the State to successfully contend that the statute met *The Florida Star* test of “further[ing] a state interest of the highest order.” *The Florida Star*, 491 U.S. at 533.

### **“Not True Threats”**

The State unsuccessfully argued that the new law prohibits only proscribable true threats under *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9<sup>th</sup> Cir. 2002). However, the Court noted that the statute continues to permit the dissemination of “merely names, addresses and numbers” unless the publisher’s subjective intent is “to harm or intimidate.” *Planned Parenthood* specifically rejected the notion that subjective intent can be

used to measure whether or not a particular statement is a true threat. The State’s position, according to the Court, “brazenly contradicts *Planned Parenthood* and all other relevant case law; true threats do not hinge on the speaker’s subjective intent.”

The Court also found the statute invalid because it is content-based without being narrowly-tailored, underinclusive, overbroad, and vague. Inquiry into the underlying motivation of a speaker chills free speech and invites discriminatory enforcement. The decision notes: “[t]hought-policing is *not* a compelling state interest recognized by the First Amendment.” [emphasis in original]. While law-enforcement and court-related personnel may suffer from fear of harm and intimidation, the government may not censor information that it itself has placed in the public domain. The decision is available through a link at [www.justicefiles.org](http://www.justicefiles.org).

*Elena Luisa Garella is a solo practitioner in Seattle, Washington. She represented William Sheehan in each of the cases discussed above. Stephen Smith, Preston Gates & Ellis and William Evans, attorney for the City of Kirkland, represented the City of Kirkland and the individual plaintiffs in Kirkland v. Sheehan. Patrick Denis Brown, also a solo practitioner, represented co-defendant Aaron Rosenstein in King County v. Sheehan. Janine Elizabeth Joly, Deputy Prosecuting Attorney, Seattle, WA, represented King County. Michael John Killeen, Michele Lynn Earl-Hubbard, and Alison Page Howard of Davis Wright Tremaine represented Amici Curiae The Media Associations in King County v. Sheehan. Finally, James Pharris, Assistant State Attorney General, represented the state and Janine Joly represented King County in Sheehan v. Gregoire.*

**TO RECEIVE THE  
MEDIALAWLETTER BY E-MAIL  
(Or Add Others From  
Your Organization to Our List)**

**Please Contact  
Kelly Chew  
[kchew@ldrc.com](mailto:kchew@ldrc.com)**

## HIPAA and the Silencing of the Press

By Tonda F. Rush

Newspapers all over the country are lamenting the disappearance of hospital patients. Oh, they are not lost. They are just not in the paper. HIPAA has gagged the medical establishments. Medical secrecy is now a matter of federal law.

The Health Insurance Portability and Accountability Act (HIPAA) is about more than patients' names in the newspaper. It is a 1996 law that governs a wide spectrum of health information practices, from computer security to patient file access. Although HIPAA's purpose was to create privacy protocols around electronic medical information exchange in the insurance context, its reach is nonetheless far broader. And the April 14, 2003, implementation of the HIPAA privacy rule now bedevils newspapers.

*New York Times* reporter Myron Farber's investigation into suspicious nursing home deaths likely could no longer take place; if his secret source was a nursing home worker, the source would be in serious legal jeopardy. Nor could the *Orange County Register's* disclosure of fraud by University of California fertility doctors. Medical workers will be too frightened to be "whistleblowers"; biologists will refuse to prepare the necessary list of egg donors.

It will take longer for the public to learn of the possible dangers from brands of breast implants, toys, or tires when reports of product liability cases cannot be written.

HIPAA's arrival was particularly surprising in smaller towns across America, where the local birth lists or nursing home admissions were considered community information. These "refrigerator news" stories have disappeared. Clergy have complained to newspapers that they no longer can find out from the newspaper on Saturday which of their parishioners need to be on the prayer list on Sunday morning

### *Legislative History*

Congress passed HIPAA in 1996 with the notion of improving health care by further regulation of the health insurance industry. Among its objectives was to allow patient information to move more smoothly through electronic transactions, with the intention of helping employees carry insurance coverage from job to job more easily.

With all of this electronic information, fears of massive dossiers and attendant privacy violations arose. Added to the fears were the objections of some privacy advocates who felt health care industries were unfairly trading in patient information for commercial purposes:

to sell a new mother's name to a diaper service, for example. Much debate over the need for a medical privacy law ensued. Congress finally decreed that if it could not pass a privacy protocol by 1999, the U.S. Department of Health and Human Services should write the privacy rule.

Congress could not. HHS did. The new rules were announced at the conclusion of the Clinton administration. A massive outcry from health insurance and practitioners arose because of the strict standards, causing Bush appointee Tommy Thompson to reopen the HIPAA privacy discussion as one of his first acts after arriving as new head of HHS.

In 2001 and 2002, Thompson requested comments on the rule, and made adjustments both times. News organizations commented in detail and critically on both occasions. Neither the news organizations comments nor various meetings with HHS produced much change in the rule that would benefit news organizations, however.

The rule was implemented in various stages beginning in 2001, but the April 14, 2003, enforcement date was the one that most affected newspapers. Most have received letters or policy statements from local hospitals pointing out that HIPAA now bars them from releasing much of anything about a patient.

---

***Therefore, I join the MLRC in urging members to contact their Congressmen about the unacceptable impact HIPAA will have on newsgathering and reporting, and by extension, on public health and safety.***

---

(Continued on page 52)

## HIPAA and the Silencing of the Press

(Continued from page 51)

### **Implementing HIPAA**

Under procedures recommended by the American Hospital Association and followed by hospital groups in many states, if reporters already have a patient's name, the hospital may be able to confirm the patient's presence, room number and a one-word statement of condition.

However, the patient must have been advised of the directory policy and have received an "opt-out" opportunity. If the patient is unable to act on his/her own, the hospital may place the person on the directory if it has information of past preferences by that patient and is acting in patient's best interest.

AHA also recommends that whenever reporters are in the hospital on a story, they be accompanied by an official escort. This wrinkle is not found in HIPAA, but presumably has been added out of concern about liability if their employees breach the rules.

Hospitals are not alone in erring on the side of caution. In the confusion over the new law, fire departments in many communities have begun to close down their fire reports, which are not covered by HIPAA and, in many instances, in clear violation of state law. To complicate matters, fire departments often operate ambulance services that *are* covered by HIPAA.

Reporters are finding that they cannot learn who was in even a traffic accident. Neither the hospital nor the ambulance services can tell. Police reports are often filed too late to be useful.

### **A Call to Action**

Plainly, the HIPAA privacy rules have already begun to chill speech on health matters. It is becoming virtually impossible for journalists and other interested members of the public to obtain health information on matters of public interest that has routinely been available in the past. The rules' radical departure from longstanding public policy thus threatens public health, safety, and accountability. Privacy advocates' arguments that health information is not government information, and therefore not officially "public information" have speciously led policy experts to overlook nearly 100 years of com-

mon law privacy development in the states.

With injuries from terrorist attacks, anthrax infections and SARS such a central part of recent and current news, HIPAA must be amended to allow reporters to do their jobs and provide the public with the most accurate and complete information available, helping perhaps to alleviate unnecessary panic or to publicize the necessary precautions.

Therefore, I join the MLRC in urging members to contact their Congressmen about the unacceptable impact HIPAA will have on newsgathering and reporting, and by extension, on public health and safety.

For more information:

- The NNA/NAA's letter to Secretary Thompson of the U.S. Department of Health and Human Services: <<http://www.naa.org/conferences/annual02/live/NAA-NNA-ASNE-HIPAAcomments.pdf>>
- The HHS decisiontree on who is covered: <<http://www.hhs.gov/ocr>>
- Thomas R. Julin, et. al. *MLRC Newsgathering Committee Memo: A Controversial Federal Law May Impede Public Health Reporting When it is Most Needed* (2003)

*Tonda Rush is with King & Ballow, Washington D.C. and is NNA Director/ Public Policy.*

***To Be Published in July! Order Now!***

**50 State Survey 2003-2004:**

**MEDIA PRIVACY  
AND RELATED LAW**

*With a special report on privacy and related law in the Federal Courts of Appeals.*

**\$175**

## Report on Legislative Affairs

By Kevin Goldberg

The initial flurry of legislative activity is ebbing now that Congress has been in session for nearly six months. Although over 2,400 bills have been introduced in the House and over 1,200 have been introduced in the Senate, most of these bills have received little to no attention from their committee of reference. The majority of media-related bills are no exception.

This is the first in what the MLRC hopes will be a monthly update on First Amendment, Freedom of Information Act and other media-related bills that are active in Congress, as well as any ongoing executive branch proceedings on which members or their clients may wish to comment. It will often be supplemented by a more in-depth column on a particular issue worthy of such extensive attention.

### *Cameras in the Courtroom*

#### **House Version: H.R. 2155**

- Introduced on May 20, 2003 by Rep. Steve Chabot (R-OH).
- The bill grants discretion to the presiding judge of any federal district or appellate court to allow photography, electronic recording or videotaping of proceedings within his or her courtrooms.
- It was referred to the House Judiciary Committee but has not received any attention from this committee because the Chair, Rep. James Sensenbrenner (R-WI), is adamantly opposed to media coverage of court proceedings. The only way to get this through the Judiciary Committee and to the House floor is through an appeal to Rep. Sensenbrenner.

#### **Senate Version: S. 554**

- Introduced on March 6, 2003 by Sen. Charles Grassley (R-IA).
- This bill would accomplish the same goals as its House counterpart.
- It was referred to the Senate Judiciary Committee, which passed the bill on May 22, 2003. The next step will be the Senate floor, though no vote has been scheduled.

### *Restore FOIA Act (S 609)*

- Introduced on March 12, 2003 with 5 original co-sponsors: Sens. Patrick Leahy (D-VT), Carl Levin (D-MI), Robert Byrd (D-WV), Joseph Lieberman (D-CT) and Jim Jeffords (I-VT). They have been joined by Senator Bob Graham (D-FL).
- The Restore FOIA Act seeks to amend the sections of the Homeland Security Act of 2002, which allows private entities to submit information related to protection of the nation's critical infrastructure (mainly in the area of cybersecurity as it affected our nation's banking, water, oil, transportation, energy, telecommunications, and other important industries) in exchange for a promise that the information will not be accessible to the public through a FOIA request and will not be used as evidence of liability in a civil lawsuit. Though the Restore FOIA Act will not repeal these sections of the Homeland Security Act, they will greatly limit the scope of the bill and the protections offered to private industry.
- The bill has stalled in the Senate largely because it is still viewed as partisan legislation. The original co-sponsors seek a Republican ally. The main name that has been put forth is Sen. John Cornyn (R-TX), who led many freedom of information initiatives while Attorney General of Texas.
- **Any member who has a good relationship with Sen. Cornyn or any other Republican Senator who may be so inclined should press that Senator to become a co-sponsor.**

### *Freedom to Read Protection Act*

#### **House Version: H.R. 1157**

- Introduced March 6, 2003 by Rep. Bernie Sanders (I-VT).
- H.R. 1157 will exempt libraries and booksellers from Section 215 of the USA Patriot Act. Section 215 states that the FBI can seek an order requiring the production of any tangible thing related to terrorism that is held by a business; it explicitly lists books, records, and other documents (including financial documents) as ripe for

*(Continued on page 54)*

### Report on Legislative Affairs

*(Continued from page 53)*

subpoena; the further catch is that the business receiving the subpoena is gagged from telling anyone that the documents have been requested.

There is some question as to whether Section 215 would allow the search of a newsroom; there is nothing in that section, or the USA Patriot Act generally, which overturns, or even mentions, the Privacy Protection Act of 1980, which spells out the proper basis for a newsroom search. In any event, Rep. Sanders admits that his bill will have no applicability to newsrooms, if the USA Patriot Act applies to them.

- **This bill may only be of interest to a small minority of MLRC members or clients. However, Rep. Sanders' staff did indicate a willingness to work with the media on a new bill if it becomes apparent that Section 215 of the USA Patriot Act is being used against the media.** For more information, you can contact Janko Mitric in the office of Rep. Bernie Sanders at (202) 225-4115. To date, the House Judiciary Committee has not taken any action on the bill.

**Senate Version: S. 1158** (titled the "Library and Book-seller Protection Act")

- Introduced May 23, 2003 by Sen. Barbara Boxer (D-CA).
- This will accomplish the same goals as the H.R. 1157.
- It was referred to the Senate Judiciary Committee which has taken no action on the bill.

### *People's Right to Know Act (H.R. 2257)*

- Introduced on May 22, 2003 by Rep. Chris Van Hollen (D-MD).
- Just before the United States Supreme Court was to hear argument in *A.T.F. v. City of Chicago*, Congress passed, and the President signed, an appropriations bill containing a section that mooted the case. The issue in the lawsuit was whether the City of Chicago could access an ATF database which traces the origin and ownership of recovered firearms; the ATF refused to fulfill the City of Chicago's FOIA request, withholding information related to both manufacturers and gun purchasers. The appropriations bill specifically exempted the entire database from FOIA. Rep. Van Hollen's legislation seeks to reverse that section and allow access.
- The bill has been referred to the Government Reform Committee but has not received any attention. **Interested members should contact Rep. Van Hollen's office for more information on how to support this legislation.**

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or [kmg@cohnmarks.com](mailto:kmg@cohnmarks.com)

*Kevin Goldberg of Cohn & Marks LLP, Washington DC, is Chair of MLRC's Legislative Affairs Committee.*

*Order now!*

## MLRC 50-STATE SURVEY 2002-03: MEDIA LIBEL LAW

*With updated reports on libel law in the Federal Circuits and an outline of English libel law.*

**MEDIA LIBEL LAW TOPICS INCLUDE:** *Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions*

**For ordering information on the most current editions, go to [www.medialaw.org](http://www.medialaw.org)**

---

## Camera Bill Passes Senate Judiciary

A new bill to permit television cameras in federal courtrooms has cleared the Senate Judiciary Committee, but is likely to face opposition in the House.

The bill, S. 554, was introduced by Sens. Charles Grassley (R-Iowa) and Charles Schumer (D-N.Y.). It is identical to a bill that the Senate Judiciary Committee favorably reported in 2001, but which was not voted on by the full Senate. *See* S. 986, 107th Cong. (2001); *see also* *LDRC LibelLetter*, June 2001, at 37. The same bill was also introduced in 1999, but never made it out of committee. *See* S. 721, 106th Cong. (1999).

The bill, entitled the Sunshine in the Courtroom Act, would give the senior judge presiding over a federal court proceeding discretion to allow photographing, electronic recording, broadcasting, or televising of the proceeding, regardless of any legal prohibition of such coverage. The bill purports to cover all federal district and appellate courts, including the U.S. Supreme Court; the provision regarding district courts would expire after a three-year period.

The bill would require the court to order that the appearance or voice of a non-party witness be obscured upon

request by that witness. It would also allow the Judicial Conference of the United States to create non-binding guidelines for electronic coverage of court proceedings.

The bill has 10 Senate co-sponsors besides Grassley and Schumer, and has been combined in the Senate with a bill to increase judicial salaries.

There is no companion House bill, although Reps. Steve Chabot (R-Ohio) and William Delahunt (D-Mass.) were preparing to introduce such a measure. In the past, House Judiciary Committee chairman James Sensenbrenner (R-Wis.) has expressed opposition to allowing cameras in federal courts.

Several federal courts experimented with camera coverage in the early 1990s, and the Second and Ninth Circuit Courts of Appeal continue to allow such coverage. But at the conclusion of the test, the Judicial Conference adopted a policy opposing their use in district court civil proceedings. The Federal Rules of Criminal Procedure currently prohibit photographic coverage of federal criminal proceedings. *See* R. 53, Fed. R. Crim. Proc. (2002).

---

## FOIA Fights Continue

The federal government continues to limit public access to records previously accessible for decades under the Freedom of Information Act, often quietly, and often in the name of anti-terrorism.

### ***NSA Given Sweeping FOIA Exemption***

A bill passed by both houses of Congress would grant the NSA broad new powers to deny open-records requests submitted under FOIA. The legislation was headed to the House-Senate conference committee in June.

The House and Senate on May 22 separately approved an exemption for so-called "operational files," letting the NSA automatically deny requests for information concerning the means by which the agency gathers foreign intelligence or counterintelligence.

The exemption, included in the Senate Defense Authorization Act of Fiscal Year 2004, S. 1050, and the

House Defense Authorization Act of Fiscal Year 2004, H.R. 1588, requires that the NSA director review the exemption at least once every 10 years to determine whether information of "historical value or other public interest" should be released.

The legislation passed both houses over last-minute lobbying efforts by more than a dozen groups, including the American Society of Newspaper Editors and the Federation of American Scientists. Those groups complained that the exemption could bar access to information routinely available to the public and media, according to a May 16 report in *The Baltimore Sun*.

A similar provision is included in the Senate Intelligence Authorization Act of Fiscal Year 2004, S. 1025, which was pending before the Senate as of early June. The NSA exemption is modeled after one granted to the CIA in 1984.

*(Continued on page 56)*

---

## FOIA Fights Continue

(Continued from page 55)

### ***DOJ Keeps Wen Ho Lee Report Secret***

The Department of Justice has refused to release a report on the case of former Los Alamos scientist Wen Ho Lee, despite earlier indications the information would be made public. The department denied a request by the Federation of American Scientists for access to the completed report.

Attorney General John Ashcroft defended the department's refusal to release the report during a House Judiciary Committee hearing June 5. "There are lots of times, especially in international intelligence security matters, when we don't release things because it's not in the national interest to do so," Ashcroft said, according to a report by the Associated Press. Rep. Bill Delahunt (D-Mass.) had accused the Justice Department of "a culture of concealment."

A Justice Department attorney denied a request for the report in a letter to the Federation on May 29, citing national security, personal privacy and law-enforcement exemptions to FOIA. The Federation appealed that decision on June 3.

The review by the department's Office of Professional Responsibility came after Lee's release and a courtroom apology by U.S. District Judge James A. Parker in September 2000. Lee, the subject of espionage allegations by the FBI, was indicted on 59 felony counts in 1999 and held by the federal government for nine months. All but one of the counts were later dropped, and Lee was released in a major embarrassment for the FBI. Then-White House spokesman Joe Lockhart announced the Justice Department review in a September 2000 news conference, saying "the American public should look forward to an accounting there, and I think that will be done."

A Justice Department spokeswoman said on June 5 that portions of the report might be made public following an ongoing classification review, the AP reported.

### ***Bill Would Reopen ATF Gun Records***

Legislation introduced in Congress in May would scrap a new federal provision that prevents the Bureau of Alcohol, Tobacco and Firearms from releasing gun-sale and gun-tracking data requested under FOIA. The

bill, H.R. 2275, was pending before the House Committee on Government Reform as of early June.

Early this year, Rep. George Nethercutt Jr. (R-Wash.) inserted language into the omnibus federal budget legislation for fiscal year 2003, 108 P.L. 7, barring the use of federal money by the ATF in responding to FOIA requests for records on the tracking of gun sales and purchases, the tracking of guns used in crimes, and arson or explosives investigations. The provision ostensibly permits the continued release of that information under FOIA, but effectively blocks it by cutting off funding.

The provision's existence remained largely unknown until shortly before the Supreme Court was scheduled to hear a lawsuit by the City of Chicago against the Department of Justice, which includes the ATF. *See Department of Justice v. Chicago*, 123 S. Ct. 1352 (2003). The Supreme Court had granted cert. to hear the case after a ruling by the Seventh Circuit Court of Appeals, but remanded the case so the appellate court could consider the impact of Nethercutt's provision.

Chicago sued the Justice Department under FOIA in 2000, seeking records from ATF databases dealing with gun sales and the tracking of firearms used in crimes. ATF sought to withhold much of the information, including the names and addresses of gun makers, dealers, buyers and owners, under FOIA's privacy and law enforcement exemptions, but lost its argument before both the trial court and the Seventh Circuit. *Chicago v. Department of Treasury*, 287 F.3d 628 (7th Cir. 2002). The appropriations bill containing Nethercutt's provision was signed into law on February 20, and the Supreme Court remanded Chicago's lawsuit six days later.

Rep. Chris Van Hollen (D-MD) introduced H.R. 2275, which would repeal the Nethercutt provision, on May 22.

See report on Legislative Affairs, pg 51 for more on this bill's status and how you or your clients can help.

**DCS ANNUAL  
BREAKFAST MEETING 2003  
FRIDAY, NOVEMBER 14**

## Iraq, Military Access Issues Continue

While President Bush declared an end to “major combat operations in Iraq” on May 1, fighting continued in some areas, and there have been more American casualties. For free-press advocates, the access issues raised by the war in Iraq and the greater battle against terrorism continue as well.

### *CIA Officer Calls For Stricter Leak Enforcement*

Seven months after Attorney General John Ashcroft concluded that there was no need for new legislation criminalizing leaks by government officials, the CIA has published an article by one of its CIA officers advocating the adoption of such a law, better enforcement of existing provisions prohibiting unauthorized disclosures, and the adoption of laws that would make the media accountable for publishing classified information.

The article, which was first reported by MSNBC and is available online at [www.cia.gov/csi/studies/vol47no1/article04.html](http://www.cia.gov/csi/studies/vol47no1/article04.html), explicitly states that it represents the views of the author, not of the CIA or its officials. But, in the past, the agency has issued such articles as a means of expressing views on critical issues, MSNBC reported.

Congress passed a provision that would have criminalized disclosure of classified information by government employees in 2000, but it was vetoed by President Clinton. See *LDRC LibelLetter*, Nov. 2000, at 6. After briefly considering a similar bill in 2001, see *LDRC LibelLetter*, Sept. 2001, at 16, Congress asked Ashcroft to study the issue. See *LDRC LibelLetter*, Jan. 2002, at 35.

While Ashcroft concluded that no new legislation was necessary, his report stated that the Bush administration would be prepared to work with Congress should such a bill be proposed. See *LDRC MediaLawLetter*, Nov. 2002, at 42.

The CIA article was written by James B. Bruce, vice chairman of the agency’s Foreign Denial and Deception Committee. This committee works to determine how foreign governments learn about, and then try to counter, secret U.S. intelligence collection activities. According to the CIA’s 2002 Annual Report, the com-

mittee prepared “a landmark study of damage caused by unauthorized disclosures of classified intelligence” for Ashcroft’s report.

Bruce’s article, “The Consequences of Permissive Neglect,” was published in the unclassified 2003 edition of the CIA’s *Studies in Intelligence* journal. It cites specific examples from 1958, 1971 and 1975 when disclosure of classified intelligence by the press impeded American intelligence activities. More recently, Bruce writes, press reports in 1998 that the NSA had the ability to listen to calls on Osama bin Laden’s satellite phone caused the al Qaeda leader to stop using the device.

Bruce adds that there are numerous other examples, but that most were still classified:

Nearly all of the compelling evidence in support of the argument that leaks are causing serious damage

---

**“We’ve got to do whatever it takes – if it takes sending SWAT teams into journalists’ homes – to stop these leaks.”**

---

is available only in the classified domain. It thus seems daunting to make a persuasive public case for legal correctives to address unauthorized disclosures when so little of

the evidence for it can be discussed publicly. Proponents for better laws – it will soon become clear why I am one of these – sometimes feel that this is not a fair fight. Freedom-of-the-press advocates and professional journalists exert disproportionate influence on this debate, at least when compared to advocates of criminal penalties for the leaking and publishing of sensitive classified intelligence. But I have come to believe that First Amendment objections to criminal penalties for disclosing classified *intelligence* now demand a more critical reconsideration than we have given them to date. Once we get over this hurdle, it will be more of a fair fight, a more reasoned debate.

Bruce apparently has gone further than the statements in his article, arguing for more direct government action against media publication of classified government information. According to an article on the Web site Newsmax.com, which has since been removed, in late July Bruce told an audience at the Institute of World Politics that

(Continued on page 58)

## Iraq, Military Access Issues Continue

(Continued from page 57)

“We’ve got to do whatever it takes – if it takes sending SWAT teams into journalists’ homes – to stop these leaks. Somehow there has evolved a presumptive right of the press to leak classified information. I hope we get a test case soon that will pit the government’s need to prosecute those who leak its classified documents against the guarantees of free speech. I’m betting the government will win.”

### Congress Addresses “Over-Classification”

While Bruce is campaigning for stricter controls on classified information, the chairs of the congressional intelligence committees have said that a proclivity toward classification of information that need not be secret is a significant problem.

“We have a need for less classification,” House Intelligence Committee chair Porter Goss (R-Fla.) told Chuck McCutcheon of the Newhouse News Service. Goss said in late May that he was drafting legislation to address the issue.

“We need to work together on it,” said Senate Intelligence Committee chair Pat Roberts (R.-Kan.). “It’s been a problem down through the years.”

The House and Senate committees have been wrangling with the CIA over release of a Congressional report of intelligence failures prior to the September 11 terrorist attacks. See *MLRC MediaLawLetter*, May 2003, at 48. Among the report’s findings is that the CIA and NSA did not share classified information with the FBI, and that this failure to share information helped allow the attacks to happen.

There also have been concerns that government officials classify information for reasons other than national security. “A lot of documents are classified for the wrong reason,” Sen. Richard Shelby (R.-Ala.), former chair of the Senate committee, told McCutcheon. “Because they’re embarrassing, or perhaps because of a coverup.”

McCutcheon reported that the federal government took more than 33 million “classification actions” during the 2001 fiscal year, a 44 percent increase over the previous year.

### Press Codes Proposed for Iraq

Although there were several problems, the relative openness of the American military to the media during the take-over of Iraq, with more than 500 U.S. and foreign journalists embedded with military units, has generally been praised by press advocates and government officials.

Vice President Dick Cheney, speaking at the Radio & Television Correspondents’ Association dinner in early June, said that he was initially skeptical about the Pentagon’s embedding plans. “But I must say I’ve become a convert,” he told the journalists in attendance. “You did well. You have my thanks and the thanks of the entire nation.”

But the openness of American operations during combat may not apply to the post-war occupation. On June 4, the Associated Press reported that the agency overseeing the transition to civilian rule was drafting a code of conduct for the press in order to prevent incitement of ethnic and religious violence.

“There’s no room for hateful and destabilizing messages that will destroy the emerging Iraqi democracy,” Mike Furling, a senior advisor to the Coalition Provisional Authority, told the AP. “All media outlets must be responsible.”

A flood of newspapers have begun publishing in Iraq, many sponsored by political or ethnic groups. Some of the new press organs have been highly critical of the occupying coalition forces.

Meanwhile, Internews Network and Internews Europe, non-profit organizations that support independent media in emerging democracies, organized a three-day meeting in Athens of 75 media and legal experts to create a voluntary code of conduct for Iraqi media. Participants included media policy experts and journalists from Iraq, other Arab nations and Western countries.

Among proposals were the adoption of laws penalizing defamation, incitement to violence, and hate speech; creation of a commission to regulate radio and television, including a mechanism for resolving complaints; no license requirement for newspapers, magazines or journalists; and turning government-controlled media into either a public broadcasting system (radio and television) or private ownership (print media). The conference proposals are available at [http://www.internews.fr/iraq\\_media\\_conference/framework\\_toc.html](http://www.internews.fr/iraq_media_conference/framework_toc.html).

(Continued on page 59)

## Iraq, Military Access Issues Continue

(Continued from page 58)

In its report on the conference, Internews reported that Robert Reilly, the former head of the Voice of America who has been charged with overseeing media in Iraq, told the conference that it had addressed “the critical questions being asked in Baghdad that needed to be answered immediately if media are to be open and responsible in the new Iraq.” He pledged that the conference suggestions would be shared with decision-making officials of the Coalition Provisional Authority.

### *Search Continues for ITN Crew*

Among journalists covering the Iraq war – both those imbedded with troops and “unilaterals” who operated independently – 12 were killed in combat, four died in non-combat circumstances and 16 were injured. For a list of names and affiliations, see *MLRC MediaLawLetter*, April 2003, at 65; see also *MLRC MediaLawLetter*, May 2003, at 52.

But the fate of two journalists – cameraman Frederic Nerac and driver-translator Hussein Othman, both working for the British news agency ITN – remains unknown. They have both been missing since March 22, when they apparently came under fire from American or British forces.

Othman and Nerac were traveling in a two-car convoy with ITN reporter Terry Lloyd, who was killed in the incident, and Belgian cameraman Daniel Demoustier, who survived.

In late May, the British military began a formal investigation into the disappearance of the two journalists. The American military already had launched an investigation into the incident.

An investigation by two former British special operations soldiers for ITN concluded that one of the vehicles had been hit by both Iraqi and coalition troops, but that Othman and Nerac may have been abducted and held by Iraqi forces before the firefight began.

### *Prosecutor, Defense Counsel Agree on Access*

The Air Force colonel chosen by the Pentagon as chief defense counsel in trials of suspected terrorists by military tribunals told reporters that the process should be as open as possible, while protecting national security.

“[T]o the extent that this process is as open as possible, within the constraints of national security, that's going to be in the best interests of not only the detainees, but [also] in the best interests of the nation as a whole,” Col. Will Gunn told reporters at a press conference announcing his appointment, according to a Defense Department transcript (<http://www.defenselink.mil/transcripts/2003/tr20030522-0212.html>).

“[T]his process is going to be judged not so much by virtue of whether or not a particular detainee was convicted by military commission,” Gunn continued. “It will be judged from the world community by virtue of whether or not the process was fair and just. ... [Y]ou in the press play a vital role in helping to accomplish that.”

The Pentagon is preparing to conduct military tribunals to try some of the 680 prisoners captured during the takeover of Afghanistan, who are being held at the American base in Guantanamo Bay, Cuba. Under an executive order issued on Nov. 21, 2001, the President will designate individuals whose trials will take place before military tribunals.

Army Col. Frederic Borch III, who was appointed as acting chief prosecutor for the tribunals, said that “the military commissions will be open to the press to the maximum extent possible. How that's going to be worked exactly -- details are still being talked about and decided, and we will let you guys know as soon as we have those in place.”

The 2001 executive order requires the Secretary of Defense to draft regulations for military tribunals, including public access to the proceedings. See Military Order of Nov. 21, 2001, 66 Fed. Reg. 57831 (2001), § 4(c)(4); see also *LDRC LibelLetter*, Dec. 2001, at 51.

The regulations, which were announced in March 2002, create a system similar in many respects to normal criminal proceedings. See Military Commission Order No. 1 (March 21, 2002), available at <http://www.cdt.org/security/usapatriot/020321militaryregs.pdf>; see also *LDRC MediaLawLetter*, April 2002, at 63.

The rules state that the proceedings shall generally be open to the public, § 5(O), and that “[p]roceedings should

(Continued on page 60)

### Iraq, Military Access Issues Continue

(Continued from page 59)

be open to the maximum extent practicable.” § 6(B)(3). But they also provide that “[o]pen proceedings may include, at the discretion of the [Secretary of Defense or his designee], attendance by the public and accredited press, and public release of transcripts at the appropriate time.” § 6(B)(3). Photography, video, or audio broadcasting or recording is prohibited, except as necessary for preservation of a record of trial. § 6(B)(3).

The rules allow for closure for reasons such as protection of classified information or intelligence sources, methods or activities, physical protection of participants, and national security interests. Closure may be requested by either the prosecution or defense, or imposed by the presiding officer, who may order the exclusion of any person,

including the accused, but may not exclude the accused’s military lawyer. § 6(B)(3).

In addition to a military lawyer appointed to represent him, an accused person may choose to be represented by a civilian lawyer. To be eligible for such an appointment, a non-military lawyer must be able to obtain security clearance, and must agree to several conditions, including agreeing not to share or transmit materials from the proceeding to anyone not participating in the proceeding and not to make statements regarding closed proceedings or classified information. See Military Commission Instruction No. 5, “Qualification of Civilian Defense Counsel,” available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno5.pdf>.

## California Shield Law Ruling

By Thomas R. Burke

A subpoena issued to a small-town journalist by a defendant who is representing himself in a high-profile murder case in Northern California has been quashed. Del Norte County Superior Court Judge Robert Weir blocked a trial subpoena issued by Robert Allen Wigley, who sought to compel *The Daily Triplicate* reporter Kent Gray to testify at his trial.

Wigley is charged with the 1994 murder of Camillia J. Randall, an 18-year-old who was hitchhiking from Oregon to the Bay Area. Having previously fired his attorneys, Wigley is now representing himself in the case which is likely to go to trial this Fall.

Before Wigley’s arrest in December 2001, the Randall murder remained a local mystery for seven years. A DNA databank of convicted offenders was used to make a “cold hit” on Wigley, according to a press release from the state Attorney General’s office. In interviews with reporter Gray, Wigley has admitted to meeting Randall and has not denied that his DNA was found with her body.

In quashing the subpoena, Judge Weir found that the California shield law and qualified First Amendment journalist’s privilege prohibited Gray from being compelled to testify about information he obtained while gathering news since Wigley failed to demonstrate that the reporter had first-hand knowledge that was material to his defense.

Judge Weir ruled that even if the defendant wanted to compel Mr. Gray’s testimony solely for the purpose of authenticating direct quotes that appeared in his articles, the subpoena should be quashed under the federal constitutional reporter’s privilege.

Under *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995), the federal reporter’s privilege applies to both published and unpublished information. Before a court can compel a reporter to testify about any information, the federal privilege requires the subpoenaing party to show that the information requested is: (1) “clearly relevant” to his claims; (2) non-cumulative, and (3) unavailable despite the subpoenaing party’s exhaustion of all alternative sources. *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993).

The court ruled that Wiley failed to satisfy any of these tests. Specifically, the court found that the information reported by Gray in *The Daily Triplicate* articles was not material to Wigley’s defense, and that Wigley had not exhausted all other sources of information.

Gray, who has been covering the case since 2001, works on the small staff of *The Daily Triplicate* in Crescent City, California.

*Thomas R. Burke, Davis Wright Tremaine LLP, San Francisco, CA and Susan E. Seager, Davis Wright Tremaine LLP, Los Angeles, CA represented Kent Gray.*

## Supreme Court Hangs Up on Fraudulent Telemarketing Schemes

### *Illinois ex rel Madigan v. Telemarketing Associates, Inc.*

By Scott Dailard

On May 5, 2003, the U.S. Supreme Court ruled unanimously that telephone solicitation arrangements that permit charitable fundraisers to retain a large percentage of donated funds can constitute actionable fraud if accompanied by “intentionally misleading statements” designed to deceive donors about how their donations will be used. *Illinois ex rel Madigan v. Telemarketing Associates, Inc.*, 155 L. Ed. 2d 793, 801 (2003).

Writing for the Court, Justice Ginsburg distinguished this case from previous decisions striking down laws and regulations that prohibited certain charitable solicitations solely on the grounds that a prescribed percentage of the donated funds would end up in the pockets of professional fundraisers. *See, e.g., Riley v. National Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620 (1980). These cases held that regulations of charitable solicitations that barred fundraising fees in excess of specified reasonable levels effectively operated as prior restraints and were prohibited by the First Amendment.

Justice Ginsburg noted, however, that allegations of specific deceptive statements distinguished the Illinois Attorney General’s complaint against the fundraisers from the prophylactic bans on high-fee charitable solicitation that the Court had struck down in previous decisions.

### **III. A.G. Alleges Charity Fraud**

VietNow, a charitable non-profit organization that aids Vietnam veterans, retained two Illinois for-profit fundraising corporations, Telemarketing Associates, Inc. (“TAI”) and Armet, to solicit funds on its behalf. VietNow’s contract with these companies specified that the

professional fundraisers would retain 85 percent of the gross funds contributed by Illinois donors. Only 15 percent of these donations would be passed along to the charity.

In addition, TAI and Armet brokered out-of-state contracts with other paid solicitors on VietNow’s behalf. These agreements allowed the out-of-state fundraisers to retain between 70 and 80 percent of donated funds. An additional 10 to 20 percent of the donations were paid as commissions to TAI and Armet and only 10 percent wound up in the coffers of VietNow.

As a result of these arrangements, VietNow’s fundraising contractors collected approximately \$7.1 million in charitable donations, \$6 million of which they retained for themselves, leaving only \$1.1 million for the benefit of VietNow.

The Illinois Attorney General filed suit against the professional fundraisers, alleging fraud and breach of fiduciary duty. In addition

to alleging that the 85 percent fundraising fee was “excessive” and “not justified by expenses paid,” the complaint also alleged that the fundraisers made knowingly false and deceptive representations that contributions would be “used to help and assist VietNow’s charitable purposes.” *Telemarketing Associates*, 155 L. Ed. at 802 (internal quotation marks omitted). Affidavits attached to the Attorney General’s complaint heavily influenced the Court’s decision and indicated that the fundraisers:

told prospective donors that contributions would be used for specifically identified charitable endeavors . . . . One affiant asked what percentage of her contribution would be used for fundraising expenses; she “was told 90% or more goes to the vets.” Another affiant stated she was told her donation would not be used for “labor expenses” because “all members are volunteers.”

(Continued on page 62)

## Supreme Court Hangs Up on Fraudulent Telemarketing Schemes

(Continued from page 61)

*Id.* The complaint also alleged that the fundraisers falsely represented that the “donated funds would go to VietNow’s specific ‘charitable purposes,’” when in fact the “amount of funds being paid over to charity was merely incidental to the fundraising effort.” *Id.* at 809.

The state trial court dismissed the complaint on First Amendment grounds, and the Illinois Court of Appeals and Supreme Court affirmed. Although the complaint alleged violations of Illinois’ generally-applicable antifraud laws, the Illinois courts concluded that the fundraisers’ statements were alleged to be false primarily because these companies had contracted to retain 85 percent of the donated funds and failed to reveal this information to donors. The Illinois Supreme Court concluded that the attorney general’s complaint was a constructive attempt to regulate protected solicitations based upon the same kind of percentage-rate formula rejected in *Schaumburg*, *Munson* and *Riley*.

### ***Fraudulent Solicitation Unprotected Speech***

The Supreme Court reversed the decision of the Illinois Supreme Court and substantially adopted the position advanced by the United States as *amicus curiae*. Specifically, the Court held that “fraudulent charitable solicitation is unprotected speech” and that “[f]raud actions so tailored, targeting misleading affirmative representations about how donations will be used, are plainly distinguishable . . . from the measures invalidated in *Schaumburg*, *Munson*, and *Riley*.” *Id.* at 804, 809.

Justice Ginsburg reaffirmed that “fraud may not be inferred simply from the percentage of charitable donations absorbed by fundraising costs” and noted that “this Court has not yet accepted any percentage-based measure as dispositive.” *Id.* at 806, 809 n.8. She reasoned, however, that there are differences critical to First Amendment concerns between fraud actions based on representations made in individual cases and statutes that categorically ban solicitations when fundraising costs run high.

### ***“Breathing Room” for Protected Solicitation***

The Court concluded that fraud claims like the one brought by the Illinois Attorney General could sustain a

motion to dismiss “[s]o long as the emphasis is on what the fundraisers misleadingly convey, and not on the percentage limitations on solicitors’ fees *per se* . . . .” *Id.* at 809\*. In reaching this conclusion, the Court noted that under Illinois law, the elements of a fraud claim must be established by clear and convincing evidence. In the view of the Court, this exacting standard of proof, combined with the requirement that fraud plaintiffs establish an intention to mislead, provides “sufficient breathing room for protected speech” and distinguishes a “properly tailored fraud action” from a “prior restraint on solicitation, or a regulation that imposes on fundraisers an uphill burden to prove their conduct lawful . . . .” *Id.* at 810.

### ***No “Blanket Exemption” in First Amendment***

The *Telemarketing Associates* decision reaffirms the principle that, consistent with the First Amendment, fraudulent solicitation cannot be inferred from any particular percentage-based fundraising fee formula. Nonetheless, it is permissible “to take fee arrangements into account in assessing whether particular affirmative representations designedly deceive the public.” *Id.* at 811.

The Court concluded that “[w]hat the First Amendment and our case law emphatically do not require . . . is a blanket exemption from fraud liability for a fundraiser who intentionally misleads in calls for donations.” *Id.* at 810.

For petitioner: Illinois Assistant Attorney General Richard S. Huszagh. For respondent: M. Errol Copilevitz of Copilevitz & Canter (Kansas City). For the United States as *amicus curiae*: Deputy Solicitor General Paul D. Clement, Washington, D.C.

*Scott Dailard is a member in the Washington, D.C., office of Dow, Lohnes & Albertson, PLLC.*

**SAVE THE DATE**

**MLRC ANNUAL DINNER 2003**

**WEDNESDAY, NOVEMBER 12**

## The FTC's Telemarketing Sales Rule: What Media Companies Should Know

By Scott Dailard and Briana Thibau

In July, the Federal Trade Commission ("FTC") will unveil its much anticipated do-not-call registry, an automated system that will allow consumers to place their residential and wireless telephone numbers in a nationwide suppression file in order to avoid many unwanted telemarketing solicitations. While this national do-not-call list has been garnering significant attention in the popular press, it is merely the tip of an iceberg of new federal telemarketing requirements recently enacted by the FTC through expansive amendments to its Telemarketing Sales Rule ("TSR" or the "Rule"). See 16 C.F.R. pt. 310.

Although intended primarily to combat intrusive and deceptive telephone sales tactics by sellers of consumer goods and services, the TSR, as amended, will also affect many media companies. Newspaper and magazine publishers rely heavily on outbound telephone campaigns to sell and renew subscriptions and classified advertising, and Web publishers increasingly resort to telemarketing to complement their online marketing efforts. These media companies must conform their telephone sales operations to the compliance requirements of the TSR or risk substantial liability in the form of fines (up to \$11,000 per violation) and private damages claims.

The FTC deferred the effective date for some of the TSR's most onerous new provisions until October of 2003 to give companies time to modify their call center operations, re-train their telemarketing employees, and purchase or upgrade equipment and technology necessary to achieve compliance. Many of the TSR's requirements are effective today, however, and other compliance deadlines are fast approaching. This overview will help you assess the impact of the amended TSR on your clients' marketing operations and assist them in developing an effective compliance program.

### *Scope of the Telemarketing Sales Rule*

The amended TSR broadly governs the activity of "telemarketing," which the TSR defines as

"a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call . . ."

The Rule, however, expressly exempts several types of calls, including calls involving transactions completed only after a face-to-face sales presentation, most

"inbound" calls initiated by consumers in response to direct mail solicitations or general media advertisements (provided that the materials and advertisements contain certain written disclosures), and most business-to-business calls.

The TSR also has numerous loopholes attributable to the FTC's limited jurisdiction under its authorizing statute – banks, common carriers, airlines, insurance companies, credit unions, charities, political campaigns, and political fundraisers are not covered by the Rule. The TSR is fully applicable, however, to telemarketing contractors who make calls on behalf of exempt entities.

There are no exemptions generally applicable to media companies, and last year the FTC roundly rejected requests by the Newspaper Association of America to create a categorical exemption for newspaper publishers.

Telephone campaigns that do not involve more than one interstate call are beyond the jurisdictional reach of the amended TSR. Accordingly, if your client's campaigns are confined entirely to calls that originate and terminate in the same state, the amended Rule should not affect such activities. However, if two or more interstate calls are placed in connection with a given campaign, the FTC is of the view that all of the calls in-

---

***There are no exemptions generally applicable to media companies, and last year the FTC roundly rejected requests by the Newspaper Association of America to create a categorical exemption for newspaper publishers.***

---

(Continued on page 64)

## The FTC's Telemarketing Sales Rule

*(Continued from page 63)*

involved in such an effort are subject to the Rule, even if the overwhelming majority of the calls never cross state lines.

### **Compliance Concerns**

Prior to its recent amendment, the TSR required telemarketers to make specific disclosures of information at the beginning of each outbound telemarketing call and before processing any resulting payments. The Rule also prohibited misrepresentations, limited the hours that telemarketers are permitted to call consumers, prohibited calls to consumers who previously had asked the caller not to contact them again, and established restrictions on the use of customer billing information. All of these requirements have been carried forward, substantially unchanged, under the amended Rule.

In addition, the new Rule establishes a centralized do-not-call system, mandates the transmission of Caller ID information, restricts the use and dissemination of customer billing information, strictly limits "abandoned call" rates, and imposes other requirements that may directly affect the marketing practices of media companies engaged in interstate telemarketing activities.

### **National Do-Not-Call Registry**

The amended TSR provides for the creation of a national do-not-call registry designed to allow consumers to eliminate most sales calls from companies subject to the FTC's jurisdiction. The FTC has developed a fully automated system that will be activated in July of 2003 and will enable consumers to register their residential and wireless telephone numbers via a Web site or toll-free telephone number. The registry will capture only consumer telephone numbers – no names will be collected. Consumer registrations will remain valid for five years, and the database periodically will be purged of all numbers that have been disconnected or reassigned.

Telemarketers will be required to "scrub" their calling lists against the national registry at least every three months. To access the registry, telemarketers will be required to visit a secure Web site, provide certain identifying information, and pay a fee based on the number of area codes accessed.

While the national do-not-call registry will make customer prospecting campaigns more difficult, companies generally will be permitted to call persons with whom they have formed an "established business relationship" even if those persons have registered their phone numbers on the national list. The FTC narrowly defines an "established business relationship" to mean a relationship based upon either a purchase, lease or rental of goods or services within the eighteen months preceding the call, or an application or inquiry made to the company within the preceding three months.

This exemption is broad enough to encompass most customer relationships formed by media companies, but may be problematic in some circumstances. For example, the FTC's established business relationship exemption would not appear to permit a newspaper or magazine publisher to call a customer whose number appears in the national registry to solicit a renewal at the end of a prepaid 24-month subscription, absent a more recent contact with the subscriber. Telephone contacts with such a customer would be off limits to the newspaper or magazine unless the publisher has obtained its customer's prior express written or recorded oral consent to be called.

Media companies should review their telephone sales operations to determine whether, and to what extent, they will need to "scrub" their calling lists against the national do-not-call registry. Companies subject to the amended TSR also should take steps to qualify for important "safe harbor" protections.

The FTC has created a safe harbor that will protect companies from liability for inadvertent violations of the new national do-not-call requirements if they have implemented certain compliance procedures as part of their routine business practices. These procedures include the establishment and maintenance of a written do-not-call policy, the establishment of appropriate compliance practices, training personnel in the requirements of the amended Rule, and appropriate supervision and discipline of telemarketing personnel.

The FTC plans to grant telemarketers access to the national do-not-call database in September of 2003 and

*(Continued on page 65)*

## The FTC's Telemarketing Sales Rule

*(Continued from page 64)*

will enforce full compliance with the do-not-call rules beginning on October 1, 2003. Consumers will be able to report violations to the FTC online or via a toll-free number, and violators could be fined up to \$11,000 per incident.

### ***Caller ID Transmission Requirements***

Under the amended Rule, telephone sellers will be required to transmit their telephone numbers and, where made available by their carrier, their business names to any Caller ID service in use by consumers. Telemarketers may transmit any number that will allow the called consumer to identify the caller, including a number assigned to the telemarketing company by its carrier, the specific number from which a sales representative placed a call, or a number used by the telemarketer's carrier to bill for the call.

For purposes of complying with the new Caller ID requirements, telemarketing contractors calling on behalf of a client can substitute the client's business name and customer service number for its own, or use another number that is answered by the client's personnel during regular business hours. This Caller ID requirement becomes effective on January 29, 2004. Counsel for companies subject to the amended TSR should confirm that their clients currently are transmitting appropriate Caller ID information or will have technology and equipment capable of doing so in place before the January 29, 2004 compliance deadline.

### ***Predictive Dialers***

The amended TSR also prohibits "abandoned" outbound telemarketing calls. An outbound call is considered "abandoned" if a consumer picks up the phone and the telemarketer does not connect the call to a sales representative within two seconds of the consumer's completed greeting. Abandoned calls usually arise from the pervasive use of predictive dialers, which are used to maximize call center efficiency and generally are programmed to contact more consumers than can be connected to available sales representatives. When a sales representative is unavailable, the dialer either disconnects

the call or keeps the consumer connected with "dead air" – *i.e.*, a prolonged period of silence – while the dialer waits for a sales representative to become available.

Although the TSR ostensibly prohibits all abandoned calls, it creates a "safe harbor" for telemarketers that adhere to a maximum 3 percent call abandonment rate and comply with certain record-keeping, ring time, and answer time requirements. The FTC recently extended the effective date for the general prohibition on abandoned calls and the related "safe harbor" requirements until October 1, 2003.

### ***Use of Customer Billing Information***

Under the amended TSR, telemarketers are prohibited from processing any billing information for payment without obtaining the "express informed consent" of the customer. "Express" consent means that consumers must affirmatively and unambiguously articulate their consent, and such consent is considered to be "informed" under the amended TSR only when customers have received all required material disclosures under the Rule.

While telemarketers generally have discretion to decide what procedures to employ to obtain such express informed consent, certain transactions and payment methods trigger specific and rigorous requirements.

For example, if the transaction involves a "free trial offer" (as may be the case with many newspaper and magazine marketing offers) and the seller processes the transaction using account information that is "preacquired," or not obtained directly from the consumer during the telemarketing call, an audio recording must be made of the entire transaction. Moreover, in telemarketing transactions processed using payment methods other than conventional credit cards or debit cards, the amended Rule requires telemarketers to document the customers' assent to certain terms of the offer and to follow specific procedures to ensure that consumers have given their "express verifiable authorization" before processing a charge for payment.

All of these requirements are currently in effect.

*(Continued on page 66)*

## The FTC's Telemarketing Sales Rule

(Continued from page 65)

### **"Upselling" Transactions**

The amended TSR imposes new disclosure requirements and restrictions on the practice of "upselling," or soliciting the purchase of goods or services *after* the completion of an "initial transaction" or exchange of information during a telephone call. An upsell will be treated as a separate telemarketing transaction and not a continuation of the initial transaction, regardless of whether the upsell is made in a conversation during an inbound, consumer-initiated call or during an outbound, seller-initiated call.

According to the FTC, the term "initial transaction" is intended to describe any sort of exchange between a consumer and a seller or telemarketer, including, but not limited to, sales offers, customer service calls initiated by either the consumer or the telemarketer, consumer inquiries, or consumer responses to general media advertisements or direct mail solicitations. The definition of "upselling" encompasses both internal upselling (*i.e.*, a solicitation made by or on behalf of the same seller involved in the initial transaction) and external upselling (*i.e.*, a solicitation made by or on behalf of a seller other than the one involved in the initial transaction).

Under the amended Rule, telemarketers must make certain disclosures promptly at the initiation of any upsell solicitation, including a statement that the purpose of the call is to sell goods or services, the identity of the seller involved in the upsell transaction, and the nature of the goods or services to be offered.

### **Relation to Other Telemarketing Laws**

The TSR supplements, but does not preempt, state telemarketing laws and regulations. Accordingly, telemarketers must continue to comply with a growing list of state telemarketing regulations, including state-specific do-not-call statutes, in addition to the FTC's amended TSR.

Moreover, the amended TSR supplements the Federal Telephone Consumer Protection Act of 1991 ("TCPA") and a detailed body of related telemarketing regulations promulgated thereunder by the Federal Com-

munications Commission ("FCC"). *See generally*, 47 U.S.C. § 227 and 47 C.F.R. § 64.1200 *et seq.* The TCPA overlaps with the TSR to the extent that the TCPA imposes calling hour restrictions, creates obligations to honor company specific do-not-call requests, and authorizes the FCC to establish a national do-not-call registry.

Unlike the TSR, however, the TCPA applies to all telemarketers, including common carriers and other companies beyond the FTC's jurisdiction under the Federal Trade Commission Act. The TCPA also applies to both intrastate and interstate telemarketing calls and imposes certain restrictions that have no parallel in the TSR, such as restrictions on unsolicited facsimile advertisements and advertisements delivered via prerecorded telephone messages.

Pursuant to a congressional mandate, the FCC is conducting a rulemaking proceeding intended to harmonize its regulations under the TCPA with the national do-not-call registry requirements of the FTC's amended TSR. The FCC is expected to adopt complementary national do-not-call rules that effectively will plug the jurisdictional gaps in the FTC's do-not-call system and extend the scope of the national do-not-call requirements to intrastate calls.

The TCPA will likely add considerable teeth to the enforcement of the national do-not-call requirements because the statute creates a private right of action to recover statutory damages in the amount of \$500 for each telephone contact prohibited by the FCC's rules. Plaintiffs' lawyers have used a parallel private right of action applicable to unsolicited fax advertisements and prerecorded telephone solicitations to launch numerous multi-million dollar class action lawsuits, including several actions seeking to ensnare broadcasters and other media companies.

*Scott Dailard is a member and Briana Thibeau is an associate in the Washington office of Dow, Lohnes & Albertson, PLLC.*

## Eastern District of Virginia Addresses Two Novel Questions Related to Online Services' Liability for Third-Party Content

By Patrick J. Carome and C. Colin Rushing

Facing two novel issues, the federal district court for the Eastern District of Virginia has held that interactive computer services such as America Online are immune from most federal civil claims as well as state claims based on third party content under 47 U.S.C. § 230 ("Section 230"), and also that online chat rooms do not constitute a "place of public accommodation" for purposes of Title II of the Civil Rights Act of 1964. See *Noah v. AOL Time Warner Inc.*, No. 02-1316-A, 2003 WL 21135701 (E.D. Va. May 15, 2003) (Ellis, J.).

Saad Noah, proceeding *pro se* in the litigation, and a former subscriber to the AOL service, alleged that he and other Muslim AOL subscribers had been subject to ongoing harassment in AOL chat rooms devoted to Islamic cultural and religious issues and that AOL had failed to take appropriate steps to stop the alleged harassment from occurring in the first place. Noah's complaint, which sought injunctive relief as well as damages, recited racial, ethnic, and religious slurs that he allegedly had encountered while participating in these chat rooms.

In his suit, Noah asserted that AOL's alleged refusal to take action against the harassers constituted (i) violation of Title II, which, among other things, prohibits discrimination on the basis of religion in places of public accommodation and (ii) breach of contract, on the grounds that AOL had allegedly promised to prevent the type of speech that Noah claimed he saw.

### ***Title II Claim Barred by Section 230***

Under Section 230, an "interactive computer service" may not "be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). The Court of Appeals for the Fourth Circuit, which encompasses the Eastern District of Virginia, has concluded that Section 230 "creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service." *Zeran v. America Online*, 129 F.3d 327, 330 (4th Cir. 1997) (emphasis added).

According to the district court, Noah's Title II claim, like the complaint in *Zeran*, would penalize AOL for allegedly failing to exercise "a publisher's traditional editorial functions – such as deciding whether to publish, withdraw, postpone or alter content." *Noah*, 2003 WL 21135701, at \*5 (quoting *Zeran*, 129 F.3d at 330). On this basis, the district court held that Section 230 barred Noah's claims as well.

In reaching this conclusion, the district court determined that the result in this case was consistent with Congress's purpose: Section 230

"reflects Congress's judgment that imposing liability on service providers for the harmful speech of others would likely do more harm than good, by exposing service providers to unmanageable liability and potentially leading to the closure or restriction of such open

forums as AOL's chat rooms." *Id.* at \*7.

***The court held that Title II had a "sharp focus on actual physical facilities" and thus could not reach "virtual" or electronic spaces such as AOL chat rooms.***

Challenging the defendants' motion to dismiss, Noah argued that Section 230 applied only to state law torts such as defamation or negli-

gence, and thus did not prevent his Title II claim. In the first published decision to address this question, the court concluded that Section 230 applied to federal as well as state claims that would hold an interactive computer service liable for third-party content it carries, unless the claim fell within one of the narrow exceptions identified in the statute.

The court based this conclusion on two facts: First, Section 230's language is broad enough to encompass any claim, whether state or federal, with the exception of certain enumerated claims. Second, because Congress provided that Section 230 would *not* apply to certain federal and state claims, the doctrine *expressio unius est exclusio alterius* compelled the conclusion that it would apply to all other claims that otherwise fell within its scope. See *id.* at 6; see also 47 U.S.C. § 230(e) (listing federal civil and criminal claims to which Section 230 would not apply).

### ***Chat Room Not "Place of Public Accommodation"***

The district court further held that, even if Noah's Title II claim were not barred, it still would have to be dismissed on the grounds that the "public accommodation" provisions of

(Continued on page 68)

**Ct. Addresses Online Services' Liability for 3rd-Party Content***(Continued from page 67)*

Title II of the Civil Rights Act do not apply to online chat rooms.

Under Title II, a person may not prevent another person from enjoying a "place of public accommodation" on the basis of his or her "race, color, religion, or national origin." 42 U.S.C. § 2000a(a). Noah argued that AOL chat rooms constitute a "place of public accommodation," and that AOL's failure to police them adequately for harassment rendered the chat rooms inhospitable to Muslims and thus constituted a violation of Title II.

The court, however, rejected the argument that Title II reaches non-physical "spaces" such as AOL chat rooms. Based on the language of Title II, which lists examples of "places of public accommodation," as well as the case law construing Title II, the court held that Title II had a "sharp focus on actual physical facilities" and thus could not reach "virtual" or electronic spaces such as AOL chat rooms. *Noah*, 2003 WL 21135701, at \*\*8-9.

In reaching this decision, the court also examined case law construing the public accommodations provisions of the Americans With Disabilities Act. Although there is a circuit split on the question, the court agreed with the circuits holding that the ADA applies only to actual, physical places, citing favorably recent case law specifically holding that the

ADA's public accommodations provisions do not apply to virtual "places" such as web sites or electronic programming guides. See *Access Now, Inc. v. Southwest Airlines, Co.*, 227 F.Supp.2d 1312, 1316 (S.D. Fla. 2002) (Web sites); *Torres v. AT & T Broadband, LLC*, 158 F.Supp.2d 1035, 1037-38 (N.D. Cal. 2001) (on-screen programming guides).

***Breach of Contract Claim***

Noah's breach of contract claim was based on the theory that, because AOL did not adequately enforce its "Community Guidelines" – which prohibit hate speech on the AOL service – AOL had breached the Member Agreement. The district court rejected this claim because AOL's Member Agreement and Community Guidelines gave AOL "sole discretion" to enforce the Community Guidelines, and specifically disclaimed liability for third-party content.

This holding underscores the significance that Member Agreements and Terms of Service continue to play in litigation between online services and their users.

*Patrick J. Carome is a partner, and C. Colin Rushing is an associate, at Wilmer, Cutler & Pickering, in Washington, D.C. They represented AOL Time Warner Inc. and America Online, Inc., in this case. The views expressed herein are their own, and do not necessarily reflect those of their clients.*

---

## **Los Angeles Superior Court Dismisses Libel and Unfair Business Claims Against Internet Auction House Ebay**

**By Jeffrey P. Hermes**

In *Grace v. Neeley*, No. BC288836 (Cal. Super. L.A. County Apr. 28, 2003) (Willhite, J.), the Los Angeles Superior Court ruled that a cause of action for libel against internet auction house eBay, Inc., based on negative "feedback" posted on eBay's Internet Web site by another defendant, was precluded by the immunity provisions of the federal Communications Decency Act (and Telecommunications Act) of 1996.

In doing so, the court reaffirmed the position previously taken by courts in California and other jurisdictions that the immunity provisions protect interactive Web sites as well as companies that simply provide Internet access. The court found, however, that the immunity provisions did not necessarily preclude a cause of action for unfair business practices

under Section 17200 of the California Business and Professions Code, but nevertheless held that the plaintiff's specific claim under Section 17200 failed for other reasons.

The plaintiff, Roger Grace, was the winner of six auctions for goods offered for sale on eBay's Web site by defendant Tim Neeley, a dealer in Hollywood memorabilia. eBay encourages buyers and sellers using its service to post "feedback" about the people they have dealt with on eBay's Web site; this feedback takes the form of a brief on-line comment, with a tag identifying the comment as positive, negative or neutral. Any user of eBay's service can view the collected feedback of any other user.

With respect to three of the auctions that Grace won, he left negative feedback about his experiences with Neeley. In response, Neeley left negative feedback for Grace with re-

*(Continued on page 69)*

---

## LA Ct. Dismisses Claims Against Ebay

(Continued from page 68)

spect to all six of the auctions, posting for each auction a comment stating: "Complaint: SHOULD BE BANNED FROM EBAY!!!! DISHONEST ALL THE WAY!!!!"

Grace filed suit against Neeley and eBay, including claims for libel and unfair trade practices against eBay. The libel claim rested on eBay's publication of Neeley's negative comments. The unfair trade practices claim rested on three separate allegations: (1) that eBay followed a policy of not removing libel from its Web site; (2) that eBay maintained a check-out system that allowed collection of payments from California buyers without collecting the state sales tax; and (3) that eBay required California users to adopt fictitious names to sell on eBay without ensuring compliance with California's fictitious name registration law. eBay demurred to the plaintiff's complaint, seeking dismissal of all claims against it.

### **Libel Claim Precluded by 47 U.S.C. § 230**

The court sustained the demurrer, dismissing the plaintiff's complaint without leave to amend. With respect to the libel claim, the court ruled that the plaintiff's cause of action was barred by 47 U.S.C. § 230(c)(1), which provides that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

The court held that eBay was a provider of an "interactive computer service" and that Neeley was an "information content provider," that is, "a person...that is responsible, in whole or in part, for the creation...of information provided through the Internet." 47 U.S.C. § 230(f)(3). Thus, the court held that the plaintiff's common law cause of action was precluded by 47 U.S.C. § 230(e)(3), which states that "No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

The court considered but ultimately rejected the plaintiff's argument that Congress intended the category of providers of "interactive computer services" to be limited to Internet service providers – that is, companies that provide access to, as opposed to services on, the Internet. Focusing on the text of the statute, the court found no legislative distinction between Web sites offering interactive services and companies that merely enabled users to access the Internet. The court relied upon the earlier decision of the California

Court of Appeal for the Fourth District in *Gentry v. eBay, Inc.*, 99 Cal. App. 4<sup>th</sup> 816, 831 n.7 (Cal. Ct. App. 4<sup>th</sup> Dist. 2002), which, citing decisions from around the country, likewise concluded that eBay was an "interactive computer service" provider protected from claims that sought "to hold eBay liable for its exercise of a publisher's traditional editorial functions."

### **Unfair Business Practices Claim Dismissed**

With respect to the plaintiff's unfair business practices claims, the court ruled that, to the extent that the claim was based on eBay's failure to remove allegedly libelous statements, it was likewise barred by the federal immunity provision. However, the court found that the remaining aspects of that claim (that eBay encouraged violations of California's fictitious name registration law and encouraged buyers and sellers to evade payment of California sales tax) were not barred, because these aspects did not "treat eBay as the publisher or speaker of the individual defendants' materials" or "seek to hold eBay liable for its exercise of a publisher's traditional editorial functions."

The court nevertheless dismissed the claim. The fictitious name allegations failed because the registration law in question, Business and Professions Code 17910, places the burden on the individual to file the registration statement; the court found that the plaintiff did not adequately plead how eBay's failure to advise individuals of their obligations was an unfair practice.

The sales tax allegations failed because, taking judicial notice of a copy of the relevant section of eBay's website, the court determined that eBay did provide a blank on the payment form for charging sales tax. Although the court found that these claims might have been amended, the plaintiff waived his right to do so, and thus the court denied leave to amend.

Plaintiff Roger M. Grace, pro se. Michael Rhodes and Andrea Bitar of Cooley Godward LLP for defendant eBay, Inc. The slip opinion for this decision is available on-line at <http://news.findlaw.com/hdocs/docs/eBay/gracently42803ord.pdf>.

*Jeffrey P. Hermes is an associate with the Boston office of Brown Rudnick Berlack Israels LLP.*

## E-mail Marketing Group Sues Anti-Spammers in the Southern District of Florida

By Jonathan L. Katz

In April 2003, an association of e-mail marketers filed suit in federal court against several anti-spam parties, with allegations including libel, blocking of mass e-mails, and interference with contractual relationships. The case is *EMarketersAmerica v. Spews.org, et al*, Civ. No.03-CV-80295 (S.D. Fl.). The case is assigned to Judge Donald M. Middlebrooks.

The defendants are Spews.org, Spamhaus.org, CSL GMBH Joker.com, and nine individuals.

Thus far, the court summarily denied the Plaintiff's temporary injunction motion, set a January 2004 trial, and set November 2003 for discovery cutoff.

The complaint alleges that the plaintiff EmarketersAmerica includes email marketers, Internet services providers, and related businesses. The plaintiff further alleges that defendants Spews and Spamhaus operate blacklists of Internet protocol addresses, sell products that block e-mail, and post information in an effort to interrupt and block e-mail. Moreover, the complaint alleges that defendant CSL GMBH Joker.com registered the Internet domain names of defendants Spews and Spamhaus, and alleges that the individual defendants are officers, directors and principals of defendants Spews and Spamhaus.

The complaint seeks damages and injunctive relief for alleged libel, false light communications, invasion of privacy, e-mail blocking and blacklisting, and intentional contractual interference. The complaint appears to be more about the defendants' alleged treatment of the plaintiff's unnamed members than the treatment of plaintiff EmarketersAmerica itself. Moreover, the defendants' answer asserts that the plaintiff was not formed until a month before the lawsuit was filed, and, therefore, challenges whether the plaintiff had any contractual relationships that could have been harmed in the first place.

Defendants' answer denies any legal liability, and includes several standard affirmative defenses, including

challenges to personal and subject matter jurisdiction, standing and venue, and service of process. The defendants' answer also asserts protection of the First Amendment.

If the plaintiff indeed was created only one month before the lawsuit was filed, as defendants allege, that would appear to weaken the lawsuit in such respects as standing to sue and claims for damages. Any effort by the plaintiff to maintain its members' anonymity likely will be tested during the discovery phase of this litigation.

For related links, see:

- Court's docket for the lawsuit: <http://pacer.flsd.uscourts.gov>
- The complaint: <http://www.linxnet.com/misc/spam/slapp.txt>
- The defendants' answer to the complaint: <http://www.linxnet.com/misc/spam/DefendantsResponse05132003.pdf>
- The plaintiff's motion for a temporary restraining order: <http://www.linxnet.com/misc/spam/EmergencyMotionforTROPrelimInjunction.pdf>
- The court's order denying a temporary restraining order: <http://www.linxnet.com/misc/spam/OrderDenyingTROandPI.txt>
- EmarketersAmerica's Web site: <http://www.emarketersamerica.org>
- Spamhaus's Web site: <http://www.spamhaus.org>

Plaintiff EMarketersAmerica is represented by Mark E. Felstein of Felstein & Associates in Boca Raton. EMarketersAmerica's director & chief counsel. The defendants are represented by Samuel A. Danon of Hunton & Williams in Miami.

*Jonathan L. Katz is the First Amendment Defense law partner at Silver Spring, Maryland's Marks & Katz, LLC. He is President of the Free Speech Coalition of the District of Columbia, Maryland, and Virginia, Inc. Jon can be reached at [jon@markskatz.com](mailto:jon@markskatz.com).*

---

***The complaint seeks damages and injunctive relief for alleged libel, false light communications, invasion of privacy, e-mail blocking and blacklisting, and intentional contractual interference.***

---

## ***Dastar Corp. v. Twentieth Century Fox Film Corp.***

### ***The Supreme Court Takes Away One Remedy For False Attribution, But Others Remain***

By Jonathan D. Hacker

In what appears at first to be a clear victory for users of creative works in the public domain, the Supreme Court recently held in *Dastar Corp. v. Twentieth Century Fox Film Corp., et al.*, No. 02-428 (June 9, 2003), that the author of an uncopyrighted work cannot state a claim under § 43(a)(1)(A) of the Lanham Act against a party that uses or distributes the work with misattribution of authorship. But closer inspection of the opinion reveals a much murkier outcome.

This is not just the bitter spin of a defeated advocate – I was part of the team representing respondents, the nominally losing side in the Supreme Court – for our clients are users of public domain materials in addition to being authors of creative works. For that reason, I am as interested as anyone in dispassionately analyzing the Court's opinion in *Dastar* and understanding its future implications. As it happens, analyzing the opinion is one thing, understanding its future implications is another.

Unfortunately this brief report cannot capture everything there is to say about *Dastar*. I'll stick to the major highlights – enough to show what remains uncertain.

#### ***From "Crusade" to "Campaigns"***

Section 43(a)(1)(B) of the Lanham Act creates a cause of action against any person who uses any "false or misleading representation of fact which . . . is likely to cause confusion, or to cause mistake, or to deceive . . . as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."

The plaintiffs in *Dastar* – our clients – brought suit against Dastar under this provision, alleging that Dastar had essentially copied a television series called *Crusade in Europe* (based on the Eisenhower World War II mem-

oir of the same name) originally produced in 1949 by Twentieth Century Fox, and now distributed as a video by plaintiffs Fox, SFM Entertainment, and New Line Home Video.

Because the copyright on the series had expired, Dastar believed the series was left in the public domain for others to copy and use. So Dastar copied and used it, essentially reselling it (with minimal alteration) under the title *Campaigns in Europe*. Dastar also erased all references to the original producers of the series and substituted various credits to itself and its employees. All of this, plaintiffs' suit asserted, combined to leave the unambiguous impression that the video was a new, original product created entirely by Dastar.

Accordingly, plaintiffs alleged, Dastar had made a "false or misleading representation of fact" which was likely to cause confusion, mistake, or deception as to the true "origin" of the product. (Plaintiffs also brought a copyright action asserting that Dastar violated a still-extant

copyright in the *Crusade* book, as to which plaintiffs own exclusive television and video rights. Plaintiffs prevailed on the copyright claim after a full bench trial; subsequent proceedings were stayed while the Court resolved the separate Lanham Act issue.)

#### ***Court: No Lanham Liability***

Plaintiffs prevailed in the district court and the court of appeals, but the Supreme Court rejected their theory of Lanham Act liability by a vote of 8-0 (Justice Breyer recused himself because his brother, District Judge Charles Breyer, sat by designation on the court of appeals panel in the case).

The Court held that allowing a Lanham Act cause of action for Dastar's assertedly false self-attribution would effectively extend copyright law beyond its intended and permissible bounds. According to the Court, the phrase

---

***Dastar may be a victory for those who would copy and use public domain works without attribution to the original authors, but it is almost certainly a hollow one for those who would claim credit for such works when none is due.***

---

(Continued on page 72)

***Dastar Corp. v. Twentieth Century Fox Film Corp.***

(Continued from page 71)

“origin of goods” in § 43(a) therefore must be construed as only “the producer of the tangible goods that are offered for sale, and not to the author of any idea, concept, or communication embodied in those goods.” Slip op. at 13-14.

In other words, the Court held, the “origin” of a book is not the author, but only the bookbinder; the “origin” of a video is not the creative producer, but only the producer of the tangible videocassettes offered for sale.

The Court initially sought to ground this reading in the “natural understanding” of “origin,” but, recognizing that the “origin” of a book is its author under any plausible meaning of “origin,” the Court quickly moved away from the text of the Lanham Act and turned to what the Court saw as the history and purposes of the statute.

As it turned out, the history and purposes on which the Court primarily focused were not those of the Lanham Act, but of copyright law. As the Court described it, copyright law reflects a “bargain” between opposing but equal sides. On one side of the bargain is the copyright holder, who possesses a monopoly over use of the copyrighted work. On the other side is the public, which, once the copyright expires, possesses the right to copy and use “at will” creative works in the public domain. Slip op. at 10. This includes, the Court assumed, the right to falsely credit oneself with authorship of such works.

It follows, the Court concluded, that the phrase “origin” of “goods” in § 43(a)(1)(B) cannot refer to the authorship of creative works, if it were otherwise, the author of an uncopyrighted work would be able to sue whenever another person falsely claims authorship, even though copyright law, the Court suggested, gives the other person the “right” to do so. *Id.*

Although the Court thus wiped false attribution claims out of the Lanham Act’s “origin” provision, § 43(a)(1)(A), it may not have eliminated them altogether. The end of the opinion explicitly suggests that such claims simply may have been steered into a companion provision, § 43(a)(1)(B). Slip op. at 14.

This provision is directed not at false or misleading claims of “origin,” but more broadly at statements in advertising or promotion that “misrepresent[] the nature, qualities, [or] characteristics” of the product. Certainly a book seller’s false claim that she authored the book would

clearly seem to be a misrepresentation as to the nature or qualities or characteristics of the book – whether or not the book is copyrighted.

***What Does It Mean?***

The principal effect of *Dastar* is clear enough: if someone is falsely claiming credit for your uncopyrighted work, you can’t sue her under § 43(a)(1)(A). There may be little more to it than that. You might still have a claim under § 43(a)(1)(B), as the Court suggests, and state false advertising and unfair trade practices laws probably could be brought to bear as well.

The Court does employ some broad language describing the public’s right under copyright law to use and copy works in the public domain, but only as justification for reading the word “origin” in § 43(a)(1)(A) narrowly. The plain language of § 43(a)(1)(B), and of relevant state laws, may not be as susceptible to such narrowing constructions.

So *Dastar* may be a victory for those who would copy and use public domain works without attribution to the original authors, but it is almost certainly a hollow one for those who would claim credit for such works when none is due. And since nobody in the *Dastar* case was contending that the Lanham Act requires attribution in the abstract – the issue was whether § 43(a)(1)(A) prohibits *false* attributions – it is not clear whether *anyone* can draw much comfort from the Court’s opinion. After *Dastar*, a person can copy and use public domain works without attribution, but one who claims false credit for a public domain work still risks legal liability. Since that was pretty much the state of the law before *Dastar*, it remains to be seen what change, if any, the decision will bring.

*Mr. Hacker is a counsel in the Washington, D.C., office of O’Melveny & Myers LLP and a member of the firm’s Supreme Court and Appellate Practice. He was a member of the O’Melveny team lead by Dale M. Cendali, a partner in the firm’s New York office, who argued Dastar on behalf of respondents. The opinions expressed in this article are solely Mr. Hacker’s, and do not necessarily reflect the views of O’Melveny & Myers or the plaintiffs in the Dastar litigation.*

## Eighth Circuit Strikes Down Ordinance Restricting Dissemination of “Violent” Video Games to Minors

### *Court Rules that Depictions of Violence in Video Games are Fully Protected By First Amendment*

By David C. Belt

On June 3, the United States Court of Appeals for the Eighth Circuit struck down a St. Louis County, Missouri, ordinance that restricted the distribution to minors of arcade and home-video games containing depictions of “graphic violence.” *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, — F.3d —, 2003 WL 21265377 (8th Cir. June 3, 2003). In reversing the district court’s decision upholding the ordinance, the Eighth Circuit joined the Sixth and Seventh Circuits, as well as several district courts, in holding that

- (1) the First Amendment’s protections extend to the images and depictions found in video games, and
- (2) efforts to restrict the dissemination of such images and depictions,

even in the name of shielding minors from perceived harm, must be proven to be necessary to serve a compelling interest and to be narrowly tailored to achieve that end.

The unanimous opinion by Judge Morris Sheppard Arnold, joined by Circuit Judges Pasco M. Bowman II and William Jay Riley, concluded that St. Louis County had not proven either that the depictions of violence in video games actually harm minors or that the County’s asserted interest in promoting parental authority was “compelling.”

The decision is significant in at least three respects. First, the Eighth Circuit agreed with a growing body of case law recognizing that the video-game medium is entitled to the same First Amendment protection given to other expressive media. Second, the court reaffirmed that depictions of graphic violence, unlike depictions of

sexual conduct, are not analyzed under the obscenity doctrine (or the “variable obscenity” doctrine applicable to sexually explicit speech to minors) and therefore may be regulated only where the government meets strict scrutiny. Third, the court did not simply accept the asserted need to protect children, concluding that the government generally may not suppress speech either to protect minors from images that it deems unsuitable for them or to promote the role of parents in determining what their children may see and hear.

---

***“If the First Amendment is versatile enough to ‘shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,’ we see no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to a similar protection.”***

---

### *County Law*

Passed in October 2000, the St. Louis County ordinance makes it a misdemeanor to knowingly sell, rent, or otherwise make available video games defined as “harmful to minors” to a person under the age of 17 unless the parent of the minor consents. The term “harmful

to minors” turns primarily on whether a specific game contains “graphic violence,” defined as including “the visual depiction or representation of realistic serious injury to a human or human-like being.” The ordinance’s preamble sets forth the County’s view that the “violent” content of video games “causes children to imitate violent behavior, glorify violent heroes, become desensitized to violence and learn that violence is rewarded.”

Led by the Interactive Digital Software Association, a group of plaintiffs that create, publish and distribute video games, filed suit in the Eastern District of Missouri, arguing that the St. Louis County ordinance violates the First Amendment. The plaintiffs moved for summary judgment, supporting that motion with, among other things, scripts, story boards and artwork showing the storyline, characters, dialogue and design of representative games. The County relied primarily on statements of a psycholo-

*(Continued on page 74)*

## Eighth Circuit Strikes Down Video Game Ordinance

(Continued from page 73)

gist during the hearings leading to the ordinance's passage, as well as journal articles discussing the research on the purported effects of video-game "violence" on game players. The County also submitted a video tape containing excerpts from four video games.

The district court denied the plaintiffs' motion for summary judgment. The court first concluded that video games, including those with depictions of violence, are not protected by the First Amendment. The court next held that, in any event, the ordinance was narrowly tailored to the government's interest in protecting children from psychological harm, reasoning that "[s]ociety in general believes that continued exposure to violence can be harmful." *Interactive Digital Software Ass'n v. St. Louis County, Mo.*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, — F.3d —, 2003 WL 21265377 (8th Cir. June 3, 2003). The district court then dismissed the case *sua sponte* based on its prior ruling.

### *Video Games Are Protected Expression*

The Eighth Circuit began by analyzing whether video games are a protected form of speech. After reviewing the well-settled principles that the First Amendment protects entertainment and that a "particularized message" is not necessary, the court determined that the evidence was sufficient to establish that video games are expressive:

"If the first amendment is versatile enough to 'shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,' we see no reason why the pictures, graphic design, concept art, sounds, music, stories and narrative present in video games are not entitled to a similar protection."

2003 WL 21265377, at \*1 (quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 569 (1995)). The court agreed with the Seventh

Circuit, which struck down a similar ordinance, that modern video games "contain stories, imagery, 'age-old themes of literature,' and messages, 'even an 'ideology,' just as books and movies do.'" *Id.* (quoting *American Amusement Mach. Ass'n v. Kendrick*, 244 F.3d 572, 577-78 (7th Cir.), *cert. denied*, 534 U.S. 994 (2001)).

In dismissing the argument that games are creative but not expressive, the court found it "telling" that the County sought to restrict access to the games "precisely because their content purportedly affects the thought or behavior of those who play them." *Id.* at \*2. The court also brushed aside the claim that video games are different from other media because they are constructed to be interactive, rea-

soning that other media are interactive and in fact derive much of their expressive force from their interactivity:

"literature is most successful when it 'draws the reader into the story, makes him identify with the characters, invites him to judge them and quarrel

with them, to experience their joys and sufferings as the reader's own.'" *Id.* (quoting *American Amusement*, 244 F.3d at 577).

Whether or not "violent" video games add anything of value to society is irrelevant, the court concluded; under established First Amendment principles, "they are as much entitled to the protection of free speech as the best of literature." *Id.* (quoting *Winters v. New York*, 333 U.S. 507, 510 (1948)).

### *Strict Scrutiny Applies*

Having determined that video games are expressive and that the ordinance regulates games based on their content, the court held that the ordinance would have to satisfy strict scrutiny. The court rejected the County's argument that "graphically violent" content may be deemed obscene, or at least "obscene as to minors," relying primarily on an earlier Eighth Circuit decision concluding that "depictions of violence cannot fall within the legal definition of ob-

(Continued on page 75)

---

***The court noted that it was unaware of a case suggesting that "the government's role in helping parents to be the guardians of their children's well-being is an unbridled license to governments to regulate what minors read and view."***

---

## Eighth Circuit Strikes Down Video Game Ordinance

(Continued from page 74)

scenity for either minors or adults.” *Id.* The County, therefore, had to show that “the ordinance is necessary to serve a compelling state interest and that it is narrowly tailored to that end.” *Id.* at \*3.

### County’s Interests Insufficient

Although the Eighth Circuit accepted that the County’s stated interest in safeguarding the psychological well-being of minors was “compelling in the abstract,” the court concluded that the County had not come forward with empirical proof that “violent” video games actually cause harm to minors, offering instead evidence supporting only the “vague generality” that there may be a connection between playing violent video games and aggressive behavior. Lacking such “substantial supporting evidence” of harm, the court continued, the county could not fall back on a perceived belief that “society” accepts that exposure to violence may be harmful. *Id.*

The court seemed even more skeptical of the County’s stated interest in promoting the right of parents to guard their children’s well-being.

“To accept the County’s broadly-drawn interest as compelling would be to invite legislatures to undermine the first amendment rights of minors willy-nilly under the guise of promoting parental authority.” *Id.* at \*4.

In most circumstances, the court explained,

“the values protected by the First Amendment are no less applicable when the government seeks to control the flow of information to minors.” *Id.* (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975)).

Although careful not to minimize the right of parents themselves to control their children’s exposure to violent materials, the court noted that it was unaware of a case suggesting that “the government’s role in helping parents to be the guardians of their children’s well-being is an unbridled license to governments to regulate what minors read and view.” *Id.* At least where fully protected speech is at issue, it

“cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them.” *Id.* (quoting *Erznoznik*, 422 U.S. at 213-14).

Having concluded that the ordinance could not survive strict scrutiny, the Court reversed the district court’s judgment and remanded the case for entry of an injunction barring the ordinance from taking effect.

Deanne E. Maynard of Jenner & Block, LLC, argued the case on behalf of the appellants, and was joined on the brief by Paul M. Smith and David C. Belt of Jenner & Block and by Paul J. Puricelli of Stone, Leyton & Gershman, P.C. Michael A. Shuman, Associate County Counselor of St. Louis County, argued the case on behalf of the appellees.

*David C. Belt is an associate in the Washington, D.C. office of Jenner & Block, LLC, which represented the plaintiffs-appellants in this case.*

**JUST PUBLISHED! 2003:1 CRIMINALIZING SPEECH ABOUT REPUTATION: THE LEGACY OF CRIMINAL LIBEL IN THE U.S. AFTER SULLIVAN & GARRISON**

## 2003 MLRC BULLETIN

The 2003 BULLETIN will include

- MLRC’s **REPORT ON TRIALS AND DAMAGES** in cases against the media – our authoritative annual summary of media trials in libel, privacy and related cases, that details the current trends in damages and appeals.
- MLRC’s **SIGNIFICANT DEVELOPMENTS** – an annual review of media law developments in libel and media privacy and related cases.
- MLRC’s **SUPREME COURT REPORT** – an annual review of appeals to the U.S. Supreme Court in libel, media privacy and other First Amendment cases of interest.

The BULLETIN is written and edited by MLRC staff and other noted media lawyers and First Amendment scholars. Single issues are \$35. Annual subscriptions are \$110. Foreign subscriptions are \$150. **Back orders are available.**

**To order contact us or visit our website,  
www.medialaw.org**

## Court Imposes Rule 11 Sanctions Against Lawyer Who Invites Media to Asset Seizure to Collect Judgment

By Mary Ellen Roy

The federal Fifth Circuit Court of Appeals recently upheld Rule 11 sanctions against an attorney who used the media to publicize his client's plight. The primary purpose for the *en banc* review was to decide whether the district court had abused its discretion in imposing sanctions pursuant to Rule 11(b)(1) (the "improper purpose" prong of Rule 11). See *Whitehead v. Food Max v. Minor*, 2003 WL 21231908 (5th Cir. (Miss.), May 29, 2003).

Attorney Paul Minor had won a \$3.4 million judgment against Kmart for providing negligent parking lot security that resulted in the abduction and rape of his client from a Kmart parking lot. Minor attempted to execute his client's judgment by bringing two U.S. Marshals to the Kmart to seize the currency in the cash registers and vault. Prior to the seizure attempt, Minor had notified the news media about the event.

While at Kmart, Minor gave television news interviews during which he described Kmart's actions as "arrogant" and "outrageous" and said that his client had been "victimized" by Kmart twice, once having been abducted and again by Kmart's "not paying . . . a just debt." In a majority opinion written by Judge Rhesa Barksdale, the court described Minor's comments as "extremely hyperbolic, intemperate, and misleading." The print and broadcast media published Minor's remarks in several different reports.

### **Media "Paraded" Through Kmart**

Minor obtained the writ of execution from the court clerk three days after the defendants' post-trial motions were denied. Kmart argued that Minor had violated an automatic 10-day stay of execution of judgment pursuant to Federal Rule of Civil Procedure 62(f), incorporating Mississippi Rule of Civil Procedure 62(a). Kmart also argued that with "numerous newspapers reporters and television interview teams" Minor had

"paraded through [Kmart] in full view of customers and employees . . . orchestrat[ing] damage to Kmart, its business and goodwill."

Attached to Kmart's motion were copies of two newspaper articles and a videotape of television broadcasts about the attempted execution. Kmart maintained that Minor's "improper purpose" under Rule 11(b)(1) was obvious from his actions.

Minor argued that there was no stay in effect at the time of his attempted seizure because Kmart had not moved for a stay. He contended that "where counsel's action has a reasonable basis under the law, a court will not find an im-

proper purpose . . ." Minor further argued that his purposes for obtaining the writ of execution were proper – to bring Kmart to the settlement table and to collect a portion of the judgment (believing that Kmart was self-insured and had not filed a supersedeas bond).

The district court concluded that a motion is not a prerequisite to a stay under the applicable rules and that Minor had failed to make a reasonable inquiry into the law governing execution of judgments. The district court also found that Minor's real purposes for his actions were "to embarrass [Kmart] and call attention to himself as a tireless laborer of the bar attempting to obtain justice for his client when, in fact, there was no basis whatsoever in fact or in law for the actions taken . . ." The district court ordered Minor to pay Kmart approximately \$8,000 in sanctions – Kmart's attorneys' fees for opposing the execution.

### **Rule 11 Sanctions Appealed**

Minor appealed the Rule 11 sanctions. In January 2002, a divided panel reversed them. *Whiteford v. Food Max*, 277 F.3d 791 (5th Cir. 2002), *vacated by* 308 F.3d 472 (5th Cir. 2002) (*en banc*). The panel majority held that the rules do not afford a stay unless the judgment debtor files a motion claiming the stay, and that Minor had not

---

***Thus, the Court held that "where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose," then the court may impose sanctions even when the attorney has made nonfrivolous representations.***

---

*(Continued on page 77)*

### Court Imposes Rule 11 Sanctions

(Continued from page 76)

failed to make a reasonable inquiry into the governing law. Regarding the alleged “improper purpose” of Rule 11(b)(1), the panel majority held: Minor’s “intentional use of publicity for the *purpose of embarrassing an adversary*” was “*patently inappropriate*,” but an ulterior motive should not be read into a document filed for a legitimate purpose; and “any consequences that flowed from such behavior” was a decision for the state bar.

In the *en banc* decision, the Fifth Circuit assumed that Minor did not violate Rule 11(b)(2), that is, the Court assumed that Minor’s obtaining the writ of execution was warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Nevertheless, the Fifth Circuit held that a violation of Rule 11(b)(1) (presenting a pleading or other paper “for any improper purpose”) provides a separate basis for sanctions.

The Fifth Circuit rejected Minor’s argument that the subpart (b)(1) improper purpose ruling is inextricably intertwined with whether, under subpart (b)(2), Minor had an objectively reasonable belief that a stay did not exist. Thus, the Court held that “where it is objectively ascertainable that an attorney submitted a paper to the court for an improper purpose,” then the court may impose sanctions even when the attorney has made nonfrivolous representations.

Relying solely on the district court’s statement quoted above, the Fifth Circuit scoured the record and imputed findings to the district court to the effect that Minor’s stated purposes did not explain “his collateral media play.” The Court said,

“the execution certainly did not require the media’s presence at the Kmart or the improper comments Minor made there to the media.”

The Court pointed out that Minor did not dispute that he intended to embarrass Kmart or that he was seeking personal recognition. Minor argued, “most regrettably,” according to the court, that “almost everything an attorney in litigation does . . . is designed to embarrass an opponent in

one way or another” and “establishing a reputation for success in the representation of clients is the most professional way for a lawyer to build a practice.” The Fifth Circuit disagreed, holding that a purpose to embarrass an opponent was an “improper purpose” under Rule 11(b)(1), akin to a purpose “to harass.”

### “Media Event” Shows Improper Purpose

The Fifth Circuit held that what the Court called the “media event orchestrated by Minor, in particular” constituted objective evidence of his improper purpose in obtaining the writ. The Fifth Circuit agreed with the district court’s finding that the videotape of Minor’s “improper” comments made clear his improper purpose

and said that it was a classic example of Minor’s being “hoist with his own petard” (*quoting* William Shakespeare, *Hamlet* act 3, sc 4). The Fifth Circuit said:

“Minor’s improper comments, preserved by the very entity he enlisted to embarrass Kmart and

promote himself were . . . arguably the best evidence of his improper purpose in obtaining the writ.”

### Court Ignores First Amendment

The Fifth Circuit ignored the First Amendment considerations that Minor raised, stating (erroneously) that they were raised for the first time before the *en banc* court.

“In any event,” the Court stated, “the improper purpose in obtaining the writ, not the vehicle (such as the media) used to implement that improper purpose, is what is decided by the sanctioning court and reviewed on appeal . . . . The collateral media play simply constitutes objective evidence of that improper purpose.”

Judge Carolyn King’s dissent, which was joined by two other judges, described Minor’s comments as

(Continued on page 78)

---

**The Fifth Circuit disagreed, holding that a purpose to embarrass an opponent was an “improper purpose” under Rule 11(b)(1), akin to a purpose “to harass.”**

---

### Court Imposes Rule 11 Sanctions

(Continued from page 77)

“colorful to say the least” and “perhaps in poor taste.” (The *en banc* majority referred to these descriptions as “extremely regrettable.”)

The dissent also disagreed with the majority’s conclusion that subparts (b)(1) and (2) were not intertwined. The dissent stated that Fifth Circuit case law required that when a paper was well grounded in fact and warranted by existing law, only under “unusual” or “most exceptionable” circumstances should the filing of the paper constitute sanctionable conduct. The dissent did not believe that Minor’s conduct constituted the required “unusual” or “exceptionable” circumstances to deserve sanction under Rule 11.

The dissent described the intent to embarrass one’s opponent and to gain publicity for oneself as being “both quite common characteristics in a judgment or debt collection setting.” The dissent called the majority’s opinion an “I know it when I see it” approach to judging an attorney’s conduct.

The dissent stated that the majority “appears most perturbed regarding Minor’s offensive tow of the media to the judgment collection.” The dissent disagreed that such conduct merited sanctions and said that because appellate judges

“operate at a far remove from the business of collecting judgments or effecting settlements[, w]e ought to refrain from excoriating a lawyer based upon our own sensibilities . . . .”

*Mary Ellen Roy is at Phelps Dunbar LLP in New Orleans, Louisiana, and was not involved in the case. Luther Munford, Rick Bass and Chris Shaw from Phelps Dunbar LLP in Jackson, Mississippi represented Paul Minor. Kmart was represented by Don Haycraft and Khristina Miller.*

**REGISTER NOW!**

**MLRC LONDON CONFERENCE**

**SEPTEMBER 22-23, 2003**

### Rule 11. (in part) Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

#### (a) Signature.

Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney’s individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer’s address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

#### (b) Representations to Court.

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

#### (c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

## ETHICS CORNER:

### Kentucky Bar Association Opens Pandora's Box With Announcement of Proposed Attorney Advertising Regulations

By Richard M. Goehler and Amy D. Cubbage

The Kentucky Bar Association has set off a firestorm in the area of attorney advertising by announcing proposed regulations that restrict a number of commonly-used advertising techniques, particularly for television advertisers. The Kentucky Bar Association insists, however, that the proposed regulations are a response to deceptive and misleading advertising by Kentucky attorneys.

The proposed regulations, first published in March 2003, provide a list of commonly-used advertising techniques that will be deemed to be per se violations of Kentucky's attorney discipline rule forbidding false, deceptive or misleading advertising. The list of forbidden techniques includes: the use of actors in advertisements; the use of props in a manner that implies that the prop was involved in an actual legal case; the use of client testimonials; and any reference to prior results such as the dollar amount of jury verdicts.

The regulations also require advertisers to include a plain-language explanation of all that must be proven in court if the advertisement refers to any claims for recovery of money, such as in a personal injury claim.

#### ***Impact on TV, Web***

While it appears clear that the Kentucky Attorney Advertising Commission had television advertisements primarily in mind when drafting the new regulations, the regulations apply equally to print and web-based advertising. This means that a law firm utilizing stock photography or actors in promotional brochures or on its website would be guilty of an ethical violation and could be subject to disciplinary proceedings by the bar authorities, without any determination that the advertisement was in fact misleading to any actual consumer of legal services.

Counsel for the Kentucky Bar Association and the President of the Kentucky Bar Association, Steven Catron of Bowling Green, have denied that the new regulations are an attempt to target any specific advertisers, but television advertisers have insisted publicly that they believe the new regulations specifically target them.

#### ***Possible Legal Challenges***

Some Kentucky lawyers, most notably attorneys who regularly advertise on television, have announced their intention to file a legal action against the Kentucky Bar Association in an attempt to prevent the proposed rules from taking effect. MLRC Defense Counsel members Lucian Pera of Memphis and Jon Fleischaker of Louisville, on behalf of Gary Becker, a prominent Louisville, Kentucky attorney who has regularly advertised on television since 1985, have filed extensive comments on the proposed regulations with the Kentucky Bar Association and are contemplating filing a legal challenge to both the proposed regulations and the current Kentucky ethical rule requiring a 30-day mandatory pre-publication review of all advertisements in Kentucky. Kentucky is the last state to have such mandatory pre-publication review, which is a vestige of initial attempts to curb attorney advertising in the 1980s.

The proposed regulations have also attracted national attention. Public Citizen, a national, nonprofit consumer advocacy organization founded by Ralph Nader, has filed comments on the proposed regulations and has indicated that it will consider litigation if the Kentucky Bar Association enacts the regulations as proposed, according to Scott Nelson, an attorney for Public Citizen.

“If the Bar stops and thinks about this, it ought to realize that the proposed regulations are not sustainable. If the

---

***A law firm utilizing stock photography or actors in promotional brochures or on its website would be guilty of an ethical violation...without any determination that the advertisement was in fact misleading to any actual consumer of legal services.***

---

*(Continued on page 80)*

### **Kentucky Bar Association Opens Pandora's Box**

*(Continued from page 79)*

Bar does move forward with the regulations as written, however, [Public Citizen] would actively consider litigation," Nelson said.

### ***Bar Satisfied With Rule***

The Kentucky Bar Association, however, contends there is a problem with deceptive and misleading advertising in Kentucky and that the proposed regulations are necessary and appropriate responses to the problem.

Benjamin Cowgill, chief counsel for the Kentucky Bar Association, has stated publicly that the Bar is satisfied that the proposed regulations are a constitutional response to a real problem, though he admits that the Kentucky Bar Association has not received any complaints about attorney advertising from consumers. Furthermore, Cowgill has stated that the regulations are also an attempt to eliminate inconsistencies in decision-making by the Kentucky Attorney Advertising Commission, the nine-member body which performs the 30-day pre-publication review of all attorney advertising in Kentucky. The Kentucky Supreme Court admonished the Attorney Advertising Commission for inconsistent decision-making in a case where the Kentucky Supreme Court overruled a decision by the Attorney Advertising Commission that a law firm could not advertise using the catchphrase "injury lawyers." See *In re Hughes & Coleman*, 60 S.W.3d 540, 545 (Ky. 2001).

Given the outcry from members of the Bar and from public interest groups about the proposed regulations, the Kentucky Bar Association has extended the public comment period from June 1, 2003 to September 1, 2003. There is no current deadline for final action on the regulations, but media reports indicate that a final decision will be made by the end of this year or in early 2004. If that final decision is to approve the proposed rules in substantially the same form as they exist today, it is clear that the Kentucky Bar Association will be facing litigation.

*Dick Goehler and Amy Cabbage are attorneys in the First Amendment, Media & Advertising Law Practice Group at Frost Brown Todd LLC. Mr. Goehler is in Frost Brown Todd's Cincinnati, Ohio office. Ms. Cabbage practices in the Firm's Louisville, Kentucky office.*

**SAVE THE DATE!**

**New York City**

**MLRC ANNUAL  
DINNER 2003**

**WEDNESDAY, NOVEMBER 12**

**DCS ANNUAL  
BREAKFAST MEETING**

**FRIDAY, NOVEMBER 14**

©2003

**MEDIA LAW RESOURCE CENTER, INC.  
80 Eighth Avenue, Suite 200  
New York, NY 10011**

BOARD OF DIRECTORS

Harold W. Fuson, Jr. (Chair)  
Robin Bierstedt  
Dale Cohen  
Henry Hoberman  
Ralph P. Huber  
Kenneth A. Richieri  
Elisa Rivlin  
Susan E. Weiner  
Mary Ann Werner  
Lee Levine (ex officio)

STAFF:

Executive Director: Sandra Baron  
Staff Attorney: David Heller  
Staff Attorney: Eric Robinson  
LDRC Fellow: Joshua Saltzman  
Legal Assistant: Kelly Chew  
Staff Coordinator: Debra Danis Seiden