

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

Reporting Developments Through June 30, 2005

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## **Save the Dates!**

### **MLRC London Conference 2005**

**September 19-20, 2005  
Stationers' Hall**

**September 21, 2005  
Special In-house Counsel Breakfast  
swiss hotel The Howard**

The MLRC London Conference 2005 will focus on international developments in libel, privacy and newsgathering laws, discussing these developments in a practical way, exploring where the law is going, and how best the media bar can address the changes. The Conference will also be a platform to continue a legal and professional dialogue among media lawyers and press experts from around the world.

The Conference is presented with the support of Bloomberg News, The Hearst Corporation and The National Magazine Company, Media/Professional Insurance, Times Newspapers Ltd. and the law firms of Covington & Burling, Davis Wright Tremaine LLP, Finers Stephens Innocent, Jackson Walker LLP, Prince Lobel Glosky & Tye LLP and Reynolds Porter Chamberlain.

***The current Conference schedule is available online at [www.medialaw.org](http://www.medialaw.org)***

***For more information contact [londonconference@medialaw.org](mailto:londonconference@medialaw.org)***

## DCS EXECUTIVE COMMITTEE MID-YEAR UPDATE

As summer is suddenly upon us, it seemed a good time to report to the membership on some of the issues the DCS Executive Committee has been working on during the first half of 2005.

- Formation of an Entertainment Law Committee that will enhance MLRC's contacts with the people and issues unique to the Entertainment Community. Lou Petrich of Leopold, Petrich & Smith has agreed to chair the committee. He is in the process of seeking members who wish to be active in the committee and help develop an agenda of issues relevant to MLRC members. Any member who has ideas or wishes to participate is encouraged to contact Lou at [lpetrich@lpsla.com](mailto:lpetrich@lpsla.com) or Sandy Baron at [sbaron@medialaw.org](mailto:sbaron@medialaw.org).
- The Baltimore Sun and Youngstown, Ohio cases illustrate what may be a troubling national trend of government efforts to control access to information or "locking out" particular journalists. On June 2nd, the New York Times reported on the ongoing attempts to physically intimidate a local television reporter by the Mayor of Detroit's security detail. We are working to get our arms around the scope of this problem. If you have encountered any such situations, please respond to Jennifer O'Brien's ([jobrien@medialaw.org](mailto:jobrien@medialaw.org)) recent request for information. We hope to develop this project for the membership through a written report or symposium addressing the problem, and possible approaches or solutions.
- Bloggers continue to be a subject of discussion and sometimes concern for the traditional media. The New Legal Developments Committee is working on a symposium discussing blogger related issues for the afternoon of the Annual Dinner on Wednesday, November 9, 2005. Anyone who has ideas for that session is encouraged to contact Laura Handman ([laurahandman@dwt.com](mailto:laurahandman@dwt.com)).

Some of the many projects that the committees have been working on include:

- The Newsgathering Committee is working on creation of an MLRC "Panic Book" that will include briefs and outlines addressing situations such as closed courts when you need something to cite or argue from and there's no time for any briefing. The contact person is Dean Ringel ([dringel@cahill.com](mailto:dringel@cahill.com)).
- The Pretrial Committee is working on updating sections of the MLRC Trial Brief. Any assistance would be welcome. Contact Henry Abrams ([habrams@saul.com](mailto:habrams@saul.com)).
- The Prepublication Broadcast Committee is working on an update of "Hot Words" or "Red Flag Words," prepublication issues presented by reporting on children as victims or witnesses, and a summary of the "Best Practices" in prepublication/pre-broadcast. If you would like to participate, contact Jerry Fritz ([jfritz@allbrittontv.com](mailto:jfritz@allbrittontv.com)).
- The Trial Techniques Committee is working on an update of the Model Jury Instructions Manual, a model Voir Dire and updating the expert witness database. If you would like to participate, contact Bob Nelon ([bnelon@hallestill.com](mailto:bnelon@hallestill.com)).
- The International Committee has formed subgroups for each region of the world and will be providing quarterly updates from each group for the Media Law Letter. If you have interest in any particular region, please contact Tom Kelley ([tkelley@faegre.com](mailto:tkelley@faegre.com)).

It has been an active first half of the year. We completed a very successful conference in Toronto in May with Ad IDEM, the Canadian equivalent of MLRC, and are looking forward to the London Conference in September.

If there is something you would like to do with MLRC or if you have ideas, call any member of the Executive Committee or Sandy Baron. MLRC work is not only professionally rewarding, but you'll make new friends and actually have some fun – guaranteed.

Have a great summer.

Jim Stewart  
President  
MLRC Defense Counsel Section

## MLRC's New Web Site Is Now Online!

[www.medialaw.org](http://www.medialaw.org)

The new Media Law Resource Center web site offers 24/7 access to the materials and information members have come to rely on.

- The MediaLawLetter, MLRC Bulletins, Reports and Practice Guides, our database of Expert Witnesses, a growing portion of the MLRC libraries of briefs, jury instructions, and closing arguments, and much more are now available at your fingertips.
- MLRC's valuable resources are now archived and searchable
- In addition, each Committee has its own dedicated page to highlight projects and materials – and each has a web forum to share news, comments and ideas.

**Note: Media and Enhanced DCS members have access to the entire site. Basic DCS members may purchase annual subscriptions to online materials – or upgrade to full access.**

**Contact Debby Seiden, [dseiden@medialaw.org](mailto:dseiden@medialaw.org), for details.**

## U.S. Supreme Court Issues *Grokster* Decision

### **Reaffirms *Betamax* Holding and Announces Standard for Active Inducement of Copyright Infringement**

By Jon Hart and Kat Fuller

On June 27, 2005, the United States Supreme Court issued a unanimous decision in the high-profile copyright case *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* (“*Grokster*”), No. 04-408 (June 27, 2005). The Court reaffirmed the rule of law it announced in 1984 in *Sony v. Universal*, 464 U.S. 417 (1984) (“*Sony-Betamax*”), but held that the *Sony-Betamax* rule does not immunize the distributor of a technology from liability for secondary copyright infringement where the distributor of the technology intentionally induces direct infringement by others.

The Court held that: “one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.*, slip op. at 19.

The Court vacated the decision of the U.S. Court of Appeals for the Ninth Circuit and remanded the case to the trial court to decide whether defendants *Grokster* and *StreamCast*, both distributors of peer-to-peer file sharing software, are liable for inducing end-users of their software to infringe plaintiffs’ copyrights.

Such a finding of liability might be based, the Court said, on “words and deeds going beyond distribution” of the software, words and deeds from which the trial court might find “a purpose to cause and profit from third-party acts of copyright infringement.” *Id.* at 24.

The trial court may not presume or impute fault, based on defendants’ distribution of software that was used to infringe, but may infer “a patently illegal objective from statements and actions showing what that objective was.” The Court not only vacated the entry of summary judgment for defendants *Grokster* and *StreamCast*, but sug-

gested that, on remand, “consideration of [the plaintiffs’ motions] for summary judgment will be in order.” *Id.*

Justice Souter wrote the opinion of the Court. Justice Ginsberg filed a concurring opinion, in which Chief Justice Rehnquist and Justice Kennedy joined. Justice Breyer also filed a concurring opinion, in which Justice Stevens and Justice O’Connor joined. The text of the Supreme Court’s decision can be found at <http://a257.gakamaitech.net/7/257/2422/27jun20051200/www.supremecourtus.gov/opinions/04pdf/04-480.pdf>.

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***The Court remanded the case to the trial court to decide whether defendants Grokster and StreamCast, both distributors of peer-to-peer file sharing software, are liable for inducing end-users of their software to infringe plaintiffs’ copyrights.***

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#### ***The District Court Decision***

In 2002, plaintiff motion picture studios, music publishers and songwriters sued defendant software distributors alleging that the vast majority (nearly 90%) of files exchanged through the use of defendants’ peer-to-peer file-sharing software was copyrighted

material, of which most (approximately 70%) was owned by plaintiffs. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 259 F.Supp.2d 1029, 1033 (C.D.Cal. 2003).

The question presented in the trial court was whether *Grokster* and *StreamCast* could avail themselves of the staple-article-of-commerce defense, under the U.S. Supreme Court’s decision in *Sony-Betamax*, which had held that distribution of a product that was used for, or was “merely ... capable” of, substantial noninfringing use did not constitute secondary copyright infringement.

On cross-motions for summary judgment, the trial court held that *Grokster* and *StreamCast* could not be found secondarily liable for copyright infringement committed by users of their software because neither defendant had any actual knowledge of specific infringement or material involvement in the trading of copyrighted materials by end-users and neither defendant had the right and ability to supervise their end-users’ conduct. *Id.* at 1038, 1043.

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## U.S. Supreme Court Issues *Grokster* Decision

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### ***The Impact of Napster***

The copyright owners appealed to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit had previously considered the circumstances under which a distributor of peer-to-peer software could be held secondarily liable for copyright infringement in *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9<sup>th</sup> Cir. 2001) (“*Napster I*”).

In *Napster I*, the Ninth Circuit held that peer-to-peer software distributor Napster could not avail itself of the staple-article-of-commerce defense because Napster had actual, specific knowledge of direct infringement committed by end-users of its software. *Id.* at 1022. The Ninth Circuit interpreted *Sony-Betamax* as “declin[ing] to impute the requisite level of knowledge where the defendants made and sold equipment capable of both infringing and ‘substantial noninfringing uses.’” *Id.* at 1020.

It concluded that Napster *could* be held liable for contributing to copyright infringement committed by its users because Napster actually knew of specific infringing material traded on its system, had the ability to remove or block access to the system by suppliers of the infringing material, and nevertheless failed to block such access or to remove the material. *Id.*

### ***Ninth Circuit Decision in Grokster***

The Ninth Circuit affirmed the district court’s partial grant of summary judgment in favor of defendants Grokster and StreamCast, concluding that, under its earlier decision in *Napster I*, distribution of the current versions of the Grokster and StreamCast software did not give rise to liability under either a contributory infringement or a vicarious infringement theory. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 380 F.3d 1154 (9<sup>th</sup> Cir. 2004).

Specifically, the Ninth Circuit found that the defendants’ software was both capable of, and was actually being used for, noninfringing purposes, including trading works with the consent of the copyright owners and trading public domain works not protected by copyright. *Id.* at 1161-1162.

Therefore, under the Supreme Court’s *Sony-Betamax* decision, the defendants could avail themselves of the staple-article-of-commerce doctrine unless they were found to have “reasonable knowledge of specific infringement” at a time when the infringement occurred. *Id.* at 1162.

In that regard, the court found that the plaintiffs had failed to raise genuine issues of material fact because, unlike Napster’s more centralized system, StreamCast’s decentralized network and Grokster’s quasi-decentralized, supernode-type network included no central index, neither defendant hosted infringing files or lists of infringing files, and the defendants did not regulate or provide access to the infringing files. *Id.* at 1163.

The court also held that defendants’ failure to modify their software to filter out specific infringing files or to monitor users’ access to their user networks via a login and password mechanism did not give rise to liability under a theory of contributory infringement. *Id.*

### ***Supreme Court Reaffirms Sony-Betamax***

The Supreme Court rejected the invitation of the copyright owners to revisit *Sony-Betamax*, which held that, under the staple-article-of-commerce doctrine, a distributor of a product that is capable of substantial noninfringing uses is not secondarily liable for copyright infringement committed by users of the product based merely on its distribution of the product.

Instead, the Court reaffirmed its holding in *Sony-Betamax*, stressing that “mere knowledge of infringing potential or of actual infringing uses would not be enough . . . to subject a distributor to liability.” Slip op. at 19. (The plaintiffs had argued that a defendant seeking to invoke the staple-article-of-commerce doctrine in its defense should have to prove that non-infringing uses of its products predominated over infringing uses.)

### ***Active Inducement Test***

The Court adopted an active inducement test intended to “balance the interests of protection and innovation.” *Id.* at 23-24. Just as the *Sony-Betamax* court

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## U.S. Supreme Court Issues *Grokster* Decision

(Continued from page 8)

adopted the staple-article-of-commerce doctrine from patent law, the *Grokster* court looked to patent law as the source of its active inducement standard. *Id.* at 19.

The Court's inducement test would not subject a product distributor to liability for "mere knowledge of infringing potential or of actual infringing uses" or for "ordinary acts" incident to product distribution, such as offering customers technical support or product updates. *Id.*

The active inducement test looks to whether the defendant actually intended to induce copyright infringement by others. The Court found the trial court record "replete with . . . evidence that Grokster and StreamCast, unlike the manufacturer and distributor in Sony, acted with a purpose to cause copyright violations by use of software suitable for illegal use." *Id.* at 21.

As evidence that "active steps were taken with the purpose of bringing about infringing acts," the Court looked to advertising messages communicated by the defendants and at assistance the defendants gave to users "in locating and playing copyrighted materials."

In addition, the Court found three features of the evidence before the trial court "particularly notable":

- (1) each company showed itself to be "aiming to satisfy a known source of demand for copyright infringement, the market comprising former Napster users";
- (2) "neither company attempted to develop filtering tools or other mechanisms to diminish the infringing activity using their software"; and
- (3) the "commercial sense" of each company's business turned on high-volume use, which the record showed to be infringing use. *Id.* at 20-21.

The Court was careful to note, however, that none of these elements taken alone could justify an inference of unlawful intent. Rather, the Court emphasized that the "entire record" led the Court to believe that in the case of Grokster and StreamCast "[t]he unlawful objective is unmistakable." *Id.* at 22.

The Court also stressed that "in the absence of other evidence of intent, a court would be unable to find contributory infringement merely based on a failure to take affirmative steps to prevent infringement, if the device is otherwise capable of substantial noninfringing uses."

Such a holding, the Court said, "would tread too close to the Sony safe harbor." *Id.* at 22, fn.12.

Rather, the Court held, that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." *Id.* at 19. The plaintiff must show "purposeful, culpable expression and conduct" intended to induce infringement. *Id.*

Accordingly, the Court emphasized, the announcement of the inducement standard, coupled with reaffirmation of the staple-article-of-commerce doctrine announced in *Sony-Betamax*, would not "compromise legitimate commerce or discourage innovation having a lawful promise." *Id.* at 19-20.

### Court Rejects Ninth Circuit's Test

The Supreme Court rejected the Ninth Circuit's interpretation of *Sony-Betamax* as requiring "reasonable knowledge of specific infringement" at a time when the infringement occurs. The Court explained that, while *Sony-Betamax* "limits imputing culpable intent as a matter of law" from the characteristics or uses of a distributed product, "nothing in *Sony* requires courts to ignore evidence of intent if there is such evidence." *Id.* at 17.

Where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows "statements or actions directed to promoting infringement," *Sony-Betamax* will not preclude liability. *Id.*

*Jon Hart is a member and Kat Fuller an associate at Dow, Lohnes & Albertson, PLLC in Washington, D.C. Jon, Kat, and Dow Lohnes member Jim Burger authored an amicus brief in Grokster on behalf of Intel Corporation urging the Supreme Court to reaffirm Sony-Betamax.*

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

Call us, or send us a note.

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*Save the date ...*



**TWENTY-FIFTH ANNUAL DINNER**

**WEDNESDAY  
NOVEMBER 9th, 2005**

**Sheraton New York Hotel and Towers, New York City**

*A discussion on the reporter's privilege with –*

**Matt Cooper  
Judith Miller  
James Taricani  
Congressman Mike Pence**

**Moderated by Diane Sawyer**

## **Tory v. Cochran: U.S. Supreme Court Strikes Down Overly Broad Injunction Issued After A Defamation Trial**

By Jean-Paul Jassy

The United States Supreme Court's first defamation case in 14 years came to the right conclusion, but without deciding the core issue presented for review. On May 31, 2005, the Court decided *Tory v. Cochran*, Case No. 03-1488, striking down an injunction preventing Ulysses Tory and Ruth Craft from ever again mentioning famed attorney Johnnie L. Cochran, Jr. in any public forum.

In a 7-2 decision authored by Justice Breyer, the Court determined that the injunction, which was issued after a defamation trial, was an overly broad prior restraint on speech, and was unconstitutional. The Court clearly was influenced by the death of Cochran on March 29, 2005, only one week after oral argument. *Tory v. Cochran*, No. 03-1488, 125 S. Ct. 2108 (May 31, 2005).

### **Background**

In the early 1980's, Cochran represented Tory in a civil rights suit. Tory was dissatisfied with Cochran's services and, over the next few decades, periodically picketed in front of Cochran's office. Tory purportedly carried signs that challenged Cochran's abilities as an attorney. In separate correspondence, Tory demanded the return of money he believed Cochran owed to him. Ultimately, Cochran sued Tory for defamation and false light invasion of privacy.

Tory could not afford an attorney at the trial court level, and his case was tried before a judge and without a jury. Cochran waived any claim to money damages and only sought an injunction.

The trial court granted preliminary injunctive relief. At the conclusion of the trial, it found Tory liable for defamation and false light invasion of privacy. The trial court issued a permanent injunction preventing Tory and his putative spouse Ruth Craft (who was not a defendant and not given an opportunity to defend herself at trial)

from ever again saying anything in any "public forum" about Cochran or his law firm (which was not a plaintiff and presented no evidence of damages at trial).

The California Court of Appeal affirmed the trial court's injunction, ruling that a permanent injunction following a defamation trial was not a prior restraint and was not subject to the overbreadth doctrine.

The Court of Appeal also rejected several other challenges to the injunction and the underlying finding of liability, including attacks on the grounds of opinion, actual malice (Cochran conceded his status as a public figure), of and concerning and publication. The California Supreme Court denied review.

---

***In briefing before the Supreme Court, Tory and Craft took the position that injunctions should never be allowed in defamation cases, at least not for public figures***

---

### **Supreme Court Decision**

Tory and Craft petitioned the United States Supreme Court, raising the following question:

"Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."

In the Petition for a Writ of Certiorari, Tory and Craft pointed to a split in the law since the seminal decision in *Near v. Minnesota*, 283 U.S. 697 (1931), disapproving the use of any form of prior restraint in defamation cases. Although most jurisdictions follow the maxim that "equity will not enjoin a libel," at least four federal circuits (the Third, Fifth, Sixth and Ninth) and nine state supreme courts (Alabama, California, Georgia, Massachusetts, Minnesota, Missouri, Nebraska, Nevada and Ohio) have, expressly or tacitly, condoned injunctions on purportedly false or damaging speech.

In briefing before the Supreme Court, Tory and Craft took the position that injunctions should never be allowed in defamation cases, at least not for public figures. Even if injunctions could be permitted in certain limited circumstances, they would need to be narrowly tailored.

(Continued on page 12)

***Tory v. Cochran***

*(Continued from page 11)*

The case was heard on March 22, 2005. On March 29, 2005, Cochran died. Following Cochran's death the Court called for supplemental briefing. Cochran's attorney asked for Cochran's widow to be substituted as the Respondent, and suggested that the injunction was moot as to Cochran.

Tory and Craft agreed to substitute Cochran's widow as Respondent, but denied that the case was moot.

Justice Breyer, writing for the Court, issued its opinion on May 31, 2005. The Court rejected the contention that the injunction was moot, observing that it still "remains in effect," and that "[n]othing in its language says to the contrary."

The decision went on to hold that the injunction "continues significantly to restrain petitioners' speech, presenting an ongoing federal controversy."

"At the same time," the Court observed, "Johnnie Cochran's death makes it unnecessary, indeed unwarranted, for us to explore petitioners' basic claims, namely (1) that the First Amendment forbids the issuance of a permanent injunction in a defamation case, at least when the plaintiff is a public figure, and (2) that the injunction (considered prior to Cochran's death) was not properly tailored and consequently violated the First Amendment."

Instead, the Court noted that the "injunction, as written, has now lost its underlying rationale" given Cochran's death.

Consequently, the Court concluded that "the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification. As such the Constitution forbids it."

The Court vacated and remanded the case, suggesting that an "appropriate party" could ask for new injunctive relief, but the Court was not willing to express any view on the "constitutional validity" of any as yet unformed "new relief, tailored to these changed circumstances."

***Thomas and Scalia Dissent***

Justice Thomas, along with Justice Scalia, dissented on procedural grounds. According to Justice Thomas, Cochran's death made the issue before the Court merely "a matter of case-specific error correction," and the better course was "to avoid passing unnecessarily on the constitutional question" and to dismiss the writ as improvidently granted.

Justice Thomas also observed that the majority's opinion invites some uncertainty by leaving open the possibility that an "appropriate party" could ask for new injunctive relief. Of course, the majority also left open the possibility that any such new relief would be an unconstitutional prior restraint.

***Conclusion***

*Tory v. Cochran* left open the question, which has split jurisdictions throughout the country, whether injunctions could ever issue following a defamation trial. However,

the *Tory* decision did make clear that any such injunctions are presumptively unconstitutional prior restraints, and that, at a minimum, they demand narrow tailoring.

*Jean-Paul Jassy, an associate in the Century City, California office of Sheppard, Mullin, Richter & Hampton LLP, represented Ulysses Tory and Ruth Craft at every stage of the appellate process. Tory and Craft also were represented by Gary L. Bostwick, a partner of Sheppard, Mullin, Richter & Hampton LLP. Professor Erwin Chemerinsky of Duke University Law School was lead counsel for Tory and Craft in the U.S. Supreme Court.*

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***The Tory decision did make clear that any such injunctions are presumptively unconstitutional prior restraints, and that, at a minimum, they demand narrow tailoring.***

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## Supreme Court Rules Grower-Funded Food Advertising Is “Government Speech” Takes First Amendment Challenges Off the Table

By Eric M. Stahl

The advertising campaign featuring the slogan, “Beef. It’s What’s for Dinner,” is credited to cattle producers, who pay for it through mandatory marketing assessments. Nevertheless, the ads amount to the government’s own speech, and therefore the compulsory funding does not implicate the First Amendment, the Supreme Court ruled last month.

The 6-3 decision, *Johanns v. Livestock Marketing Assoc.*, 125 S. Ct. 2055 (May 23, 2005) (Scalia, J.), could signal a significant expansion of the “government speech” doctrine.

Justice Scalia’s majority opinion notes that the decision is the first in which the Court has “squarely held[] that compelled funding of government speech does not alone raise First Amendment concerns.” Further, *Johanns* holds that funding for government speech may be compelled even where the speech is not obviously attributable to the government, and even where it is funded through targeted assessments rather than general tax revenues.

*Johanns* also may be the death knell for numerous pending constitutional challenges to federal programs that compel agricultural producers to fund generic advertising programs for their products. (These programs finance, for example, the well-known “Got Milk?” and “Pork. The Other White Meat” campaigns.)

Courts have had difficulty agreeing on the appropriate framework for evaluating constitutional challenges to these mandatory advertising programs, which have been characterized in various decisions as compelled speech, as restrictions on commercial speech, and as mere economic regulations. *Johanns*, however, holds that once it is determined that the government has established the marketing program and maintains some level of control over the message, the constitutional inquiry ends.

### *Court’s Third Generic Advertising Case*

*Johanns* is the Supreme Court’s third agricultural advertising case in eight years. The two earlier cases each applied a differing legal approach.

In the prior cases, whether the First Amendment applied to the compelled advertising assessments at issue turned on the objectives of the particular regulatory scheme. A mandatory assessment supporting generic advertising for California fruit trees was held not to implicate the First Amendment at all in *Glickman v. Wileman*

*Bros. & Elliott, Inc.*, 521 U.S. 457 (1997), on grounds that the assessments were simply economic regulations, ancillary to a more comprehensive program that restricted growers’ market autonomy.

But four years later, the Court found that a mandatory assessment on mushroom growers violated the

First Amendment protection against compelled association, because the object of that program was simply advertising, and the assessment was not germane to any purpose independent of the speech itself. *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

Both *Glickman* and *United Foods* left open the possibility that advertising funded by compelled subsidies could be justifiable as government speech. (The government did not raise the argument at all in *Glickman*, and raised it belatedly in *United Foods*.) In fact, the beef assessment program at issue in *Johanns* is substantively identical to the mushroom advertising program that *United Foods* struck down as impermissible compelled speech. In *Johanns*, however, the government-speech defense was squarely in issue.

The beef regulations were issued by the Secretary of Agriculture under the Beef Promotion and Research Act of 1985, 7 U.S.C. § 2901 *et seq.* The regulations assess a “per-head” fee on cattle producers and importers. Over \$1 billion has been collected since 1988. The assessment

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***Johanns, however, holds that once it is determined that the government has established the marketing program and maintains some level of control over the message, the constitutional inquiry ends.***

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## Supreme Court Rules Grower-Funded Food Advertising Is “Government Speech”

(Continued from page 13)

is used primarily to promote beef, including through the familiar trademarked slogan, “Beef. It’s What’s for Dinner.”

The program was challenged by individuals and associations whose members were subject to the assessment. They objected to the compelled advertising because the ads promote beef as a generic commodity, allegedly impeding their ability to promote the superiority of certain types of beef (such as American beef over imports, or certified Angus beef).

After a bench trial, the district court found for the producers, holding that compelling them to subsidize speech to which they object violates the First Amendment. The Eighth Circuit affirmed. That court found that while the challenged advertising amounted to government speech, that fact protected only its content. According to the Eighth Circuit, compelled funding even of government speech still could be challenged under the First Amendment.

### ***Compelled Funding of Government Speech***

In reversing, the Supreme Court majority began with the proposition that in earlier cases invalidating compelled subsidies of speech (such as *United Foods*, *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990), and *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977)), “the speech was, or was presumed to be, that of an entity other than the government itself.”

According to Justice Scalia, the critical feature of the compelled speech in those cases was its non-governmental nature. In contrast, compelled support of government “is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position.”

What makes the beef promotional program the type of governmental speech that is not susceptible to First Amendment challenges? According to the majority, it is that the promotional message “is effectively controlled by the Federal Government itself.” First, the message to promote the image and desirability of beef was established by Congress. Second, although the program is administered by a board of beef producers, the Secretary of Agriculture appoints half of the members, and has the power to remove all of them. Fi-

nally, the Department of Agriculture reviews, and can reject, “every word used in every promotional campaign.”

For similar reasons, the majority rejected the argument that the message is not government speech because it is funded by a targeted assessment administered by a politically unaccountable board. The Court found the political safeguards adequate, and in any event found no precedent for the contention that “every instance of government speech must be funded by a line item in an appropriations bill.”

The Court also rejected the argument that the beef advertisements could not be deemed “government speech” because they are attributed to someone other than the government. Most of the promotions bear the credit line, “America’s Beef Producers,” which, respondents argued, attached their endorsement to a message with which they did not wish to associate.

The majority held that this argument did not support the respondents’ facial challenge, because the regulations do not require any particular attribution. And the argument did not support an as-applied challenge, because the record did not show that anyone viewing the advertising had attributed it to the respondents. The majority allowed that a misattribution theory might hold sway on other facts – that is, the advertisements might not be deemed government speech if it could be shown that the message was understood to be that of individual producers rather than the government.

### ***“Government Speech” Doctrine***

The dissent (written by Justice Souter and joined by Justices Stevens and Kennedy) parted with the majority primarily on this point. “[I]f the government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message....”

The beef regulations fail this test, the dissent reasons, because they do not “require the Government to show its hand.” Noting the “government-speech doctrine is relatively new, and correspondingly imprecise,” the dissent suggested it should be harmonized with the First Amendment protection against compelled speech-related assessments by ensuring

(Continued on page 15)

## Supreme Court Rules Grower-Funded Food Advertising Is “Government Speech”

(Continued from page 14)

“democratic checks” on the speech at issue. The beef program, in contrast, permits the government to conceal its role in producing the ads and thereby escape political accountability.

The majority response to this argument consists of a dismissive footnote finding “no authority for this highly refined elaboration – not even anyone who has ever before thought of it.” Faulting the dissent for lacking precedent for its proposed refinement of the definition of “government speech” seems unwarranted, given that the majority opinion admittedly expands the definition of government speech doctrine beyond previous bounds.

In any case, according to the majority, the question is not whether the government fails to disclose its role in promulgating supposedly “government speech.” Rather, under the compelled-subsidy cases, the only issue is whether a reasonable viewer would attribute the speech to an individual who objects to it.

*Johanns* thus suggests that the First Amendment is no bar to compelled funding of the government’s own speech, even where the government deliberately hides its role in promulgating that speech. (It seems reasonable to ask whether this ruling could be a source of mischief in an era of secret executive-branch payments to opinion columnists and of government-sponsored, misattributed video news releases.)

Moreover, such unattributed messages can be deemed government speech, even if they contradict other speech that the government clearly conveys in its own name. As Justice Ginsburg noted in a concurring opinion, dietary guidelines published by the Department of Agriculture – and promoted as the government’s views on dietary health information – urge Americans to *reduce* their intake of beef. (Justice Ginsburg nevertheless concurred in *Johanns*, on the ground that the beef assessments are permissible economic regulations.)

*Johanns*’ conception of government speech raises other questions as well. What level and type of proof would be required to show that speech paid for by a mandatory assessment is reasonably being attributed to the funders, rather than to the government, such that a constitutional question still exists?

Would anecdotal evidence suffice, or would courts insist on the type of consumer survey evidence typically required in Lanham Act misattribution cases? Another potential issue is whether the government will rely on *Johanns* to support a sovereign immunity defense to tort claims based on speech that does not appear to be government speech, but is.

Finally, will *Johanns*’ expanded understanding of government speech eventually lead to erosion of First Amendment protections against certain types of compelled association with speech, or will the majority’s distinction between “compelled speech” and “compelled subsidy

of speech” remain tenable?

*Johanns* produced two additional concurring opinions, by Justices Thomas and Breyer (both of whom joined the majority). Justice Thomas wrote to emphasize that the beef regulations remained subject to an as-applied challenge (including, perhaps, by amended complaint on remand) based on the objectors’ First Amendment right to be free from coercive association with unwanted messages.

Justice Breyer stated that while he would prefer to continue evaluating the advertising assessments as economic regulations (as in *Glickman*), he accepted that the Court has come to view the issue differently.

*Eric M. Stahl is a partner with Davis Wright Tremaine LLP in Seattle. John J. Walsh of Carter Ledyard & Milburn LLP, New York, reviewed and provided valuable input to a draft of this article. Deputy Solicitor General Edwin S. Kneedler and Gregory G. Garre of Hogan & Hartson L.L.P., Washington, D.C., argued the case for Petitioners. Laurence Tribe argued for Respondents.*

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***It seems reasonable to ask whether this ruling could be a source of mischief in an era of secret executive-branch payments to opinion columnists and of government-sponsored, misattributed video news releases.***

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## Supreme Court Refuses to Hear Plaintiffs' Appeal in Texas Satire Case

The Supreme Court let stand a decision by the Texas Supreme Court dismissing a libel suit brought over a satirical newspaper article. *New Times Inc. v. Issacks*, 146 S.W.3d 144 (Tex. 2004), cert denied, 125 S.Ct. 2557 (U.S. Jun 6, 2005) (No. 04-1464).

Plaintiffs, a judge and prosecutor, had sued an alternative weekly, *The Dallas Observer*, for its publication of a satire piece entitled, "Stop the Madness" that was intended to lampoon the officials for their handling of a school discipline matter. The article described plaintiffs jailing a six-year-old girl for writing a book report on the children's classic *Where the Wild Things Are*.

Both the Court of Appeals and District Court had denied the *Observer's* motions for summary judgment, citing factual issues concerning actual malice. The Texas Supreme Court, reversed and dismissed, reasoning that no reasonable person could find that the article stated actual facts about plaintiffs.

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## U.S. Supreme Court Refuses to Hear Miller Cooper Appeal

### *Case Will Return to District Court for Hearing on Sentencing*

On June 27, the U.S. Supreme Court refused without comment to hear the petitions for certiorari filed by Time Magazine and its editor Matthew Cooper and New York Times reporter Judith Miller seeking to quash grand jury subpoenas issued as part of a Special Prosecutor's investigation into the potentially illegal disclosure of the identity of CIA Agent Valerie Plame. *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. Feb. 15, 2004) (Sentelle, Henderson, Tatel, JJ.), *rehearing en banc denied*, 405 F.3d 17, *cert. denied*, 73 USLW 3686, 73 USLW 3702 (U.S. Jun 27, 2005) (No. 04-1507).

The reporters were first held in contempt by Washington D.C. Federal District Court Judge Thomas Hogan in October 2004 who ruled that they had no First Amendment or common law privilege to resist answering questions before the grand jury. That decision was unanimously affirmed by a D.C. Circuit Court of Appeals panel in February 2005, though one judge, David Tatel, expressed support for recognizing a qualified privilege. *See also MediaLawLetter* Feb. 2005 at 5.

The case now returns to Judge Thomas Hogan who will hear arguments on July 6. He indicated at a hearing on June 29 that he would jail the reporters for up to 120 days if they did not testify. At press time, Time Inc. announced that it would comply with the grand jury subpoena and provide records to the special prosecutor, and that this should obviate the need for Cooper to testify.

### *Special Prosecutors Brief in Opposition*

In May, Special Prosecutor Patrick J. Fitzgerald filed his brief in opposition to certiorari which focused on the reporters privilege in the grand jury context. Key excerpts are reprinted below. In addition to arguing that no reporters privilege exists in the grand jury context, Fitzgerald argued that the Court should not hear the appeal because even if a qualified privilege exists, Miller and Cooper could not prevail on the facts of the case – noting that the D.C. Circuit assumed *arguendo* the existence of a qualified privilege and determined that it was overcome by these facts.

The facts supporting the merits of the underlying investigation were supplied to the reviewing courts *ex parte* and were never made available to Miller and Cooper. Their petitions condemned the use of “secret evidence” to jail and fine reporters, and argued this constituted a due process violation. But the argument gained no traction with the courts.

### *Attorney Generals Amicus Brief*

In an interesting amicus brief, the attorneys general of 34 states had urged the High Court to hear the appeal and recognize a federal reporter's privilege, lest the federal judiciary undermine both the common law and statutory privileges that exist at the state level.

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***At press time, Time Inc. announced that it would comply with the grand jury subpoena.***

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### *Arguments Made in the Special Prosecutor's Opposition Brief*

[N]o federal common law reporter's privilege should be recognized in the context of a good faith grand jury investigation. However, the court of appeals assumed that petitioners prevailed on their claim that a qualified privilege exists, and assumed that the privilege has the broadest possible scope. The court merely held that any such privilege has been overcome on the particular facts of this case. Whether the court of appeals erred in applying the legal principle advocated by petitioners to the specific facts of this case is not a question that warrants this Court's review. See Sup. Ct. R. 10... Indeed, the court concluded that the government's affidavits and exhibits overcame even the special version of the privilege for “leak” cases favored by Judge Tatel, which required not only showings of the essentiality of the evidence sought and the exhaustion of alternative sources, but the court's balancing of “the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value.” Miller Pet. App. 58a.

*(Continued on page 18)*

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In light of the court of appeals' decision, petitioners could prevail in this Court only if (1) there is an absolute reporter's privilege; (2) there is a qualified reporter's privilege broader in scope than that assumed to exist by the court of appeals; (3) the assumed qualified reporter's privilege was not overcome on the facts of this case; or (4) the court of appeals applied an improper procedure in deciding that the assumed qualified privilege was overcome. Petitioners do not make any of the first three arguments, and even if they did, none would provide a basis for certiorari.

Petitioners do argue that the lower courts employed an improper procedure in applying the assumed qualified privilege to the facts of the case—namely, the consideration of *ex parte* submissions that contained a detailed description of much of the evidence previously gathered by the grand jury. Miller Pet. 27-28; Cooper Pet. 27-29. Petitioners contend that they were entitled to access to the submissions as a matter of due process.

Applying the assumed qualified privilege to the facts necessitated an evaluation by the lower courts of information concerning the full scope and breadth of the ongoing grand jury investigation.

Contrary to petitioners' contention (Miller Pet. 28; Cooper Pet. 27-28), the lower courts' consideration of the *ex parte* materials was not barred by any decision of this Court. As Judge Tatel noted in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the cases relied upon by petitioners involve situations far removed from the compulsion of grand jury testimony due to the rejection of a claim of privilege. See *In re Oliver*, 333 U.S. 257 (1948); *Greene v. McElroy*, 360 U.S. 474 (1959); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

Although this Court held that the litigants in each of those cases were entitled to examine and challenge the evidence against them, the disputed evidence in each case was limited and related to the litigant's own conduct. Moreover, in those cases, the potential consequences of the litigant's conduct was the central issue in the case before the Court. In this case, petitioners faced a coercive penalty of civil contempt because they refused to obey a lawful order to give evidence, rather than a penalty for past actions. The evidence contained in the *ex parte* submissions related to the government's conduct of the grand jury investigation.

Petitioners contend (Miller Pet. 11-20; Cooper Pet. 21-23) that there is a conflict in the circuits regarding the existence of a reporter's privilege grounded in the First Amendment. But no court of appeals has recognized a First Amendment reporter's privilege in the circumstances of a grand jury investigation conducted in good faith...In applying a reporter's privilege in contexts other than a grand jury investigation, the courts of appeals have distinguished *Branzburg*, and expressly acknowledged that *Branzburg* precludes recognition of a First Amendment privilege in the context of a good faith grand jury investigation. See, e.g., *Zerilli*, 656 F.2d at 711.

### ***Arguments Made in Attorneys General Amicus Brief***

As Judge Tatel noted in his concurring opinion in the court of appeals, there has been a "shift in favor of the [reporter's] privilege" among the States since this Court last addressed the issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection." Pet. App. 59a.1. The statutes and judicial decisions of the fifty jurisdictions that fueled this "dramatic growth in support for the reporter privilege," *id.* 61a, are collected in the Miller Petition (No. 04-1507) at 23 nn.21-22.

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The decision below – in which the court of appeals declined to fashion any corresponding federal reporter’s privilege – conflicts with the recognition of such a privilege by virtually every State and the District of Columbia. A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and protect “buck[s] the clear policy of virtually all states,” Pet. App. 58a (Tatel, J., concurring), and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them. Cf. *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).

To quote Judge Tatel, continued denial of a federal reporter’s privilege would “frustrate the purposes of the state legislation’ by exposing confidences protected under state law to discovery in federal courts’.” Pet. App. 57a (quoting *Jaffee*, 518 U.S. at 13).

As this Court observed in *Jaffee*, the “policy decisions of the States bear on the question whether federal courts should recognize a new privilege.” Because State legislatures “are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.” *Jaffee*, 518 U.S. at 13.

Texas Attorney General Greg Abbott filed the amicus curiae on behalf of the attorneys general of 34 states and the District of Columbia.

## D.C. Cir. Affirms Contempt Ruling Against Reporters in Wen Ho Lee Case

At press time, the D.C. Circuit Court of Appeals affirmed an order of contempt against four reporters who have refused to comply with a discovery order directing them to reveal the identity of their confidential sources for reports about Wen Ho Lee, a former scientist with the Department of Energy who was suspected of spying. *Lee v. Department of Justice*, No. 04-5301 (D.C. Cir. June 28, 2005) (Sentelle, Randolph, Rogers, JJ.). Lee is suing the government for violation of the Privacy Act, 5 U.S.C. § 552a, for leaking information about him to the media.

The four reporters are James Risen of *The New York Times*, H. Josef Hebert of Associated Press, Bob Drogin of the *Los Angeles Times*, and ABC reporter Pierre Thomas. The appeals court vacated the contempt order against a fifth reporter, Jeff Gerth of *The New York Times*, finding lack of evidence that he had violated the discovery order.

All five reporters had been held in contempt in August 2004 by Judge Thomas Penfield Jackson. See *Lee v. United States Dep’t of Justice*, 2004 WL 1854138 (D. D.C. Aug. 18, 2004).

The D.C. Circuit Court panel unanimously affirmed, holding that any qualified reporter’s privilege applicable in civil cases had been overcome by a showing that the information sought “goes to the heart of [Lee’s] case” and that Lee had exhausted “every reasonable alternative source of information”

The Court noted, among other things, that “the protections of the Privacy Act do not disappear when the illegally disclosed information is leaked to a journalist, no matter how newsworthy the government official may feel the information is.”

A full report on the opinion will be included in next month’s *MediaLawLetter*.

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## Pennsylvania Trial Court Orders Reporter to Reveal Source in Libel Case

In a troubling decision this month, a Pennsylvania trial court ordered a reporter to disclose her confidential source for an allegedly libelous report about two local politicians because the confidential source allegedly provided information about plaintiffs' testimony to a grand jury. *Castellani v. Scranton Times*, No. 05 CIV 69 (Pa. Ct. C.P., Lackawanna County June 3, 2005) (Mazzoni, J.).

Although Pennsylvania case law holds that the press cannot be compelled to reveal confidential sources in libel cases, the trial court concluded that grand jury secrecy is of such paramount concern that both the Shield Law and a qualified First Amendment privilege were overcome – even though the source provided *inaccurate* information about the proceeding.

Although this is a libel case, the court approached the matter as if it were a criminal leak investigation akin to the Miller Cooper case, stating that the communication at issue is a “crime” that “undermines the grand jury process.”

### Background

The plaintiffs, two local Democratic Party officials, sued over an article that was published in *The Scranton Times* and *The Tribune* in January 2004 concerning their appearances before a grand jury investigating allegations of wrongdoing at Lackawanna County Prison. Plaintiffs were county commissioners and members of the prison board.

The article, headlined “Dems Stonewall Grand Jury,” reported that plaintiffs were “considerably less cooperative” before the grand jury; gave “vague” and “evasive” answers and that the grand jurors were “ready to take out the big hook and yank each of them out of the witness chair.” The allegations, including these quotes, were attributed to “a source close to the investigation.”

Plaintiffs sued the two newspapers and the individual reporter in January 2004. Plaintiffs also filed a complaint with Judge Isaac Garb, the supervisory judge for the grand jury, who appointed a special prosecutor to investigate the leak.

The special prosecutor never questioned the reporter or newspapers over the leak. Instead, the special prosecutor issued a report concluding that the Attorney General's Office was not the source of the leak. Judge Garb reported this conclusion in a written opinion issued in September 2004.

Judge Garb added that “none of the things” reported by the newspaper happened. Instead, the plaintiffs were cooperative, their testimony was not vague and at no time did the grand jurors become irate over plaintiffs' testimony. He concluded that the source was “obviously not privy to the grand jury proceedings.”

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***Because the information here – although inaccurate – was apparently leaked by someone who had witnessed the grand jury testimony and who had been sworn to secrecy, the court reasoned that “the Shield Law should relinquish its priority.”***

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### ***The Pennsylvania Shield Law***

The Pennsylvania Shield Law, 42 Pa. C.S.A. § 5942(a), provides:

No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation,

for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

The leading Pennsylvania cases hold that the Shield Law creates an absolute privilege protecting the identity of confidential sources even in libel cases against the press. *See, e.g., Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987); *Davis v. Glanton*, 705 A.2d 879 (Pa. Super. 1997).

In *Hatchard*, the Pennsylvania Supreme Court ruled that a libel plaintiff was not entitled to discovery of unpublished information that would disclose or lead to the disclosure of confidential sources. In *Davis*, an appellate court applied the same rule to a non-party reporter in a libel case. The state supreme court had also held that no adverse or positive inferences are to be drawn at trial if the press relies on the Shield Law to protect the identity of a confidential source in a libel case. *Sprague v. Walter*, 543 A.2d 1078, 1086 (Pa. 1988).

(Continued on page 22)

## **Pennsylvania Trial Court Orders Reporter to Reveal Source in Libel Case**

(Continued from page 21)

### ***Grand Jury Secrecy Trumps Shield Law***

The court acknowledged this case law, but concluded that “because of the alleged facts of this case ... and because this case allegedly involves an apparent wrongful disclosure from a statutorily mandated proceeding” the Shield Law was pierced.

Discussing at length grand jury secrecy cases, the court found “the state interest in grand jury secrecy to be so important as to outweigh other competing constitutional or statutory rights.”

Because the information here – although inaccurate – was apparently leaked by someone who had witnessed the grand jury testimony and who had been sworn to secrecy, the court reasoned that “the Shield Law should relinquish its priority.”

### ***No First Amendment Protection***

The court also rejected defendants’ argument that a separate qualified First Amendment privilege existed to protect against compelled disclosure of the confidential source.

The court recognized that Pennsylvania appellate courts have adopted a qualified reporter’s privilege that can only be overcome where the party seeking the information can “(1) demonstrate that it has made an effort to obtain the information from another source; (2) demonstrate that the only access to the information sought is through the journalist and [his or her] sources; (3) persuade the court that the information sought is crucial to [its] claim” (citation omitted).

Plaintiffs made no attempts to obtain the information from other sources, but the court held their duty to make such efforts was effectively satisfied by the special prosecutor’s leak investigation. Thus, defendants were the only source for information crucial to the plaintiffs’ case.

Defendant newspapers are represented by J. Timothy Hinton, Jr. of Scranton and W. Thomas McGough, Jr. of Pittsburgh, Pa. Defendant reporter is represented by Donald H. Brobst of Wilkes Barre, Pa. Plaintiffs are represented by Richard Sprague of Philadelphia and Lawrence J. Moran of Scranton, Pa.

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## **Mississippi Court Orders Non-party Reporter To Reveal Source**

A Mississippi trial court this month ordered a non-party reporter to reveal her source for a confidential drug enforcement agency memo. *Pierce v. Melton*, No. 03-CV-071 (June 8, 2005) (Bailey, J.). The court found that while the reporter enjoyed a qualified privilege to protect the identity of her source, plaintiffs had exhausted all reasonable means to discover who leaked an allegedly false and defamatory memo.

### ***Background***

Plaintiffs, a current and retired agent with the Mississippi Bureau of Narcotics, sued the former director of their agency, Frank Melton, for emotional distress, alleging he leaked a confidential internal memo that discussed allegations of serious wrongdoing by plaintiffs. (Plaintiffs also sued another agent alleging he was the underlying source of the false accusations contained in the memo.)

Ann Radelat, a reporter for the *Clarion Ledger*, in Jackson, Mississippi, obtained the memo from a confidential source and reported on it in April 2003. The memo was also the subject of press coverage in other local newspapers.

### ***Trial Court Decision***

The trial court first acknowledged that a reporter enjoys a qualified privilege to protect the identity of his or her confidential sources. Citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983). But the privilege here was overcome because plaintiffs had exhausted “all reasonable means” to discover the source, including obtaining sworn statements from all persons (including defendants) who obtained the memo denying they leaked they leaked it to the press. The court rejected the argument that plaintiffs should have investigated whether agency secretaries leaked the memo, stating that “obtaining affidavits from every person who may have in the realm of imagination had access to the memo is not the definition of reasonable efforts.”

Leonard Van Slyke, of Watkins Ludlam Winter & Stennis in Jackson, Mississippi represented the newspaper and reporter in this matter.

## The Tribune's Trial of the Century

By Chip Babcock, Nancy Hamilton and Cedric Scott

It was the trial of this century (so far) and the first libel trial for the *Chicago Tribune* since the middle third of the last century, which means that the usual confluence of events (denial of summary judgment and refusal to settle) were present when trial began in the Circuit Court of Cook County, Illinois in the libel case of *Thomas Knight vs. Chicago Tribune Company, Maurice Possley and Ken Armstrong*, No. 2000-L-004988 (Ill. Cir. Ct. jury verdict May 20, 2005). See also *MLRC MediaLawLetter* May 2005 at 9.

### Background

By the time of trial only the following twenty-nine (29) words were alleged to be false and defamatory per se:

Gorajczyk told the DuPage grand jury that Knight told him to keep his mouth shut about his conclusion and not to tell anyone that there was no written report.

Plaintiff's complaint was two-fold. First, the statement says "Gorajczyk told the DuPage grand jury" when in fact Gorajczyk himself did not testify before the grand jury, but instead told the grand jury investigator, who verified what he was told by Gorajczyk under oath to the grand jury.

Second, the grand jury transcript reflects Gorajczyk as saying; "Knight's response was to tell Gorajczyk not to discuss the matter with anyone and not to report to anyone about his negative findings and his failure to write a report" which Possley, the *Tribune* reporter, paraphrased to: "Knight told him to keep his mouth shut about his conclusion and not to tell anyone that there was no written report."

The 29 words were published on January 12, 1999, in the third article entitled *Prosecution on Trial in DuPage* of a five part series titled *Trial and Error: How Prosecutors Sacrifice Justice To Win*.

The series ran one week before plaintiff was scheduled to face trial for felony indictments relating to his alleged prosecutorial misconduct in connection with a murder case in 1983. Plaintiff was ultimately acquitted of the charges.

### 1983 Murder Remains Unresolved

The plaintiff, Knight, is a former DuPage County (Illinois) State's Attorney and the case was rooted in the tragic events of over twenty-two years ago; the 1983 abduction, rape and murder of a ten year old girl, Jeanine Nicarico. The victim was home alone from school the day she was abducted. A clearly visible boot print was found on the front door that had been violently kicked open.

At the time of the Nicarico murder, Knight, who was the Chief of the Criminal Division of the State's Attorney's office, was in charge of the investigation and responsible for the presentation of evidence to the grand jury, which subsequently indicted three young men, Buckley,

Cruz and Hernandez, despite the warnings from two prominent law enforcement officials working on the case that, as one of them put it at the time, "these mutts didn't do it."

In December 1984, just weeks before the trial of the three young men, Buckley's public defender moved to dis-

miss the indictment because of the prosecution's failure to disclose to the defense that a DuPage County forensic lab footprint expert had examined boots provided by Buckley in the investigation and concluded that they did not match the boot print on the door. Buckley's counsel argued to the court, "I tripped over this thing. I got lucky. I find out he makes an examination of the shoes, comes to the conclusion that they don't match and then all of a sudden the great cover-up is on...I find out a report is intentionally not made in this case. If that isn't evidence tending to negate the guilt of my client, then there never was such a thing."

Early in the investigation Buckley, who was at the time cooperating with the investigators, had been asked by a detective if he had seen any boots like the one that left the print on the Nicarico door, to which he responded, "Yes. I have some just like that." When the detective said he would like to see them, Buckley quickly complied.

Just weeks before the 1985 trial, the defense learned that after the Buckley boots were taken to the DuPage County Crime Lab, they were examined by two lab examiners: the second, and more experienced examiner,

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***It was the trial of this century (so far) and the first libel trial for the Chicago Tribune since the middle third of the last century.***

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## The Tribune's Trial of the Century

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Gorajczyk, told the sheriff and several deputies that the Buckley boots did not match the print, (exculpatory information which should have been shared with the defense) and was told not to write a report.

In February, 1985 at the first trial, Knight was the lead prosecutor and relied heavily on the only piece of physical evidence connecting the three defendants – Buckley's boots and a boot print on the Nicarico's front door.

In support of the prosecution, Knight presented three experts who examined the Buckley boots after they were examined and rejected by Gorajczyk; one from the Illinois State Crime Lab, one from the Kansas Bureau of Investigation and a forensic anthropologist, Louise Robbins, who was the only one of the three who made a positive identification that the boots matched. Robbins was later discredited by the Illinois Supreme Court in another case from DuPage County, as well as by the scientific community. The Chicago Lawyer magazine later called her "The Queen of Quackery."

There was a hung jury as to Buckley but he was not released until March 1987, nearly a year after an FBI expert who subsequently examined the boots and confirmed Gorajczyk's initial examination that the boots did not match. The jury convicted Cruz and Hernandez. Knight left the State's Attorney's office after the first trial.

In 1988, the Cruz and Hernandez convictions were appealed and reversed because, the Illinois Supreme Court held, the three defendants should not have been tried together, especially in light of Knight's closing argument which the court said was a "deliberate and constitutionally impermissible effort to circumvent" the defendants' constitutional rights.

Cruz was convicted a second time. Hernandez' second trial ended in a mistrial and the charges against him were eventually dropped. In the meantime, another person, Dugan, confessed to the crime – to date Dugan has not been charged. But Cruz faced trial yet a third time.

### **Prosecutorial Misconduct**

In 1995, after twice being given the death penalty, during Cruz' third trial, one of the detectives recanted his prior testimony on a key point. The trial judge stopped the trial and found Cruz not guilty. Following Cruz's third

trial, a special prosecutor, William Kunkle, was appointed to look into the conduct of the prosecutors and law enforcement officials in connection with prosecution of the Nicarico murder case (that – at that time – had resulted in the four trials dating back to 1985).

A grand jury was convened and in December 1996 returned an indictment against seven law enforcement officials, including Knight, for conspiracy with the intent to obstruct justice and official misconduct. The seven defendants became known as the "DuPage 7."

The 1996 criminal indictments of the DuPage 7 were virtually unprecedented in American jurisprudence and heavily publicized. The indictments caused the *Chicago Tribune* editors to question whether or not there was a systemic problem with the criminal justice system. Ken Armstrong, the *Chicago Tribune* legal affairs reporter, began a review of legal resources to see how often criminal convictions had been reversed for either a failure to disclose exculpatory evidence (the rule set forth in the U. S. Supreme Court case *Brady v. Maryland*, commonly referred to as the "Brady rule") or where officials had knowingly used false evidence to gain a conviction.

In 1997, Armstrong wrote a series of memos updating his superiors and asking for permission to continue his research on a nationwide basis, as well as a review of Illinois cases where convictions were reversed for a broader range of prosecutorial misconduct. One of Armstrong's memos outlining his research and investigation concluded that the issue had the makings of a fantastic series and that "It's time to put the prosecutors on trial. No one else is," he wrote. Armstrong received the green light from the *Chicago Tribune* and reporter Maurice Possley was assigned to join in the research and investigation.

Although there had been heavy media coverage of the impending trial, the *Chicago Tribune* alone had a virtually complete set of the DuPage 7 grand jury transcripts. The 4400 plus page grand jury transcript had been provided to the *Chicago Tribune* – ironically as it turned out – by Knight's own criminal defense lawyer. As work on the series progressed, Possley sat down "sometime after Labor Day" of 1998, with the transcripts in an effort to capture what the grand jury had heard which led to the felony indictments and the upcoming trial. He took notes

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## The Tribune's Trial of the Century

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and summarized the testimony, including that of an investigator, Kirby, who had interviewed Gorajczyk.

In the grand jury transcript, Kirby testified that he had interviewed the lab examiner Gorajczyk who said that he had examined the Buckley boots and found that they did not match the print but that he did not write a report; and further that Gorajczyk had spoken to Knight whose "response was to tell Gorajczyk not to discuss the matter with anyone and not to report to anyone about his negative findings and his failure to write a report."

When Possley originally drafted the article, he accurately wrote that "Gorajczyk recalled later" the conversation with Knight. The article went through multiple drafts with a series of editors. Very late in the process – months after Possley had reviewed the grand jury transcripts – an editor asked Possley the source of the "Gorajczyk recalled later" language. Possley responded that it had come from the grand jury.

The editor suggested that the phrase "according to grand jury transcripts" be inserted but, as that phrase had been used in the preceding paragraph, Possley and the editor agreed that the sentence would be changed to "Gorajczyk told the DuPage grand jury that Knight had told him to keep his mouth shut." Thus was created a mistake of attribution and a paraphrase which formed the basis of the lawsuit. It turned out that the paraphrase was more troublesome for the jury than the mistake.

On Sunday January 10, 1999, one week before the DuPage 7 trial was scheduled to begin, the *Chicago Tribune* published the first of a five-part series entitled *Trial and Error: How Prosecutors Sacrifice Justice To Win*. Armstrong and Possley shared the series by-line.

Day one contained Armstrong's national review of homicide cases that had been reversed for prosecutorial misconduct. On Tuesday January 12, 1999, the third segment of the series which was principally written by Possley and entitled "Prosecution on Trial in DuPage" was pub-

lished. The purpose of the "Prosecution on Trial in DuPage" article was to recount what the DuPage County grand jury heard that ultimately lead to the DuPage 7 indictments and upcoming trial.

### ***When You Know "It" But Can't Recall It At The Time***

Possley stated at his deposition taken in 2002, that he "knew" Gorajczyk had not testified before the DuPage grand jury. It was this testimony that likely led the pretrial motions judge to conclude that there was sufficient evidence of "actual malice" to go to trial. During his testimony at trial, Possley explained that while he knew Gorajczyk had not testified, at the time the editing change was made he had simply forgotten it. Possley likened the situation to "checking into a motel and being asked your automobile license plate number. You know it but can't recall it at the time."

Possley, as well as other defense witnesses, testified adamantly to the jury that they believed his paraphrase of "keep your mouth shut" was accurate.

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***Possley stated at his deposition taken in 2002, that he "knew" Gorajczyk had not testified before the DuPage grand jury. It was this testimony that likely led the pretrial motions judge to conclude that there was sufficient evidence of "actual malice" to go to trial.***

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### ***Other Coverage of Plaintiff***

Before trial, the assigned judge dealt the defense a major blow. He ruled that other negative publicity about Knight (there was a large haystack) would be inadmissible and could not be mentioned to the jury. The defense had planned to make extensive use of this other media evidence to show that Knight's claimed damage from the single 29 word sentence in a 5000 plus word article which was published amidst a flood of far more critical commentary by other publishers was preposterous.

Knight claimed the statement was defamatory per se and maintained that not only could he rely on presumed damages which in his mind were conclusive, but the Defendants could not present evidence to rebut presumed damages. The court disagreed with Knight's position that presumed damages could not be rebutted and admonished

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## The Tribune's Trial of the Century

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Knight that once he opened the door to his reputation that he would reconsider his ruling on the other media evidence.

The judge ultimately relented slightly on his pretrial ruling by permitting a very truncated admission of other media critical of Knight. For example, the defense was permitted to play a 90-second clip from an hour long A&E documentary which accused Knight directly of "a violation of Illinois law" by not revealing the exculpatory boot examination to the defense. On cross-examination when Knight was asked if he had ever complained to A&E about this broadcast, he replied: "You can't sue everybody."

Knight also hurt himself by answering written discovery with the word "none" when asked about evidence of his damage. He had largely refused during discovery to allow inspection of his firm's or his own financial documents. He apparently had forgotten about his firm's website which revealed that he had negotiated a \$6.1 million settlement nine months after the article in question.

The website got into evidence when the judge ruled that the presumption was rebuttable and not conclusive. This, we were later told, would have been dispositive with the jurors on the issue of damages (but they didn't reach that question).

### Jury Selection and Questionnaire

Jury selection in Illinois is done in panels of four and as we began the selection we were aided greatly by a questionnaire, prepared by our outstanding jury consultants, Lyndon McClennan and Jason Bloom of Courtroom Sciences, Inc. Some of the jurors' answers were revealing. We selected a jury of 12 with 2 alternates. There were seven women and five men. Both alternates were Caucasian women. The real jury had four African-Americans and one woman of Eastern European descent, the remainder were Caucasian.

One juror wrote that she had little trust of the media, while three answered that they had a lot of trust. The rest said they had some trust of the media although some distinguished between the print and broadcast media, with the latter scoring higher on the trust scale. One juror said that on the issue of freedom of the press he was a seven or "very concerned" on a scale of 1 to 7. He was the only juror who rated freedom of the press concerns that high and yet was one of the jurors most critical of our case.

One juror did not answer any press questions on her survey. She turned out to be the most passionate advocate for our position in the jury room.

The trial judge was outstanding and excused many prospective jurors after uncovering (mostly by himself) hidden biases against either the Plaintiff or Defendants. One of the alternate jurors was seated without any such discovery. She was not allowed to deliberate but would have been a very negative juror for

the defendants. Nothing about her questionnaire or answers to oral questions revealed this bias.

### Pro se Opposing Counsel

Plaintiff, a veteran of over twenty-five years in the courtroom and literally hundreds of trials, represented himself – against the advice of the judge – and deliberately tried to set up the *David v. Goliath* theme. He sat at counsel table alone, seldom had any papers on his counsel table, and frequently fumbled for exhibits and papers.

The defense tried to minimize the visual impact of this disparity in people and resources by having the three defendants sit behind each of the three trial lawyers. In the end, some of the jurors remarked that they thought that Knight was faking it and that his solo performance was an "act," especially after we introduced his firm's website which trumpeted multi-million dollar recoveries in medical malpractice cases.

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***Plaintiff, a veteran of over twenty-five years in the courtroom and literally hundreds of trials, represented himself – against the advice of the judge – and deliberately tried to set up the David v. Goliath theme.***

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## The Tribune's Trial of the Century

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The jurors did not seem bothered at all about the staff representing the Defendants nor our state-of-the-art visuals and graphics. They, in fact, later commented how much the visual aids helped and impacted their determination.

In his case, Knight called Possley and Armstrong as well as other *Chicago Tribune* reporters and editors, including the columnist Eric Zorn, among his first several witnesses. The case might have been over when Possley left the stand after nearly three days of testimony. He was credible, forthright and temperate in his testimony. That is his nature but so often the courtroom brings out the worst, not the best, in journalist witnesses.

Likewise, Armstrong was direct and unruffled in his testimony – especially when Knight accused him of engaging in a “witch hunt against prosecutors.”

The judge refused to let Knight narrate his direct testimony and insisted that he bring in another lawyer to handle his examination. According to the judge and at least one of the jurors, Knight made a credible and sympathetic witness.

### Defense Calls Two Key Witnesses

In addition to a couple of custodian depositions to get documents into evidence, the defense called the Special Prosecutor Kunkle who indicted and prosecuted Knight, and former *Chicago Tribune* editor Robert Blau, who was involved in the change of attribution. Kunkle testified that while Knight was acquitted, Kunkle believed then and believes today that he withheld evidence and was guilty.

Blau, the editor, was a powerful witness not only for his acknowledged responsibility for the unknowing misattribution but also for his testimony about growing up in a household of first generation Americans who revered newspapers and the freedoms he enjoyed in this country which his father did not have growing up in Russia – testimony that is suspected to have resonated with at least one of the jurors.

### The Defense Attacks In Closing

After trial, the judge commented that he thought that defense counsel had overdone it in bringing out negative things about Knight in closing, especially how he had either negligently or intentionally withheld the exculpatory evidence and allowed innocent men to sit in prison – in some cases on death row – while he was complaining that his reputation had been harmed and that he suffered mental anguish over 29 words in the *Chicago Tribune*. As it turned out, the jurors (with the exception of the one alternate) were either not bothered by this or were empowered to make arguments in our behalf.

Closing arguments gave us the opportunity to say what we sometimes lose sight of in the intensity of a trial – what our clients do is vitally important in a democracy and what we do in defending them is equally important.

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**Closing arguments gave us the opportunity to say what we sometimes lose sight of in the intensity of a trial – what our clients do is vitally important in a democracy and what we do in defending them is equally important.**

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### Jury Deliberations And Verdict

Defendant Armstrong was dismissed on a directed verdict at the close of Knight's case. The twelve jurors deliberated for four hours and returned a general verdict in the remaining defendants' favor and also answered special interrogatories that there was no actual malice, there was no defamation, but there was material falsity.

They were not bothered by the attribution mistake but thought that “keep your mouth shut” was too harsh and different than “don't discuss this with anyone.” The two alternates were held over but deliberated in a separate room without a copy of the charge. In a later discussion with the jurors, one of the alternates was overtly sympathetic to Knight and stated she would have awarded Knight several millions of dollars.

The Plaintiff has filed a motion for new trial which will be heard later in the summer or early fall.

*Chip Babcock, Nancy Hamilton and Cedric Scott represented the Chicago Tribune, Maurice Possley and Ken Armstrong at trial, assisted by their Jackson Walker colleague Gary Washington and local counsel Pat Morris of Johnson & Bell.*

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## Clear Channel and Talk Radio Host Win Jury Verdict in Kentucky

By Richard Goehler

On May 24, 2005, a Jefferson County, Kentucky Circuit Court jury ruled against former WDRB-TV morning host, Darcie Divita, on every claim in her defamation and invasion of privacy lawsuit against Clear Channel Broadcasting d/b/a 84 WHAS Radio in Louisville and its former talk show host, John Ziegler. *Divita v. Ziegler*, No. 03 CI 09214.

After a five day trial and just two hours of deliberation, the jury of eight women and four men returned a defense verdict on all claims in a case which resulted from certain “personal” on-air comments broadcast by Mr. Ziegler about Ms. Divita in August of 2003.

### ***Background – Louisville’s “Reality Relationship”***

The case involved a “Reality Relationship” – one that was widely publicized in Louisville –

on television, on the radio, and in the newspaper. This Reality Relationship was played out in full for the public and the two participants in the relationship made no distinction between their public lives and their personal lives. The Relationship was between a television morning show anchor – just new to Louisville – Darcie Divita, and a talk radio host on 84 WHAS Radio – John Ziegler.

The Relationship began with much fanfare amid substantial promotional splashes made by WDRB-TV 41 (FOX 41) trumpeting Ms. Divita’s arrival to town, and on the Fox in the Morning show. Divita’s picture was plastered on billboards around Louisville and she was promoted very heavily on local television and radio.

In fact, the Relationship actually began even before Divita’s arrival in Louisville. After being hired by FOX 41 in late 2002, one of her new co-workers suggested to her that when she got to town she should go out on a date with John Ziegler, a highly rated radio talk show host. Divita enthusiastically agreed because she knew it would be good for promotions and for her ratings on Fox in the Morning.

The headline in the *Louisville Courier-Journal* on January 30, 2003 – Divita’s first day on the show – proclaimed,

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***The case involved a “Reality Relationship” – one that was widely publicized in Louisville – on television, on the radio, and in the newspaper.***

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“Fox in the Morning Signs Up New Co-Host.” In that article, Divita was quoted as saying, “I have a desire to learn everything, try everything and go everywhere . . . I want to jump full feet into this community.” And, as this case showed, she did just that – she jumped full feet into Louisville – not making any distinction between her public life – her life as a morning show anchor – and her personal life – when that was of benefit to her.

The other person in this Reality Relationship was John Ziegler. He was the host of The John Ziegler Show – a talk show on 84 WHAS Radio in Louisville, Monday–Friday from 9:00 a.m.–11:40 a.m., during which Ziegler would engage listeners, callers and guests on his show in talk and opinion about local, regional and national topics of interest.

As listeners to the show also recognized, Ziegler also talked extensively about his personal life. The goal of his show was to present perspectives in a way

that would both entertain and provoke thought.

Every Friday, The John Ziegler Show also included a segment at the very end called “Ask John Anything” in which Ziegler allowed callers to ask him questions on any subject, and prizes were given to caller who asked “the best questions you can ask about me, my life, my career, my views on anything you haven’t heard me express an opinion on that’s been in the news . . . It’s all pretty much fair game and we give away prizes to the best questions, comments or calls that we get during this hour.”

Nearly every one of Ziegler’s shows on 84 WHAS also began with his credo – “This is the show where host says what he believes and believes what he says.”

Within a few days of her heavily-promoted arrival to town – which was the first day of February sweeps – Ms. Divita was a guest on John Ziegler’s show – not only to promote her Fox in the Morning show, but to talk about their upcoming date that weekend. As one would expect, the Relationship was then played out on the radio.

Ziegler talked about their first date on his show on the Monday following their date, and then sent Divita an e-mail telling her that she should be “Thrilled!” Listeners

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## Clear Channel and Talk Radio Host Win Jury Verdict

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and viewers responded. This Reality Relationship was right in their own town. Their e-mails showed that they wanted to know more.

Divita enthusiastically promoted this personal relationship because it helped her public exposure to Louisville, which she thought would help her show. During her second full week in Louisville, she was a guest on the Terry Meiners Show, an afternoon talk show on WHAS. They talked about her show and about her first date with Ziegler. Divita also used her own Fox in the Morning show to promote the relationship. She talked about dating Ziegler on her show on Valentine's Day – February 14. The e-mails from listeners and viewers continued to flood in to both Ziegler and Divita, copies of which Divita provided to her news director to be kept in her personnel file at FOX 41.

On February 21, 2003, just three weeks into Divita's arrival in Louisville, Ziegler spent part of his talk show discussing the topic of the "dating scene" in Louisville. On his show that day was a guest who had written a song entitled, "I Like Darcie" to the tune of In-A-Gadda-Da-Vida. The guest sang the song on the radio. Divita was listening and called into the show:

*Ziegler: "Alright. Well, actually, Darcie's on the phone, so let's get her reaction to this.... Darcie Divita from FOX 41, welcome back.*

*Darcie Divita: "Hi, how are you?"*

*Ziegler: "What do you think?"*

*Divita: "First of all, how spectacular ... I mean, I'm truly swept off my feet. In all my years of dating, I don't think anyone's ever wrote a song about me. So thank you. It's great. . . ."*

It was about this time, in late February/early March 2003, that Divita decided to begin dating other men – again, with the thought that these were the men who would help her in her career. She dated a highly successful plastic surgeon in town and later a local business man with a large auto dealership. Divita tried to keep these other dating relationships a secret from Ziegler – who believed that he and Divita had an exclusive, intimate relationship.

As March rolled around, Divita was able to arrange a trip to attend and cover the Academy Awards in California for Fox in the Morning. Still basking in all of the public exposure, she called in to The John Ziegler Show from California to relate her experiences, which included being ogled and harassed by actor Mickey Rourke who, she told the listeners of The John Ziegler show, was staring at the breasts of women, including her own.

By early April, Divita had only been on the air two full months in Louisville, but format changes were already underway for her Fox in the Morning show since the ratings were suffering.

On April 8, Ziegler was invited to be a guest on her show. Afterwards, on his own radio talk show, Ziegler was critical of Fox in the Morning, giving his opinion that the show lacked chemistry between the main anchors, Darcie Divita, and her co-host, Darrin Adams. By that time, Ziegler had begun referring to Darcie and Darrin as "the dork and the devil."

The month of May rolled around and everyone knows that early May is Derby Week in Louisville, Kentucky. Divita covered the parties and fashions at the Derby for Fox in the Morning. She was also again a guest on the John Ziegler Show to talk about those parties and fashions.

The month of May is also a key sweeps period in the television industry and, as it turned out, the Fox in the Morning show lost forty percent of its viewers during that critical ratings month. As a result, format and personnel changes continued and the show fired Jim Bulleit, Divita's co-worker who had originally set her up on her first date with John Ziegler.

Following his termination by WDRB-TV, Bulleit was a guest on The John Ziegler Show on June 20, 2003 and used that forum to criticize WDRB/FOX 41, its management, and the remaining Fox in the Morning show team. At that point, management at the local media companies stepped in to this Reality Relationship chronology. Bill Lamb, the general manager of WDRB, which happened to be a regular advertiser on the local Clear Channel radio stations, called Bill Gentry, the general manager at WHAS Radio, to complain about the treatment of his television station and its morning show team by John Ziegler.

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## Clear Channel and Talk Radio Host Win Jury Verdict

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As a result, WHAS management felt it was time to pull the Reality Relationship off its air. In late June, both Bill Gentry and Kelly Carls, the program director at WHAS Radio, told Ziegler that he should stop talking about the personal lives of Darcie Divita and others at FOX 41 on his radio show.

Meanwhile, WDRB management made additional personnel changes on the Fox in the Morning show and, as a result, the plug got pulled on Divita's reality career in Louisville. After only seven months on the air, Divita's employment was terminated by FOX 41.

### ***The August 22, 2003 Broadcast – He Believed What He Said And Said What He Believed.***

Friday, August 22, 2003 was Darcie Divita's last day on Fox in the Morning in Louisville. Again, the *Courier-Journal* headlines of the day preceded the events: "WDRB's Early Show Losing Two Personalities." The article went on to say, "She [Divita] signed on to be the host of more of an entertainment show," Lamb said, and she was concerned about the program's move toward more of a straight newscast. "Divita was never hired to be a news anchor, but the co-host role really didn't fit in the new format," Lamb said.

Ziegler invited Divita to be a guest on his show on that Friday – her last day on the air. She did not come on the show. But Ziegler's listeners were interested and during a segment on his show that day Ziegler discussed the "demise of Darcie Divita."

After mentioning that they went out on several dates, he said,

I believe Darcie to have a problem with the truth. I believe it's possible she may be pathological in her problems with telling the truth, especially when it comes to how many people she's dating and – where and when she is, and – and also things about her background and her history, which don't seem to jibe with what she says about herself, all of which, of course, basically, no matter how hot you are, makes you ineligible to date me, because you have to at least tell the truth. I mean, you can have the best fake breasts

in the world, which Darcie does, by the way. Darcie has probably the best fake breasts. Whoever did her fake breasts deserves some sort of Nobel prize.

After a brief interruption he added: "We've bashed the morning show pretty good," and referred to Divita and her co-host Darrin as the "dork and the devil." "She was the devil, he was the dork." After a general discussion regarding FOX 41's ratings, Ziegler talked about other topics of interest that day.

At the conclusion of his show that Friday, during the "Ask John Anything" segment, the first caller asked about Divita and any additional reasons for her being fired by FOX 41. The caller also asked why Ziegler and Divita could not get along.

Ziegler stated:

Well, because she's a liar and because she was dating a lot of the guys without being honest about it, none of which is very conducive to – to dating me – we had a good time. I mean, there's no question, she's a lot of fun. She's a lot smarter than she appears to be on the air. A lot smarter. She's a very smart person. Which is part of the reason why we referred to her the – as the devil. I mean, the devil is very conniving, very smart and crafty, and – Darcie definitely fits into that category.

The second caller asked Ziegler what Divita had against wearing dresses and skirts: "Every time you see the woman she's got slacks on." Ziegler responded, "I'm not exactly sure why that is. Although, I have a – theory as to why that might be. Because – oh man, peo – people are gonna – do you know where I'm going with this?"

Caller: "Well, go ahead."

Ziegler: "Darcie does not wear underwear."

Caller: "Holy Mackerel, I didn't know that."

Ziegler: "And – and – if she were to wear a skirt on the air with the z- with the set the way that it is, that would create some dangerous circumstances. Although, depending on the lighting it would probably be very difficult to tell, if you know what I mean ... because

(Continued on page 32)

## Clear Channel and Talk Radio Host Win Jury Verdict

(Continued from page 31)

she's very well kept in that area. So I probably told way, way more than I should have, but you asked me the question. That's the best answer I can come up with."

Ziegler then indicated he would take one last call on the Divita subject. The next caller then asked if Divita was "ladylike or was she kind of a little on the trashy side?" Ziegler answered that Divita was "both a tease and – fairly easy at the same time," and that she would "let you into the ballpark . . . but – but to go all the way home was a lot more difficult."

There were four more callers to this segment of the show (none of which involved Divita), and none of the questions relating to Divita won the prize for the day.

Following Ziegler's broadcast of August 22, WHAS management did receive some complaints – including another complaint from Bill Lamb, the general manager at FOX 41.

Prior to Ziegler's next scheduled show the following week, management of the radio station met with Ziegler and it was agreed that he would broadcast an apology to Ms. Divita. On August 26, 2003, Ziegler apologized "for going way too far" on his show regarding the remarks he had made about Divita. 84 WHAS Radio also broadcast a separate station apology.

The next day, August 27, WHAS management decided to terminate the employment of John Ziegler on the grounds of insubordination – for failing to follow the directive of management which had been given to him at the end of June not to talk about personal matters concerning Ms. Divita. (Several months later, in December 2003, John Ziegler was hired by Clear Channel – Los Angeles. He continues to be employed by Clear Channel as a highly-rated talk show host on KFI-AM 640.)

### ***The Complaint***

Following the August broadcast, Divita retained high profile Louisville attorney Thomas E. "T" Clay to represent her. Clay filed a complaint on her behalf in October 2003,

generally alleging claims against 84 WHAS and Ziegler for defamation, invasion of privacy, intentional infliction of emotional distress and negligent hiring/supervision.

The parties conducted some discovery – primarily depositions of key individuals (Divita, Ziegler and WHAS management – Bill Gentry and Kelly Carls) – and motions for summary judgment were filed on behalf of both WHAS Radio and Ziegler. Judge Geoffrey Morris granted the motions in part and denied them in part.

The media defendants were frustrated by the denial of summary judgment on the defamation claim since

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***The media defendants were frustrated by the denial of summary judgment on the defamation claim since the record established that many of Ziegler's statements about Divita were admittedly true, or were clear statements of his opinion.***

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the record established that many of Ziegler's statements about Divita were admittedly true, or were clear statements of his opinion provided in the talk radio context.

In addition, the record established that there was no evidence of any constitutional actual malice – Divita, a public figure, did not present any evi-

dence that Ziegler broadcast any statements about her with knowledge of falsity or with serious doubts as to the truth or falsity of those statements.

In addition, the media defendants were perplexed about the survival of the invasion of privacy claims since, under well-established Kentucky law, the right of privacy does not prohibit: 1) any publication of a matter which is of public or general interest; 2) the publication of a matter which is a privileged communication according to libel and slander law; 3) statements which are oral; and 4) a publication which is true. *McCall v. Courier-Journal and Louisville Times Company*, 623 S. W.2d 882, 887 (1981).

Accordingly, the media defendants tried again – filing motions for reconsideration on these grounds. Those motions were summarily denied.

Thereafter, the remaining claims – claims for defamation, false light invasion of privacy, public disclosure of private facts and intentional infliction of emotional distress – were then set for trial.

(Continued on page 33)



## Clear Channel and Talk Radio Host Win Jury Verdict

(Continued from page 32)

### **The Trial**

Pretrial proceedings and trial preparation became a bit contentious as Divita's counsel submitted an initial witness list of over 60 proposed witnesses and over 120 proposed exhibits – which clearly reflected a trial strategy aimed at introducing evidence of “bad” character of Ziegler, and evidence that would only have been relevant to the claim for negligent hiring/supervision which had been dismissed by the court on summary judgment.

At the final pretrial conference, a few days before the trial was set to start, Judge Morris asked at one point, “Have you all attempted to settle this?” The *Courier-Journal*, which provided extensive coverage of the trial proceedings, reported the following exchange:

The attorneys told the judge not to get his hopes up.

Richard M. Goehler, a lawyer for Clear Channel, described a settlement demand from Divita's lawyer as “outrageous,” adding: “Ms. Divita brought the case. She has not given any indication she wants to do anything but come to Louisville and tee it up.”

Clay said that he wasn't surprised that his initial offer would be termed “outrageous” by opposing counsel, prompting the judge to quip, “Mr. Clay, it probably was.”

As the jury selection process began, Judge Morris told prospective jurors that, “this is not the average civil case” and that those selected for the jury would be “fascinated” by the evidence and deliberations. Attorney Clay's questioning of prospective jurors continued to show Divita's trial strategy – Plaintiff's case would be all about spite, ill will, and retaliation – Ziegler would be cast as the “spurned suitor” who used his 50,000 watt radio station to damage the reputation of Darcie Divita.

During his opening statement, Clay described Plaintiff's evidence of “actual malice” in the following way:

Incidentally, you are going to hear about Mr. Ziegler's attitude about Louisville and the women in Louisville, which I think is – you'll agree with me is going to be somewhat degrading, but Mr. Ziegler did all this, ladies and gentlemen, and he did it – the Judge is going to give you a definition in a few minutes about actual malice.

You are going to hear in this case overwhelming evidence that John Ziegler acted with actual malice toward Darcie Divita. He was a spurned suitor, and that's why he got mad. You are going to hear about the enemies list, that she got on the enemies list. You're going to hear what it takes to get on the enemies list.

Following the opening statements, Judge Morris did give a preliminary initial instruction on constitutional actual malice, but then, over repeated and continued objections from counsel for the Defendants, allowed Plaintiff to present evidence that went *only* to spite, ill will and in support of Plaintiff's trial theme that Ziegler was a “spurned suitor.”

In one of the more dramatic moments of trial testimony, in tears on the witness stand with her voice shaking, Divita spoke directly to Ziegler about their relationship.

“The girl you wanted didn't want you. I'm sorry about that. But you didn't have to make sure nobody else wanted her. I have to rebuild who I am.”

In a post-trial interview with the media, the jury foreman said that the emotional testimony from Divita did not affect the jury's decision. Certainly, more relevant, was Divita's testimony on cross-examination where she admitted that “John believed what he said on his radio.”

The jury instruction process also proved to be a significant challenge for the media defendants. Kentucky civil practice generally provides for only very “bare bones” jury instructions – which clearly were at odds with a typical First Amendment-focused set of jury instructions in a case involving a public figure plaintiff asserting claims for defamation and invasion of privacy against media defendants.

Judge Morris went back and forth on his decision concerning the appropriate application of the actual malice standard. At one point, the Judge indicated that he would apply the actual malice standard to *all* of Plaintiff's claims. Later, he indicated that he did not believe that *Hustler v. Falwell* controlled and said that he would not apply the actual malice standard to the intentional infliction of emotional distress claim.

Thereafter, almost immediately prior to closing arguments, Judge Morris decided that he would apply the actual malice standard to the intentional infliction of emotional

(Continued on page 34)

## Clear Channel and Talk Radio Host Win Jury Verdict

*(Continued from page 33)*

distress claim, but not to the public disclosure of private facts claim. The final set of jury instructions, therefore, applied actual malice to the defamation claim, the false light claim, and the intentional infliction of emotional distress claim against Mr. Ziegler. *None* of the media defendants' proposed instructions on the applicable defenses, including substantial truth, opinion, or proximate cause, were given.

During closing arguments, counsel for Divita stayed on theme, attacking Ziegler as the retaliating spurned suitor. Plaintiff's closing arguments made no real attempt to address the constitutional actual malice issue.

Accordingly, a substantial amount of time was used during the closing for 84 WHAS Radio to explain to the jury the burden of constitutional actual malice and what that standard included (knowledge of falsity and/or serious doubts as to the truth of the statements at the time of publication) and what constitutional actual malice did not include – spite, ill will, and hatred.

### ***A Complete Defense Verdict***

Fortunately, as the jury foreman indicated in his post-trial interviews with the media, the jury understood the concept of constitutional actual malice and followed the law. "It was offensive to everybody," said jury fore-

man, Paul Priddy. "But it all had to go back to the case of actual malice and that's where we stood." "They didn't prove any actual malice," Priddy said.

The verdict returned by the jury was unanimous on the defamation claim (12-0); unanimous on the false light claim (12-0); unanimous on the intentional infliction of emotional distress claim against Ziegler (12-0); and 10-2 in favor of Defendants on the public disclosure of private facts claim.

In his typical fashion, following the verdict, Ziegler said what he believed and he believed what he said, "I think the jury deserves an awful lot of credit for being able to see through an enormous amount of bull crap that was being piled their way by T Clay."

Divita says she will appeal. "We're not going to give up. We believe in what we said we believed in, fighting for – and I believed in fighting for – him crossing the line . . . ."

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***The jury understood the concept of constitutional actual malice and followed the law.***

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*Richard Goehler and Joseph Tomain of the Cincinnati office of Frost Brown Todd LLC and Amanda Main of Frost Brown Todd's Louisville office represented Clear Channel Radio d/b/a 84 WHAS. Talk radio host John Ziegler was represented by attorney Ken Sales of Louisville. Plaintiff Darcie Divita was represented Thomas E. Clay, of Clay, Kennealy, Wagner & Adams PLLC of Louisville, Kentucky.*

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## Utah Appeals Court Recognizes Neutral Report Privilege

Showing that good facts can make good law, the Utah Court of Appeals adopted the neutral report privilege in affirming dismissal of a pro se plaintiff's libel and false light claims against a Utah newspaper and individual reporters and editors. *Schwarz v. Salt Lake City Tribune*, 2005 WL 1037843, 2005 UT App 206 (May 5, 2005) (Billings, Davis, and Jackson, JJ.).

### ***"A FOIA Terrorist"***

The complained of article, published in May 2003, was headlined "[Salt Lake] Woman's Quest Strains Public Records System." It discussed plaintiff's history of filing dozens of frivolous request and lawsuits seeking information about "her Utah hometown" (which, in fact, doesn't exist); her allegations of wide-ranging government conspiracies and her own self-published tale claiming kinship to L. Ron Hubbard, founder of the Church of Scientology, and descriptions of being "kidnaping by Nazis, mind control, conspiracy, hidden fortunes ... and micro chips implanted in unsuspecting peoples' heads."

The article also reported that federal workers had dubbed plaintiff a "FOIA terrorist" and coined the verb "have you been Schwarzed" to describe her unending requests for information. It also quoted a Scientology official who described Schwarz as "delusional."

A trial court dismissed plaintiff's claims in September 2003.

On appeal, the media defendants argued, among other things, that the newspaper report was protected by the neutral report privilege. They argued that the privilege applied not only to the neutral reportage of allegations made by "prominent" or "responsible" persons, but to all neutral reports of serious charges made in the course of public controversies.

### ***Court Adopts Neutral Report Privilege***

In a short decision, the Utah Court of Appeals affirmed dismissal, stating that the article "is covered by the neutral reportage privilege because it contains 'accurate and disinterested reporting' of the information contained in the record." Citing *Edwards v. National Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir.1977).

Quoting from *Edwards*, the court further stated the "the public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them."

The short decision does not discuss the underlying controversy about plaintiff's lawsuits – but their nature is hinted at as the court went on to affirm dismissal of causes of action for "abuse of her personal identity, copyright violation, theft by deception, fraud, and breach of contract" and failure to disqualify the trial court judge.

The Utah court's decision is a welcome endorsement of a privilege that has so far been met with only limited success in the courts. Earlier this year, for example, the Pennsylvania Supreme Court expressly rejected the privilege, finding there was no constitutional basis for it and expressing concern that it would undermine the state's interest in protecting reputation. *Norton v. Glenn*, 860 A.2d 48, 32 Media L. Rep. 2409 (Pa. 2004), *cert. denied*, 125 S.Ct. 1700 (U.S. 2005).

The media defendants were represented by Michael Patrick O'Brien, of Jones Waldo Holbrook & McDonough PC, in Salt Lake.

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## No Privacy for Drug Smuggler

By Katherine M. Bolger

The U.S. Court of Appeals for the Eleventh Circuit affirmed dismissal of an invasion of privacy claim brought by a convicted drug smuggler, Paul Alexander, against an author and book publisher for allegedly outing the smuggler as a cooperating individual for the Drug Enforcement Agency (“DEA”). *Alexander v. HarperCollins Publishers Inc. and Bernard B. Kerik*, No. 04-12801, 2005 WL 1163612 (11th Cir. May 18, 2005) (Edmondson, Tjoflat, Kravitch JJ.).

### Background

The plaintiff, who has been incarcerated in federal prison in Georgia for importing massive quantities of cocaine into the United States while at the same time nominally working as a cooperating individual (“CI”) for the DEA, sued HarperCollins Publishers Inc. and the author, Bernard Kerik, the former police commissioner of the City of New York, for invasion of privacy and negligent publication based on the book *The Lost Son: A Life In Pursuit of Justice*.

The book recounted in detail Alexander’s role as a CI for the DEA and Alexander’s ultimate betrayal of the DEA by importing cocaine. Alexander claimed that the publication of the admittedly truthful fact of his CI status put his and his family’s lives in danger.

In particular, Alexander claimed that passages in the book that detailed Alexander’s involvement with specific drug trades and/or specific drug traffickers and drug trafficking organizations placed Alexander’s life in danger by identifying him to members of the Cali drug cartel. Alexander also complained that a passage in the book that described his wife and children and stated that they now lived in Brazil put their lives in danger, as well.

Several months before Mr. Alexander filed the action against HarperCollins and Kerik, Mr. Alexander had filed a similar action for invasion of privacy based on the book *Without A Badge* by Jerry Speziale, published by Kensington Books.

That action, like the HarperCollins action, sought damages for the publication of the allegedly private fact that Mr. Alexander was a CI for the DEA. The defendants in the Kensington action had moved to dismiss that complaint on the grounds that Mr. Alexander’s identity as a CI was a public fact.

Judge Anthony Alaimo of the United States District Court for the Southern District of Georgia denied the motion to dismiss on the grounds that, while Mr. Alexander’s status as a CI was a private fact, the specifics of his involvement in drug trafficking were not public. On that basis, Judge Alaimo allowed the action to proceed.

Despite this precedent and despite the fact that the HarperCollins action was also assigned to Judge Alaimo, Kerik and HarperCollins moved to dismiss the complaint in the HarperCollins action or in the alternative for summary judgment, on the basis

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***The fact that Alexander was a CI turned drug smuggler was a matter of public interest such that Alexander could not maintain a cause of action for invasion of privacy.***

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that the First Amendment barred Mr. Alexander’s claim.

Specifically, the defendants argued that, because the book involved a matter of public interest, the First Amendment barred an action for invasion of privacy. In addition, the defendants argued that, under the U.S. Constitution, no cause of action for the negligent publication of truthful facts was permissible.

The defendants also argued that because the fact of Alexander’s CI status was available in court files, the publication of that information was protected by the absolute privilege articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and the qualified privilege articulated in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). Finally, the defendants argued, the fact of Alexander’s status as a CI was not a private fact.

In so arguing, the defendants pointed to information that had not been brought up by the defendants in the Kensington action, specifically that Alexander’s status as a CI – as well as his involvement in specific drug transactions – had been established in the court files related to his criminal conviction (including a decision of the Eleventh Circuit), and in various publications available before the publication of the book.

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## No Privacy for Drug Smuggler

(Continued from page 37)

### **Summary Judgment Granted**

Judge Alaimo granted the HarperCollins defendants' motion for summary judgment, concluding that the fact that Alexander was a CI turned drug smuggler was a matter of public interest such that Alexander could not maintain a cause of action for invasion of privacy. Judge Alaimo also concluded that the First Amendment barred a negligence claim arising out of the truthful publication of speech on a matter of public interest.

After judgment was entered, Mr. Alexander moved to amend the complaint to assert a breach of contract action against Mr. Kerik, arguing that Mr. Kerik's conduct was governed by Mr. Alexander's cooperating individual agreement with the DEA, even though Mr. Kerik was neither a signatory to that agreement nor a DEA employee. Alexander also moved to amend the judgment to allow Alexander to proceed on his breach of contract claim.

Judge Alaimo denied the motion, holding that it was not appropriate to amend a complaint after the entry of judgment dismissing that complaint. Judge Alaimo also denied the motion to amend the judgment on the grounds that Mr. Alexander should have asserted the breach of contract claim in the original complaint. Mr. Alexander appealed the grant of the motion for summary judgment and the denial of the motion to amend the judgment.

On May 18, 2005, in a *per curiam* opinion the Eleventh Circuit unanimously affirmed the lower court's decision that "the First Amendment shielded HarperCollins and Kerik from liability." Further, the Court upheld the denial of Mr. Alexander's motion to amend the judgment.

*Slade R. Metcalf and Katherine M. Bolger of Hogan & Hartson L.L.P. represented HarperCollins and Bernard Kerik in this lawsuit. Plaintiff was represented by Andrew McCanse Wright, Jackson Kelly PLLC, in Morgantown, West Virginia.*

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## Texas Supreme Court Grants Summary Judgment to Newspaper

At press time, the Texas Supreme Court granted summary judgment to Freedom Newspapers in a libel suit brought by a public official over coverage of his statements at a candidates debate. *Freedom Newspapers of Texas v. Cantu*, No. 04-0115, 2005 WL 1489924 (Tex. June 24, 2005) (Brister, J.), *reversing*, 126 S.W.3d 185, 32 Media L. Rep. 1555 (Tex. App. 2003). See also *MediaLawLetter* Oct. 2003 at 59.

In a unanimous decision, the Court concluded that discrepancies between the news reports and what plaintiff actually said at the debate were insufficient evidence of actual malice to withstand a motion for summary judgment.

### Background

The plaintiff in the case, Conrado M. Cantu, was the successful candidate for sheriff in Cameron County, an overwhelmingly Hispanic county in Texas. Cantu sued his local newspaper for libel, claiming that the paper's coverage of a candidates debate misrepresented statements he made about the importance of his heritage and Spanish language fluency.

The newspaper report on the debate began with the sentence "No Anglo could ever be sheriff of Cameron County, Conrado Cantu said Wednesday during a debate with his opponent ...."

Cantu did not use that phrase but stated "you have to have the right character to be a sheriff .... You have to be bi-cultural to understand what is going on in our neighborhoods, where there is a lot of burglaries, how are you going to relate to these people – in Spanish."

In a follow up report, the newspaper published plaintiff's statement that "I did not say that an Anglo could not be sheriff," as well as statements from voters at the debate. One woman understood plaintiff to mean that "the only person who could be sheriff is an Hispanic." Another "didn't hear it that way" and said "claiming that he said no Anglo could ever be sheriff wasn't a fair representation" of plaintiff's comments.

The trial court denied summary judgment. The appellate court affirmed, concluding that there was sufficient circumstantial evidence of actual malice to defeat summary judgment.

### Texas Supreme Court Decision

Reversing, the Texas Supreme Court held that reasonable readers would conclude that the newspaper was interpreting the plaintiff's statements, not quoting them verbatim. Moreover, while plaintiff never used the precise words stated in the newspaper article "the standard is whether that summary was a rational interpretation of what he said." Here plaintiff's remarks could be rationally interpreted as a plea for ethnic solidarity.

The Court also rejected other circumstantial evidence of actual malice relied on by the appellate court to deny summary judgment. First, allegations that officials at the newspaper "had it out" for Cantu was not significant because "actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff." Second, the newspaper's follow up article was not a republication of the allegedly defamatory remarks. In fact, the Court found the second article showed an absence of actual malice. Third, the Court noted that an editor's questioning of the reporter after Cantu complained was irrelevant to the issue of defendants' state of mind during the editorial process.

Finally, the Court rejected the testimony of plaintiff's journalism expert, Alfred Lorenz, who testified that the newspaper had a pattern of biased reporting about Cantu. Actual malice, the Court again noted, involves an inquiry into the mental state of defendant, and the expert could not show that the newspaper "knew its articles were not a rational interpretation of Cantu's remarks."

John A. Bussian, The Bussian Law Firm, Raleigh, North Carolina, and Jeffrey T. Nobles, Beirne, Maynard & Parsons LLP, Houston, Texas, represented Freedom Newspapers of Texas. Jorge C. Rangel, Jon D. Brooks, The Rangel Law Firm, PC, represented Amici Curiae Scripps Newspapers of Texas, LP and Southern Newspaper Publishers Association. Plaintiff was represented by Victor Quintanilla, Larry Zinn and Ernesto Gamez, Jr.

## New Jersey Court Issues Split Decision In Reality TV Privacy Class Action

By David McCraw

Two patients at a New Jersey hospital who allege their privacy was invaded by a television documentary show will not be allowed to bring their case as a national class action – but can proceed with a class action on behalf of other patients at the hospital, a New Jersey Superior Court judge ruled this month. *Castro v. NYT Television*, No. MON-L-2743-03 (Super. Ct. June 3, 2005), (Locascio, J.).

### Background

The patients were filmed in 2001 at Jersey Shore Medical Center by a crew from the show, *Trauma: Life in the ER*, which was produced by NYT Television, a division of The New York Times Company. While both patients signed consents to be filmed, they now contend that the consents were invalid. Several other patients, all represented by the same New Jersey plaintiffs' lawyers, have brought identical suits challenging the consents they signed at the time of the *Trauma* filming.

The decision on class certification was handed down by Judge Louis Locascio of Superior Court, Monmouth County. Both The Times and the hospital are defendants, as is Discovery Communications, Inc., which aired the *Trauma* series, including the two episodes focusing on Jersey Shore Medical Center, on The Learning Channel.

The popular *Trauma* show was filmed regularly over a seven-year period at hospitals around the country. With the consent of patients and the hospitals, crews would film interesting cases as they passed through emergency rooms and trauma centers, then interview doctors, patients, and family members about their experiences.

The Times argued, among other things, that neither a national nor Jersey Shore hospital class should be certified because individual facts, not common facts, would predominate, and because class treatment was not superior, given the inescapable need for claimants to attempt to vitiate written consent on a patient-by-patient basis.

The Times pointed out that each named plaintiff had signed a consent form, each individual claim would therefore turn on the factual circumstances of the signed consent, and the various plaintiffs in these cases have offered differing reasons for why the consent should be vitiated.

One plaintiff has argued that he was under medication, another claimed that he was induced to sign by false promises, and still others allege that they did not understand the consent or thought that the filming was to be used only for training of medical personnel. There was no evidence of a common "script" or writing that allegedly rendered consent invalid.

Without addressing the Times' showing that no claims could be valid absent individualized testimony (rendering class certification an inferior way of proceeding), Judge Locascio opined that "some variation among class members is permissible" and certified the Jersey Shore hospital class.

Nonetheless, he rejected a national class, holding that such a class would be unmanageable because state laws on privacy differed, different hospital defendants would be involved, and The Times used different film crews at other hospitals. In seeking a national class, plaintiffs sought to represent what they claimed to be "hundreds of thousands" of patients at the 35 hospitals in 23 states where *Trauma* was shot.

The court's decision did not define the class that was being certified. While plaintiffs' complaint focused on patients who were filmed by the *Trauma* crew, their lawyers later argued in their motion papers that the class should include any patient at Jersey Shore Medical Center who was observed by a *Trauma* employee, whether the patient was filmed or not. The court did not directly address the issue, but used the phrase "observed and filmed" in discussing the class in the decision.

While plaintiffs speculate that the Jersey Shore Medical Center class could contain as many as 5,000 patients – a number apparently derived from the total number of admissions during the period when filming was taking place – it is impossible to estimate the size of the class because of the uncertainties surrounding the definition of the class.

The defendants intend to appeal.

*David McCraw is Counsel at The New York Times Company. The Times is represented by Chuck Sims and Matt Morris of Proskauer Rose in New York. Jersey Shore Medical Center is represented by J. Barry Cociello of Podvey, Meanor, Catenacci, Hildner, Cociello & Chattman of Newark, N.J. Plaintiffs are represented by John Keefe Jr. and Gerald Clark of Lynch Keefe Bartels of Shrewsbury, N.J., and Kevin Parsons of Gill and Chamas of Woodbridge, N.J.*



## Illinois Appellate Court Dismisses Defense Lawyer's Lawsuit Based On Mob Book

By Jeffrey O. Grossman

An Illinois appellate court has affirmed the dismissal of a case brought by a Chicago criminal defense lawyer who claimed that a non-fiction book discussing his representation of organized crime figures implied that he had acted unethically or criminally. *Tuite v. Michael Corbitt, Sam Giancana, and HarperCollins Publishers Inc.*, No. 1-03-3768, 2005 Ill. App. LEXIS 566 (June 7, 2005) (Garcia, J.).

The court rejected the lawyer's claims for libel *per se* and false light invasion of privacy, as well as his claim that the book's publisher and authors had intentionally inflicted emotional distress upon him by stating in the book that they were surprised that he was not ultimately "whacked" by dissatisfied mafia clients.

### Background

The plaintiff is a well-known criminal defense lawyer in Chicago named Patrick A. Tuite. He sued HarperCollins Publishers Inc. and authors Michael Corbitt and Sam Giancana for references to him made in the book *Double Deal*. In that book, Corbitt, a former Willow Springs, Illinois policeman, described his life and involvement with organized crime, an account billed on the book's cover as "The Inside Story of Murder, Unbridled Corruption, and the Cop Who Was A Mobster." Tuite was mentioned in six pages of the book due to his involvement in the trial of a major organized crime figure in the mid-1980s.

In his complaint, filed in the Circuit Court of Cook County, Illinois, Tuite asserted claims for defamation and false light invasion of privacy based on the book's report that Tuite's mafia clients believed that by hiring the "big shot" lawyer Tuite, who had "represented mob cases in the past," their acquittals were "a done deal" and Tuite "had it all handled."

Tuite alleged that, with these statements, the book implied that he had been hired to get his clients acquitted not through his legal skill, but by engaging in bribery. Tuite asserted that this reading was supported by the fact

that the authors of the book stated that they were surprised that Tuite's clients did not have him "whacked," *i.e.*, killed, once they were convicted rather than acquitted, and by the fact that the book described Tuite as having demanded, and received, a \$1 million retainer for his services.

Tuite further alleged that the book attributed criminality to him because it described that his clients obtained the money to pay his \$1 million retainer by "skimming" it from their operation of Las Vegas casinos.

Tuite's claim for intentional infliction of emotional distress was based on the authors' expression of surprise that Tuite was not "whacked" after his clients were convicted, as well as general statements that co-author Michael Corbitt allegedly made in marketing the book that the secrets revealed within it could lead members of organized crime to "whack" people.

### Trial Court's Decision

Illinois follows the "innocent construction" rule. Under this standard, even if a court finds that a passage is reasonably susceptible to a defamatory construction, if the passage is *also* reasonably susceptible to an innocent construction, a claim for libel *per se* must be dismissed as a matter of law. (A libel *per se* claim is one where the plaintiff alleges only general reputational damage rather than "special damages," which are a specific pecuniary loss that is directly linked to the alleged defamation.)

In August 2003, the defendants moved to dismiss the complaint. The defendants argued that Tuite's claims for libel *per se* and false light invasion of privacy should be dismissed because the passage could reasonably be construed innocently, and that the emotional distress claim should be dismissed because the authors' comments did not rise to the level of "extreme and outrageous" conduct necessary to sustain such a claim.

The plaintiff argued that the statements, when read in the context of a book about murder and corruption written in the vernacular of Mafiosi, were not capable of any reasonable innocent construction, and that the comments were sufficiently "extreme and outrageous" because they were the equivalent of provoking and advocating for Tuite's murder.

(Continued on page 42)

## Illinois Appellate Court Dismisses Defense Lawyer's Lawsuit Based On Mob Book

(Continued from page 41)

On November 25, 2003, the Circuit Court granted the motion to dismiss. It agreed that the passage could reasonably be construed innocently, and dismissed the libel *per se* claim. The court also dismissed the false light invasion of privacy claim, holding that Tuite was not permitted to circumvent the restrictions imposed on libel claims that do not qualify as *per se* claims – specifically, the requirement that he plead special damages – by simply relabeling his claim as one for false light.

Finally, the Circuit Court rejected Tuite's claim for intentional infliction of emotional distress, holding that the statements were simply vague opinions and, most importantly, not the type of "extreme and outrageous" conduct necessary for a claim.

### ***Appellate Court Decision***

Tuite appealed the dismissal. On June 7, 2005, the Appellate Court of Illinois, First District, Second Division, affirmed the order of dismissal.

While the court recognized that "statements made in the form of insinuation, allusion, irony, or question may be defamatory," it held that the passage clearly had a reasonable innocent construction. This required dismissal of both the libel *per se* claim and the false light claim.

The court pointed out that, according to the book, the organized crime figures had hired Tuite because they wanted "better representation," from an attorney with experience having "represented mob cases in the past." It was therefore reasonable to read their willingness to pay him a \$1 million retainer simply as evidence of their recognition that such "better representation came at a price," and reasonable to read their belief that acquittals were a "done deal," as nothing more than "complete faith in . . . a high-priced and experienced attorney."

The court additionally noted that the \$1 million retainer was described in the context of a discussion about the mafia's reputation for not paying their attorneys' legal bills, and that Tuite was described as having played "hardball" with his clients to get paid this retainer up-front because he "was far from stupid."

The court observed that if Tuite had been asking for the \$1 million in order to engage in bribery and corruption on behalf of his clients, "it is unlikely he would have had to

play hardball to get those funds." Nor, the court found, did the book's statement that Tuite received the \$1 million retainer on the same night that one of the authors returned to Chicago with the Las Vegas "skim" "necessarily insinuate that the plaintiff knew that the funds were illegally obtained."

Lastly, the court rejected Tuite's argument that the context of the book, which recounted numerous instances of bribery and corruption engaged in by others, made it unreasonable to construe innocently the passage about Tuite. The court noted the explicit nature of the authors' language when they described illegal activities, and held that the fact that "the plaintiff and his activities are not described in this manner" further supported their finding that an innocent construction of the statements was "neither strained nor unnatural." Citing *Bryson v. News America Pub., Inc.*, 174 Ill.2d 77, 91 (1996).

The court also affirmed the dismissal of Tuite's claim for intentional infliction of emotional distress, holding that the defendants' conduct was not "so outrageous and extreme that it goes beyond all possible bounds of decency." The court held that the authors' "comments about something that did not happen, over an event that occurred nearly 20 years ago," did not rise to the necessary level of extreme and outrageous conduct, and were also merely vague expressions of opinion.

### ***The Dissent***

Although all three justices on the appellate panel concurred in the dismissal of Tuite's claim for intentional infliction of emotional distress, one justice dissented from the dismissal of the libel and false light claims. The dissent stated that the authors had "used a kind of code, apparently recognizing there are legal limits to what can be said about a lawyer. But the code is transparent." The dissent held that it saw no reason for the authors to refer to Tuite in "a book about 'unbridled corruption'" unless it was to describe him as corrupt, and that the passage clearly had no reasonable innocent construction.

*Slade R. Metcalf and Jeffrey O. Grossman of Hogan & Hartson L.L.P. in New York City, and David P. Sanders of Jenner & Block, LLP in Chicago, represented the defendant-appellees Michael Corbitt, Sam Giancana, and HarperCollins Publishers Inc. Paul Levy, Phillip J. Zisook, and Brian D. Saucier of Deutsch, Levy & Engel, Chartered, in Chicago, represented the plaintiff-appellant Patrick A. Tuite.*

## False Light Claim Fails Over Failure To Identify False Facts

By **Damon Dunn**

A false light claim against the *Chicago Sun-Times* and several of its reporters was dismissed with prejudice in the United States District Court for the Northern District of Illinois by Judge Elaine Bucklo in *Gyrion v. City of Chicago, et al.*, No. 04 C 5670 (May 4, 2005) (2005 U. S. Dist. LEXIS 9508).

### **Background**

The case arose out of the *Sun-Times*' award winning "hired truck program" series that investigated improprieties in how the City of Chicago leased privately owned trucks for city work. Several of the early stories focused on the Mayor of Chicago's cousin, Mark Gyrion, a water department official whose mother-in-law owned a lucrative business that leased trucks to the City.

After the *Sun-Times* broke the story, the City held a press conference to announce that Gyrion had been fired because he had "betrayed the public trust." Gyrion sued the City, Mayor Daley and two water commissioners for civil rights violations, defamation and false light, and sued the *Sun-Times* and its reporters for false light.

The *Sun-Times* filed a motion to dismiss under Rule 12(b)(6), arguing that Gyrion had not pleaded that it had published any verifiably false facts in the stories attached as exhibits to Gyrion's complaint, that the reports were substantially true based on admissions in his Complaint, and that the stories were not highly offensive because they constituted legitimate commentary on matters of public interest.

Gyrion responded that the articles collectively "exaggerated certain statements and/or presentation of the same" and thereby conveyed the false impression that he had acted unethically by concealing his involvement in the hired truck program when he allegedly had disclosed it to the City.

### **District Court Decision**

Granting the motion to dismiss with prejudice, the District Court agreed that the stories implied that Gyrion's mother-in-law "owed her lucrative HTP contracts to her relationship with Mr. Gyrion" but noted that this

conclusion was a "constitutionally protected expression of opinion about a matter of public interest."

The Court summarized several of the articles and concluded that Gyrion did not contest crucial underlying facts published in the stories and that his claim that the stories were "exaggerated" failed to state a cause of action.

On the other hand, the District Court denied the City Defendants' motion to dismiss. The Court ruled that statements made in the City press conference that Gyrion had betrayed the public trust and implying that he was a "foul ball" in an "honest" department could be deemed *per se* defamatory and to have placed Gyrion in a false light.

*Damon Dunn, a member of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago, Illinois, represented The Sun-Times and its reporters in this case. Plaintiff was represented by Maura Kathleen McKeever and James Patrick Kelly of Matuszewich, Kelly & McKeever, LLP, and the City Defendants by Corporation Counsel.*

## **MLRC Cyberspace Committee: Articles on Selected Topics 2004**

**JURISDICTION OVER INTERNET PUBLISHERS**  
*David A. Schulz & Kurt Wimmer*

**THE STATE OF THE LAW OF  
SECTION 230 IMMUNITY**  
*Patrick J. Carome, Samir Jain, & C. Colin Rushing*

**HAPPY SIXTH BIRTHDAY:  
EMERGING IMPLICATIONS FOR THE PRESS OF THE  
DIGITAL MILLENNIUM COPYRIGHT ACT**  
*Bruce P. Keller, Jeffrey P. Cunard & Jeremy Feigelson*

**SEARCH SERVICE KEYWORD-BASED  
ADVERTISING: TRADEMARK INFRINGEMENT  
OR FAIR COMPETITION?**  
*Mark Sableman*

**AFTER THE CAN-SPAM ACT:  
WHY YOUR IN-BOX REMAINS FULL**  
*Kavita Amar & Thomas R. Burke*

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## Connecticut Appellate Court Affirms Dismissal of Libel Claim Article Was “Fair Report” of Criminal Trial

The Connecticut Appellate Court affirmed dismissal of libel and related claims against a local newspaper and individual reporters and editors, holding that the complained of articles were protected by the fair report privilege and published without actual malice. *Fuller v. Day Publishing Co.*, No. 25228, 2005 WL 1175310 (Conn. App. Ct. May 24, 2005) (Schaller, Harper, Peters JJ.)

This is the second Connecticut Appellate Court decision in the past year to expressly apply the fair report privilege. Last year, the court addressed the privilege for the first time in *Burton v. American Lawyer Media, Inc.*, 887 A.2d 1115, 32 Media L. Rep. 1893 (2004).

### Background

The pro se plaintiff, Janice Fuller, was tried and convicted for possession of a firearm without a permit and attempted first-degree assault on a Connecticut Superior Court Judge and his wife. *The Day*, a New London, Connecticut newspaper, published several reports on the trial.

Plaintiff alleged that the articles falsely characterized her as “mentally ill and dangerous.” She sued alleging libel, violations of privacy, negligent and intentional infliction of emotional distress and violations of the Connecticut Unfair Trade Practices Act.

The trial court granted summary judgment to the defendants, finding that the articles were fair and accurate

reports of plaintiff's criminal trial. Further, the court concluded that the plaintiff was a limited purpose public figure who “voluntarily injected herself into the limelight by committing a crime,” inviting public comment relating to her trial. See 2004 WL 424505 (Conn. Super. Feb 23, 2004).

### Summary Judgment Affirmed

Affirming summary judgment, the Connecticut Appellate Court held that the articles “constituted fair and accurate reporting and commentary” about plaintiff's criminal trial, citing, inter alia, *Burton v. American Lawyer Media, Inc.*, *supra*.

In *Burton*, the Appellate Court relied on the *Restatement (Second) Torts*, § 611 to recognize the fair report privilege, including the statement in comment b of § 611 that “[i]f the report is accurate or a fair abridgment of [an official] proceeding, an action cannot constitutionally be maintained for defamation.”

Here the court also found no evidence of actual malice, finding that the newspaper reports were based on court records, interviews with persons associated with the plaintiff's trial and the opinions of persons with knowledge of the trial.

Thomas W. Boyce, Jr., Faulkner & Boyce, New London, CT; and Jennifer Antognini-O'Neill, Middletown, Ct., represented the defendants.

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## Georgia Court of Appeals Dismisses Defamation Suits Against Employee Whistleblower and Private Citizen

By Christopher L. Mezell

On June 1, 2005, a panel of the Georgia Court of Appeals, including Chief Judge John H. Ruffin, Jr., Presiding Judge J.D. Smith and Judge M. Yvette Miller, held, on remand, that televised statements by a former employee of the Atlanta Humane Society (“AHS”) were privileged and that defamation claims brought thereon must therefore be dismissed under Georgia’s anti-SLAPP statute. *Harkins v. Atlanta Humane Soc’y. et al.*, No. A03A1422, 2005 WL 1283266 (Ga. App. Jun. 1, 2005).

In a companion case decided on June 3, 2005, the same panel held that the AHS could not bring a defamation suit against a private critic and that its director had failed to show actual malice underlying defendant’s criticism of him on her web site. *Atlanta Humane Soc’y. et al. v. Mills*, Nos. A03A2480, A03A2481, 2005 WL 1315269 (Ga. App. Jun. 3, 2005).

### Investigative Reports Led to Libel Suits

Both suits followed an investigative series broadcast by Atlanta ABC-affiliate WSB-TV in the summer of 2001 that exposed AHS’ mismanagement of animal control services for Fulton County and the City of Atlanta. The public was outraged by the misuse of tax dollars and the County Commission held a series of open meetings to review AHS’ performance.

With their government contracts under threat and donations shrinking, AHS and its director, Bill Garrett, filed separate defamation suits against Barbara Harkins, a former employee interviewed by WSB-TV, and Kathi Mills, a local animal advocate who criticized AHS and identified Garrett as “Mr. Kill” on her web site.

Citing plaintiffs’ failure to supply the proper certification required by Georgia’s anti-SLAPP statute (O.C.G.A. § 9-11-11.1(b)), both defendants filed motions to dismiss. The trial courts denied these motions and accepted the plaintiffs’ last-minute pro forma verifications as sufficient.

On interlocutory appeal, however, the Georgia Court of Appeals reversed the lower courts, holding that the anti-SLAPP statute provided substantive as well as merely procedural safeguards against lawsuits intended to stifle individual rights to free speech on matters of public concern. *Harkins v. Atlanta Humane Soc’y. et al.*, 590 S.E.2d 737 (Ga. App. 2003) (reported in the December 2003 MLRC MediaLawLetter); *Atlanta Humane Soc’y. et al. v. Mills*, 591 S.E.2d 423 (Ga. App. 2003). The Georgia Supreme Court granted certiorari and consolidated the cases.

In 2004 the Georgia Supreme Court unanimously affirmed

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**Since AHS could not show that Harkins acted out of malice or “for any other reason than to prompt government action on this issue of public concern,” her statements were privileged under Georgia’s anti-SLAPP statute.**

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the Court of Appeals’ interpretation of the anti-SLAPP statute but divided over its application of the substantive component. *Atlanta Humane Soc’y. et al. v. Harkins*, 603 S.E.2d 289 (Ga. 2004) (reported in the January 2004 MLRC MediaLawLetter). Against a dissent filed by Chief Justice Norman Fletcher, and joined by Presiding Justice Leah Ward Sears, the Court remanded both cases to the Court of Appeals

“to examine the records further.” *Id.* at 294.

### Statements Privileged Under Anti-SLAPP Statute

On remand, the Court of Appeals held that Harkins’ statements to WSB-TV were privileged communications within the meaning of O.C.G.A. § 51-5-7 and O.C.G.A. § 9-11-11.1, which protect “statements made in good faith as part of an act in furtherance of the right of free speech or the right to petition government [...] in connection with an issue of public interest or concern.” O.C.G.A. § 51-5-7(4) (2004).

The Court concluded that Harkins, a veteran animal rights activist, spoke to WSB-TV in the good faith belief that her actions could persuade government officials to remedy the problems she exposed at AHS. Since AHS could not show that Harkins acted out of malice or “for any other reason than to prompt government action on this issue of public concern,” her statements were privileged as a matter of law and she was therefore entitled to summary dismissal under Georgia’s anti-SLAPP statute.

(Continued on page 46)

## Georgia Court of Appeals Dismisses Defamation Suits Against Employee Whistleblower and Private Citizen

(Continued from page 45)

### *Humane Society is a Governmental Entity*

In the *Mills* case, the Court of Appeals did not even reach the anti-SLAPP issue, focusing instead on the remaining assignments of error to the trial court. The first of these involved AHS' appeal of its status as a governmental entity incapable of filing a defamation claim under the multi-factor standard established by *Cox Enterprises v. Carroll City/County Hosp. Auth.*, 273 S.E.2d 841 (Ga. 1981).

Although the Court of Appeals regarded *Cox Enterprises* as controlling, it rejected AHS' argument that all of these factors set forth an "ironclad list of requirements" for identifying governmental entities. Instead, the Court adopted the trial court's cumulative approach, taking note of the AHS' receipt of public funds, the County's practice of deputizing AHS employees, and the state Attorney General's determination that the AHS was subject to the Georgia Open Records Act.

Under these circumstances, the Court concluded that exempting AHS from the usual criticism directed at governmental entities would frustrate the public's ability to bring about "necessary and desirable change when those services fall below standards which the public demands."

The Court also affirmed the trial court's determination that Garrett was a limited-purpose public figure with respect to the controversy surrounding AHS' animal control work. Applying the Eleventh Circuit's three-prong test, adopted by the Georgia Supreme Court in *Mathis v. Cannon*, 573 S.E.2d 376 (Ga. 2002), the Court of Appeals noted that this controversy predated Mills' comments, that Garrett "voluntarily injected himself" into the debate, and that Mills' criticism of Garrett, though florid and hyperbolic, was nevertheless "germane to [Garrett]'s participation in the controversy."

Finally, the Court reversed the trial court's summary finding that there were genuine issues of fact with respect to Garrett's claims against Mills. Noting that the standard of proof of "actual malice" is "extremely high," the Court concluded that Mills' comments, while cast in hyperbolic and sometimes scatological language, did not

meet this constitutional requirement and largely expressed only her own exaggerated and unprovable opinion regarding the plaintiffs' performance.

Moreover, the Court rejected Garrett's assertion that Mills' failure to investigate the truth of her statements amounted to bad faith or actionable recklessness. Although reporters have a limited duty of verification, private citizens were not required to "investigate the investigators" before voicing their opinion. "In other words, if it is not permissible to slay the messenger, it is certainly not appropriate to slay one who simply received and reacted to the intended message."

*Christopher L. Mezell is an associate in the Atlanta office of MLRC member firm Dow, Lohnes & Albertson, PLLC, and, together with Peter C. Canfield and Thomas M. Clyde, filed an amicus brief in the previous Court of Appeals stage of the case on behalf of WSB-TV. Defendant/Appellant Barbara Harkins was represented by Hollie Manheimer, Stuckey & Manheimer of Decatur, Georgia and Gerald Weber, ACLU of Georgia, Atlanta; Defendant/Appellee Kathi Mills was represented by Alan I. Begner, Robert Adelson and Katie K. Wood, Begner & Begner, P.C. of Atlanta, Georgia; Plaintiffs/Appellants Atlanta Humane Society and Bill Garrett were represented by Edward L. Greenblatt, James V. Zito and Janet Leah Bozeman of Lipshutz, Greenblatt & King, Atlanta, Georgia.*

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## Pennsylvania Appellate Court Reinstates Libel Action

### *True Statement May Have Created Libelous Implication*

By John Connell

A Pennsylvania appellate court reinstated a lawyer's libel case against three newspapers for their reports about a statement in a domestic abuse petition. *Weber v. Lancaster Newspapers, Inc.*, No. 898 MDA 2004, 2005 WL 1217365 (Pa. Super. Ct., May 24, 2005) (Del Sole, P.J., Lally-Green, Popovich, JJ.).

The court found that while the reports about the statement were literally true they could create the defamatory implication that plaintiff was the defendant in the petition and, therefore, the reports were not protected by the fair report privilege.

#### **Background**

Plaintiff, Gail Weber, was a law firm associate who provided legal counsel to Quarryville Borough in her firm's capacity as Borough solicitor. The plaintiff became involved in a professional and personal relationship with the Acting Police Chief of Quarryville Borough, Patricia Kelley, and as a consequence of that relationship she was drawn into a domestic dispute between Kelley and her then-partner, Dawn Smeltz.

Smeltz filed a Protection from Abuse Petition ("PFA") against Kelley. In the PFA petition Smeltz stated: "Patti's friend, Gail Weber, phoned me at work, harassing me." *Id.* at ¶2. Given the public profiles of Kelley, who was the leading candidate for permanent assignment to the Police Chief's position, and Weber, who had functioned publicly as a solicitor to the Borough, the dispute garnered much local attention.

Concerned about how the controversy would affect the qualifications of the Acting Police Chief, the Borough commenced an investigation. Due to the apparent conflict of interest caused by Weber's actions, the investigation was undertaken by a specially appointed independent counsel.

Defendants, *Sunday News*, and *Lancaster New Era* (collectively, the "LNI" defendants), along with the *Solanco Sun Ledger* published eight articles concerning

these and related events, which specifically stated the "literal truth" – as determined by the Superior Court – that plaintiff was accused in the PFA petition of harassing the Acting Police Chief's partner.

Weber sued for defamation, claiming, among other things, that the newspapers falsely implied that she was named as a defendant in the PFA petition. The trial court granted defendants' motions for summary judgment as to all issues, and dismissed the case with prejudice. The trial court held that the fair report privilege applied because the articles represented a substantially fair and accurate account of the PFA petition.

Specifically, the trial court reasoned that although the

articles may have used the word "threatening" rather than "harassing," this choice of words did not produce a materially greater "sting" than a *verbatim* account would have created.

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***Weber's claim that the articles falsely implied that she was named as a defendant in the PFA petition was remanded for trial.***

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#### **Summary Judgment Reversed**

After argument on appeal, the Superior Court initially remanded the case without decision for a more thorough opinion, while retaining jurisdiction. In a subsequent supplemental opinion, the trial court expanded upon its initial determination that the fair report privilege applied to most of Weber's claims and where it did not apply, the statements were found not to be capable of defamatory meaning.

Subsequently, the Pennsylvania Superior Court affirmed the trial court's decision in all respects but one: Weber's claim that the articles falsely implied that she was named as a defendant in the PFA petition was remanded for trial.

The appellate court began by addressing Weber's claim that the newspapers implied she was the defendant in the PFA petition. In doing so, the court examined the defense of truth, not in the context of an absolute defense, but in the framework of the qualified defense of the fair report privilege. Significantly, the court conceded the literal, not merely substantial, truth of the publication.

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## Pennsylvania Appellate Court Reinstates Libel Action

(Continued from page 47)

However, the court explained that “while it is literally true that Weber was ‘named’ and ‘accused’ in the petition, the fact remains that she was mentioned only incidentally in a petition that overwhelmingly concerns Officer Kelley.” *Weber*, at ¶30. The court found that the headlines and lead paragraphs that referred to Weber as being “accused” in the petition of making “threatening” or “harassing” phone calls, though true, did convey the misleading impression that Weber was named as a defendant in the PFA petition.

Thus, the court explained that, notwithstanding that the statements published by the newspapers were “literally true,” the perception that the articles created was misleading in that it was difficult to discern the truth that only Officer Kelley was named in the PFA petition as a defendant. Consequently, the court found that a reasonable jury could conclude that being named as a defendant in a PFA petition does carry a materially greater “sting” than being mentioned only incidentally.

According to the court, the “sting” was materially greater, not because of what was stated in the articles, but because of what they did not say – that Weber was only incidentally named in the PFA petition. Therefore, the court reversed the grant of summary judgment and remanded on that single issue.

### ***Plaintiff Not a Public Figure***

The court also addressed the defendants’ alternative argument that Weber, in her capacity as Borough Solicitor, was a public figure and had to prove actual malice. The court ignored defendants’ arguments that plaintiff was a public official and/or figure, ruling instead that the actual malice fault standard was inapplicable because plaintiff was not a limited purpose public figure.

The court explained that plaintiff was only an associate attorney in a private-practice law firm who did not inject herself into a public controversy. Instead, the court opined that when Weber telephoned Smeltz it was a private matter, and the matter only became public when Smeltz filed a PFA petition against the Acting Police Chief. The court added that Weber had no control or influence over the fact that Smeltz mentioned her in the PFA petition, and nothing in the record indicated that

the plaintiff took any action to inject herself further into the controversy after it ignited. Therefore, the court concluded that she was not a public figure and did not have to prove actual malice. *Weber*, at ¶40.

### ***Conclusion***

The opinion was internally inconsistent in examining literal truth. In addition to the allegation that the newspapers portrayed her as a defendant in the PFA petition, Weber claimed that the newspapers also defamed her: when they referred to multiple phone calls that she had made to Smeltz, instead of one; when they incorrectly stated that she called Smeltz at church in addition to calling her at work; and when they used the word “threatening”, not found in the PFA petition, as opposed to “harassing.” On these claims, the Superior Court affirmed the trial court, reasoning that none of these statements in the articles created a materially greater “sting”, and therefore they were protected by the fair report privilege.

Specifically, with respect to the number of phone calls, the court explained that the PFA petition is not clear how many phone calls Weber made to Smeltz and thus, “the articles fairly summarized the literal words of the PFA,” and as a result, were also protected by the fair report privilege. *Id.* at ¶43.

Furthermore, the Superior Court affirmed the trial court’s determination that the following statements were not capable of defamatory meaning: 1) Smeltz provided information to the press; 2) Kelley was living with Weber at the time of the PFA; and 3) that Quarryville retained an independent counsel to investigate whether Weber’s continued employment at the Borough solicitor’s law firm constituted a conflict of interest.

*John C. Connell, a partner with Archer & Greiner in Haddonfield, New Jersey, represented Ledger Newspapers and the Sun Ledger in this case.*



## Pennsylvania Appellate Court Affirms Dismissal of Libel-by-Implication Suit

By Tom Curley

Affirming a trial court's grant of summary judgment for the media defendants, the Pennsylvania Superior Court has dismissed a defamation claim brought by a state government official who alleged that a television news report falsely implied that he was an organized crime figure. *Lamenza v. Hearst-Argyle Stations, Inc., et al.*, No. 443 WDA 2004 (Pa. Superior Ct. May 20, 2005) (unpublished).

The decision reiterates that it is for the court in the first instance to determine, as a matter of law, whether a publication is reasonably capable of the defamatory implication alleged.

### Background

The lawsuit arose out of a news report broadcast in 2000 by WTAE-TV in Pittsburgh concerning the plaintiff, a labor mediator employed by the Pennsylvania Department of Labor. The broadcast reported that the plaintiff had pled guilty to a bookmaking charge prior to being hired by the Labor Department and that plaintiff had failed to pay his criminal fine in full until the television station began making inquiries.

The report also noted that the plaintiff had passed a civil service exam, had prior labor experience, and had performed satisfactorily in his job, but observed that his hiring was supported by a member of the state legislature, who wrote a letter on his behalf.

Plaintiff's arrest stemmed from his role in a Lawrence County gambling ring that attracted the attention of police during the NCAA basketball tournament in 1992. Plaintiff was one of 28 people arrested in the gambling ring and the news report of plaintiff's subsequent hiring by the Labor Department noted a widely-publicized statement made by state police at the time of the arrests, that the "ring" was "linked to organized crime figures in the Pittsburgh area."

However, no statement was made by police at the time of plaintiff's arrest, or in the subsequent news report at issue in this case, that the plaintiff himself had any direct organized crime connection. Nonetheless, the principal thrust

of the defamation lawsuit was that the broadcast falsely implied that the plaintiff was a member of organized crime.

The media defendants moved for summary judgment in the trial court on a variety of grounds, including that the broadcast was not reasonably capable of being understood to convey the defamatory implication alleged. Alternatively, even if it was reasonable to construe the broadcast as falsely implying that the plaintiff himself was a member of organized crime, that implication arose out of statements made by state police and thus WTAE's accurate reporting of those statements was privileged.

The defendants also argued that, as a government labor negotiator, plaintiff was a public official under defamation law and therefore required to prove actual malice by clear and convincing evidence in order to prevail. Plaintiff conceded that he could not demonstrate that

the news report, which had been thoroughly researched, was broadcast with actual malice.

### Appellate Court Decision

In an opinion that largely adopted the decision of the lower court, the three-judge appellate court concluded that "the broadcast at issue, when considered in its entirety, cannot be reasonably interpreted as implying that [plaintiff] is an organized crime figure." The court also held that, by virtue of plaintiff's position as a government mediator, he was a public official within the meaning of *New York Times Co. v. Sullivan* and its progeny. Because the plaintiff conceded that he could not demonstrate actual malice, the lawsuit was properly dismissed on this basis as well, the court determined.

*David A. Schulz, Jay Ward Brown and Thomas Curley of Levine Sullivan Koch & Schulz, LLP and David J. Porter and Mark R. Hornak of Buchanan Ingersoll, P.C. represented the defendants in this matter. Plaintiff was represented by Jeffrey A. Hulton of Brandt, Milnes & Rea, P.C.*

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***The principal thrust of the defamation lawsuit was that the broadcast falsely implied that the plaintiff was a member of organized crime.***

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## California Court Rejects Civil Rights Suit Over Screening of Talk Radio Caller

A California appellate court affirmed dismissal of a civil rights-based claim against a radio broadcaster and talk show host for allegedly screening out an older caller. *Ingels v. Westwood One Broadcasting Services, Inc.*, 2005 WL 1244794 (Cal.App. 2 Dist.) (Hastings, Epstein, Whillhite, Jr. JJ.).

The court held that California's Unruh Civil Rights Act, Civil Code § 51, which forbids discrimination in business establishments, does not create a cause of action for a caller who was told by a radio show on air that he was too old and outside the program's desired demographic.

### Background

Tom Leykis hosts a popular drive time talk radio show in Los Angeles, produced by Westwood One, that focus on news and current events. Plaintiff, Mary Ingels, is a veteran Hollywood actor and regular caller to talk radio shows.

On June 25, 2003, Ingels was listening to the Leykis show and called in to offer his views on the topic of relationships. His call was answered by a screener. Ingles gave a pseudonym and stated that he was 60 (he was 65 at the time). The screener proceeded to make joke's about Ingels' age, and suggest that Ingels did not belong on this show. However, he was eventually put through to speak with Leykis live, on the air. During the on the air exchange, Ingels brought up the age issue:

THE CALLER: Hey, Tom, I hope you got an answer for me. I had to actually muscle my way in here, because I am older than your demographic.

TOM LEYKIS: You're not just older than my demographic, you're the grandfather of my demographic... I'm not in the business of trying to appeal to people like you calling from a rest home or a card room.... I don't really care how smart you are, Pal. You know what, we have a targeted demographic on this program; you don't fit it, period. You're way too old, Pops. You don't belong on the air. Call a big band station. Call somebody else, please. Don't call here.

Ingels sued Leykis and Westwood One alleging he was denied equal accommodation because of his age; and also brought a derivative unfair competition claim based on the same facts.

The trial court granted defendants' anti-SLAPP motion to strike the complaint, holding that the action fell within the scope of California's anti-SLAPP statute, Cal. Code. 425.16; and that the Unruh Act could not "be applied to impose upon broadcasters a viewpoint unwanted in their message to targeted audiences."

### Court of Appeals Affirms

The appellate court first affirmed that plaintiff's claims were properly subject to an anti-SLAPP motion to dismiss, finding no distinction between the facts of the case and an earlier appeals court ruling in *Seelig v. Infinity Broadcasting, Inc.*, 97 Cal. App. 4<sup>th</sup> 798 (2002) (striking defamation and related claims against radio talk show hosts and broadcaster).

As to the merits of the claim, the court found that while certain aspects of broadcasting could fall under the Unruh Act, such as discrimination in advertising or denial of access to facilities, defendants had a First Amendment right to control the content of their radio talk show.

Plaintiff was represented by Robert G. Klein of the Law Office of Robert G. Klein. Bernard M. Resser of Berman, Mausner & Resser represented Westwood One Broadcasting Services, Inc. and Tom Leykis.

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## Paramount Pictures Wins Summary Judgment In “Hardball” Movie Litigation

By Debbie Berman and Wade Thomson

In a decision favorable to movie studios that produce films that are “inspired by a true story,” an Illinois federal district court granted summary judgment to Paramount Pictures, SFX Tobbins/Robbins, Inc., and Fireworks Pictures on a suit brought by a plaintiff who claimed that Paramount’s 2001 movie, “Hardball,” was based on his life story and, among other things, defamed him. *Muzikowski v. Paramount Pictures Corp.*, 01 C 6721 (N.D. Ill. June 10, 2005) (Kocoras, J.).

The court concluded that the Illinois innocent construction rule and the First Amendment’s protection of artistic works defeated plaintiff’s claims.

### Background

In 1992, Daniel Coyle wrote a non-fiction novel, entitled *Hardball: A Season in the Projects*, which tracked the season of an inner-city youth baseball team. Paramount purchased the rights to the book and based its film “Hardball” loosely on the team highlighted in the book.

Robert Muzikowski, the plaintiff in the Paramount case, was one of several coaches of the team discussed in Coyle’s book. The film stars Keanu Reeves as a down-and-out gambler who finds redemption coaching an inner-city team to a Hollywood ending.

Based on preliminary information about the content of the film, Muzikowski filed suit in California in 2001, claiming that the Reeves character was actually a portrayal of Muzikowski and that the film defamed him through the unflattering acts of the Reeves character. After voluntarily dismissing that complaint, Muzikowski refiled in Chicago, his home town, and the setting of the film.

In 2001, Judge Kocoras dismissed Muzikowski’s claims of defamation per se and false light because the Reeves character was significantly different than Muzikowski and the film was subject to the Illinois innocent construction rule:

the film could reasonably be construed to pertain to someone other than Muzikowski. 2001 WL 1519419 (N.D. Ill. Nov. 29, 2001).

The Seventh Circuit Court of Appeals reversed, holding that the issue of whether the movie could be innocently construed was an issue of fact in federal court, not an issue of law, despite long-standing precedent to the contrary. 322 F.3d 918 (7th Cir. 2003).

Applying this new standard, the court held that differences between Muzikowski and the Reeves character were

not sufficient at the motion to dismiss stage for the innocent construction rule, and that some of Muzikowski’s claims, including the imputation of criminal activity and unlicensed business practices stated a claim for defamation per se.

On remand, Muzikowski added defamation claims based on additional scenes in the movie as well as claims for false advertising, false endorsement, commercial disparagement, intentional infliction of emotion distress, and unjust enrichment.

### Movie Portrayal Can Be Innocently Construed

Implicating an inherent tension, Muzikowski claimed that the Reeves character was a portrayal of Muzikowski, but that some of the acts and characteristics of the fictional character were so off base that they defamed Muzikowski.

Judge Kocoras resolved this tension in favor of Paramount, again finding that the movie could reasonably be construed to pertain to someone other than Muzikowski or no real person at all. The court noted the actual differences between Muzikowski and the Reeves character, including their names, marital status, and professional backgrounds. Further, it noted that “though not completely dispositive, the fact that the context for the [Reeves] character is a blockbuster movie, starring actors of worldwide fame and using many devices typical of a fictional story is very significant.”

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## Paramount Pictures Wins Summary Judgment In “Hardball” Movie Litigation

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The court recognized that “simply calling a statement fiction does not necessarily make it so,” but held that there was nothing in the “Hardball” film to indicate it was a documentary or even a dramatized account of actual events. Thus, a reasonable viewer “would recognize the hallmarks of Hollywood make-believe and not mistake the characters depicted as historical reenactments of real stories of real people.”

The ruling is significant for defamation cases in Illinois because it highlights the continued vitality of the innocent construction rule, a rule the court interpreted to require plaintiff to show that the “only reasonable construction” was that the Reeves character was plaintiff. Thus, even though reasonable viewers may have seen the connection between Muzikowski and Reeves, it was not the *only* reasonable construction, a fact made clear by Muzikowski’s original California claims – based on early scripts of the film – that there were several characters in the film that moviegoers could have confused for Muzikowski.

### *First Amendment Trumps Other Claims*

The court also rejected Muzikowski’s claim that Paramount falsely advertised the film – by advertising it as based on a true story when in fact it was so far from the truth that the story could no longer be classified as true – for insufficient evidence. The court concluded that the sixteen affidavits of moviegoers (many of whom knew Muzikowski personally for years) did not establish a triable issue of fact as to whether the alleged false advertisement swayed a substantial number of potential audience members to view a film they otherwise would not have.

The court also rejected Muzikowski’s Lanham Act claim that the movie and its promotion would confuse moviegoers to believe that he approved or endorsed the film. Muzikowski attempted to analogize himself to the plaintiffs in *White v. Samsung Electronics America*, 971 F.2d 1395 (9th Cir. 1992) and *Allen v. National Video*, 610 F. Supp. 612 (S.D.N.Y. 1985), claiming that he had attained a mark in his persona as a successful inner-city baseball league coach and founder. But, the court recognized, in those cases the celebrities’ personas had been used solely to produce profit through sale of a commercial good. Paramount’s

film, on the other hand, is a creative expression and despite the fact that viewers pay to see it, films of artistic expression are fully safeguarded by the First Amendment.

Where, as here, someone’s mark is potentially implicated and the Lanham Act and the First Amendment “lock horns,” the court ruled that cases originating with *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) provide the “prevalent” analytical framework: where the alleged use of a mark has artistic relevance to the underlying work (as opposed to merely being used in a title and having nothing else to do with the underlying work), the First Amendment must be weighed against the possibility that consumers will be misled.

The First Amendment naturally affords flexibility to incorporate real life aspects into creative works. Thus, “no matter how valuable Muzikowski’s persona may be, it cannot outweigh society’s interest in access to” some of the characteristics of his life. “If we were to allow Muzikowski to exercise exclusive dominion over the aspects of his life that [the Reeves character] shares, we would remove significant metaphorical vehicles from the lexicon of the artist and society as a whole would be the worse for Muzikowski’s sole benefit.”

Similarly, the court rejected Muzikowski’s commercial disparagement and intentional infliction of emotional distress claims because the content of the claims implicated the same First Amendment concerns.

Finally, the court again relied on the First Amendment to defeat Muzikowski’s unjust enrichment claim, holding that Muzikowski could not have a better claim to control over details of his life than Paramount because the Reeves character bore only a “passing resemblance” to Muzikowski.

In the court’s memorandum order, it also awarded Paramount over \$50,000 in sanctions stemming from Muzikowski’s counsel’s non-compliance during discovery.

*Debbie L. Berman, Michael A. Doornweerd, Matthew T. Albaugh, and Wade A. Thomson from the Chicago office of Jenner & Block LLP represented defendants Paramount Pictures Corporation, SFX Tobbins/Robbins, Inc., and Fireworks Pictures. Plaintiff was represented by Schuyler, Roche & Zwirner of Chicago.*

## No Libel Claim For Criticism Of Columnist's Job Performance

By Jeffrey O. Grossman

If a supervisor criticizes a subordinate's work, and the subordinate believes the criticism is unjust, can the subordinate sue for defamation? New York's Appellate Division, First Department, recently said that the answer was "no". *Zion v. NYP Holdings, Inc. and Robert McManus*, 2005 WL 1252584 (1st Dep't May 26, 2005).

Sidney Zion, a well-known journalist and columnist, sued NYP Holdings, Inc., the publisher of the *New York Post* newspaper (the "*Post*"), and the *Post*'s editorial page editor, claiming that he was improperly terminated in September 2001 from his position as a freelance columnist with a little less than a year left on his two-year contract. Zion also asserted a claim for libel based on a July 2001 letter in which the editorial page editor informed him of problems with a column he had written. Zion claimed that the letter, which was seen by only four other people – all NYP employees – injured his reputation as a journalist.

### The Column

The column at the center of the dispute discussed the controversy of whether Kathy Boudin, a woman involved in a 1981 robbery of a Brink's Company truck carried out by a gang of self-described "revolutionaries," should be granted parole. The Brink's robbery ultimately resulted in the deaths of a security guard and two police officers.

Zion's column stated that the security guard was killed by members of the gang at the time of the robbery itself. The column further stated that during the attempted getaway, the police had stopped a van concealing the members of the gang, Boudin alone had stepped out of the van, police officers then put away their weapons, at which time gang members stepped out and shot and killed two of the officers. According to the column, Boudin was willingly "used as a decoy."

The premise of the column was that those opposed to Boudin's parole were being helped by a growing outcry from the media falsely attributing legal responsibility to Boudin for the deaths of both the police officers and the security guard. The column pointed out that as a legal matter, Boudin had only pled guilty to the robbery and the murder of the security guard.

The column referred to these supposed media misrepresentations as constituting the conventional "line" on Boudin and concluded: "[D]on't bet the house against the line, which says against the evidence that she killed two cops." The editorial page editor had a subordinate contact Zion on the Friday that the column was submitted (for publication the following Monday) to clarify the meaning of the term "line".

The editorial page editor stated that he was not aware of the existence of the "line" Zion referred to and, late on the Sunday night before the column was to be published, he did a search of articles on the Nexis database to see if he could find evidence of it. He did not believe he found any such evidence. Rather, it appeared to him that those in the media opposing Boudin's parole were doing so based on the fact that, whatever she was legally convicted of, she was *morally* responsible for the deaths of the police officers because of her participation in the robbery and attempted getaway.

Although it was too late at that point to pull the column, the editorial page editor called Zion the next day and told him he had put together a column based on an inflated premise.

### The Allegedly Defamatory Letter

The editor followed the call up with a letter to Zion, which was the basis for Zion's libel claim. The letter: 1) outlined the back and forth concerning the column; 2) reported on the content and results of the editor's Nexis search; 3) stated that the editor believed Zion had "fabricated" the existence of the "line" that his column claimed to be refuting; 4) stated that Zion had "intentionally misled" the editor's subordinate when contacted for clarification by telling the subordinate that the term "line" was being used to describe "a growing anti-Boudin media outcry" based on a "willful misrepresentation" that "she had been convicted of murdering two police officers"; and 5) concluded by setting out new deadlines and procedures for the submission of future columns.

The undisputed evidence demonstrated that the editor sent or showed the letter to only four other people, all NYP employees – the *Post*'s publisher, editor-in-chief, execu-

(Continued on page 54)

**No Libel Claim For Criticism Of Columnist's Job Performance***(Continued from page 53)*

tive editor of the editorial page (who reported to the editorial page editor), and deputy editor of the editorial page (who also reported to the editorial page editor).

***The Trial Court's Decision***

After discovery, defendants moved for partial summary judgment dismissing the libel claim on a number of grounds. On December 17, 2004, the Supreme Court, New York County (Hon. Barbara Kapnick) granted Defendants' motion, on two of those grounds. *Zion v. NYP Holdings, Inc.*, No. 115834/02 (Sup. Ct. N.Y. Co. Dec. 17, 2004). First, the court held that while journalists were entitled not to be lightly characterized as inaccurate or dishonest, the complained of statements were not actionable because they were statements of opinion accompanied by the facts on which they were based. Where an opinion is accompanied by such a recitation of facts, the court stated, "the statement is readily understood by the audience as conjecture and is not actionable." Citing *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993).

Second, the court held that the letter was subject to a qualified privilege for communications made in furtherance of, and to persons who possess, a common interest in their subject matter. Citing *Lieberman v. Gelstein*, 80 N.Y.2d 429 (1992). New York courts routinely find statements made in the employment context to be non-actionable based on one or both of these grounds.

Under New York law, the qualified privilege can be overcome if the plaintiff shows that the maker of the complained of statements "in fact entertained serious doubts as to the truth of" those statements (*i.e.*, acted with "actual" or "constitutional malice"), or was motivated to make the statements solely by spite or ill will (*i.e.*, acted with "common law malice"). *See, e.g., Lieberman v. Gelstein*, 80 N.Y.2d 429 (1992).

However, the court found that the plaintiff had failed to submit sufficient evidence to permit the conclusion that the editor "in fact entertained serious doubts as to the truth of the publication," and also found that the fact that the editor may not have been a "fan" of Zion's writing style did not show that the editor was motivated *solely* by spite or ill will in writing and distributing the letter.

***The Appellate Division's Decision***

On May 26, 2005, the Supreme Court, Appellate Division, First Department, unanimously affirmed the grant of partial summary judgment. The Appellate Division held that the editor's expression of his view that Zion "had fabricated the premise of one of his columns" was "non-actionable since it amounted to no more than an expression of opinion based on disclosed facts." Citing *Gross v. New York Times Co.*, 82 N.Y.2d at 153.

The court also held that, in any event, the letter was protected by the qualified "common interest" privilege since all of the letter's recipients had a common interest in Zion's "job performance at the paper." The court further found that Zion had failed to overcome the qualified privilege by submitting evidence that the editor "had knowledge that the complained-of statement was false" or "acted 'with reckless disregard of whether it was false or not'" or that "the sole motive for the statement was spite or ill will." The case continues as to the breach of contract claim.

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## Failed Footballer Tackled For a Loss Over Novel Libel Claim

By **Herschel P. Fink**

Proving once again that no claim is so far fetched that some lawyer won't bring it, is the case of *Neal v Electronic Arts*, No. 4:04-CV-87, 2005 WL 1309136 (W.D. Mich. June 1, 2005), a twist on the long discredited rule that it was defamatory to say of a white person that he is black.

### **Background**

Electronic Arts publishes an enormously successful video game called Madden NFL Football, which features images of actual football team rosters (biographical section), along with video images of the players (action section). The players' photos and likenesses are licensed from the NFL and NFL Players Association. Players license their images as a part of their player contracts.

A player for the three-time Super Bowl championship New England Patriots is named Steve Neal. Neal is white. Electronic Arts also received, as a part of its license arrangement with the NFLPA, the photo of a black player, also named Steve Neal, who had signed with the Tennessee Titans, but "never made an opening day roster."

Under the rule that, if something can go wrong, it will, the photo of the black Steve Neal appeared in the biographical section of the New England Patriots, along with the statistics and player number of the white Steve Neal. The representation of the player in the action section of the game was of the white Steve Neal.

### **False Light & Libel Claims**

The lawsuit followed, alleging "false light" and defamation. But, in a twist on an old theme, it was the black Steve Neal, the rookie washout, who sued, claiming he was defamed and placed in a false light by having been confused with the white Super Bowler.

U. S. District Judge Richard Enslen, granting Electronic Arts' motion for summary judgment, was not amused, penalizing the lawyer's novel variation on a theme \$1,000 as "frivolous" under FRCP 11.

Dismissing the "false light" count, Judge Enslen wrote:

The Court can find no case law in support of Plaintiff's claim. Plaintiff's argument that the use of his

picture in place of a Caucasian player is highly offensive to a reasonable person is simply contrary to the well-established history of the judiciary not to condone theories of recovery which promote racial prejudice or effectuate discriminating conduct.

Similarly, as to the defamation count, the Court held:

Upon review, the Court determines that as a matter of law, such a statement is not defamatory. First of all, the Court can find no case law which would support a claim of defamation based on the use of a player's likeness that might suggest that plaintiff is of another race.

The irony of a football failure claiming libel because he was confused with a champion was also not lost on the Court:

Plaintiff's claim could also arguably be examined as the incorrect use of the Patriot's Steve Neal's statistics in conjunction with the correct use of Plaintiff's likeness and name. Plaintiff "never made an opening day roster." The Patriots have won three of the last four Super Bowl championship games, and the Patriot's Steve Neal signed with the Patriots in 2001 and played in at least part of 2001, 2002 and 2004 seasons. Therefore, the Court also finds that the association of Plaintiff's likeness with the Patriot's Steve Neal's statistics could not reasonably be considered to harm the reputation or to deter third persons from associating or dealing with Plaintiff.

After also dismissing an added commercial appropriation claim because the plaintiff had licensed his likeness, the Court found that none of the Plaintiff's claims were objectively reasonable, and warranted the "minimum financial sanction of \$1,000" against his lawyer under Rule 11(b)(2).

*Herschel Fink of Honigman Miller Schwartz and Cohn, Detroit, Michigan, represented Electronic Arts. The Plaintiff was represented by Randy Pomeroy, Portage, Michigan.*

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## ALI Project on Enforcement of Foreign Judgments

By Thomas Leatherbury

At the annual meeting of the American Law Institute this May in Philadelphia, the membership approved the final draft of the Project on Recognition and Enforcement of Foreign Judgments.

The project has taken the form of a proposed federal statute. Of particular interest has been one of the Reporters' Notes concerning cases and commentary on attempts to enforce foreign libel judgments in the United States.

While the current case law uniformly rejects the efforts

to enforce foreign libel judgments because foreign courts' failure to observe First Amendment constitutional protections violates fundamental public policies of the United States, initial drafts of the Reporters' Note criticized the case law and relied on law review articles to cast doubt on whether the First Amendment was a fundamental public policy which justified the refusal to enforce foreign libel judgments.

The Reporters' Note went through several iterations before the Project's final draft and, as adopted by the ALI membership, reads as follows:

(d) *The public-policy exception and the First Amendment.* Recent American cases have invoked the public-policy exception to deny enforcement of libel or other judgments obtained in foreign countries after determining that the libel or other law of those countries was contrary to the "fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" at the heart of the First Amendment. See *Telnikoff v. Matusевич*, 347 Md. 561, 602, 702 A.2d 230, 251 (1997) (declining to enforce an English libel judgment obtained by one English resident against another, both of whom were Russian émigrés, where offending letter and published comments had no connection with the United States, but with one judge dissenting), *aff'd* (table), 159 F.3d 636 (D.C. Cir. 1998); *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*, 169 F.Supp.2d 1181 (N.D. Cal. 2001) (barring enforcement of a French injunction requiring Yahoo! to block French internet users from accessing on-line auctions of Nazi paraphernalia on ground of inconsistency with First Amendment), *rev'd* for want of jurisdiction, 379 F.3d 1120 (9th Cir. 2004); *Bachchan v. India Abroad Pubs., Inc.* 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) (declining to enforce an English libel judgment against a foreign news agency operating in New York that distributed an allegedly libelous news story both in New York and in the United Kingdom, in circumstances where English common law imposed strict liability for false statements, including statements concerning bribes allegedly paid by arms manufacturers to politically well-connected Indians). In a fourth case, *Dow Jones & Co. v. Harrods, Ltd.*, 237 F.Supp. 2d 394, 432-433, 446 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), a court in the United States declined to enjoin a libel action in England against a U.S.-based publisher on the ground that it was premature, but added that it would have "little hesitation" in refusing to enforce a judgment inconsistent with First Amendment principles, citing *Bachchan* and the district-court decision in *Yahoo!*.

These cases have provoked extensive debate in academic journals over two issues raised by these foreign judgments implicating First Amendment rights. One issue is whether there are some foreign judgments that would not pass muster under the First Amendment that do not rise to the level of "repugnan[ce] to the public policy of the United States." Compare EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 1335 n.12 (4th ed. 2004) and Joachim Zekoll, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 Alb. L. Rev. 1283, 1305-1306 (1998) (criticizing the implicit holding in *Bachchan* that even "minor" deviations from American free-speech standards violate public policy and render judgments unenforceable), with Kyu Ho Youm, "Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law," 16 Hastings Comm. & Ent. L.J. 235 (1994) (pointing out that American libel law offers publishers significantly more protections than does English law). The second issue is whether a territorial connection or nexus with American interests other than the presence of assets in the United States should be necessary to trigger the public-policy exception in American courts. See Linda J. Silberman and Andreas F. Lowenfeld, "A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute," 75 Ind. L. J. 635, 644

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(2000) (criticizing *Telnikoff* on the ground that U.S. public policy was not implicated because there was no U.S. party or transaction involved and inviting an analysis of public policy that identifies the U.S. interests at stake and shows how those interests are threatened); Craig A. Stern, “Foreign Judgments and The Freedom of Speech: Look Who’s Talking,” 60 *Brook. L. Rev.* 999 (1994) (criticizing *Bachchan* because “the policies of the freedom of speech indicate that neither the United States nor New York has an interest in applying the Free Speech Clause to *Bachchan*, while England apparently does have an interest in applying its law of defamation”).

However these issues are resolved in particular cases, the practical importance of the public-policy exception has increased with the advent of the World Wide Web. See *Lewis v. King*, 2004 WL 2330166, [2004] EWCA Civ 1329 (affirming a decision of the High Court, Queen’s Bench Division, to allow American citizen Don King to proceed in an English court with a libel action brought against Lennox Lewis, the British boxer, Lewis’s American promotion company, and Lewis’s American lawyer for comments made to American boxing publications and then distributed over the Internet); *Bangoura v. The Washington Post* [2004] 235 D.L.R. (4th) 564 (finding that Ontario was an appropriate forum for a libel suit against the U.S.-based Washington Post for communications appearing on its web page in circumstances where the alleged libel was based on the plaintiff’s work in Africa and where plaintiff only later became a citizen and permanent resident of Canada; and rejecting the contention of unfairness by the defendants because the “defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided” and noting that it “would be surprised if [the Post] were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be.”); *Dow Jones & Co., Inc. v. Gutnick* [2002] HCA 56 (2002) (upholding jurisdiction of Australian court over the U.S.-based Dow Jones in a libel action by a South African plaintiff living in Victoria, Australia, on the basis of an article published on the defendant’s web site that was downloaded by subscribers in Australia and limiting damages to that suffered by the plaintiff in Victoria).

Foreign courts have reacted in different ways to concerns about the impact of the Internet on libel law, and in particular to the constitutional protection afforded to speech in the United States in the context of a global publication. In *Gutnick*, the joint judgment of the High Court observed that “those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction” and indicated that defendants ran the risk of liability in those jurisdictions in which the publication was not lawful. Justice Kirby, in a separate opinion, reflected on the need for national legislative attention and international discussion, noting that a foreign publisher with no assets in the jurisdiction could wait until an attempt was made to enforce the judgment in its own courts where the judgments might be regarded “as unconstitutional or otherwise offensive to a different legal culture.” In the *Lewis* case, the English Court of Appeal was unimpressed with defendant’s argument that England was an inappropriate forum because the U.S. plaintiff would not have been able to obtain relief in the United States, and held that England was a proper forum. On the other hand, in *Jameel v. Dow Jones & Co., Inc.*, [2005] EWCA Civil 75 (2005), a different Court of Appeal stayed a libel action brought by foreign claimants against the U.S.-based Dow Jones where only five subscribers in England had accessed the hyperlink disclosing claimants’ names, noting that the damage recovery and vindication for plaintiff are minimal and that the “cost of the exercise will have been out of all proportion to what has been achieved.”

The discussion above suggests that issues such as Internet defamation are the ones most likely to raise the public-policy question. See also 47 U.S.C § 230 (2002), which protects Internet providers from liability. At the same time, the impact of particular developments in Europe, such as the European Convention on Human Rights and the International Covenant of Civil and Political Rights, on the libel laws of many countries including England, may result in greater sensitivity to principles akin to the First Amendment. See, e.g., the recent decision of the European Court of Human Rights, *Case of Steel & Morris v. The United Kingdom*, Application no. 68416/01 (Feb. 15, 2005), holding that England’s failure to provide legal aid to defendants in a suit against them by McDonald’s for libel gave rise to an absence of procedural fairness and equal-

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ity in the proceedings and constituted an interference with defendants' freedom of expression in violation of Article 10 of the European Convention on Human Rights. See generally Michael Traynor, "Conflict of Laws, Comparative Law, and The American Law Institute," 49 Am. J. Comp. L. 39,396 (2001).

Also of interest is the Reporters' agreement to a suggestion from the floor to add a reference in the Comments to the draft statute which would specifically mention "the chilling of free speech" as an example of a violation of fundamental public policy.

We have not yet seen the Project as revised to include changes such as this one which were suggested during the debate at the meeting. If this change is made, this should make it significantly more difficult to enforce foreign libel judgments.

Finally, at the meeting, the ALI's Executive Director Lance Liebman indicated that the ALI will undertake a project on Privacy in the near future. Please stay tuned for further information on this project as it takes shape.

*Thomas Leatherbury, a partner at Vinson & Elkins LLP in Dallas, is a member of the American Law Institute and was a participant on the Project on Recognition and Enforcement of Foreign Judgments. Also involved in working on the Project were MLRC members Carl Solano, Schnader Harrison Segal & Lewis LLP; Mark Hornak, Buchanan Ingersoll, P.C.; Kurt Wimmer, Covington & Burling; Lucien Pera, Armstrong Allen, PLLC; and Jack Weiss, Gibson Dunn & Crutcher. Professor Eric Freedman, Hofstra Law School also deserves a special thanks.*

## Media Amicus Brief Filed in Ehrenfeld v. Bin Mahfouz

### Author Seeking Declaration That UK Libel Judgment is Unenforceable in the U.S.

**Kurt Wimmer**

In *Ehrenfeld v. Bin Mahfouz*, No. 04-CV-9641 (RCC) (S.D.N.Y.), an American author and researcher into the causes and financing of terrorism has filed an action seeking a declaratory judgment that a default libel judgment obtained by a billionaire Saudi Arabian sheik in a London court is not enforceable in the United States.

The defendant has moved to dismiss, and, on June 10, 2005, a coalition of companies and associations filed a memorandum of law *amicus curiae* in support of her efforts. The *amicus* group included Amazon.com; the American Society of Newspaper Editors; Article 19, a London-based freedom of expression advocacy group; the Association of Alternative Newsweeklies; the Association of American Publishers; the Authors Guild; the Electronic Frontier Foundation; the European Publishers Council; John Fairfax Holdings, Ltd., one of Australia's largest publishers; the Newspaper Association of America; the Online News Association; NYP Holdings, Inc., the publisher of the New York Post; the Radio-Television News Directors Association; Reporters Committee for Freedom of the

Press; Times Newspapers Limited, publisher of the London Sunday Times; and the World Press Freedom Committee.

### Background

Plaintiff Rachel Ehrenfeld, a U.S. citizen and the director of the U.S.-based American Center for Democracy, wrote *Funding Evil: How Terrorism is Financed and How to Stop It*. The book was published in 2003 by Bonus Books, a U.S. publisher, solely in the United States. The book alleges that defendant Khalid Salim a Bin Mahfouz, a subject of Saudi Arabia, financially supported Al Qaeda in the years preceding the September 11, 2001, terrorist attacks on New York and Washington, D.C.

Mr. Bin Mahfouz alleges that Dr. Ehrenfeld's statements concerning him in *Funding Evil* are false and defamatory, and he brought a libel action against Dr. Ehrenfeld. Mr. Bin Mahfouz did not bring his action in the United States, where Dr. Ehrenfeld works and lives and where *Funding Evil* was published.

Instead, he followed the lead of so many other Saudi Arabian libel tourists and sued Dr. Ehrenfeld in London, despite

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the fact that only 23 copies of her book were purchased by English citizens from Internet sites. (The English court also noted that the first chapter of *Funding Evil* was available on the ABC.com website, which was of course available in England, and that the website as a whole might have received as many as 211,000 hits during the period when the chapter was available; there was no evidence, however, that any U.K. resident had actually read the chapter at ABC.com.)

Clearly, Mr. Bin Mahfouz meant to avoid the application of U. S. libel law and the protections that the First Amendment provides to libel defendants by his choice of forum. Dr. Ehrenfeld chose not to defend against Mr. Bin Mahfouz's English libel action, and the suit progressed to a default judgment.

Mr. Bin Mahfouz was able to obtain "substantial damages," as he has describes it on his website, against Dr. Ehrenfeld, including his attorneys' fees. He also obtained an injunction against the publication of *Funding Evil* in the United Kingdom, and even an extraordinary "declaration of falsity" in which the court entered a determination into the record (without, of course, the benefit of the views of Dr. Ehrenfeld, Bonus Books or any other witnesses) that *Funding Evil* is false and defamatory.

This default judgment might never be executed against Dr. Ehrenfeld, particularly given Mr. Bin Mahfouz's arguments that U.S. courts do not have jurisdiction over him (a view that is perhaps influenced by the fact that Mr. Bin Mahfouz is a defendant in multi-billion-dollar litigation brought by the families of 9/11 victims in the Southern District of New York).

But its value to Mr. Bin Mahfouz's campaign against Dr. Ehrenfeld and other journalists who have also linked him to the funding of terrorism is obvious. Predictably, a summary of the case, which tellingly did not include the salient facts that the court's ruling was a default judgment and that Dr. Ehrenfeld did not appear to defend herself, was trumpeted on Mr. Bin Mahfouz's website:

"On 3 May 2005, Mr Justice Eady in the High Court in London awarded Sheikh Khalid bin Mahfouz, Abdulrahman bin Mahfouz and Sultan bin Mahfouz substantial damages in their libel action against Rachel

Ehrenfeld and Bonus Books. The Judge also made a declaration that the allegations contained in a book, "Funding Evil", written by Rachel Ehrenfeld and published by Bonus Books were false and highly defamatory of the Claimants. The Judge ordered the Defendants to pay the Claimants' costs of the action and publish a correction and apology. The full Judgment of Mr Justice Eady will be made available shortly."

([http://www.binmahfouz.info/news\\_20050503.html](http://www.binmahfouz.info/news_20050503.html))

Interestingly, after this quote was pointed out to the court in the brief submitted by *amici*, Mr. Bin Mahfouz published a more complete version of the case history on his website.

Remarkably, this version seems to imply that Dr. Ehrenfeld submitted to the English court "material of a flimsy and unreliable nature, and the claimants have taken the trouble to demonstrate its lack of merit." This statement

is attributed to the English judge; it is curious, to say the least, given that Dr. Ehrenfeld neither appeared nor submitted anything to the English court.

### ***Libel Judgment's Chilling Effect***

Dr. Ehrenfeld complained that this English default judgment, as well as the English court's "declaration of falsity" and its injunction against publication, will have "a chilling effect on [Dr. Ehrenfeld's] ability to attract publishers interested in publishing her books."

This potential chilling effect was supported by the *amici*, who pointed out that publishers, who carry insurance policies imposing obligations to review the liability risks of works they consider for publication, may well shy away from an author subject to such a judgment.

A further and more direct chilling effect was demonstrated by the menacing message that reportedly was delivered to Dr. Ehrenfeld when she was served with papers for the English action – "you had better respond, Sheikh bin Mahfouz is a very important person, and you ought to take very good care of yourself." See *Another First Amendment Landmark Case?*, EDITOR & PUBLISHER, Mar. 21, 2005.

The major point made by the *amici*'s brief was the broader one – that the chilling effect of Mr. Bin Mahfouz's

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**Media Amicus Brief Filed in Ehrenfeld v. Bin Mahfouz***(Continued from page 60)*

forum-shopping tactics will not be limited to Dr. Ehrenfeld. Increasingly, publishers are being subjected, based on *de minimis* availability of their works abroad, to the jurisdiction of foreign courts that apply laws that do not comport with the first amendment or U.S. public policy, at the behest of libel tourists such as Mr. Bin Mahfouz.

These judgments cause concrete and specific harm to U.S. publishers. Those with assets abroad are particularly vulnerable. But even smaller publishers, newspapers and online media outlets operating entirely in the United States seeking funding for their expressive activities are likely to be handicapped in their day-to-day business activities when subjected to potentially crippling foreign judgments. Individual investigative journalists and authors will be even more chilled.

Because of the broad current impact of the default judgment, *amici* urged the court to find that the dispute between the parties was sufficiently concrete to issue a declaratory judgment. They argued that litigation against U.S. publications and authors in foreign countries constitutes a clear threat to the ability of the U.S. press to vigorously investigate and publish news and information about the most crucial issues before the U.S. public – including, as in this case, the funding and sources of terrorism.

The English judgment provides compelling evidence of the ease with which the subjects of critical investigative journalism are able to punish U.S. authors by using the courts of another country to avoid the protections of the First Amendment, and *amici* urged the court to provide a counterweight against this tactic for U.S. authors and publishers by issuing a declaratory judgment.

This approach could provide a weapon that could be used against foreign libel litigation. As MLRC members well know, Internet publication and distribution of newspapers, books and other media has led to litigation in which the courts of Australia, Canada, England, France, Germany, Italy and Zimbabwe, among others, have applied local laws to determine the liability of publishers and authors.

If publishers may be sued in any country in which a handful of citizens have accessed or purchased their works over the Internet, the media will lose the essential ability to

predict the law that will apply to their publications. This trend, if unrestrained, will lead to publishers curtailing speech that would be protected in their home country out of legitimate concern that a more restrictive legal system will define their liabilities after publication.

The principle that such judgments would be unenforceable to the extent they do not comport with the laws of the country in which the work was published would protect free expression and enable publishers to retain the full benefit of their countries' laws in an Internet-enabled publication marketplace.

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***UK Judgment Unenforceable***

If Mr. Bin Mahfouz did attempt to enforce the default judgment against Dr. Ehrenfeld, it is clear that under U.S. law it would be unenforceable against her because it was rendered by a legal system that does not comply with the requirements of the first amendment. *See*

*Matusevich v. Telnikoff*, 877 F. Supp. 1 (D.D.C. 1995) (answering questions certified from the D.C. Circuit Court of Appeals), 159 F.3d 636 (D.C. Cir. 1998), conforming to judgment of Maryland Court of Appeals, 702 A.2d 230 (Md. 1997); *Abdullah v. Sheridan Square Press*, No. 93 Civ. 2515 (LLS), 1994 WL 419847 (S.D.N.Y. May 4, 1994).

*Amici* urged that this principle be effectuated without forcing Dr. Ehrenfeld to await the execution of an English default judgment that is quite likely never to occur.

The Declaratory Judgment Act (DJA) provides a means by which a federal court “may declare the rights and other legal relations of any interested party” in the “case of an actual controversy within its jurisdiction.” 28 U.S.C. § 2201(a).

An “actual controversy” is a “real and substantial controversy admitting of specific relief through a decree of a conclusive character,” as opposed to an advisory opinion on a “hypothetical set of facts.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

Here, the *amici* argued that the English default judgment creates an immediate and real harm that gives rise to an actual controversy. In order to succeed, however, it will be essential for Dr. Ehrenfeld to convince the court that *Dow*

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*Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 407 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), does not control the outcome of the case.

### ***Distinguishing Dow Jones v. Harrods***

In *Dow Jones*, the court found a dispute to be insufficiently real and immediate where the requested declaratory relief was sought before the ongoing English defamation proceeding in question had been concluded.

In contrast, the court in *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001), *rev'd on other grounds*, 379 F.3d 1120 (9th Cir. 2004), *reh'g en banc granted*, 399 F.3d 1010 (9th Cir. 2005), granted the plaintiff's motion for summary judgment in a similar declaratory judgment action where there were "no relevant appellate proceedings" pending in a French lawsuit stemming from the content of plaintiff's Internet publications. *See* 169 F. Supp. 2d at 1188.

*Dow Jones* distinguished *Yahoo!* on this ground, stressing its inapplicability to "an incipient lawsuit, or litigation still in its early stages." *Dow Jones*, 237 F. Supp. 2d at 413.

The *Dow Jones* court acknowledged that "it is easier to satisfy the threshold of a justiciable controversy when the claim implicates First Amendment rights." *Dow Jones*, 237 F. Supp. 2d at 409.

As the *Yahoo!* court recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" and hence gives rise to a real and immediate threat within the context of the DJA's "actual controversy" requirement. 169 F. Supp. 2d at 1190.

Here, Dr. Ehrenfeld and amici argued that the harms to Dr. Ehrenfeld arising out of the English judgment give rise to an actual controversy because the judgment is final and valid under English law. The English action is not an incipient or ongoing proceeding. Instead, it has – as had the French action in *Yahoo!* – been reduced to a final judgment which has already begun to have effects in the United States.

This judgment – and Mr. Bin Mahfouz's publicizing of it – has undermined Dr. Ehrenfeld's professional reputation.

It has created a risk of financial liability which may compromise her ability to borrow funds. And it has, perhaps most crucially, threatened and chilled her constitutionally protected expressive activity.

Amici argued that *Dow Jones* is not to the contrary – in fact, it supports the issuance of a declaratory judgment in Dr. Ehrenfeld's favor. In *Dow Jones*, it was unclear at the time of the U.S. litigation whether Dow Jones would be held liable in the English courts, let alone "[w]hat specific relief would be granted, whether monetary or injunctive" and whether any ruling "would be sustained on final appeal." *Id.* (In fact, Dow Jones did prevail over Harrods in the English litigation, although it undoubtedly required significant expenditures to achieve that victory.)

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***Ehrenfeld and amici argued that the harms to Dr. Ehrenfeld arising out of the English judgment give rise to an actual controversy because the judgment is final and valid under English law***

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### ***Conclusion***

As was the case in *Yahoo!*, the foreign proceeding has concluded. Indeed, the *Dow Jones* court itself noted that "Dow Jones would have a

substantial likelihood to prevail ... were the remedy Dow Jones proposed limited, such as it was in *Yahoo!*," to a declaration that a foreign order sought to be executed domestically would not be cognizable under American law and would thus be unenforceable in the United States. *Dow Jones*, 237 F. Supp. 2d at 432-33.

Moreover, Dr. Ehrenfeld's action does not seek to enjoin an English court. Because she seeks only a declaration of her legal rights under U.S. law as applied domestically, a judgment in Dr. Ehrenfeld's favor would not give rise to issues of interjurisdictional conflict.

As the *Dow Jones* court noted, "comity ceases where a foreign judgment's actual conflict with vital public concerns of the forum state begins to prejudice or undermine domestic interests." *Dow Jones*, 237 F. Supp. 2d at 446.

*Kurt Wimmer, a partner with Covington & Burling in Washington, D.C., coordinated the media amicus effort in this case. Rachel Ehrenfeld is represented by Mark Platt of Kornstein Veisz Wexler & Pollard, LLP, of New York. Khalid Salim Bin Mahfouz is represented by Geoffrey Stewart of the New York office of Jones Day, Stephen Brogan of the Washington, D.C. office of Jones Day, and Michael Nussbaum of Bonner, Kiernan, Trebach & Crociata of Washington, D.C.*

## New York High Court Rejects Bid for Cameras in Courtroom

In a unanimous decision, New York's high court has rejected an appeal by Court TV challenging the state's statutory ban on cameras in the courtroom, holding that the ban violates neither the federal nor New York state constitutions and that permitting cameras in the courtroom is a legislative prerogative. *Courtroom Television Network LLC v. New York*, (June 16, 2005) (Smith, J.).

In June 2004, a unanimous five judge intermediate appeals court panel similarly rejected Court TV's constitutional challenge. *Courtroom Television Network LLC v. State of New York*, 2004 N.Y. Slip Op. 05386, 2004 WL 1382325 (N.Y.A.D. 1 Dept. June 22, 2004). See also *LDRC LibelLetter* October 2001 at 47; *MLRC MediaLawLetter* July 2003 at 34; *MLRC MediaLawLetter* June 2004 at 19; *MLRC MediaLawLetter* November 2004 at 25.

In considering the challenge to New York Civil Rights Law § 52, the court first recognized that while the First Amendment grants both the press and public a right of access to trials, the ban on televising courtroom proceedings does not amount to a "restriction on the openness of court proceedings but rather on what means can be used in order to gather news."

While affirming that the press has the same right of access to trials as the public, the court found that it "is not imbued with any special right of access ... nor any right to information greater than the public" (citations omitted). Although recognizing that the Supreme Court has acknowledged that the broadcasting of a criminal trial does not amount to a "per se violation of [a defendant's] fair trial rights," the court further cited the Supreme Court's pronouncement that "there is no constitutional right to have [live witness] testimony recorded and broadcast" in holding the ban does not violate the federal constitution. *Citing Chandler v. Florida*, 449 U.S. 560, 569 (1981) (quoting *Nixon v. Warner Communications*, 435 U.S. 589, 610 (1978)).

Turning to Court TV's argument that the ban violated Article 1, section 8 of the New York state constitution, the court rejected Court TV's reliance on courtroom clo-

sure cases to "suggest that New York has granted the press broader rights than those provided under the First Amendment."

While recognizing that courtroom proceedings are presumptively open to the public, that court stated that it has also "clearly and unequivocally held that the state constitutional right of the press to attend a trial is the same as that of any citizen."

Citing its earlier decisions in *United Press Assocs. v. Valente*, 308 NY 71, 85 (1954) and *Johnson Newspaper Corp. v. Melino*, 77 NY 2d 1, 8 (1990), the court concluded that "that there is no additional or broader protec-

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**While the First Amendment grants both the press and public a right of access to trials, the ban on televising courtroom proceedings does not amount to a "restriction on the openness of court proceedings..."**

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tion under the State Constitution ... than under the First Amendment insofar as access to court proceedings is concerned," that would support appellant's argument that the ban is unconstitutional.

In dicta, the court stated that Civil Rights Law § 52 would also withstand a strict scrutiny review had such analysis been required in that it is a narrowly-tailored means of serving the government's interests in "insuring that criminal defendants receive fair trials ... that witnesses are forthcoming in their testimony ... that the trial court has control of the courtroom and that the integrity of the trial is maintained" (citations omitted).

Finally, the court stated that in New York, the decision of whether to permit cameras in the courtrooms is a "legislative prerogative," and that it would not "circumscribe the authority constitutionally delegated to the Legislature to determine whether audio-visual coverage of courtroom proceedings is in the best interest of the citizens of this state."

Jonathan Sherman and David Boies of Boies, Schiller & Flexner LLP represented Court TV.

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## Hawaii Court Rejects Prior Restraint

By Jeffrey Portnoy

A Hawaii state court denied a motion for an injunction to prohibit *The Honolulu Advertiser* (the "Advertiser"), a Honolulu daily newspaper, from publishing a document covered by the attorney-client privilege that the Advertiser had obtained. *City and County of Honolulu v. Gannett Pacific Corporation dba The Honolulu Advertiser*, S.P. No. 05-1-0258 (Cir. Ct. June 15, 2005) (Marks, J.).

### ***Newspaper Obtained Counsel's Memo***

The document was a memorandum from counsel for the City and County of Honolulu ("City") to the City prepared in the course of counsel's representation of the City in a Fair Labor Standards Act action, *James Smith v. City and County of Honolulu*, Civil No. 02-1-1006-04 VSM (Haw. Cir. Ct., 1st Cir.) (the "FLSA Action").

The memorandum, which discussed legal strategy and contained recommendations to the City as to future lawsuits, was obtained legally by the Advertiser. The City initiated a special proceeding to seek enjoinder of the Advertiser from publishing the memorandum, and filed a motion seeking such relief. The City argued that an injunction against the Advertiser was necessary to preserve the attorney-client privilege.

The circuit court construed the motion as a request for a prior restraint order. The court noted that a prior restraint of publication comes to a court "with a heavy presumption against its constitutional validity." Citing, e.g., *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931).

Further, a party seeking a prior restraint "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam) (internal quotation marks omitted).

### ***City Did Not Meet Burden***

The court determined that the City did not meet its heavy burden of showing that a prior restraint was proper. The court observed that the United States Su-

preme Court has repeatedly struck down prior restraints as an unconstitutional curtailment of the First Amendment right to freedom of the press. See, e.g., *CBS Inc. v. Davis*, 510 U.S. 1315 (1994); *Oklahoma Publ'g Co. v. Dist. Ct.*, 430 U.S. 308 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times*, 403 U.S. 713; *Near*, 283 U.S. 697.

The circumstances in the case before the court did not fit within any exception to that body of precedent. The City had cited *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla. 1990), and *In re The State-Record Co., Inc.*, 504 S.E.2d 592 (S.C. 1998), in support of its argument that protection of the attorney-client privilege was a justifiable basis for imposing a prohibition against publication on the Advertiser.

The court found the cases distinguishable because they were criminal cases in which publication or broadcast of privileged information would have jeopardized the Sixth Amendment right to a fair trial.

In contrast, the FLSA Action was a civil case to which the Sixth Amendment did not apply. Moreover, to the extent the City argued that even a defendant in a civil case is entitled to a fair trial, the court found that there were constitutionally permissible means by which it could protect the interest in a fair trial in a civil proceeding, such as extensive *voir dire*.

The court further held that the preservation of the attorney-client privilege was not a constitutional interest or a state interest of the "highest order," see *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989), that would justify the issuance of a prior restraint. Accordingly, the court denied the motion.

*Jeffrey Portnoy, Peter Olson and Elijah Yip of Cades Schutte LLP in Honolulu, represented the Advertiser in this matter.*

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## Sixth Circuit Reaffirms: “Get a License or Do Not Sample”

In a controversial decision, the Sixth Circuit Court of Appeal ruled this month that “digital sampling” – a common feature of rap, hip hop and other pop music of incorporating small elements from other sound recordings – is not subject to the *de minimis* use rule of copyright law. [Bridgeport Music et al. v. Dimension Films et al., No. 02-6521, 2005 WL 1384376, Fed. App. 0243A](#) (6th Cir. June 3, 2005) (Guy, Gilman, Barzilay, JJ.).

### Background

At issue in the case was a three-note sample of a guitar riff taken from the song “Get Off Your Ass and Jam.” The sample was used in five places in the song “100 Miles and Runnin” which was included in the soundtrack for the movie “I Got the Hook Up” produced by No Limit Films, the defendant in this case.

The district court ruled that the copying was *de minimis* and therefore not actionable. Among other things, the district court found that no reasonable person would recognize the source of the sample.

The Sixth Circuit reversed last year, 401 F.3d 647 (6th Cir. 2004), then granted rehearing. This month’s decision on rehearing essentially follows the Court’s earlier ruling, although the new decision further clarifies that it is not ruling on the issue of fair use as defense.

### Use of Two of More Notes Is Actionable

The court based its holding on Section 114(b) of the Copyright Act, which deals with copyrights in sound recordings. The section provides that copyright holders in sound recordings have the exclusive right “to duplicate the sound recording in the form of phonorecords or copies that directly or indirectly recapture the actual sounds fixed in the recording.” Among these exclusive rights, according to the Court, is the right to sample.

In a footnote the Court noted that sampling a single note would probably not be actionable, as the text of the Copyright Act refers to the “fixation of a *series* of musical, spoken, or other sounds.” But applying the Court’s logic, sampling of two or more notes would be actionable.

### Justification for this Bright-line Test

The Court’s reasoning for its bright-line test rests on three basic premises: ease of enforcement, market controls of license prices, and the purposeful nature of sampling.

(1) Ease of enforcement: The court reasoned that the bright-line test will not stifle creativity in any significant way, as artists can still incorporate riffs into their recordings, they simply must recreate the sound themselves rather than sampling it from a pre-existing recording.

(2) Market controls: Market forces will keep the cost of a license in line with the cost of recreating the recording.

(3) Purposeful nature: Digital sampling is never accidental. You know you are taking someone else’s work product when you sample a sound recording.

### Why Is There No De Minimis Taking?

According to the Court, *de minimis* taking from sound recordings is first and foremost foreclosed by the language of Section 114(b). Additionally, the Court likened sampling to the “physical taking” of sound recordings from a fixed medium – a fairly strained analogy.

Finally, the Court noted that its bright-line rule is supported by the principle of judicial economy since there are hundreds of claims involving sampling and courts would have to engage in “mental, musicological and technological gymnastics” were they to adopt a *de minimis* analysis. The Court also noted that the decision is efficient for the industry because it is cheaper to license than litigate.

### Conclusion

The court concluded by noting that if the recording industry is not pleased with the result it can look to Congress to clarify the Copyright Act. Additionally, the affirmative defense of fair use may still be advanced in sampling cases. Music samplers would still be entitled to raise fair use as affirmative defense. As a practical matter, a fact based fair use defense is easier to litigate than

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**Sixth Circuit Reaffirms: "Get a License or Do Not Sample"**

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the issue of de minimus copying. Thus, the standard in the Sixth Circuit now appears to be: if you want to sample two or more notes, "get a license or do not sample." The defendant has indicated it will seek rehearing en banc.

Richard S. Busch and D'Lesli M. Davis of King & Ballow in Nashville, Tennessee represented the plaintiffs. Robert L. Sullivan and John C. Beiter of Loeb & Loeb in Nashville, Tennessee represented the defendant. [Amicus briefs in support of the defendant were filed by the Recording Industry Association of America and the Brennan Center for Justice and Electronic Frontier Foundation.](#)

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## Constitutional Challenge to Uruguay Copyright Agreement Rejected

A D.C. Circuit Court of Appeals panel unanimously rejected a constitutional challenge to § 514 of the Uruguay Round Agreements Act (“URAA”), codified at 17 U.S.C. §§104A, 109. *Luck’s Music Library, Inc. v. Gonzales*, 407 F.3d 1262 (D.C. Cir. May 24, 2005) (Randolf, Roberts, Williams, JJ).

Plaintiffs had sought a declaration that URAA – which implements part of the Berne Convention – violates the Copyright and Patent Clause of the U.S. Constitution by granting copyright protection to works that had previously entered the public domain in the U.S.

Section 514 of the URAA establishes copyright protection in the U.S. for foreign holders whose works are protected in the country they were initially published in but for a variety of reasons are in the public domain in the United States.

Luck’s Music Library rents and sells orchestral sheet music and Moviecrafft preserves, restores and sells old footage and films. They both alleged that under the URAA they are no longer free to distribute certain works in their collections.

### ***Court Follows Eldred***

Plaintiffs argued that copyright laws that remove works from the public domain “do not provide significant incentives for new creations” because “rewarding prior works will not provide any significant incentive to create new works because it will not change the costs and benefits of doing so.”

This, according to the Court, was the core argument rejected by the U.S. Supreme Court in *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

The Court also rejected plaintiffs’ argument that there is no historical precedent for granting copyright protection to works in the public domain, finding historical precedent, *inter alia*, in the Copyright Act of 1790 which “granted copyright protection to certain books already printed in the United States at the time of the statute’s enactment.”

Plaintiffs were represented by Daniel H. Bromberg, Geoffrey S. Stewart, Carmen M. Guerricagotia and

Jonathan L. Zittrain. The government was represented by John S. Koppel, Peter D. Keisler, Kenneth L. Wainstein and William G. Kanter of the U.S. Department of Justice.

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## Freelance Photographer's Copyright Claim Barred by Equitable Estoppel

By Robert Penchina

In a copyright case involving rights in a freelancer's photographs, the district court in New York dismissed, on equitable estoppel grounds, the photographer's infringement claims against The New York Times Company. *Dallal v. The New York Times Company*, 03 Civ. 10065 (AKH) (S.D.N.Y. May 10, 2005), (Hellerstein, J.).

### Background

From 1994 through November 2002, Thomas Dallal accepted and performed freelance photography assignments for the Times. There were no written agreements covering the relationship between the parties.

For each assignment he accepted and completed, Dallal was paid a day rate, and he retained ownership of the copyrights in the photographs he created. Beginning in about 1996, Dallal's invoices to the Times contained language to the effect that he was granting a "first exclusive, one time right" to use the photographs. The Times paid the invoices as a matter of course, but never indicated that it accepted or agreed to any of the terms inserted into his invoice forms.

In 1996, the Times launched the web site version of *The New York Times*. From that point on, any photographs created by Dallal for the Times that appeared in the print edition of the newspaper also appeared on the Times' web site. The Times did not pay any additional compensation for using Dallal's photographs on the web-site.

By letter dated May 6, 1997, Dallal complained to the Times that "other clients I work for pay additional assignment or usage fees for electronic use." Dallal also complained orally to various Times employees about the terms pursuant to which the Times utilized freelance photographers.

However, between May 1997 and November 2002, without securing any agreement by the Times to change the terms pursuant to which it offered freelance photography assignments, Dallal accepted hundreds of assignments to create photographs for the Times knowing that the Times had used, and would continue to use, the photographs in both its print and web site editions.

On November 25, 2002, Dallal sent a letter to the Times asserting that the Times had committed copyright infringement by making use of his photographs on the Times' web site "without [his] permission," and had been doing so "since 1997." Upon receipt of Dallal's letter, the Times immediately stopped offering further assignments to Dallal, and took steps to make inaccessible any Dallal photographs that may have remained accessible via the Times' web site.

On December 19, 2003, Dallal filed suit alleging copyright infringement of 113 photographs that appeared on the Times' web site between February 2000 and December 2002. The complaint sought damages in the amount of \$52.5 million.

The Times moved for summary judgment on multiple grounds, including that the web publication of Dallal's photographs was permitted by an implied license; the web edition of the *New York Times* was privileged as a revision of a collective work under section 201(c) of the Copyright Act; and Dallal was equitably estopped from asserting copyright infringement claims against the Times.

### District Court Decision

Judge Alvin K. Hellerstein granted the Times' motion for summary judgment on the ground that Dallal was equitably estopped from claiming copyright infringement.

The court noted that, "in order for a defendant to prevail on a defense of equitable estoppel, the defendant must have been misled into reasonably believing that the plaintiff would not pursue his claims against the defendant."

Applying the equitable estoppel doctrine in the specific context of a copyright claim, the court followed the formulation of the doctrine set forth in *Encyclopedia Brown Productions v. Home Box Office, Inc.*, 1998 WL 734355 (S.D.N.Y. Oct. 15, 1998):

The plaintiff-copyright holder's rights may be destroyed if the defendant shows that: a) the plaintiff knew of the defendant's wrongful conduct; b) the plaintiff intended that his conduct be acted upon or acted in a way that the defendant had a right to

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### Freelance Photographer's Copyright Claim Barred by Equitable Estoppel

(Continued from page 71)

believe it was so intended; c) the defendant was ignorant of the true facts; and d) the defendant relied on plaintiff's conduct to his detriment.

Judge Hellerstein found that the facts before him presented a "compelling case for equitable estoppel." It was "undisputed that Dallal knew of Defendants' conduct beginning in 1997." The court found that "Dallal's conduct ... may be thought of as a protracted attempt to negotiate a better deal for himself while the parties continued in their longstanding compensation arrangement, but it displays inaction in pursuing a claim for copyright infringement."

The court found the remaining elements of estoppel present because the record lacked any basis from which to conclude that the Times knew its conduct was consid-

ered to be infringing by Dallal, and the Times relied on Dallal's inaction to its detriment.

Judge Hellerstein remarked that the issue raised by the Times concerning the respective rights between the owner of a collective work, such as a newspaper, and the owner of a contribution thereto, such as a photographer, under section 201(c) of the Copyright Act "is a thorny one." Because he found that "equitable estoppel is so clear," the court declined to address section 201(c).

*Robert Petchina, of Levine Sullivan Koch & Schulz, LLP in New York, along with George Freeman of the New York Times Legal Department, represented the New York Times Company. Eric Vaughn-Flam of Rubin Bailin Ortoli Mayer & Baker LLP in New York represented plaintiff.*

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## U.S. Restrictions on Online Gambling Ads Buoyed by Recent Decisions

By Johnita P. Due

Efforts by the United States government to clamp down on advertising of internet gambling operations have been buoyed by two recent decisions – a federal court decision rejecting a First Amendment challenge to government restrictions; and a decision by the World Trade Organization.

### *First Amendment Challenge Rejected*

In February 2005, a federal court in Louisiana rejected a First Amendment challenge to the government's enforcement activities against internet-based gambling brought by Casino City, Inc., "a United States company that maintains a website which derives revenue from running advertisements of overseas companies which offer online casino or sportsbook gambling." *Casino City, Inc. v. United States Department of Justice*, Civil Action No. 04-557-B-M3, (M.D. La. Feb. 15, 2005).

At issue was a letter dated June 11, 2003 from the U.S. Department of Justice Criminal Division to the National Association of Broadcasters (NAB) about "Advertising for Internet Gambling and Offshore Sportsbooks Operations."

In its letter, the DOJ stated that "Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violate Sections 1084 [Wire Act], 1952 [Travel Act], and 1955 [Illegal Gambling Business Act] of the United States Code, each of which is a Class E felony" and warned "entities and individuals placing these advertisements may be violating various state and federal laws and...entities and individuals that accept and run such advertisements may be aiding and abetting these illegal activities." See June 11, 2003 letter from John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice, to National Association of Broadcasters.

In addition, the DOJ advised that "broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations since, presumably, they would not run advertisements for illegal

narcotics sales, prostitution, child pornography or other prohibited activities" and requested the NAB to "forward this public service message to all your member organizations which may be running such advertisements, so that they may consult with their counsel or take whatever actions they deem appropriate.

Shortly after the DOJ sent its letter to the NAB in June 2003, various U.S. Attorneys began issuing subpoenas to media outlets as part of their investigations into criminal violations of the above-mentioned laws. More warnings were issued by the DOJ to media organizations last fall and subpoenas have been ongoing. Hearst was reportedly served with subpoenas in April.

As a result of the DOJ letter and subpoenas, several media outlets, including Infinity Broadcasting, Clear Channel Communications, and Discovery Networks, have since stopped accepting online gambling ads. See Chuck Humphrey, "Advertising Internet Gambling," (February 27, 2005).

A number of major Internet advertising portals, such as Yahoo and Google, have also stopped accepting gambling ads.

Although Casino City had not received the letter from the DOJ and had not been served with a subpoena, it filed a declaratory judgment suit in federal district court in Louisiana challenging on First Amendment grounds "the application of the prohibition against aiding and abetting the commission of a federal offense to those who run advertisements for Internet and offshore gambling operations that take bets from bettors located in the United States."

The district court dismissed the case with prejudice, finding that Casino City had no standing to sue because it failed to show that it "intend[ed] to engage in a prohibited activity proscribed by statute" and "failed to show a credible threat of prosecution."

More importantly, the court reached the merits and held that even if Casino City had established standing, it had no claim for a First Amendment violation.

Applying the four-part test enunciated in *Central Hudson Gas & Electric Corp. v. Public Service Commis-*

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***The DOJ advised that "broadcasters and other media outlets should know of the illegality of offshore sportsbook and Internet gambling operations."***

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## U.S. Restrictions on Online Gambling Ads Buoyed by Recent Decisions

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sion of *New York*, 447 U.S. 557, 567 (1980), for determining whether commercial speech is protected by the First Amendment, the district court found that the plaintiff had no First Amendment right to advertise illegal activity, the government's interest was specifically and only directed at the advertising of illegal activity (internet gambling), and "the speech in which plaintiff wishes to engage is misleading because it falsely portrays the image that internet gambling is legal."

Finally, the court ruled that the government's interest was significant:

Internet gambling is of significant interest to the government because of its accessibility by the general public, which includes children and compulsive gamblers. By targeting and punishing advertisers who utilize this type of information, the government reaches its goal of deterring this illegal activity.

### *Casino City's Appeal*

Casino City appealed the ruling in April and filed its brief to the Fifth Circuit on June 10, 2005. The brief argues that there is standing to sue because the DOJ warnings constitute an objective chill of speech-related activity; it was within the class of entities threatened by the DOJ's warnings and subpoenas; and it had suffered a direct injury in fact because its parent company lost a potential sponsorship relationship with A&E Television Network and the History Channel website.

Casino City also argues that DOJ's restrictions on advertising fail the *Central Hudson* test because 1) "the online gambling entities advertised on Casino City are legal in the jurisdictions in which they operate"; 2) the restrictions do not directly and materially advance the asserted governmental interest; and 3) the DOJ's restrictions amount to a blanket ban so broad that it would prevent internet advertising even in places where the online gambling itself was legal.

Unless Casino City's appeal is successful, it is likely the U.S. government will continue to use the threat of criminal action to pressure media entities to cease accepting advertisements for online gambling.

### *WTO Obligations*

On the heels of its victory in federal district court in the *Casino City* case, the U.S. federal government survived an international legal challenge before the World Trade Organization (WTO) brought by the country of Antigua.

Antigua filed a complaint claiming that U.S. laws prohibiting internet gambling suppliers located outside the U.S. from supplying services to consumers within the U.S. were inconsistent with market access obligations agreed to by the U.S. under the General Agreement on Trade in Services (GATS).

The laws examined by the WTO in the dispute included the same laws cited in the DOJ letter sent to the NAB: the Wire Act (Title 18 U.S.C. Section 1084), the Travel Act (Title 18 U.S.C. Section 1952), and the Illegal Gambling Business Act (Title 18 U.S.C. Section 1955). (Eight state laws were also reviewed: Colorado, Louisiana, Massachusetts, Minnesota, New Jersey, New York, South Dakota and Utah.)

A WTO panel had ruled in November 2004 that U.S. laws did not qualify for the exceptions to GATS based on "public morals" and "public order." But on April 7, 2005, the WTO Appellate Body reversed, upholding the U.S. restrictions on internet gambling as "measures... necessary to protect public morals or to maintain public order." See Report of the WTO Appellate Body, World Trade Organization, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (April 7, 2005), Section VIII (Findings and Conclusions), par. 373 (d) (iii).

The WTO Appellate Body also reversed the original WTO panel's finding that the state laws of Louisiana, Massachusetts, South Dakota and Utah were inconsis-

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**Unless Casino City's appeal is successful, it is likely the U.S. government will continue to use the threat of criminal action to pressure media entities to cease accepting advertisements for online gambling.**

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(Continued on page 75)

## U.S. Restrictions on Online Gambling Ads Buoyed by Recent Decisions

(Continued from page 74)

tent with GATS. *Id.* at Section VIII (Findings and Conclusions), par. 373 (c)(iii).

(The WTO Appellate Body did find that the U.S. had failed to show that its 2000 Interstate Horse Racing Act was in conformity with its obligations under GATS since it did not show that it did not discriminate against foreign service providers of remote betting services. *Id.* at Section VIII (Findings and Conclusions), par. 373 (d)(vi)).

Overall, the WTO ruling was a victory for the U.S. which should only strengthen government efforts to regu-

late internet gambling. Based on the *Casino City* decision, threatening and prosecuting those who advertise internet gambling services will be one mode of enforcement.

*Johnita Due is with CNN in Atlanta. Casino City was represented by the law firms of Taylor, Porter, Brooks & Phillipps, LLP of Baton Rouge, Louisiana, and Greenberg Traurig, P.A. of Tallahassee and Ft. Lauderdale, Florida.*

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## Michigan Court of Appeals Holds That Televised Nudity is Public Indecency

By Robert Corn-Revere

In a ruling with broad potential significance for cable television programming, the Michigan Court of Appeals held that the state's indecent exposure law may be applied to prohibit depictions of nudity on a public access channel. *People v. Huffman*, 2005 WL 1106504 (Ct. App. Mich., May 10, 2005).

If the rationale were to be upheld or adopted by other courts, local nuisance laws could be enforced against programming on any television channel, including premium cable offerings like HBO. However, as explained below, the decision is being challenged and is unlikely to be followed by other courts.

### Background

On May 10 the Michigan Court of Appeals unanimously upheld the conviction of Timothy B. Huffman, a local public access channel producer under the state's "indecent exposure" law for a three minute (non-sexual) comedy segment in which a man's (non-erect) penis was shown.

The court held that it was reasonable to interpret the state law governing public nudity to apply to cable TV because the law may apply to "any conduct consisting of a display of any part of the human anatomy under circumstances which create a substantial risk that someone might be offended."

It reached this conclusion even though the court acknowledged that no person who was actually exposed to the penis during the taping was offended. The court also agreed that a televised image was "qualitatively different than a physical exposure," but observed that "in some ways, it can be more offensive and threatening." It noted that the exposed penis was "larger than life" and that the exposure was more prolonged ("fully three minutes") than would have occurred in public.

The court rejected the defendant's First Amendment arguments against applying "public indecency" laws to televised images. In doing so, it analyzed the case as a symbolic speech problem and applied intermediate scrutiny pursuant to *United States v. O'Brien*, 391 U.S. 367 (1968), as well as the nude dancing cases, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) and *City of Erie v. Paps A.M.*, 529 U.S. 277 (2000).

It distinguished cases that actually apply to the regulation of cable television, such as *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) and *Denver Area Educational Telecommunications Consortium v. FCC*, 518 U.S. 717 (1996), saying that "content-neutral restrictions on expressive conduct which constitutes symbolic speech, must be tested under the *O'Brien* analysis." *Huffman*, 2005 WL 1106504.

It thus avoided the more rigorous level of constitutional scrutiny that normally applies to content-based regulation of the media. In this connection, the court of

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## MI Court Holds That Televised Nudity is Public Indecency

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appeals cited *FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978), the landmark Supreme Court decision that upheld the FCC's enforcement of its broadcast indecency rules, for the proposition that "of all forms of communication, it is broadcasting that has the most limited First Amendment protection." It concluded that "this same reasoning applies to cable television broadcasting." *Huffman*, 2005 WL 1106504.

Overall, the court held that the application of public indecency laws to cable television is justified because "preventing public nudity promotes public morality."

### **Implications of the Decision**

The *Huffman* decision literally suggests that any depiction of nudity on television is subject to prosecution under local laws that prohibit *public* nudity. The court's reasoning

is not restricted to the context of local public access channels or some limited set of facts. Rather, it held that the law may apply to any display "of any part of the human anatomy" under circumstances where "someone might be offended."

It further held that the act of preparing for public distribution a program that contains nude images is the same thing as appearing nude in public. Specifically, it said that "the exposure offense occurred when defendant arranged for the tape's delivery to GRTV, in Grand Rapids, for the purpose of having it distributed by cable network into thousands of homes."

It appears the same logic would apply to the preparation of a program in New York or Los Angeles and arranging for its delivery via satellite for the purpose of having it transmitted by cable networks into millions of homes.

Under this rationale, it would be difficult if not impossible, for cable television systems (or direct broadcast satellite operators) to continue to offer premium channels that subscribers purchase individually. While depictions of nudity sometimes appear on other cable television channels (and less frequently on broadcast

channels), premium services are in the business of delivering uncut movies and original programs to audiences who are willing to pay.

Given that such programs not infrequently contain nude images, they would be susceptible to local prosecutions under the theory of indecent exposure adopted by the court in *Huffman*. This does not count the channels that are primarily devoted to sexually-oriented programming. By allowing a prosecution against an individual access channel program, where the rest of the schedule was made up of programs that did not depict nude bodies, the holding suggests that any program on any channel could suffer the same fate.

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**The court of appeals applied an aberrational interpretation of the term "public nudity" and fundamentally misread the controlling precedents on the issue of cable television regulation.**

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Such a result would effectively extend indecency laws to cable and satellite transmissions on a locality-by-locality basis.

### **Analysis**

Timothy Huffman filed a timely application with the Michigan Supreme Court for leave to appeal from the May 10 decision. If the court agrees to review the case, it seems extremely unlikely that it would uphold the court of appeals decision. It also is quite improbable that judges in other jurisdictions will follow the lead of the *Huffman* court. The court of appeals applied an aberrational interpretation of the term "public nudity" and fundamentally misread the controlling precedents on the issue of cable television regulation.

The decision by the court of appeals that televised nakedness equates to "public nudity" is entirely unique. No other court has reached the same conclusion in countless cases from across the United States construing local indecent exposure ordinances. *See, e.g.,* David Carl Minneman, *What Constitutes "Public Place" Within the Meaning of State Statute or Local Ordinance Prohibiting Indecency or Commission of Sexual Act in Public Place*, 95 A.L.R.5th 229 (2005).

Perhaps the closest analogy would be to cases involving live performers in booths in adult bookstores. *See, e.g., Adams v. State*, 461 N.E.2d 740 (Ind. Ct. App. 3d Dist. 1984). Yet even in that circumstance, courts cannot agree

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## MI Court Holds That Televised Nudity is Public Indecency

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that the performance was in a “public place.” *E.g.*, *Sweeney v. State*, 486 N.E.2d 651 (Ind. Ct. App. 2d Dist. 1985). Although the *Huffman* court acknowledged that a televised image of nudity is “qualitatively different than a physical exposure,” it nonetheless treated them the same so that it could characterize the access program as “conduct” and not “speech.”

This decision to treat the program as “conduct” is the linchpin to the court’s application of intermediate constitutional scrutiny and the key to its misreading of applicable law. The Michigan court expressly relied on “public nudity” cases involving strippers (*e.g.*, *Barnes* and *Paps A.M.*) while trying to distinguish more recent precedent involving “indecent” programming on cable television (*e.g.*, *Playboy Entertainment Group*).

But in its *Playboy* opinion, issued two months after its decision in *Paps A.M.*, the Supreme Court made clear that content controls on cable television programming must be subjected to strict scrutiny and that such regulations are presumptively invalid. *Playboy Entertainment Group*, 529 U.S. at 812-813.

The Court expressly rejected the central assumptions of the *Huffman* opinion – that programming can be banned because it may offend some people and that restrictions on cable television are subject to the same relaxed scrutiny as over-the-air broadcasting.

Indeed, the Court in *Playboy* made crystal clear that the lower level of constitutional scrutiny articulated in *Pacifica* cannot be applied to the technology of cable television. *Id.* at 814-815.

In any event, the cases restricting conduct – actual physical nudity – upon which the *Huffman* court relied, applied a lower level of scrutiny because the government was seeking to regulate “secondary effects” that presumably were unrelated to the communication. Although the *Huffman* court tried to dispute this point, cases such as *Barnes* and *Paps A.M.* were quite clearly based on the “secondary effects” theory that the Court first articulated in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). See *Paps A.M.*, 529 U.S. at 294-295.

Once again, however, the Court in *Playboy* expressly rejected this theory when applied to television programming, and it held that “the lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech.” *Playboy Entertainment Group*, 529 U.S. at 815.

The *Huffman* court’s other assumption, that a restriction of speech could be based solely on the interest in promoting “public morality,” has also been undermined by Supreme Court authority. See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003).

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***It is very unlikely that the theory articulated by the Michigan court of appeals in Huffman will be adopted by other courts.***

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If *Huffman* were to be upheld and its rationale adopted by other courts, the resulting patchwork of local laws would make it impractical to operate a national programming service that transmitted any depictions of nudity.

However, the Supreme Court has held that local regulation of television programming that has such a disruptive impact is subject to preemption under the Supremacy Clause, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), and lower courts have held specifically that local ordinances seeking to regulate indecency on cable television are preempted by federal law. See *e.g.*, *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099, 1105-06 (D.C. Utah 1985), *aff’d sub nom. Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff’d mem.* 480 U.S. 926 (1987).

As a consequence, it is very unlikely that the theory articulated by the Michigan court of appeals in *Huffman* will be adopted by other courts.

*Robert Corn-Revere practices First Amendment and communications law and is a partner at Davis Wright Tremaine LLP in Washington, D.C.*

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**THE TWENTY-FIRST CENTURY ANTI-INDECENCY CRUSADES:  
TAKING UP GOVERNMENT SWORDS AGAINST  
RADIO, TELEVISION AND SUBSCRIPTION SERVICES**

**PROTECTED SPEECH IN THE DEEP FREEZE:  
FROM CAUTION AND RESTRAINT TO REGULATORY EXCESS**

*By Steven A. Lerman and Jean W. Benz*

*“[C]ommencing in 2003, the FCC’s approach to indecency enforcement metamorphosized from one grounded in judiciousness and restraint to one of zealous intrusion into content matters utilizing a significantly expanded, confusing and obscure indecency definition, coupled with an erosion of procedural safeguards.”*

**STEMMING THE TIDE:  
CAN THE FCC’S ANTI-INDECENCY CRUSADE BE EXTENDED TO  
CABLE TELEVISION AND SATELLITE RADIO**

*By Robert Corn-Revere*

*“The ability to regulate “indecent” speech is a limited constitutional exception, not the general rule, and the Supreme Court has invalidated efforts to restrict indecency in virtually all other media.... In these circumstances, any effort to extend indecency regulation to cable television or other non-broadcast media would be almost certain to fail a constitutional challenge.”*

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## Justice Department Limits Prosecution Under HIPAA

By David V. Marshall

A June 1, 2005 opinion of the U.S. Department of Justice (DOJ) Office of Legal Counsel (OLC) (hereafter "DOJ Opinion"), publicly disclosed June 7, 2005 in a *New York Times* article, has limited DOJ criminal prosecutions under the federal health privacy law, the Health Insurance Portability and Accountability Act (HIPAA). See [http://www.worldprivacyforum.org/pdf/hipaa\\_opinion\\_06\\_01\\_2005.pdf](http://www.worldprivacyforum.org/pdf/hipaa_opinion_06_01_2005.pdf).

The DOJ Opinion is relevant to media organizations and their lawyers, because reporters sometimes seek access to, or receive, "protected health information" under HIPAA, creating at least the potential for federal prosecution of reporters and their employers.

In sum, the DOJ Opinion limits prosecutions to:

- "covered entities," that is, healthcare providers, health plans (insurers), and health-care (billing and payment) clearinghouses;
- certain directors, officers, and employees of such covered entities who may be criminally liable "directly" "in accordance with general principles of corporate criminal liability" (little explained in the DOJ opinion); and
- those third parties who cause, aid or abet, counsel, command, induce, procure, or conspire with, a covered entity to act (through employee conduct imputed to the entity in certain circumstances) in violation of HIPAA, liable under "principles of aiding and abetting liability and of conspiracy ...." DOJ Opinion, p.1.

This article discusses the background to the new DOJ Opinion and the opinion itself. We note in passing that there is brewing controversy relating to the new opinion, which one commentator says "drastically cuts back the medical privacy protections of Americans," and turns "the medical privacy law into little more than a voluntary standard." See Peter P. Swire, *Justice Department Opinion*

*Undermines Protection of Medical Privacy*, [www.americanprogress.org](http://www.americanprogress.org) (June 7, 2005) (Mr. Swire, a law professor, formerly served as chief counselor for privacy in the Office of Management and Budget).

The new DOJ Opinion leaves much unsaid, and though federal prosecutors will likely act with caution in applying its guidance, they retain the ability to prosecute parties outside of covered entities, depending on the applicable facts.

### Background

HIPAA was passed in 1996 as a broad reform of health care practices and related regulatory systems.

Among other things, HIPAA required the establishment of standards for (a) electronic transactions between health care providers and health plans, (b) privacy of patient health information and (c) security of same.

Privacy regulations now codified at 45 C.F.R. Parts 160 and 164 require "covered entities" to safeguard patient health information ("PHI") and restrict disclosures of PHI. PHI is defined to include "demographic information" revealing information about a person's health care, such as a provider's patient list, and "individually identifiable" health information about patients, such as a patient's name, date of birth, and social security number.

HIPAA established several criminal penalties, including penalties relating to use and disclosure of PHI. HIPAA Section 1177, codified at 42 U.S.C. § 1320d-6, provided:

- (a) OFFENSE.--A person who knowingly and in violation of this part [Part C entitled "Administrative Simplification," representing HIPAA sections 1171 - 1179, codified at 42 U.S.C., Chapter 7, Subchapter XI, Part C] --
- (1) uses or causes to be used a unique health identifier;

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***The DOJ Opinion is relevant to media organizations and their lawyers, because reporters sometimes seek access to, or receive, "protected health information" under HIPAA, creating at least the potential for federal prosecution of reporters and their employers.***

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## Justice Department Limits Prosecution Under HIPAA

(Continued from page 79)

- (2) obtains individually identifiable health information relating to an individual; or
  - (3) discloses individually identifiable health information to another person, shall be punished as provided in subsection (b).
- (b) PENALTIES.--A person described in subsection (a) shall--
- (1) be fined not more than \$50,000, imprisoned not more than 1 year, or both;
  - (2) if the offense is committed under false pretenses, be fined not more than \$100,000, imprisoned not more than 5 years, or both; and
  - (3) if the offense is committed with intent to sell, transfer, or use individually identifiable health information for commercial advantage, personal gain, or malicious harm, be fined not more than \$250,000, imprisoned not more than 10 years, or both.

HIPAA thus created three new healthcare privacy related crimes:

- a federal misdemeanor for “knowing” violations of the privacy rules (which the new DOJ opinion says “requires only proof of knowledge of the facts that constitute the offense” not “proof of knowledge that the conduct was contrary” to law);
- a five year felony if a knowing violation involved false pretenses (such as misrepresentation of identity); and
- a 10 year felony if a knowing violation involved intent to transfer or use PHI for gain or to cause harm.

There has been only one HIPAA privacy prosecution, *United States v. Gibson*, No. CR04-0374RSM, W.D. Wa., filed in Seattle, Washington and resolved by plea agreement in late 2004. Richard Gibson was an employee of a Seattle cancer center, who obtained “demographic” health information for a cancer patient being treated at his employer’s facility.

Gibson obtained credit cards in the patient’s name, then used those to obtain cash advances and to purchase items worth more than \$9,000. He was sentenced to 16 months in jail.

In a published interview with the *Gibson* case prosecutor, the interviewer noted that the U.S. Department of Health and Human Services (HHS) Office of Civil Rights had previously “said that any civil penalties that are imposed will only affect HIPAA covered entities.” See *Interview*, Health Law Section eSource, Vol.1, No.2, American Bar Association (October 2004), [www.abanet.org/health/esource/vol1no2/loitz.html](http://www.abanet.org/health/esource/vol1no2/loitz.html).

In response, the government prosecutor stated her office coordinated with DOJ, decided the prosecution was not a “close call,” and concluded Gibson “clearly violated the HIPAA criminal statute,” *id.*, while also noting Gibson had been employed by a “covered entity.”

### *DOJ Office of Legal Counsel June 1, 2005 Opinion*

According to the DOJ Opinion, the Office of Legal Counsel was asked by the HHS General Counsel:

whether the only persons who may be directly liable under section 1320d-6 [the HIPAA privacy crimes] are those persons to whom the substantive requirements of the subtitle, as set forth in the regulations ... , apply -- i.e., health plans, health care clearinghouses, certain health care providers ... -- or whether this provision may also render directly liable other persons, particularly those who obtain protected health information in a manner that causes a person to whom the substantive requirements of the subtitle apply to release the information in violation of that law.

DOJ Opinion, p.1. In response, DOJ opined that the parties “directly” liable included the “covered entities” and, “depending on the facts of a given case,”

certain directors, officers, and employees of these entities may be liable directly under section 1320d-6, in accordance with general principles of corporate criminal liability, as these principles are developed in the course of particular prosecutions. Other persons may not be liable directly under this provision. The liability of persons for conduct that may not be prosecuted directly under section 1320d-6 will be determined by principles of aiding and abetting liability and of conspiracy liability.

*Id.*

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## Justice Department Limits Prosecution Under HIPAA

(Continued from page 80)

The DOJ Opinion emphasized:

an analysis of liability under section 1320d-6 *must begin with covered entities, the only persons to whom the standards apply*. If the covered entity is not an individual, general principles of corporate criminal liability will determine the entity's liability and that of individuals within the entity, including directors, officers and employees. Finally, certain conduct of these individuals and that of other persons outside the covered entity, including of recipients of protected information, may be prosecuted in accordance with principles of aiding and abetting liability and of conspiracy liability.

*Id.*, at p. 4-5 (emphasis added).

The DOJ Opinion concluded:

When the covered entity is not an individual, principles of corporate criminal liability will determine the entity's liability and the potential liability of particular individuals who act for the entity. \* \* \* [T]he conduct of an entity's agents may be imputed to the entity when the agents act within the scope of their employment, and the criminal intent of agents may be imputed to the entity when the agents act on its behalf. See Kathleen F. Brickley [sic, Brickey], *Corporate Criminal Liability* §§ 3-4 (2d ed. 1992) [hereafter, "*Brickey*"]. In addition, we recognize that, at least in limited circumstances, the criminal liability of the entity has been attributed to individuals in managerial roles .... See *id.* § 5.

*Id.*, at p.9. The DOJ Opinion declined to discuss further these general corporate and aiding and abetting liability principles, noting the law varies in different jurisdictions and will be applied on a case by case basis.

### *Principles of Corporate Criminal Liability*

Professor Brickey's analysis of these general corporate liability issues provides some guidance. She notes that:

in the context of corporate criminal prosecutions, "within the scope of employment" is a term of art

signifying little more than that the employee's crime must be committed in connection with his performance of some job-related activity ....

*Brickey*, at § 3.01, p.90. Professor Brickey has also observed that the "clear weight of federal authority" holds a corporation bound by the acts of its agent even though the agent acts contrary to actual instructions or policy. *Brickey*, at § 3.08, p.111, *cases collected* at p.111 - 114 (and in 2004 pocket part, *citing U.S. v. Beusch*, 596 F.2d 871, 877-88 (9th Cir. 1979)); see also, *cases collected in Note, Corporate Criminal Liability for Acts in Violation of Company Policy*, 50 *Georgetown Law Journal* 547 (1962).

Professor Brickey also has stated the accepted doctrine that the agent "must intend to benefit the corporation if the entity is to share responsibility ....," *id.*, at § 4.02, p.131, with the agent intending to produce "some benefit to [the] corporation or some benefit to himself and secondarily to [the] corporation," *id.*, p. 136, n.22 (*citing U.S. v. Gold*, 743 F.2d 800, at 823 (11th Cir. 1984)). According to Professor Brickey, for obvious reasons it's easier to find intent to benefit an entity if the individual involved is the entity's owner. *Id.*, at § 4.03, p.138.

Where a "rogue" employee acts with no intent to benefit a covered entity, and solely for personal gain, it will be harder for prosecutors to show a covered entity was "in violation of HIPAA," an element of the crime per the DOJ Opinion.

The DOJ Opinion states "certain directors, officers, and employees of these [covered] entities may be liable directly under section 1320d-6" "depending on the facts of a given case." DOJ Opinion, pp.1 & 9. Again, the DOJ Opinion contains little explanation, but references *Brickey*. Professor Brickey's treatise says there is liability for corporate entity managers and employees for offenses committed by the corporate entity, including (1) liability for "direct" participants, whose conduct results in entity liability, (2) liability for managers with duties to control illegal conduct based on responsibilities within the organization, now called "responsible corporate officers" under the Supreme Court cases *U.S. v. Dotterweich*, 320 U.S. 277 (1943) and *U.S. v. Park*, 421 U.S. 658 (1975), and (3) liability under the federal aiding, abetting and causation statute, 18 U.S.C. § 2. The aiding and abetting statute provides:

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## Justice Department Limits Prosecution Under HIPAA

(Continued from page 81)

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him *or another* would be an offense against the United States, is punishable as a principal.

(Emphasis added.)

Professor Brickley's treatise observes, now particularly relevant to this recent DOJ Opinion and its interpretation of HIPAA, that:

the legislative history [of 18 U.S.C. § 2] ... contains an explicit statement of congressional purpose "to clarify and make certain the intent to punish aiders and abettors regardless of the fact that they may be incapable of committing the specific violation which they are charged to have aided and abetted."

*Brickley, id.*, at § 5.11, p. 169, and n.92. See also, *U.S. v. Scannapieco*, 611 F.2d 619 (5th Cir. 1980) (upholding conviction of a firearms dealer's *salesman* under 18 U.S.C. § 2(b) for causing a violation of 18 U.S.C. § 922 -- which statute prohibits a *dealer* from selling and delivering firearm(s) to a buyer while knowing the buyer does not reside in the state of the sale, despite the fact the *dealer* was not present at the time of the illegal sales and not convicted of the sales). In *Scannapieco*, the court held § 2(b) permits conviction as a "causer" even though the accused was himself not capable of committing the act forbidden by federal statute (he was not a *dealer* and the statute prohibited only acts by a *dealer*). Other cases support this doctrine. See *cases collected at Annotation*, 52 A.L.R. Fed. 769.

Professor Brickley's treatise noted that "an aider and abettor may be held accountable as a principal even though the perpetrator has not first been tried and convicted or even identified, so long as the government proves the crime was actually committed." *Id.*, at § 5.12, p. 171

(*cases collected* at nn. 94 - 95). In other words, DOJ prosecutors may charge that an employee caused an entity to act "in violation of" HIPAA and that the employee is therefore liable, without charging the entity. Unindicted co-conspirators and other parties show up in government indictments all the time, without the name of the unindicted party explicitly stated. Finally, the DOJ Opinion states that the "conspiracy statute prescribes punishment "if two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy," citing 18 U.S.C. § 371 (2000). Federal conspiracy liability is broad, and poses risk to third parties who affiliate with covered entity employees who "cause" the entity to violate HIPAA.

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***There still are risks to media organizations, because prosecutors may use aiding and abetting and conspiracy theories, though the DOJ Opinion suggests caution in so doing.***

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### Conclusion

Assuming that DOJ does not rescind its recent opinion, analysis of the risk of prosecution under HIPAA has become very fact specific. Federal prosecutors may conclude there is no employee or

third party liability without a nexus between the particular individual and a covered entity acting "in violation of" HIPAA's privacy standards.

Where there *is* a nexus with a covered entity, where protected records came from a provider and the third party dealt directly with a healthcare provider through one of its employees, then there is greater risk a prosecutor might bring a case.

Arguably, based on the corporate liability doctrines referenced in the DOJ Opinion, such a prosecution should fail absent proof the employee acted with some intent to benefit the employer entity.

There still are risks to media organizations, because prosecutors may use aiding and abetting and conspiracy theories, though the DOJ Opinion suggests caution in so doing. It remains to be seen how prosecutors will follow the June 1, 2005 DOJ Opinion, which left to the DOJ Criminal Division and local U.S. Attorneys application to real world cases.

*David V. Marshall is with Davis Wright Tremaine LLP in Seattle, Washington.*

## LEGISLATIVE UPDATE

### Open Government Act & Freedom of Information

By Kevin M. Goldberg

Although it has not itself moved any closer to passage, the Open Government Act has inspired two other, more discreet bills, which may provide quicker payoff for those who wish to see the procedural changes effected to the Freedom of Information Act.

Both have already passed the Senate Judiciary Committee and are on a faster track to a full Senate vote. In addition, the Free Flow of Information Act is still pending in both Houses, though that legislation appears to have stalled as the Department of Justice studies its provisions. In addition, a provision has been inserted into the Defense Authorization Act which would greatly limit access to the Pentagon's "operational documents".

#### ***Open Government Act of 2004 (S 394 and HR 867)***

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.
- Among the changes proposed in this bill are:
  - A broader definition of the "news media" for purposes of fee waivers
  - An increase in the circumstances where "fee shifting" would occur to award attorney's fees to a litigant who must go to court to obtain documents from a federal agency
  - Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
  - Stricter enforcement of the 20 day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
  - Maintenance of accessibility of records that have been given to private contractors for storage and maintenance

- The creation of a "FOIA Ombudsman" within a new Office of Government Information Services to oversee FOIA
- The subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee held a hearing on the topic of FOIA generally, this bill and the FASTER FOIA Act (discussed below) on May 11, 2005.

#### ***Identification of Statutes that Would Affect FOIA (S 1181)***

- Though the Open Government Act's momentum has slowed somewhat, discussion of the proliferation of the so-called "(b)(3)" exemptions to FOIA – when another statute exempts a specific class of information from disclosure upon request – led to Senators Cornyn and Leahy introducing S 1181, which simply consists of that section of the Open Government Act that would require any bill that seeks to exempt information from release under FOIA to specifically cite to 5 U.S.C. § 552 in order for that new exemption to become effective. This will allow those who track FOIA legislation to find all potential new exemptions that are often inserted as one paragraph of a much larger, non-FOIA specific, bill.
- S 1181 was introduced on June 7, 2005 and passed the Senate Judiciary Committee just two days later.

#### ***Faster FOIA Act***

- Senators Cornyn and Leahy also introduced the "Faster FOIA" Act as S 589 on March 10, 2005. This bill is intended to support the Open Government Act by establishing an advisory commission on Freedom of Information Act processing delays. The bill was introduced in the House of Representatives on April 6, 2005 by Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX). It was given bill number HR 1620.
- The May 11, 2005 hearing touched on the importance of the Faster FOIA Act to proper FOIA functioning.

*(Continued on page 84)*

**LEGISLATIVE UPDATE**

*(Continued from page 83)*

- The Faster FOIA act has passed the Senate Judiciary Committee but has not been brought to the Senate floor.

***Free Flow of Information Act  
(HR 581 and S 340)***

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2004 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- A hearing was scheduled to be held in the House Judiciary Committee's Subcommittee on Courts, Internet, and Intellectual Property on May 12, 2005. However, that hearing has now been canceled. The Department of Justice is still reviewing the bill.

***Defense Authorization Act Provisions Affecting  
Pentagon Operational Files (S 1042)***

- An example of the ill sought to be countered by S 1181 is the Fiscal Year 2006 Defense Authorization Act, which was introduced as S 1042 on May 17, 2005 and as HR 1815 on June 6, 2005. Section 922 of the Senate bill seeks to exempt the "operational documents" of the Defense Intelligence Agency from release under FOIA. A narrowly tailored exemption already exists for the CIA and an attempt has been made, in 2000, to extend the exemption to the "DIA" in 2000, which was rejected.
- Though introduced in both bills, the provision was removed from the House version, which passed that chamber on May 25. The Senate version passed the Armed Services Committee on May 12 but awaits a full Senate vote. This difference, and other differences, between the bills will have to be resolved in Conference Committee later this year.

*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 Kevin.Goldberg@cohnmarks.com.*

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