

MULRC Media Law Resource Center

MEDIA LAW LETTER

Reporting Developments Through June 30, 2006

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Government, Reporters Settle With Wen Ho Lee

By Dave Tomlin

Wen Ho Lee, the former government nuclear scientist at Los Alamos National Laboratory who was the subject of a 1999 espionage investigation that was leaked to reporters, dropped his Privacy Act lawsuit against three federal agencies on June 2 in exchange for a payment of \$895,000.

At the same time, five news organizations agreed to pay a total of \$750,000 to Lee after he asked the trial court -- and the court agreed -- to vacate contempt orders against the five reporters who refused the court's order to identify the sources of the leaks that gave rise to some of Lee's claims against the Energy and Justice departments and the FBI.

The two settlement agreements were the outcome of court-ordered mediation in the case. They came just as the U.S. Supreme Court was preparing to announce whether it would consider the appeal of four of the reporters from the D.C. Circuit Court of Appeals decision upholding the contempt orders.

The appeal of the fifth reporter, Walter Pincus of the Washington Post, was still pending before the D.C. Circuit. The other four reporters were Pierre Thomas of ABC News, H. Josef Hebert of The Associated Press, Robert Drogin of the Los Angeles Times, and James Risen of the New York Times.

The employers of the five journalists expressed mixed feelings about cutting the appeals process short and paying money to a plaintiff to avoid a potential choice between naming confidential sources or the sanctions that would follow defiance of a federal court order.

"We were reluctant to contribute anything to this settlement," the news companies said in a joint statement, "but we sought relief in the courts and found none. Given the rulings of the federal courts in Washington and the absence of a federal shield law, we decided this was the best course to protect our sources and to protect our journalists."

Most observers agreed that the settlement provided fresh evidence that a federal shield law is badly needed.

But some expressed strong disappointment that the news companies had chosen to settle rather than waiting to see whether the Supreme Court could be persuaded to rule that a reporter privilege based on constitutional or common law, or both, protected the reporters from Lee's demand for their sources' identities.

There was concern in some quarters that an opportunity to strengthen the reporter privilege might have been wasted, that plaintiffs in other cases might view the settlement as an invitation to seek quick payments from journalists as an alternative to lengthy litigation of their actual claims, and that media critics might point to the settlement as a concession that the reporters had done something wrong.

CNN, where Pierre Thomas was working at the time of his Wen Ho Lee reporting, said it decided not to take part in the settlement for "philosophical" reasons. Thomas wished to settle, however, and ABC agreed to underwrite his share of the payment to Lee.

The other news organizations concluded that the concerns expressed by settlement critics were either entirely misplaced or were heavily outweighed by more immediate dangers. They believed there was a significant chance that the Supreme Court would either decline to hear the reporters' appeals, or would hear them and then uphold the contempt orders, possibly further or even fatally undermining what remains of the reporter privilege still recognized in a majority of the federal circuits.

The reporters and their employers calculated that a settlement of the case after a final loss in the Supreme Court would either be far more costly or not possible at all, in which case severe contempt sanctions, including the strong likelihood of jail time for the reporters, would be almost sure to follow.

Refusing the settlement opportunity in hopes of winning their contempt appeal before the Supreme Court thus seemed like a gamble the journalists could not afford to lose.

On the heels of the settlement announcement, there was evidence the journalists might have been right. The Supreme Court announced on June 5 that it was declining to hear the reporters' appeals, despite the fact that the justices must already have known they would soon be asked to dismiss them in the wake of the settlement.

While it can't be known whether the court would have granted cert if no settlement had been in the offing, some observers viewed the court's seemingly pointed denial as a sign that if they had not settled, the reporters would have reached their difficult crossroads sooner rather than later.

Dave Tomlin is assistant general counsel for the Associated Press.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

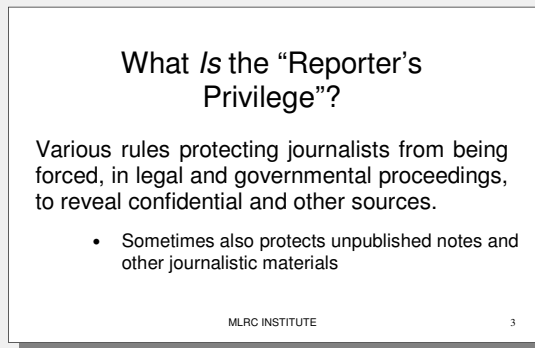
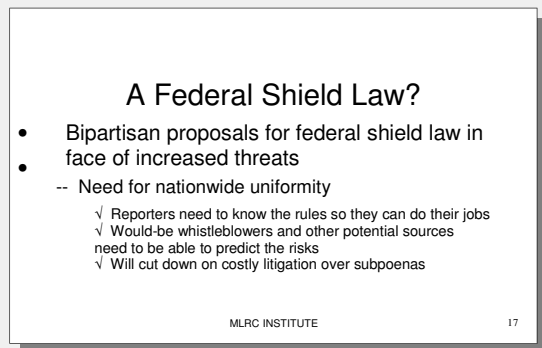
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

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Suggestion for background reading:
Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.



Connecticut Passes Shield Law

By Karen Kaiser, Craig Bloom and Maherin Gangat

On June 6, 2006, Connecticut became the 32nd state to enact a shield law when Governor M. Jodi Rell signed House Bill No. 5212, "An Act Concerning Freedom of the Press," into law.

The legislation, spearheaded by Representative James Spallone (D-Essex), takes effect on October 1, 2006 and provides a strong qualified privilege against compelled disclosure of sources and information, regardless of confidentiality.

Following an unsuccessful effort to pass a shield law bill during the 2005 legislative session, Rep. Spallone convened a task force made up of local media representatives and attorneys to work on passage of a bill in 2006. The task force included, among others, Karen Kaiser (attorney representing *The Hartford Courant*), Craig Bloom (attorney representing NBC Universal, Inc. and its Hartford station, WVIT), Eric Kemmler (attorney representing ESPN), Kirk Varner (news director of LIN TV station, WTNH) and Maherin Gangat (MLRC attorney).

The focus of the renewed legislative effort was on streamlining the provisions of the previous bill, in particular the definition of a journalist, and establishing a large-scale consensus among Connecticut media entities in support of the bill. The bill was drafted carefully to draw appropriate balances in defining coverage while also strengthening protection for journalists and their sources, and promoting the free flow of information.

The lobbying effort was a true success, as the legislation drew support from the Board of Directors of the Connecticut Broadcasters Association and the Connecticut Daily Newspapers Association; the Connecticut Council on Freedom of Information; and the Attorney General of Connecticut. Indeed, aside from some last-minute opposition from an insurance lobby, support for the bill was overwhelming.

Legislative Background

The original bill put forward by Rep. Spallone in the start of the session provided an absolute privilege for confi-

dential sources and information received in confidence, and a strong qualified privilege for non-confidential information. It was based on the model shield law drafted by the MLRC.

Shortly after introduction, the legislature's Joint Committee on Judiciary held a public hearing on the bill. Ms. Kaiser and Mr. Varner testified as part of a panel in favor of the bill, together with Kevin Crosbie, publisher of the *Willimantic Chronicle*, representing the Connecticut Daily Newspapers Association. Jim Taricani, the investigative reporter for Providence, R.I. station WJAR who recently served a 4-month sentence for refusing to disclose a confidential source, also testified in support of the bill. Chris Powell, managing editor of the *Journal Inquirer*, testified against the bill.

Of the many issues raised during the extensive public hearing, one of the chief concerns was the definition of a journalist and whether the scope of the bill was too broad in including Internet bloggers. Critics of the bill

feared that expanding the definition of journalist from traditional media to include bloggers would impermissibly extend protection to any member of the public who posts commentary on his or her individual website.

Another line of questioning concerned protection of sources during leak investigations. In particular, opponents of the bill challenged the use of the Shield Law to withhold confidential source information when the leaking of information is itself a crime.

Much of this discussion analogized to the recent grand jury investigation into the leaked identity of CIA operative Valerie Plame. Senators and Representatives demanded to know why sources should be protected in such situations. Critics of the bill further questioned why existing First Amendment protection was not sufficient, and argued that the law would unfairly establish a special status for reporters, creating a privileged class of citizens. Opponents of the bill further questioned the need for the legislation, given the historically limited number of Connecticut journalists jailed or held in contempt.

The panel spent much of its time explaining the expanding role of the Internet and the need to cover new forms of media, while distinguishing those bloggers who

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One of the chief concerns was the definition of a journalist and whether the scope of the bill was too broad in including Internet bloggers.

Connecticut Passes Shield Law

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are legitimate journalists from those whose posts are personal in nature. The panel explained that the bill draws a meaningful distinction in a test built on both function and experience.

It further explained the potential public benefit of certain leaks, citing numerous historical examples of how the public benefited from leaked information, even if the leaking was a crime. And it stressed the importance of providing a shield to potential whistleblowers, giving them the confidence to come forward with important information about government or corporate wrongdoing, without fear of reprisal. The bill passed the Judiciary Committee by a vote of 30-10.

Several weeks later, in a vote of 107 to 34, the House of Representatives approved the bill, but added an amendment addressing the rights of a criminal defendant under the shield law. The new provision specified that nothing in the bill “shall be construed to deny or infringe the rights of an accused in a criminal prosecution guaranteed under the sixth amendment to the Constitution of the United States ...”

In the final days of Connecticut’s legislative session, the bill faced a number of proposed amendments in the Senate. The most notable amendment that passed the Senate was rejection of the absolute privilege, and instead making disclosure of confidential sources and information received in confidence subject to a qualified privilege.

Rep. Spallone, however, successfully lobbied members of the Senate to defeat other amendments to the bill, including one that would have required individual journalists to have a degree in journalism in order to claim the privilege.

The Senate unanimously passed the amended bill on the eve of the very last day of the legislative session and it returned to the House the following morning for subsequent approval, which it received in a vote of 136-11.

Substantive Protections

The privilege contained in HB 5212 covers members of the “news media,” a defined term that includes (1) newspapers, magazines and other periodicals, book publishers, news agencies, wire services, radio and television stations and networks, and cable and satellite systems that disseminate information to the public by print, broadcast, photographic, mechanical, electronic or any other means or medium; (2) journalists working for such entities (as employees, agents or independent contractors) and persons supervising or assisting those journalists in newsgathering; and (3) entities in the corporate family that are subpoenaed for privileged information.

The party seeking to subpoena the news media (or initiate other compulsory process) must first engage in prior negotiations with the news media. If such negotiations fail, a court may compel disclosure of the subpoenaed information if the party seeking the information overcomes the balancing test.

As a preliminary matter, the party seeking to compel must establish that in criminal investigations, there are reasonable grounds to believe that a crime has occurred, and in civil cases, that there are reasonable grounds to sustain a cause of action. The party must also prove that the subpoenaed information is “critical and necessary” and not available from alternative sources and that there is an overriding public interest in disclosing the information.

The shield law also extends the media’s privilege to records held by third parties, to the extent such parties receive subpoenas seeking business records that would reveal privileged information.

Karen Kaiser is Senior Counsel with Tribune Company, which owns the Hartford Courant. Craig Bloom is Senior Media Counsel with NBC Universal, Inc. Maherin Gangat is a Staff Attorney with MLRC.

REGISTRATION MATERIALS NOW AVAILABLE AT WWW.MEDIALAW.ORG

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference
Alexandria, Virginia

Connecticut House Bill No. 5212

Public Act No. 06-140

AN ACT CONCERNING FREEDOM OF THE PRESS

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Section 1. (NEW) (*Effective October 1, 2006*) As used in sections 1 to 8, inclusive, of this act:

- (1) "Information" has its ordinary meaning and includes, but is not limited to, any oral, written or pictorial material, whether or not recorded, including any notes, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium; and
- (2) "News media" means:
 - (A) Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates information to the public, whether by print, broadcast, photographic, mechanical, electronic or any other means or medium;
 - (B) Any person who is or has been an employee, agent or independent contractor of any entity specified in subparagraph (A) of this subdivision and is or has been engaged in gathering, preparing or disseminating information to the public for such entity, or any other person supervising or assisting such person with gathering, preparing or disseminating information; or
 - (C) Any parent, subsidiary, division or affiliate of any person or entity specified in subparagraph (A) or (B) of this subdivision to the extent the subpoena or other compulsory process seeks the identity of a source or the information described in section 2 of this act.

Sec. 2. (NEW) (*Effective October 1, 2006*) No judicial, executive or legislative body with the power to issue a subpoena or other compulsory process may compel the news media to testify concerning, or to produce or otherwise disclose, any information obtained or received, whether or not in confidence, by the news media in its capacity in gathering, receiving or processing information for potential communication to the public, or the identity of the source of any such information, or any information that would tend to identify the source of any such information, unless such judicial, executive or legislative body complies with the provisions of section 3 of this act.

Sec. 3. (NEW) (*Effective October 1, 2006*)

- (a) Prior negotiations with the news media shall be pursued in all matters in which the issuance of a subpoena to, or the initiation of other compulsory process against, the news media is contemplated for information described in section 2 of this act or the identity of the source of such information, or any information that would tend to identify the source of any such information.
- (b) If the news media and the party seeking to compel disclosure of information described in section 2 of this act or the identity of the source of any such information, or any information that would tend to identify the source of any such information, fail to reach a resolution, a court may compel disclosure of such information or the identity of the source of such information only if the court finds, after notice to and an opportunity to be heard by the news media, that the party seeking such information or the identity of the source of such information has established by clear and convincing evidence:
 - (1) That (A) in a criminal investigation or prosecution, based on information obtained from other sources than the news media, there are reasonable grounds to believe that a crime has occurred,

or (B) in a civil action or proceeding, based on information obtained from other sources than the news media, there are reasonable grounds to sustain a cause of action; and

(2) That (A) the information or the identity of the source of such information is critical or necessary to the investigation or prosecution of a crime or to a defense thereto, or to the maintenance of a party's claim, defense or proof of an issue material thereto, (B) the information or the identity of the source of such information is not obtainable from any alternative source, and (C) there is an overriding public interest in the disclosure.

(c) A court of this state shall apply the procedures and standards specified by this section to any subpoena or other compulsory process whether it arises from or is associated with a proceeding under the laws of this state or any other jurisdiction, except that with respect to a proceeding arising under the laws of another jurisdiction, a court of this state shall not afford lesser protection to the news media than that afforded by such other jurisdiction. No subpoena or compulsory process arising from or associated with a proceeding under the laws of another jurisdiction shall be enforceable in this state unless a court in this state has personal jurisdiction over the person or entity against which enforcement is sought.

Sec. 4. (NEW) (*Effective October 1, 2006*) The provisions of section 2 of this act protecting from compelled disclosure information described in said section 2 and the identity of the source of any such information shall also apply if a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks information concerning business transactions between such third party and the news media for the purpose of obtaining information described in said section 2 or discovering the identity of a source of any such information. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks information concerning business transactions between such third party and the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard.

Sec. 5. (NEW) (*Effective October 1, 2006*) Publication or dissemination by the news media of information described in section 2 of this act, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure provided in section 2 of this act with respect to any information that is not published or disseminated.

Sec. 6. (NEW) (*Effective October 1, 2006*) Any information obtained in violation of the provisions of sections 1 to 8, inclusive, of this act, and the identity of the source of such information, shall be inadmissible in any action, proceeding or hearing before any judicial, executive or legislative body.

Sec. 7. (NEW) (*Effective October 1, 2006*) Whenever any person or entity seeks the disclosure from the news media of information that is not protected against compelled disclosure pursuant to section 2 of this act, such person or entity shall pay the actual cost that would be incurred by the news media in making a copy of such information if a subpoena or other compulsory process was not available, and may not use a subpoena or other compulsory process as a means to avoid paying such actual cost.

Sec. 8. (NEW) (*Effective October 1, 2006*) Nothing in sections 1 to 7, inclusive, of this act shall be construed to deny or infringe the rights of an accused in a criminal prosecution guaranteed under the sixth amendment to the Constitution of the United States and article twenty-ninth of the amendments to the Constitution of the state of Connecticut.

Approved June 6, 2006

Update: Missouri Appeals Court Affirms \$15 Million Misappropriation Verdict

By Joseph E. Martineau

The Missouri Court of Appeals this month affirmed a \$15 million verdict in favor of former hockey player Tony Twist in his long-running misappropriation claim over the use of his name in a comic book series. *Doe, a/k/a Tony Twist v. McFarlane, et al.*, 2006 WL 1677856 (Mo. App. E.D. June 20, 2006).

Background

Previous issues of the *MediaLawLetter* (August 2004 and 2003) and the *LDRC Libel Letter* (July 2000, November 2000 and August 2002) have reported on the case, in which former professional hockey player, Tony Twist, sued comic book creator, Todd McFarlane, alleging misappropriation of name and infringement of the right of publicity because a character in his comic book series, *Spawn*, was named after the hockey player.

In October 2000, the original trial judge set aside a \$24.5 million jury verdict, stating that he had made a “grievous mistake” in submitting the case to the jury. He

held that the evidence failed to show that McFarlane had used Twist’s

name intending to derive a commercial advantage. According to the trial judge: “No rational person could believe that the use of plaintiff’s name as the nom de guerre of a swarthy mafioso in a comic book series, having absolutely nothing to do with hockey, either benefited defendants or injured plaintiff in any way, except perhaps in plaintiff’s imagination.”

The trial judge also found that Twist’s evidence of damage was nothing more than “junk economics” and “exercises in speculation.” (See *LDRC LibelLetter* Nov. 2000 for a discussion of the trial court’s JNOV after the first trial.)



Spawn’s ‘Tony Twist’

In July 2002, these holdings were affirmed by a three judge panel of the Appellate Court for the Eastern District of Missouri, which held that the use of Twist’s name in the comic book was protected under the First Amendment. See *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc.*, 30 Media L. Rep. 2409 (Mo. Ct. App. E.D. July 23, 2002).

In so ruling, the appellate court, too, was highly critical of the case, saying:

While a proud hallmark of our system of justice requires that we err on the side of trial on the merits, some trials that should never have taken place, while capable of serving a role in the orderly development of the law, can in fact do more damage to our system of values than others. This is especially true where First Amendment rights are at stake.

McFarlane’s victory was temporary. On July 29, 2003, a unanimous Missouri Supreme Court reversed the trial court’s JNOV and vacated the appellate court’s favorable opinion.

The supreme court held that Twist had a triable case

for violation of his “right of publicity.” It held further that the use of Twist’s name and identity was not protected under the First Amendment because there was a commercial purpose in using Twist’s identity and because that commercial purpose outweighed any use for artistic or expressive purposes. *Twist v. TCI Cablevision of Missouri, Inc.*, 110 S.W.3d 363, 375, 31 Media L. Rep. 2025 (Mo. 2003), cert. denied 124 S.Ct. 1058 (2004).

The court adopted a test which it coined the “predominant use test.” The case was remanded for a new trial because of an error in instructing the jury.

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Tony Twist

Update: Missouri Appeals Court Affirms \$15 Million Misappropriation Verdict

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On July 9, 2004, after a three week trial, which largely mirrored the original trial, a jury returned a \$15 million verdict against *Spawn's* creator for using Twist's name. See *MediaLawLetter* Aug. 2004 for a discussion of the second trial and jury verdict.

This month that verdict was affirmed in its entirety by a different three judge panel of the Court of Appeals.

Appellate Court's Decision

In his second appeal McFarlane continued to assert that because his use of the Twist name involved artistic and literary expression, it ought to be protected under the First Amendment. At the same time, he acknowledged that the Missouri Supreme Court had rejected this argument. The appellate court rejected the point for that reason, saying that under the Supreme Court's prior opinion, "artistic value alone is not sufficient to invoke the First Amendment under the predominant use test."

Attempting a second bite at the First Amendment apple, McFarlane also sought to show that his use of Twist's name was not predominantly commercial because when he first began using Twist's name, Twist was a journeyman hockey player with little name recognition or commercial value.

Not until later, did Twist develop commercial value – and even then only weakly. McFarlane argued that proper application of the "predominant use" test required balancing the "artistic value" of the name against the "commercial value" of the name when first used. He pointed to evidence offered at the second trial through literary experts that the use of the name reflected the "twisted" nature of the villainous character in *Spawn* and formed part of a comic book tradition of giving villains alliterative names.

Rejecting this argument, the appellate court said that McFarlane misunderstood the "predominant use" test, which it said was based simply on whether the use was for commercial exploitation or expressive or artistic commentary. The "value" of the name as a literary device or for commercial appeal had nothing to do with application of the test.

Further, given that the Supreme Court had already held on substantially identical evidence that McFarlane had used the name primarily as a ploy to sell comic books, any First Amendment protection had already been disallowed. The court said:

We are bound by the law set forth [by the Supreme Court] and because the evidence before the Supreme Court ... and before us .. is virtually the same with respect to what the Court found relevant with respect to the predominant use test, we reach the same conclusion.... The predominant purpose of the use of the name "Tony Twist" was to sell comic books and related products and not to make an expressive comment about Twist the hockey player. Therefore, the use of the name is not entitled to First Amendment protection.

"Artistic value alone is not sufficient to invoke the First Amendment under the predominant use test."

Further, according to the appellate court, McFarlane's testimony that he had used the name primarily for artistic reasons "lacked credibility." Before the suit, McFarlane had expressly acknowledged in interviews using the name based on the hockey player. Suspiciously, after suit was brought, and despite being an avid hockey fan and using other hockey players' names for characters in the comic, McFarlane "downplayed the importance of the fact that there was a hockey player named Tony Twist – admitting that he had the player in mind, at least subconsciously, but that he did not intentionally name the character after him. According to McFarlane, it was just a coincidence."

This "coincidence" was apparently as hard for the appellate court to fathom as it had been for the previous two juries. The court noted: "To the extent McFarlane's own claims about his artistic reasons for using the name 'Tony Twist' are significant, it was well within the trial court's discretion to find that his testimony lacked credibility." (As a trial strategy, this attempt to dissuade a conclusion that the character was named after the hockey player may have substantially damaged the credibility of any argument that the First Amendment protected the use, and it could have been a factor in two juries' decisions to award Twist millions for use of a name that had never garnered more than a few thousand dollars.)

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Update: Missouri Appeals Court Affirms \$15 Million Misappropriation Verdict

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The appellate court also noted that in the first trial, McFarlane had expressly denied any intention to comment on Twist. In its earlier opinion, the Supreme Court had posited that this denial was “perhaps to avoid a defamation claim.” It seems just as likely, however, that having denied any conscious intention to name the character after the hockey player, McFarlane recognized that he could not also contend that his comic book character was designed to parody or comment upon the hockey player’s reputation as “a renowned enforcer (i.e. ‘goon’),” as described by another publication mentioned in the appellate court’s opinion. It is remarkably ironic that a position McFarlane may have taken to avoid liability (either for defamation or infringement of the right of publicity) may have led to his undoing.

Expert Witnesses Testimony

McFarlane’s appeal also challenged the expert witness testimony as to a significant profit derived by McFarlane in using the Twist name. One of these experts, a former marketing executive at the Anheuser-Busch brewery, testified that based on Twist’s engaging personality, his noteworthiness as a hockey player and his “work ethic,” Twist had the potential to earn between \$3 and \$50 million as a product endorser, but had lost that ability as a consequence of being associated with *Spawn*.

The other expert, a marketing professor at St. Louis University, testified, without ever undertaking any independent research, that Twist was entitled to 15% of *Spawn* profits for products that had the Twist character (the comic book and season 1 of a derivative HBO television series) and 9% of the profits for those products that did not have the character (a *Spawn* movie and various *Spawn* toys and memorabilia that did not include a Twist character). According to this “expert” this is what would have been negotiated between Twist and McFarlane for use of the name.

Although this was essentially the same evidence that the original trial judge characterized as “junk economics,” and that the Missouri Supreme Court characterized as “purported” expert testimony, the appellate court rejected these points, holding that McFarlane’s objections to the experts went to the issue of weight to be given to their testimony, not to admissibility, and that all these arguments were fully developed in cross examination.

Other Evidentiary Arguments

McFarlane raised other evidentiary issues which were quickly and probably correctly rejected by the appellate court, including arguments about the admissibility of McFarlane’s pre-suit media interviews in which he acknowledged basing the character on the hockey player and videotapes of a HBO television series based on *Spawn*.

The Next Steps

McFarlane’s attorneys have promised further appeals. Under Missouri procedure, McFarlane has fifteen days to petition the appellate court for a rehearing or transfer to the Missouri Supreme Court. Thereafter, assuming such requests are rejected by the appellate court, he has another fifteen days to seek an order from the Supreme Court seeking transfer of the case.

As the Supreme Court has not had any change in its makeup since the original opinion, the prospect of any relief on the First Amendment front may be dubious. A greater possibility lies in seeking its review of the ridiculous amount of damages awarded based on the vague, speculative testimony of Twist’s expert witnesses.

Analysis

The appellate court opinion on the First Amendment issue comes as little surprise, as the earlier Supreme Court opinion adopting the “predominant use” test and applying it to reject a First Amendment argument essentially tied the appellate court’s hands.

What is surprising is the appellate court’s apparent wholesale and unquestioning acceptance of that test as a good one. Although this opinion was issued by a different panel, it is interesting that the new opinion wholly disregards the earlier, much better reasoned decision of a different panel that questioned the viability of the claim and recognized the danger that permitting such a claim imposed on literary and artistic expression.

Also surprising is the extent to which the appellate court seemed willing to forego a requirement of objectively proving damage in such a claim and to allow what can only be characterized as expert speculation. While the court was arguably correct that the testimony was admissible, what it seems to miss is that the evidence was insufficient to support such a magnani-

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Update: Missouri Appeals Court Affirms \$15 Million Misappropriation Verdict

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mous verdict to a hockey player who had never demonstrated significant earning potential as a commercial endorser of products or services.

Normally, a plaintiff desiring to recover damages for lost profits – which essentially is what *Twist* was trying to do by claiming that *Spawn* cost him endorsement revenues – must prove those profits with reasonable certainty. Usually, this requires some relationship with past profits. See, e.g., *Coonis v. Rogers*, 429 S.W.2d 709 (Mo. 1968).

For *Twist*, past profits from endorsements and the like had been minimal. It seems highly dubious that a court would ever find such meager evidence sufficient to support a multi-million dollar verdict in a defamation, invasion of privacy or trademark infringement case. And Professor McCarthy's well-recognized work on the Right of Publicity reveals no case wherein such an amount of damages were awarded. See 2 J. T. McCarthy, *THE RIGHTS OF PUBLICITY AND PRIVACY* §11.32, pp. 683-84 (2d ed. 2006).

The *Twist* case and the precedent developed from it put Missouri at odds with the holdings in every other jurisdiction. Where an item subject to a claim of infringement of the right of publicity involves pure expression – i.e. an item that has no utility independent of expression (e.g., a newspaper, a book, a movie, and yes, even a comic book) – most courts have applied a test that protects it unless the use is exclusively commercial in the First Amendment sense of commercial speech (e.g. an advertisement for a product or service), even where the work is fictional. See *id.* §8.74, p. 248 (“The vast majority of relevant case, by whatever route of reasoning, reach the conclusion that the fictional use of human identity is not actionable as either invasion of privacy by ‘appropriation’ or infringement of the right of publicity.”)

The test employed now in Missouri – the predominant use test – gives too little regard to the First Amendment interests of free expression that are at stake, and it conflicts with the First Amendment paradigm that courts should not concern themselves with the relative value to be assigned to works of literary and artistic expression.

While the “predominant use” test could be argued to have viability in applying right of publicity claims to items

not involving pure expression, i.e. items having utility independent of expression (e.g. coffee mugs, tee shirts, and possibly even sports trading cards, such as in *Cardtoons v. Major League Player's Ass'n.*, 95 F.3d 959 (10th Cir. 1996)), applying such an analysis to purely expressive words creates a grave risk of severely impinging the creative energy and efforts of those who inform and entertain us.

In the now legally meaningless words of the first *Twist* appellate decision:

To extend the right of publicity to allow a celebrity to control the use of his or her identity in a work of fiction would grant them power to suppress ideas associated with that identity, placing off-limits a useful and expressive tool. This, in turn, would effectively revoke the poetic license of those engaged in the creative process. To proscribe their right to use

certain names, works, thoughts and ideas would ultimately apply to the rest of us, impeding our ability to express ourselves.

2002 WL 1610972 at *12.

On a practical level, the *Twist* test further complicates an already confusing area of the law, and it creates a divergent, more celebrity-favorable standard for right of publicity claims in the State of Missouri than elsewhere. In this regard, one must now ponder whether celebrities (e.g. Johnny and Edgar Winter), who find the law in most of the country less favorable to right of publicity claims, will now come to Missouri seeking relief which they could not get elsewhere.

In *Zacchini v. Scripps Howard Broadcasting Co.*, the United States Supreme Court said that “[n]o social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.” *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 576 (1977). This was the policy underlying its recognition that the First Amendment would not bar a claim against a defendant's pirating of a professional performance.

That policy is entirely justifiable. But it does not countenance the astounding verdict in *Twist v. TCI*. Little was taken from the hockey player Tony Twist. Because no one

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The Twist case and the precedent developed from it put Missouri at odds with the holdings in every other jurisdiction.

Update: Missouri Appeals Court Affirms \$15 Million Misappropriation Verdict

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would realistically construe the non-look-alike *Spawn* character as a real life depiction of him or his activities, his reputation was not tarnished.

Because there was little evidence that the defendants attempted to parlay the hockey player's modest success and limited recognition into success for *Spawn*, there was little, if any, commercial exploitation of his identity. (It seems fair to say that *Spawn* benefited commercially no more from Tony Twist, the hockey player, than Tony Twist, the hockey player benefited or was hurt by *Spawn*.)

Moreover, how can it be said that the recognition value of the hockey player correlated to enhanced revenues for *Spawn* of \$15 million or that the hockey player's name – a name which had never attracted more than \$16,000 per year in endorsement value – was hurt to that degree?

Indeed, the real theft that is threatened here is the court-sanctioned theft of McFarlane's creative efforts and energies by giving the hockey player a substantial portion of the total revenues of the entire *Spawn* empire. This

gives the hockey player, who never contributed anything to *Spawn*, possibly as much as seems to have been made by *Spawn*'s creator. “[I]t is difficult to imagine anything more unsuitable, or more vulnerable under the First Amendment, than compulsory payment, under a theory of appropriation, for the use made of [an individual's identity in a work of fiction].” See *Guglielmi v. Spelling-Goldberg Productions*, 160 Cal. Rptr. 352 (Cal. 1979)(Bird, C.J., concurring), quoting Hill, “Defamation and Privacy Under the First Amendment,” 76 COLUM. L. REV. 1205, 1305 (1976).

This verdict will be a dark force to be reckoned with by all those who create or produce expressive works that are designed primarily to entertain, rather than inform or comment.

Joseph E. Martineau is a partner at Lewis, Rice & Fingersh, St. Louis, Missouri. McFarlane was represented by Thomas C. Walsh, James F. Bennett, Michael A. Kahn and Geoffrey Gerber. Plaintiff was represented by James P. Hol-loran, Robert D. Blitz, John E. Bardgett, R. Thomas Avery and Thomas W. Rynard.

D.C. Cir. Grants Motion for Rehearing En Banc in *Boehner v. McDermott*

On June 23, the D.C. Circuit Court of Appeals issued a one page per curiam order granting a motion for rehearing in *Boehner v. McDermott*. In March, a divided panel held that Congressman James McDermott violated the federal wiretap act by passing on to the media a tape of an illegally intercepted phone conversation between Congressman John Boehner and House Republican leaders. See No. 04-7203, 2006 WL 769026 (D.C. Cir. March 28, 2006); *MLRC MediaLawLetter* March 2006 at 5.

The decision written by Judge Raymond Randolph and joined by Circuit Chief Judge Douglas Ginsburg reasoned that the case was distinguishable from *Bartnicki v. Vopper*, 532 U.S. 514 (2001), because Congressman McDermott had actual knowledge that the phone conversation was illegally intercepted and knew who intercepted the call, concluding McDermott had “unlawfully” obtained the recording and had no First Amendment right to disclose it.

Judge Sentelle wrote a forceful dissent arguing that McDermott's knowledge of the interception was irrelevant for purposes of First Amendment protections. Calling the decision “fraught with danger,” Sentelle argued the majority ruling could easily be extended to the media and others because it provides no reason for liability to stop with the original recipient.

The motion for rehearing will be heard on September 28, 2006.

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New York Privacy Claim Survives Appeal

By Laura Handman and Wendy Tannenbaum

On June 6, 2006, New York's Appellate Division, First Department, affirmed a ruling allowing a woman whose image was briefly displayed in a newsworthy HBO television program to proceed with a privacy claim under New York Civil Rights Law §§ 50-51 ("Section 50/51"). The ruling in *Nieves v. HBO et al.*, 2006 WL 1529128, Index No. 100966/05 (N.Y. App. Div. 1st Dep't, 2006), represents a rare instance in which an appeals court has declined to dismiss a Section 50/51 privacy claim in a case that involves neither advertising nor fictionalization.

Background

The lawsuit arises out of nine seconds of a 30-minute episode of the television series "Family Bonds," produced by defendant Stick Figure Productions and distributed by HBO. The series followed a colorful Queens, New York, family, the Evangelistas, as they went about their family business as bail bondsmen. The parties agree that the series, tracking the par-

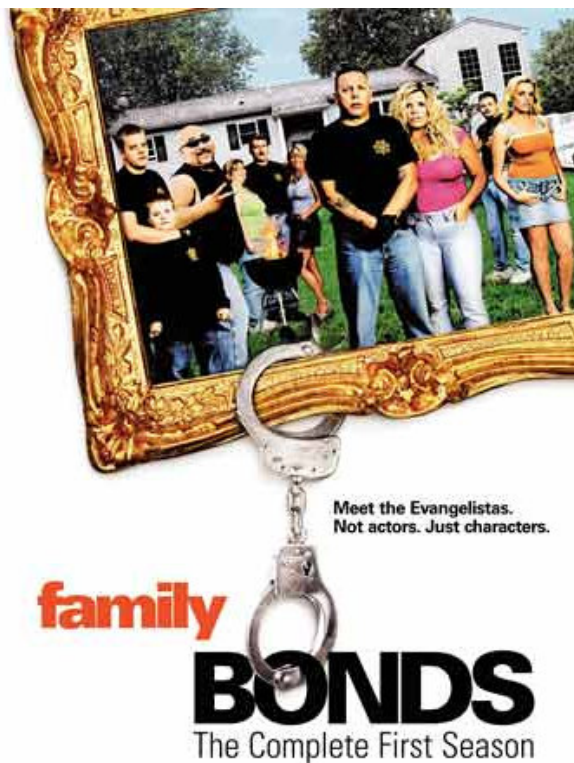
ticipants' real-life activities as they searched for fugitive criminals and went about their unusual daily lives, was newsworthy.

Plaintiff Chanti Nieves describes herself in the complaint as an aspiring actress and singer. A resident of New York, she was walking at a public intersection in Manhattan when her image was captured on video by the producers' cameras. When the episode aired, it contained an image of Ms. Nieves next to a van in which members of the Evangelista family were parked while conducting a search for a fugitive. During the nine seconds that plaintiff's image was shown on-screen, members of the family search team, including a teenager on his first fugitive mission, were captured on tape offering crude banter about the effects her appearance had on their libidos. Plaintiff was never identified by name.

Defendants moved to dismiss the complaint for failure to state a claim, on the grounds that (1) Section 50/51's narrow relief, aimed explicitly and exclusively at "advertising or trade," does not apply to the non-commercial use of plaintiff's image in a television documentary; (2) the expansive newsworthiness exception to Section 50/51, well-developed in the many cases on the subject, precludes liability; (3) the use bore a real relationship to the series, as part of the real life action on the streets of New York and the subject of commentary by the principals in the series, and, as such, could not be subject to the statute; and (4) the use was incidental and therefore non-actionable.

In plaintiff's opposition to that motion, she conceded the newsworthy nature of the program but argued that the use of her image bore no real relationship to the rest of the program and was therefore actionable.

On January 10, 2006, Justice Debra A. James of the New York Supreme Court, New York County, issued a short opinion denying the defendants' motion to dismiss. Justice James, who had not viewed the videotape of the program that had been submitted with defendants' motion to dismiss, held that issues of fact remained as to "whether the use of plaintiff's image and accompanying commentary bears a real relationship to a 'documentary' about a 'bounty-hunting' family." Order, *Nieves v. HBO et al.*, Index No. 100966/05 (N.Y. Sup. Ct. Jan. 10, 2006), at 4. The court noted the "derogatory and degrading" nature of the commentary that accompanied plaintiff's image.



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New York Privacy Claim Survives Appeal

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Appeals Court Decision

Following the trial court's ruling, defendants appealed the decision to the Appellate Division. Defendants' principal arguments were that the trial court's decision was inconsistent with the exceedingly narrow scope of Section 50/51 and that the "no real relationship" exception to the newsworthiness doctrine, aimed at ferreting out commercial uses in disguise, did not apply, as a matter of law, to plaintiff's claim.

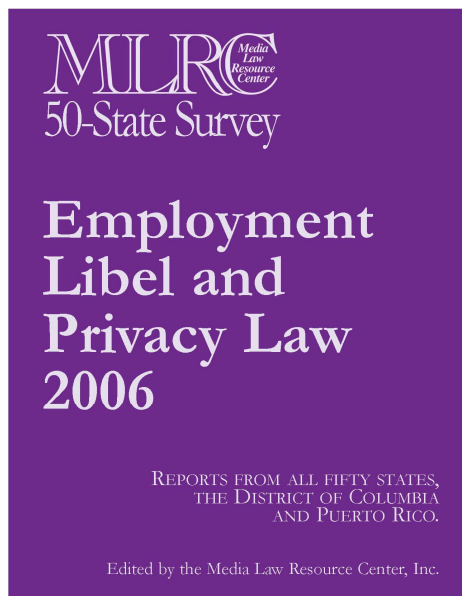
Like Justice James, the unanimous appellate panel, in their page and a half decision, noted the sexual nature of the remarks about Ms. Nieves. Citing cases from 1952 and 1932, the Appellate Division held that, on a motion to

dismiss, defendants had failed to demonstrate that there was a "real relationship" between the use and the "Family Bonds" episode and also failed to show that Ms. Nieves was not "singled out and unduly featured merely because [she was] on the scene." *Id.* at 2 (quoting *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 359 (1952)).

Laura R. Handman and Wendy W. Tannenbaum of Davis Wright Tremaine LLP represented the defendants together with Eve A. Konstan, Stephanie S. Abrutyn and Peter R. Rienecker of Home Box Office. Plaintiff was represented by Daniel N. Arshack, Arshack & Hajek PLLC.



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Playboy Mansion Party Videos Not Covered By California Anti-SLAPP Statute

Tapes Not A Matter of Public Interest

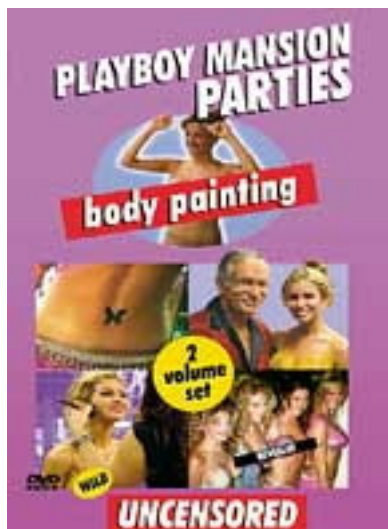
A California appeals court this month affirmed the denial of Playboy's motion to strike misappropriation, false light and related claims over the distribution of Playboy Mansion party videos, finding the videos did not involve a matter of public interest and were therefore outside the scope of the California anti-SLAPP statute. *Whitney v. Playboy Entertainment Group, Inc.*, No. B182230, 2006 WL 1494005 (Cal. App. 2 Dist. June 1, 2006) (unpublished) (Chavez, Boren, Doi Todd, JJ.).

Background

The plaintiff, Jennifer Whitney, was hired by Playboy to dance and serve drinks at a "Midsummer Night's Dream" party at the Playboy Mansion, wearing only body paint. The party was private, but was openly videotaped by Playboy. Plaintiff said she was told this was being done so that guests could view the videotapes contemporaneously on television monitors inside the Mansion. She was presented with a release form to sign, but "threw it into a trash can." Playboy claimed plaintiff signed the release, but could not produce it because the company lost it after an office move.

Playboy produced two videos for sale, "Playboy Mansion Parties, Behind the Scenes," and "Playboy Mansion Parties, Body Painting," that include scenes of plaintiff nude at the party. Plaintiff's picture also appeared on the front covers of the video boxes. The videos also contained scenes from other Mansion parties, including scenes of women engaging in sex.

Playboy moved to strike the complaint under the California anti-SLAPP statute, Cal. Civ. Code § 425.16, arguing the videos were protected free speech and that Playboy and founder Hugh Hefner were the subject of widespread public interest. The trial court denied the motion.



Appeals Court Decision

Affirming, the Court of Appeal held the videotapes were not created in connection with a public issue or an issue of public interest as required under the anti-SLAPP statute, §425.16, subdivision (e)(4). Specifically, the court found that plaintiff was not a public figure and the videotapes not matters of widespread public interest. "To hold otherwise," the court stated, "would not be in keeping with the legislative intent of section 425.16."

The court accepted that Playboy and Hefner were the subject of public interest, but stated that "their status is not pertinent to our analysis." Instead the court reasoned that plaintiff, a "part-time waitress and bikini model" without "an agent, website, or fan club" was a private figure.

The court then "reject[ed] Playboy's argument that media coverage of Mr. Hefner, or parties at the Playboy Mansion are matters of public interest by virtue of Mr. Hefner's celebrity status." "Celebrity watching," the court added, "is not inherently a public issue." Citing *Rogers v. Home Shopping Network, Inc.* (1999) 57 F.Supp.2d 973, 985, fn. 7.

The assertion of an amorphous public interest is not sufficient, the court explained. Moreover, where an issue is of interest to a limited portion of the public, it "must occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance." Citing *Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 119.)

The Playboy Mansion videos "were not instructional tapes on body painting or documentaries designed to provoke a general discussion on the mores of Mr. Hefner, the merits of body painting, masturbation, or lesbian activities" and thus not part of any controversy or debate.

Defendant was represented by Anthony Glassman and Alexander Rufus-Isaacs, Glassman, Browning & Saltsman, Inc., Los Angeles. Plaintiff was represented by Cyrus John Nownejad and Donna M. Boris, Law Offices of Cyrus & Cyrus.

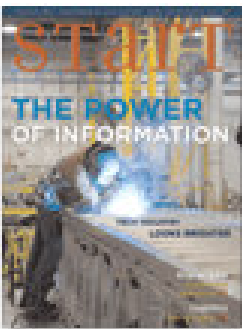
Illinois Supreme Court Holds That Fair Report Privilege Is Absolute *Privilege Not Defeated By Actual Malice*

The Illinois Supreme Court this month held that the state's fair report privilege is absolute and cannot be defeated by allegations of actual malice. *Solaia Technology, LLC v. Specialty Pub. Co.*, No. 100555, 2006 WL 1703487 (Ill. June 22, 2006). Illinois appellate courts were divided on the issue and the state supreme court had not previously addressed the question.

The court further held that there is no judicial-action limitation on the fair report privilege in Illinois. Thus once a complaint is filed in court it is an official document for purposes of the fair report privilege. There is no need for the complaint to be brought before a court for action. This is the rule followed in the majority of jurisdictions that have considered the question. See *Sack on Defamation* (3d ed. 2006) § 7.3.2.2.4. But this rule is rejected in a comment in the Restatement. See *Restatement (Second) Torts* § 611 cmt. e. (1977).

Background

The case arose over a series of articles in *Start* magazine, a specialty business publication for manufacturing executives. The articles were highly critical of a series of patent infringement claims and litigations brought by Solaia Technology. Solaia owns a computer processing patent for communicating real-time information between computers and machines. Solaia claims its patent is used by virtually every company that uses a computer to control manufacturing operations.



Among other things, one article reported that Solaia and its lawyers, Niro, Scavone, Haller, & Niro, Ltd., a Chicago intellectual property law firm, were targeting “innocent companies”; that they were “deeply greedy people,” and it referred to Solaia’s “so-called patent.”

Another article described the patent litigation as “legal carnage” – a “runaway train, fueled by lawyers and their clients hoping to cash in.”

A third article entitled “Conspiracy of a Shakedown,” discussed a lawsuit filed against Solaia by Rockwell Automation that charged Solaia with unfair business practices and criminal antitrust violations. This article also contained a letter from a person identified only as an “industry veteran” that called So-

laia’s patent “essentially worthless” and likened Solaia and its lawyers to Johnny Cochran, Enron and WorldCom executives, the D.C. sniper, and to a group of muggers with baseball bats.

Solaia, its patent law firm and individual partner Robert Niro sued for libel, false light and tortious interference. The trial court dismissed the complaint, finding that the complained of statements were either subject to an innocent construction, were protected opinion or subject to the fair report privilege.

Last year a divided First District appellate court affirmed in part, but reinstated claims over the third article entitled “Conspiracy of a Shakedown.” 2005 WL 736256 (Ill. App. Mar 31, 2005) (Burke, Wolfson, Cahill, JJ.). The court held that while the article was a fair summary of the allegations in Rockwell’s complaint, the privilege was defeated because Solaia alleged that *Start* knew that some of the allegations in the complaint were false. “Illinois law,” the appellate court wrote, “still allows allegations of actual malice to defeat the fair report privilege.”

In a lengthy survey of law on the question, the appellate court noted that while the *Restatement (Second) Torts* § 611 considers the privilege absolute, it was unclear whether the state supreme court would follow the *Restatement*. The court also found that the majority of state appellate court decisions considered the privilege absolute, but several cases in the First District allowed allegations of actual malice to defeat the fair report privilege.

“We believe that our finding that allegations of actual malice defeat the fair report privilege will aid in preventing schemes in which a person files a complaint solely for the purpose of establishing a privilege to publish its content and then immediately drops the action, which is a concern set forth in the *Restatement (Second) of Torts* § 611, cmt. e.”

Illinois Supreme Court Decision

The Illinois Supreme Court reversed on the question of law regarding the scope of the fair report privilege. “We hold,” the court stated “that the fair report privilege over-

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Illinois Supreme Court Holds That Fair Report Privilege Is Absolute

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comes allegations of either common law or actual malice.” The court expressly endorsed § 611 of the Restatement which explains:

“The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings.... [T]he privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding.”

Restatement (Second) of Torts § 611, cmt. a (1977).

The court then went on to expressly hold that there is no judicial action limitation to the privilege. The judicial action limitation requires that some official judicial action be taken on a complaint before it is covered as an official document for purposes of the fair report privilege. It is endorsed by the Restatement “to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action.” *Restatement (Second) of Torts* § 611, cmt e (1977).

The supreme court rejected the limitation for four reasons. First, the filing of a complaint is itself a public act. Second, the privilege serves the public’s interest in the judicial system, and this interest begins with the filing of a complaint. Third, it found the judicial-action limitation ineffective. “Simply because a suit has proceeded to the point where judicial action of some kind has taken place does not necessarily mean that the suit is less likely to be groundless and brought in bad faith.” Fourth, and finally, “the public has a sophisticated understanding of the court system and is capable of evaluating information gleaned from a complaint.”

Two Claims Reinstated

The court went on to affirm dismissal of most of the claims, but found that plaintiffs had stated two claims. First, the court found that the magazine had inaccurately described part of the complaint against Solaia by loosely

describing it as a complaint against both Solaia and lawyer Robert Niro. Niro was not named as a defendant and the court found he stated a claim for the suggestion raised in the magazine that he engaged in “false claims of patent infringements.”

The court also reinstated the defamation claim against the magazine over the description of Solaia’s patent as “essentially worthless.” Although the phrase has “no precise meaning in the abstract,” in context it suggested that Solaia secured a worthless patent and filed infringement claims with the sole aim of extracting settlements.

Defendants were represented by Frederick J. Sperling, Sondra A. Hemeryck, and Anne H. Burkett of Schiff Hardin LLP in Chicago. Plaintiffs are represented by Paul Vickrey of Niro, Scavone, Haller & Niro in Chicago.

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Florida Federal Court Reaffirms Sports Columnists' Right To Vigorously Express Their Opinions of Athletes

By Katherine M. Bolger

Recognizing that sports columns are a “traditional haven for cajoling, invective, and hyperbole,” a United States Magistrate Judge in the Southern District of Florida recently granted summary judgment in a libel suit brought by professional basketball player and self-described “enforcer” Danny Fortson. *Fortson v. Colangelo, et al.*, 2006 WL1589793 (S.D. Fla., June 5, 2006) (Seltzer, J.).

Background

Fortson, sued Jerry Colangelo, the former owner of the Phoenix Suns basketball team, for defamation alleging that Colangelo defamed Fortson by calling him a “thug” in interviews Colangelo gave to various media outlets in November 2003. Fortson also sued Peter Vecsey (a columnist for the *New York Post*), and NYP Holdings, Inc. (“NYP”), the publisher of the *Post*, claiming that a column entitled “Stern Warnings Not Enough” (the “Column”) defamed him.

Colangelo’s comment and Vecsey’s column were based on the same incident, which occurred on November 26, 2003 during the last three minutes of a basketball game between the Dallas Mavericks and the Phoenix Suns.

Fortson, who at the time played for the Dallas Mavericks - and who, throughout his career had been a league leader in personal, technical and flagrant fouls - entered the game in its last minutes with the Suns holding a 24 point lead. Zarko Cabarkapa, a rookie basketball player, received the ball on a fast break and elevated to the basket for a lay-up. Fortson extended his arms and - without making any effort to play the ball - pushed Cabarkapa in the chest and knocked him to the floor.

Cabarkapa broke his wrist in the fall and was unable to play basketball for almost the rest of the season. Fortson was immediately called for a flagrant foul and ejected from the game. The NBA fined Fortson \$1000 and suspended him for a total of three games.

But to Colangelo and Vecsey, this punishment was insufficient. Colangelo gave several interviews to the press stat-

ing that Fortson was “a thug.... He always has been and is.” Colangelo also suggested that Fortson should be suspended from the NBA for the same number of games that Cabarkapa was placed on the disabled list.

Similarly, on November 30, 2006, Vecsey dedicated his regular *Hoop Du Jour* column to a discussion of Fortson’s flagrant foul. In his Column, Vecsey chided NBA Commissioner David Stern for failing to suspend Fortson for the same amount of time that Cabarkapa was injured.

Vecsey described Fortson as “thugged out,” called him a “vacant lot” and a “meaningless mass,” referred to him as a “gangsta” and a “wanksta” and described Fortson’s actions as “maliciously destabilizing a player in mid-flight,” as a “mugging” and as “attempted murder.” In the lawsuit, Fortson alleged that these statements defamed him.

The context of the statements signaled to the reader that the column contained Vecsey’s opinion because it was a sports column and not a news item.

Summary Judgment Motion

NYP moved for summary judgment against Fortson (Vecsey was never served in the action), arguing that all of the complained-of statements were Vecsey’s constitutionally protected opinion. In particular, NYP argued that the context of Vecsey’s statements - a daily opinion column, rather than a hard news article - signaled to the reader that the column would contain statements of Vecsey’s opinion rather than statements of fact.

In addition, NYP argued that the words that Vecsey used were clearly rhetorical hyperbole and were not used in a literal sense. For example, NYP argued that in calling Fortson a “gangsta,” Vecsey was not referring to Fortson as a mobster involved in racketeering, but was, instead, using the term as it was used by basketball players and the Hip Hop community to refer to someone who swaggered and acted tough. Colangelo also moved for summary judgment arguing that the complained of statement attributed to him was one of opinion.

On June 5, 2006, Magistrate Judge Seltzer (who the parties had stipulated could hear the case for all purposes) granted the defendants’ motions for summary judgment

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Florida Federal Court Reaffirms Sports Columnists' Right To Vigorously Express Their Opinions of Athletes

(Continued from page 20)

and dismissed the complaint. The judge held that Vecsey's statements in the column were statements of opinion. First, he emphasized that the context of the statements signaled to the reader that the column contained Vecsey's opinion because it was a sports column and not a news item.

Next, Judge Seltzer looked to the individual words used in the Column and concluded that no reasonable reader would understand the column as stating facts about Fortson. For example, Judge Seltzer concluded that no reasonable reader would believe that when Vecsey referred to Fortson as a "vacant lot", he was calling Fortson "an unimproved parcel of property". Instead, Judge Seltzer concluded, Vecsey's use of this and other non-literal phrases to describe Fortson, demonstrated to the reader that the column contained his opinion. To emphasize this

point, Judge Seltzer compared Vecsey's description of the flagrant foul as "attempted murder" to the nickname "Murderer's Row" used to describe the 1927 New York Yankee lineup of baseball legends Babe Ruth, Lou Gehrig, Bob Meusel, and Tony Lazzeri.

Accordingly, Judge Seltzer concluded, the column did not contain any defamatory statements of fact, only statements of opinion. Similarly, Judge Seltzer dismissed the claim against Colangelo.

Slade R. Metcalf and Katherine M. Bolger of Hogan & Hartson LLP in New York represented NYP Holdings, Inc. Jerry Colangelo was represented by Anthony Strasius of Wilson Elser Moskowitz Edelman & Dicker LLP in Miami, Florida. The plaintiff was represented by Alex Clark of Winston & Clark in Plantation, Florida.



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Court Grants Anti-SLAPP Motion Filed By Columbia University

By Brian T. Markley

On May 15, 2006, a Los Angeles Superior Court granted Columbia University's motion to strike a libel complaint over an article published in the Columbia Journalism Review ("CJR"). *Bennett, et al. v. Columbia University et al.*, No. BC345094 (Cal. Sup. 2006).



et al., No. BC345094 (Cal. Sup. 2006).

Background

The January 2005 article, entitled "Tin Soldier: An American Vigilante In Afghanistan, Using the Press for Profit and Glory," was primarily about one of the plaintiffs,

a former Green Beret named Jack Idema, who went to Afghanistan after September 11 on a personal mission to capture Osama bin Laden.

While in Afghanistan, Idema appeared frequently as a counter-terrorism "expert" on numerous American news programs. He also claimed to have found seven hours of videotape footage depicting an al-Qaeda training camp, which he then sold to major media outlets. Subsequently, in July 2004, Idema was arrested by Afghan authorities and sentenced to ten years in prison (later reduced to five) for running a private jail out of his Kabul basement and torturing its inmates, whom he suspected were terrorists.

CJR's article questioned whether the press had too easily accepted Idema's credentials

as an expert on counter-terrorism. The article reported, among other things, that Idema had served time in federal prison for a 58-count fraud conviction in the mid-1990's; that he had misrepresented his military record; and, according to some experts, his al-Qaeda training camp tapes were fabricated.

Idema – who has filed numerous lawsuits over the years, frequently targeting media entities such as CBS, Fox News, and DreamWorks – claimed that he was defamed by certain statements in the article alleging that the training camp tapes were fraudulent. He was joined by two co-plaintiffs, Brent Bennett (a former member of the U.S. military who was arrested and convicted with Idema in Afghanistan) and the Counterr Group (a Fayetteville, N.C.-based organization affiliated with Idema).

Anti-SLAPP Motion

Columbia filed a special motion to strike the complaint under the California anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, Cal. Civ. Proc. Code § 425.16, which is designed to protect defendants against non-meritorious claims arising out of constitutionally protected speech by requiring plaintiffs to establish a probability of success at the early stages of litigation.

Under the statute, once the defendant establishes that the plaintiff's claim arises out of protected speech, the burden shifts to the plaintiff to put forward admissible evidence that would entitle the plaintiff to the relief sought.

Columbia argued in its opening brief that the complaint should be stricken because Idema, a public figure due to his many appearances as a commentator and source in the media, could not establish that CJR published the

CJR AMERICA'S PREMIER MEDIA MONITOR COLUMBIA JOURNALISM REVIEW

Tin Soldier

An American Vigilante In Afghanistan, Using the Press for Profit and Glory

By [Mariah Blake](#)

In April 2004, a former U.S. Special Forces soldier named Jonathan Keith Idema started shopping a sizzling story to the media. He claimed terrorists in Afghanistan planned to use bomb-laden taxicabs to kill key U.S. and Afghan officials, and that he himself intended to thwart the attack. Shortly thereafter, he headed to Afghanistan, where he spent the next two months conducting a series of raids with his team, which he called Task Force Saber 7. By late June, he claimed to have captured the plotters, and started trying to clinch a deal with television networks by offering them "direct access" to one of the terrorists who, he said, had agreed to tell all.

Idema, who was paying an Emmy Award-winning cameraman to document his activities, even distributed a sample tape of himself arresting people and interrogating hooded suspects. In one scene he is shown blocking a road and emptying passing vehicles. "Put your fucking hands up or I'll blow your fucking brains out," he screams at a group of men who have shuffled bewilderedly off a bus and are standing with their flimsy tunics whipping in the wind.

Done

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Court Grants Anti-SLAPP Motion Filed By Columbia University

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allegedly defamatory statements with actual malice. Columbia also argued that the article did not defame Bennett and the Counterr Group.

The motion was supported by declarations from the reporter and editor who worked on the article.

Opposing Columbia's motion, the plaintiffs filed eight declarations (several from individuals within Afghanistan) and a request for judicial notice, which they argued were sufficient to establish a prima facie claim of defamation. Plaintiffs argued that their evidence established that CJR published allegations that the alleged al-Qaeda training tapes were fraudulent with knowledge that those statements were false or with reckless disregard for their truth.

On reply, Columbia submitted five additional declarations – including two more from the reporter and editor and one from CJR's "fact-checker" – further supporting its argument that plaintiffs could not prove actual malice. Columbia also argued that much of plaintiffs' evidence was inadmissible. One of the declarations was from a computer forensics expert who concluded that plaintiffs' primary evidence – an e-mail allegedly sent by CJR's reporter to a potential source in Afghanistan – was fabricated.

Superior Court's Decision

The court granted Columbia's motion to strike on grounds that virtually all of plaintiffs' evidence, including the e-mail, was inadmissible and thus could not demonstrate that CJR acted with actual malice. The court sustained 141 of Columbia's 142 evidentiary objections. The court also agreed with Columbia that the allegedly libelous statements were not "of and concerning" plaintiffs Bennett and the Counterr Group.

Finally, the Court indicated that it would award attorneys' fees and costs to Columbia pursuant to the requirements of the anti-SLAPP statute. A final award of fees and costs has yet to be determined.

Columbia was represented in the case by Floyd Abrams, Cahill Gordon & Reindel LLP. He was assisted by Brian T. Markley, an associate at the firm. Columbia was also represented by Marvin Putnam and Kevin Vick of O'Melveny & Myers LLP in Los Angeles. The plaintiffs were represented by Francis Pizzulli of Santa Monica, California.



50-STATE SURVEYS

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50-State Survey

**Media
Libel Law
2006-07**

REPORTS FROM ALL FIFTY STATES,
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(published annually in November)

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Website Protected By CDA and First Amendment

By Michael K. Twersky, John G. Papianou and Katherine Skubecz

In an opinion filled with off-color language and colorful characters, a federal judge last month held that owners and operators of Internet websites cannot be held liable for publishing statements authored by third parties. See *Dimeo v. Max*, No. Civ. A. 06-1544, 2006 WL 1490098 (E.D. Pa. May 26, 2006) (Dalzell, J.).

The ruling was a significant victory for free speech rights in cyberspace, as it reaffirmed the protections afforded by both the First Amendment and the Communications Decency Act to those who host websites, message-boards and chat rooms on the Internet.

Background

On March 10, 2006, Anthony DiMeo, the owner of a public relations firm and sometime actor, sued Tucker Max, a best-selling author and Internet impresario, following a barrage of statements posted on Max's website that mocked and ridiculed DiMeo.

Tucker Max is the owner and operator of the website www.tuckermax.com, which contains the following self-description:

"I get excessively drunk at inappropriate times, disregard social norms, indulge every whim, ignore the consequences of my actions, mock idiots and posers, sleep

with more women than is safe or reasonable, and just generally act like a raging dickhead. But I do contribute to humanity in one very important way. I share my adventures with the world."

Many of the comments about which DiMeo complained concerned a "New Year's Eve Party from hell." That party, organized by DiMeo and his Renamity public relations firm to ring in 2006, generated news reports in several Philadelphia area newspapers, as well as its own separate litigation. When Max caught wind of the botched party, he too jumped into the fray – within days of the party, several message-boards criticizing DiMeo popped up on Max's website. The comments directed toward DiMeo were harsh, graphic and laden with vulgarity, and they were universally critical of DiMeo.

DiMeo sued for defamation, claiming that the six postings below, as well as other unidentified posts that appeared on Max's website, harmed his reputation and caused him to suffer financial injury:

Both the CDA and First Amendment protected defendant from liability.

1. "Maybe you should find your validation elsewhere ... preferably at the end of a magnum."
2. "I just wanted to let you know that I think that you are the biggest piece of shit I have ever heard of and I hope that you die soon."
3. "Now I know why Arlen Specter got invited to all those Renamity parties! Could it be ... bribery of your local politician?"
4. "He's got a neat, nice little page there from which we can harass him."
5. "I can believe no one has killed him yet." and
6. "You threw an absolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud."

Significantly, DiMeo did not allege that Max authored any of the offending statements – and, in fact, Max did not. Rather, he claimed only that Max, "through his [website], publishe[d] defamatory statements aimed at" DiMeo.

In response, Max filed a motion to dismiss based primarily on two grounds. First,

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TUCKERMAX.COM

"...highly entertaining and thoroughly reprehensible..."
-The New York Times

My name is Tucker Max, and I am an asshole.

I get excessively drunk at inappropriate times, disregard social norms, indulge every whim, ignore the consequences of my actions, mock idiots and posers, sleep with more women than is safe or reasonable, and just generally act like a raging dickhead.

But, I do contribute to humanity in one very important way. I share my adventures with the world. They are known as:

The Tucker Max Stories

- [The Famous "Sushi Pants" Story](#)
- [Tucker tries buttsex, hilarity does not ensue](#)
- [The Absinthe Donuts Story](#)
- [The Austin Road Trip](#)

HOME
THE STORIES
THE BLOG
MESSAGE BOARD
MISCELLANEOUS
PICTURES
CONTACT TUCKER

I HOPE THEY SERVE BEER IN HELL

TUCKER MAX

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Alphabet of Manliness
THE ALPHABET OF MANLINESS
MADDOX
Alphabet of Manliness is now

Website Protected By CDA and First Amendment

(Continued from page 24)

Max argued that the Communications Decency Act (“CDA”) provides immunity to owners and operators of Internet websites who publish messages authored by third parties.

Second, Max argued that the statements were not capable of defamatory meaning because they were expressions of opinion and, given the nature of the forum, could not be considered statements of fact by any reasonable reader.

The Court’s Opinion

On May 26, 2006, Judge Stewart Dalzell granted the motion to dismiss, agreeing that both the CDA and First Amendment protected defendant from liability against DiMeo’s claims. (Interestingly Judge Dalzell was one of a three-judge panel that decided the original constitutional challenge to the CDA. *See American Civil Liberties Union v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)).

The court began its analysis by noting that the CDA “overrides the traditional treatment of publishers under statutory and common law [and] ‘precludes courts from entertaining claims that would place computer service provider[s] in a publisher’s role ... for [the] exercise of a publisher’s traditional editorial functions – such as deciding whether to publish, withdraw, postpone, or alter content.’” *Dimeo at* *3 (quoting *Green v. American Online*, 318 F.3d 465, 471 (3d Cir. 2003)).

To hold otherwise would be contrary to Congress’ intention of promoting the free exchange of information and ideas over the Internet and encouraging service providers to self-regulate the dissemination of offensive material over their services without fear of liability for exercising editorial control. *Id.* at *3-*4.

Judge Dalzell reasoned that an opposite approach would give interactive computer service providers like Max a Hobson’s choice: “employ an army of highly trained monitors to patrol (in real time) each chatroom, message board, and blog to screen any message that one could label defamatory, or avoid such a massive headache and shut down these fora.... Either option would profoundly chill Internet speech.” *Id.* at *4.

Because Max’s website met all of the elements of an “interactive computer service” provider, Judge Dalzell held that section 230 of the CDA provided blanket immunity for the third-party comments posted about DiMeo.

The court also noted that, “putting aside the [CDA] preemption issue, DiMeo’s defamation claim would still not survive.” *Id.* at *6 n.14. At least four of the statements at issue (one, two,

four and five above) are all constitutionally protected expressions of opinion under long-standing and well established United States Supreme Court and Pennsylvania case law.

As for the remaining two statements set forth in the complaint, Pennsylvania law requires that they be viewed “in context to determine the effect the writing is fairly calculated to produce, the impression it would naturally engender, in the minds of the average person among whom it is intended to circulate.”

Max took the novel approach of arguing that his website was not the *New York Times* or the *Wall Street Journal*, and nobody who read the comments posted by “Druken DJ,” “footinmouth,” “Jerkoff” and others could possibly believe that they were stating actual facts. Again, the court agreed with Max and determined that no one viewing his website could reasonably believe that the postings were serious.

The court concluded its opinion with a statement concerning the importance of protecting speech under the CDA, which applies equally to the protection afforded under the First Amendment – even to the most offensive speech:

As we noted the last time we discussed the CDA, some of the dialogue on the Internet surely tests the limits of conventional discourse. Speech on the Internet can be unfiltered, unpolished, and unconventional, even emotionally charged, sexually explicit, and vulgar – in a word, “indecent” in many communities. But we should expect such speech to occur in a medium in which citizens from all walks of life have a voice.

There is no question that tuckermax.com could be a poster child for the vulgarity we had in mind in 1996 [when considering the constitutionality of the CDA]. But as we added then, “we should also protect the autonomy that such a medium confers on ordinary people as well as media magnates.” Here we do so by protecting coarse conversation that, it appears, never ends on tuckermax.com.

Id. at *7.

Michael K. Twersky, John G. Papanou and Katherine Skubecz of Montgomery McCracken Walker & Rhoads, LLP in Philadelphia represented the defendant in this matter. Plaintiff was represented by Matthew Weisberg.

“I am John Doe”

A Pittsburgh man testified in federal court in late May that he was the anonymous author of the now-defunct website, which was the subject of a libel suit that led to one of the first appellate court rulings regarding online anonymity. *Chapman v. Cannon*, Civil No. 01-1341 (W.D. Pa. jury verdict May 26, 2006).

The man, John J. Chapman, testifying in support of his wrongful termination suit against state officials, identified himself as the publisher of “Grant Street ‘99” – a website focusing on local politics. The jury in the case rejected his claim and found for the government.

In 1999, Pennsylvania Superior Court Judge Joan Orié Melvin filed a “John Doe” libel suit against the website for publishing allegations that she had improperly lobbied former Pennsylvania Governor Tom Ridge on behalf of an attorney seeking appointment to the Allegheny Court of Common Pleas.

Judge Melvin originally sued in Virginia, home of “Grant Street ‘99’s” web host AOL, seeking an ex parte order requiring AOL to reveal the webmaster’s identity. See *Melvin v. Doe*, At Law No 21942 (Va. Cir. Ct., Loudoun County 1999). The Virginia action was dismissed for lack of jurisdiction, and Judge Melvin then filed suit in Pennsylvania.

The trial court denied a motion to quash and ordered Doe’s identity revealed, *Melvin v. Doe*, 2000 WL 33311704, 49 Pa. D. & C.4th 449, 29 Media L. Rep. 1065 (Pa. C.P. 2000); see also *LDRC LibelLetter*, Nov. 2000 at 21. The appeals court, including three colleagues of Judge Melvin, held that defendant was not entitled to an interlocutory appeal of the denial of the motion to quash. 789 A.2d 696, 2001 PA Super 330 (Pa. Super. 2001), *rearg. denied* (Pa. Super. Jan. 31, 2002).

The decision was appealed to the Pennsylvania Supreme Court with the support of several amicus groups, including Public Citizen, Electronic Frontier Foundation and Electronic Privacy Information Center. In November 2003, the Pennsylvania Supreme Court reversed and directed the Superior Court to consider the constitutional question of whether the First Amendment requires a public official defamation plaintiff to establish a prima facie case of actual economic harm prior to obtaining discovery of an anonymous defamation defendant's identity. *Melvin v. Doe*, 575 Pa. 264, 836 A.2d 42, 32 Media L. Rep. 1599 (Pa. 2003); see also *MLRC MediaLawLetter*, Dec. 2003 at 23.

Judge Melvin dropped the case after the Pennsylvania high court decision.

D.C. District Court Dismisses Libel and Privacy Claims Against NGO *Statements About Plaintiff's Bank Not "Of and Concerning" Him*

The D.C. District Court last month dismissed defamation, false light and tortious interference claims brought by a Serbian businessman against a non-governmental organization that discussed some of plaintiff's businesses in a country report. *Jankovic v. International Crisis Group*, 2006 WL 1134481 (D.D.C. May 1, 2006) (Walton, J.). Notably, the court found that statements about a bank controlled by plaintiff were not "of and concerning" him.

Background

Plaintiff Philip Zepter is a Serbian businessman who runs a collection of consumer product businesses throughout the world. Defendant The International Crisis Group is a DC-based non-governmental organization that conducts "field-based analysis and high-level advocacy to prevent and resolve deadly conflict."

Plaintiff sued over two publicly issued reports on Serbia and an e-mail sent by the NGO to a Serbian official. The reports offer a detailed analysis of the political landscape in Serbia. Plaintiff alleged that the reports implied he had criminal ties to Serbian intelligence and former dictator Slobodan Milosevic.

Statute of Limitations Issues

The district court first found that one of the reports and the e-mail were both published more than one year before plaintiff filed suit and were therefore barred by D.C.'s one-year statute of limitations for defamation claims. The court noted that while there is no express limitation period for privacy claims, they are subject to the same statute of limitations when such causes of action are "intertwined" – as here – with a cause specified by the District of Columbia Code.

Plaintiff unsuccessfully argued that the statute of limitations should be tolled because of confusion over where defendant was located for purposes of bringing suit. Plaintiff originally sued in Belgium where the NGO maintains an office – but that mistake was insufficient grounds to toll the statute of limitations.

Of and Concerning

The court then addressed the question of whether statements about a bank owned by plaintiff were "of and concerning" him. Among other things, defendant's report stated that Serbian intelligence was "deeply compromised by criminal activities" and maintained close ties with Zepter Banka.

The court noted that a plaintiff need not be specifically named to be identified for purposes of a libel suit. Here, though, "Zepter Banka" could not reasonably be understood as a reference to Philip Zepter personally. Nothing in the NGO's report suggested a relationship between Serbian intelligence and plaintiff himself.

"Philip Zepter is not the owner of a small company, but the founder of a 'global enterprise ... based in more than fifty countries on five continents across the world.' The idea that readers ... would hold him personally responsible for the corruption of a Serbian government agency because a small arm of his business empire maintains "close ties" with this agency is neither expressly alleged by the plaintiffs nor reasonable for this Court to presume."

Defamatory Meaning

Plaintiff also complained about statements that directly named him and stated he and his bank "supported" the Milosevic regime. While this excerpt explicitly mentioned plaintiff, the court held it was not capable of a defamatory meaning. The "mere association" of plaintiff to the former Serbian dictator was not defamatory on its face where the NGO "made no mention of war crimes or ethnic cleansing" but conveyed "allegations of mutual support." This made the criticism political and not an accusation of criminal conduct.

Tortious Interference Dismissed

Finally, the court dismissed the related claim for tortious interference with business expectancy. Although the court found no legal authority directly on point in D.C., it saw "no reason not to follow the lead of courts in other jurisdictions ... since to hold otherwise would make every case of defamation of a corporation actionable as wrongful interference, thereby enabling the plaintiff to avoid the specific limitations [of] the law of defamation."

Plaintiffs were represented by Christensen Miller Fink Jacobs Glaser Weil & Shapiro, LLP, Los Angeles, McKenna Long & Aldridge, LLP, Washington, DC, and Morrison, Cohen, Singer & Weinstein, LLP, New York. Defendants were represented by Amy Neuhardt and Jonathan Greenblatt, of Shearman & Sterling LLP.

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Kentucky Court Dismisses Photo Misidentification Case

By Jon L. Fleischaker And Jeremy S. Rogers

A Kentucky court dismissed a defamation case against the Louisville Courier-Journal arising from a photograph of an individual misidentified as that of an alleged triple murderer. *French v. The Courier-Journal, Inc.*, Jefferson Circuit Court No. 06-CI-02413.

Background

The plaintiff, Daryl French, sued the newspaper after it published his photograph and identified it as that of Charles Boney, a man who was at the time was charged with murdering an Indiana woman and her two children. Boney has since been convicted of the crimes along with his co-conspirator David Camm.

The Camm/Boney murder trials received intense media attention in the Louisville and Southern Indiana region. Camm is a former Indiana state police officer and was the victims' husband and father. He was convicted at trial in New Albany, Indiana. His conviction was reversed on appeal. After a change of venue, Camm was tried a second time and convicted.

When Boney was first charged in the spring of 2005, the newspaper published a lengthy article about his alleged involvement in the crime. The article contained three photographs: two recent photographs of Boney in an orange jail jumpsuit and a 15 year old black-and-white photograph from Boney's yearbook.

Boney and the plaintiff Daryl French were high school classmates, and both had been members of the high school wrestling team, but the newspaper mistakenly published French's picture with the caption "At New Albany (Ind.) High School, Coach Jim Binkley said Boney, pictured in a yearbook, didn't cause problems on the wrestling team."

The yearbook from which the photograph was taken showed two similar wrestling photos but included information with only the photo of Boney. After the mistake was brought to the newspaper's attention, the newspaper published a correction and the photograph was removed from the article archived on the newspaper's website.

Shortly before Kentucky's one-year libel statute of limitations was due to expire, French sued the newspaper.

The complaint included a copy of the offending article and claimed that the newspaper's publication and misidentification caused French to suffer emotional damages, lost wages and lost earning capacity.

Motion to Dismiss

The newspaper moved to dismiss the lawsuit for failure to state a claim on a number of grounds. Under Kentucky law, to successfully assert a claim for defamation, a plaintiff must allege and prove each of the following four elements: 1. defamatory language; 2. about the plaintiff; 3. which is published; and 4. which causes injury to reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004); *Columbia Sussex Corp. v. Hay*, 627 S.W.2d 270, 273 (Ky. App. 1981).

The newspaper argued that, because the article was entirely about Boney and did not mention French, he could not prove the article was "of and concerning" him. The newspaper also argued that French could not demonstrate injury to his reputation, which, under Kentucky law, is a substantive element of the tort of defamation rather than simply an element of damages. The newspaper argued that a misidentified photo, without specific language about the plaintiff, could not, as a matter of law, harm the plaintiff's reputation. Readers who did not know plaintiff would have no reason to believe he was involved, and those who knew him would know that it was a case of misidentification and that plaintiff was not the person actually arrested. In either event, no one would infer anything derogatory about plaintiff that could harm his reputation.

After requesting, and being granted, an extension of time to respond to the newspaper's motion, plaintiff did not respond to the motion. The court did not write an opinion but simply dismissed the case with prejudice by signing the one-line order.

Jon L. Fleischaker and Jeremy S. Rogers of Dinsmore & Shohl in Louisville, Kentucky represented the Courier-Journal. Plaintiff was represented by Kenneth H. Baker and F. Chris Gorman.

Texas Appeals Court Embraces Fair Report Privilege

By John Bussian

In a libel suit spawned by a police department press release that incorrectly identified a suspect as a sex offender, the intermediate Court of Appeals for Midland-Odessa, Texas entered summary judgment on for the two media defendants in *Freedom Communications, et al v. Sotelo, Case*, No. 11-05-00336-CV, 2006 WL 1644602 (June 15, 2006).

The Court's eight-page opinion, authored by Chief Justice Jim R. Wright, is the clearest affirmation of the fair report privilege among reported Texas state appellate court cases.

The *Odessa American* and KWES-TV9 appealed to the Eleventh Court of Appeals following the denial of their motions for summary judgment in the 70th District Court for Ector County. The Texas interlocutory appeals statute allowing expedited appeal from the denial of a summary judgment motion in cases implicating free press rights proved invaluable once again.

Chief Justice Wright's opinion discussed the qualified, Texas statutory fair report privilege and the absolute privilege under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) in holding that both privileges protected the challenged publication and telecast.

The Texas statutory privilege is lost through publication or broadcast with constitutional actual malice, and the

Court found that the defendants negated actual malice as a matter of law. The finding extended a line of Texas cases allowing media defendants to secure summary judgment on the strength of uncontroverted affidavit testimony.

The Odessa Police Department press release, upon which the defendants based their summary judgment motions, announced a sweep that netted 155 sex offenders who are required to be registered under state law. A mug shot of the plaintiff accompanied the press release, which stated that two of 155 offenders had been arrested during the sweep. Odessa Police said that the pictured plaintiff was one of those arrested.

The Eleventh Court of Appeals' exhaustive treatment of the privilege is especially important given the dearth of Texas case law on the subject. There are no other press release-specific libel cases in the Texas reporters. And none goes as far as Chief Justice Wright, Justice McCall, and new Justice Strange in recognizing *Cox Broadcasting's* fair report protection under the First Amendment.

The plaintiff has until July 30 to seek review in the Texas Supreme Court.

John Bussian of Raleigh, North Carolina represented Freedom's Odessa American in the litigation. The plaintiff was represented by Scott M. Tidwell.

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English High Court Decision Explore Jameel's Impact on Libel Cases

In two recent cases, Mr. Justice Gray of the High Court issued decisions that illustrate the principle as to the scope of defamation actions laid out last year by the Court of Appeal in *Jameel v. Dow Jones*, QB 946 (2005), and in so doing have wide-ranging implications for the availability of England as a forum for so-called libel tourists.

Al Amoudi

In *Al Amoudi v. Brisard and another*, EWHC 1062 (QB) (2006), the court denied a libel plaintiff's motion for summary judgment.

The plaintiff, Mohammed Hussein Al Amoudi, was born in Ethiopia, resides in Saudi Arabia, and spends two-and-a-half months a year in London where he owns a home. Al Amoudi sued Swiss terrorist financing expert Jean-Charles Brisard and his company, JCB Consulting International SARL, for references to Al Amoudi made in two publications that were available for download on JCB's website.

One reference suggested that Al Amoudi may be "a knowing participant in the economic, financial and/or terrorist networks of the terrorist Osama Bin Laden," while another listed Al Amoudi as one of the "Main individual Saudi sponsors of Al Qaeda." The two publications were removed from JCB's website in 2004, but Al Amoudi claimed that the words complained of were published "to a substantial but unquantifiable number of readers in this jurisdiction."

The court rejected Al Amoudi's argument that because the publications were available on the Internet there was a presumption of law that they had been published to a substantial number of readers sufficient to justify a judgment. Relying in part on *Jameel*, the court held that the plaintiff must prove that the offending material was accessed and downloaded in the jurisdiction.

In *Jameel*, the plaintiff could only show that the allegedly defamatory material had been downloaded in the jurisdiction by five people, including Mr. Jameel's lawyer and two of his business associates. In the Court of Appeal's view, since the damage to Mr. Jameel's reputation was minimal and an action would result in only nominal damages, it would be appropriate for the defendant to "seek to strike out the action as an abuse of process."

In *Al Amoudi*, the traffic originating in the jurisdiction viewing the website containing the allegedly defamatory material was similarly small. Mr. Justice Gray suggested that because the court in *Jameel* struck out the claim it would not have supported the existence of a presumption of publication, saying in conclusion, "I am unable to accept that under English law a claimant in a libel action on an Internet publication is entitled to rely on a presumption of law that there has been substantial publication."

The parties have since reached a settlement, the terms of which remain confidential.

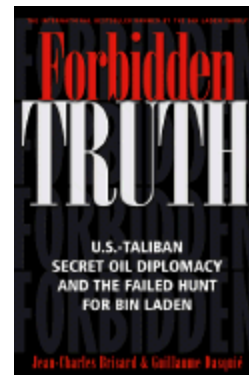
The defendants were represented by barrister Adam Speker of 5RB and Reynolds Porter Chamberlain, LLP, in London. Al Amoudi was represented by barrister Desmond Browne QC of 5RB and Jonathan Barnes of Nabarro Nathanson in London.

Mahfouz

In *Mahfouz v. Brisard*, EWHC 1191 (QB) (2006), the court granted the plaintiffs' motion for summary judgment but refused to issue a declaration of falsity. The plaintiffs, Saudi businessmen Sheikh Khalid bin Mahfouz and Abdulrahman bin Mahfouz, sued Jean-Charles Brisard and Guillaume Dasquie for references to them that appeared in the defendants' book, *Forbidden Truth*.

The language complained of included references to the first plaintiff as the "banker of terror," and words which bore the defamatory meanings that he knowingly supported and aided terrorist activities and that the second plaintiff was reasonably suspected of having assisted Al Qaeda organize an assassination attempt against Egyptian president Hosni Mubarak. The book was originally published in France in 2001 and then in the United States in 2002. Four hundred copies of the book were published in England, most ordered from distributors based outside the jurisdiction.

In granting plaintiffs' motion for summary judgment, the court noted that the defendants had not advanced any



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English High Court Decision Explores Jameel's Impact on Libel Cases

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affirmative defenses. Mr. Justice Gray rejected the defendants' argument that the case should go to trial because little was known about the plaintiffs and that it was in the public interest to hear from persons who seek to vindicate their reputations by choosing a forum in England.

In determining damages, the court accepted the plaintiffs' argument that the alleged defamation was so serious that they should be entitled to the statutory maximum award in order to clear their names, and so the court awarded each plaintiff £10,000 in damages and injunctive relief restraining Brisard from further publishing the language complained of. (A default judgment had already been obtained against Dasquie).

Relying on *Jameel*, however, the court declined to grant a declaration of falsity. Mr. Justice Gray said that the publication of 400 books within the jurisdiction here

was analogous to the Internet publication to five persons in *Jameel*. The court was further troubled by the limited connections between the plaintiffs and the forum, saying that "it seems reasonable to infer in these circumstances" that one of the reasons why the plaintiffs were seeking a declaration of falsity was to "deploy it in jurisdictions other than this one." The court found that the Defamation Act of 1996 provided for reasonable alternate remedies, including a court order for the defendants to publish a summary of the court's judgment if they refuse to publish a correction or apology.

Brisard was represented by barrister Adam Speker, 5RB, and Reynolds Porter Chamberlain, LLP, in London. (Guillaume Dasquie did not appear and was not represented.) The plaintiffs were represented by barrister James Price QC, 5RB, and Laurence Harris of Kendall Freeman, in London.



50-STATE SURVEYS



Media Libel Law 2006-07

REPORTS FROM ALL FIFTY STATES,
THE FEDERAL COURTS OF APPEALS,
U.S. TERRITORIES, CANADA, AND ENGLAND.

Edited by the Media Law Resource Center, Inc.

MEDIA LIBEL LAW

(published annually in November)

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Supreme Court Denies First Amendment Protection to Public Employee Statements Made Pursuant to Official Duties

In a 5-4 opinion written by Justice Kennedy and joined by Chief Justice Roberts, and Justices Scalia, Thomas and Alito, the U.S. Supreme Court last month held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” *Garcetti v. Ceballos*, 126 S.Ct. 1951 (U.S. May 30, 2006).

The Court reasoned that to hold otherwise would place the judiciary in the “new, permanent and intrusive role” of supervising routine managerial decisions. Instead, the Court noted that federal and state whistleblower laws, as well as union and civil service rules, provided adequate remedies for public employees who speak about matters of public concern in the course of their official duties.

Factual Background

The plaintiff, Richard Ceballos, was a deputy district attorney for Los Angeles County. One of his duties was to review affidavits in warrant proceedings to check for inaccuracies. After receiving a request to check a sheriff’s affidavit, Ceballos determined that the sheriff had misrepresented the facts.

Ceballos discussed the matter with his immediate supervisor, who agreed the validity of the warrant was questionable. Ceballos then wrote a memorandum detailing his concerns for the Head Deputy District Attorney, Frank Sundstedt. Sundstedt instructed Ceballos to rewrite the memo to make it less accusatory of the sheriff, which he did.

The prosecutors held a meeting to discuss the memo with the sheriff’s office and Sundstedt decided to proceed with the prosecution pending the outcome of a motion challenging the warrant. Ceballos informed the defense counsel of his suspicions and he was subpoenaed and testified for the defense. The criminal defendant’s challenge to the warrant was ultimately rejected.

Soon thereafter, Ceballos alleged that he was effectively demoted and transferred to a distant office. He then filed the instant §1983 First Amendment retaliation suit against his supervisors, the district attorney and the county.

Underlying Decisions

The district court granted summary judgment for the defendants based on qualified immunity. A Ninth Circuit panel reversed, holding that qualified immunity was not available because “the law was clearly established that Ceballos’s speech addressed a matter of public concern and that his interest in the speech outweighed the public employer’s interest in avoiding inefficiency and disruption.” *See* 361 F.3d 1168, 1170 (9th Cir. 2004) (Reinhardt, O’Scannlain, Fisher, JJ.).

The Ninth Circuit applied the two-step test based on the U.S. Supreme Court’s holdings in *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968): first, whether the speech addresses a matter of public concern, and, if so, whether the government employee’s interest in expressing himself outweighs the government’s interests in promoting workplace efficiency and avoiding workplace disruption.

The government defendants conceded that the plaintiff’s statements involved a matter of public concern, but argued that since the plaintiff’s statements were made as part of his job responsibilities *Pickering* and *Connick* did not apply (the position ultimately adopted by the U.S. Supreme Court). In fact, *Pickering* and *Connick* did not address this precise fact pattern and focused instead on whether the speech at issue involved matters of public or personal concern. This was also the case in the Court’s other leading decision in this area *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979). There the Court held that a teacher’s complaints to a principal concerning racist hiring practices were protected by the First Amendment. (In *Givhan*, the plaintiff’s speech was arguably in the scope of her employment, but the Court in *Connick* later described it as being made in her capacity as a “citizen.”)

But the Ninth Circuit ruled that for First Amendment purposes there was no distinction between speech pursuant to official duties and speech made outside the scope of employment. Rather, the crucial factor was whether the speech involved a matter of public interest – a position the Ninth Circuit had endorsed in *Roth v. Veteran’s Admin. of*

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Supreme Court Denies First Amendment Protection to Public Employee Statements Made Pursuant to Official Duties

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United States, 856 F.2d 1401, 1406 (9th Cir.1988). *Roth* involved a wrongful termination claim by a doctor who alleged he was fired because he prepared, as part of his official duties, reports criticizing the operation of a VA hospital. The Ninth Circuit held that the claim was subject to the *Pickering / Connick* test because the point of the speech was to bring wrongdoing to light.

Interestingly, Judge O’Scannlain wrote a separate concurrence, finding the result in *Garcetti* was compelled by *Roth*. But he concluded that *Roth* should be revisited and overruled, finding that “when public employees speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right.” 856 F.2d. at 1189.

Questions Presented

The defendants appealed, presenting the following two questions in their petition:

- (1) Should public employee’s purely job related speech, expressed strictly pursuant to duties of employment, be cloaked with First Amendment protection simply because it touches on matter of public concern, or should First Amendment protection also require speech to be engaged in “as a citizen,” in accordance with holdings in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 US. 138 (1983)?
- (2) Is immediate review by this court necessary to address growing inter-circuit conflict on the question of whether public employee’s purely job-related speech is constitutionally protected, especially when a lack of uniformity dramatically impacts ability of all public employers to effectively manage their respective agencies?”

The case was argued to the U.S. Supreme Court on October 12, 2005, but was reargued in March 2006 after Justice O’Connor retired and was replaced by Justice Alito. At the October argument, Justice O’Connor asked few questions and gave no hint as to how she would have voted.

Justice Kennedy, on the other hand, clearly telegraphed his views with the following comment to plaintiff’s counsel:

“the consequence of your view is to have the first amendment being used for courts to monitor the discussions that take place in every public agency – local, State, and Federal – in the United States. You are advocating a sweeping rule.... the intrusive consequences of your rule are sweeping.”

The oral argument transcripts are available online at http://www.supremecourt.us/oral_arguments/argument_transcripts.html

Majority Opinion

Justice Kennedy began the majority opinion by discussing *Pickering* and *Connick*, noting the competing values at stake. Kennedy was careful to note that government employees do not cease being citizens for First Amendment purposes just by virtue of their employment. Furthermore, the public has a First Amendment interest in hearing the commentary of those who are best informed on public issues. On the other hand, the government, like any employer, must retain a measure of control over employee speech if it is to accomplish its objectives efficiently.

Ceballos’s speech was not protected by the First Amendment, the Court concluded, because:

“restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”

Citing *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

To hold otherwise, the Court insisted, would place the judiciary in the “new, permanent and intrusive role” of supervising routine managerial decisions.

“This displacement of managerial discretion by judicial supervision finds no support in our precedents. When an employee speaks as a citizen addressing a

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Supreme Court Denies First Amendment Protection to Public Employee Statements Made Pursuant to Official Duties

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matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”

The Dissents

Justice Souter authored a dissent, which Justices Stevens and Ginsburg joined. Justices Stevens and Breyer issued individual dissents.

The joint dissent argued that public employees speaking on matters of public concern pursuant to their employment duties should be protected by a modified *Pickering* balancing test. Souter would have altered the *Pickering* test in these circumstances by requiring that an employee “should not prevail on balance unless he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.”

Matters of “unusual importance” include “comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety.”

He also argued that the majority’s standard, where speech engaged in pursuant to employment duties is not protected, will result in an expansion of job descriptions with the courts deciding if these descriptions are accurate.

Justice Kennedy replied to this in the majority opinion, stating that an employee’s job responsibilities would, for First Amendment purposes, be determined by a “practical” inquiry, and would not depend on formal job descriptions.

Souter also criticized the majority’s reliance on *Rosenberger* and other government speech cases. These cases, he states, apply only to employees hired to perform a specific speaking assignment, promoting a government view. However, Ceballos was hired not to promote any particular view, but to “enforce the law through constitutional action.”

In a separate short dissent, Justice Stevens argued that the majority decision was inconsistent with the Court’s decision in *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410 (1979).

In his separate dissent, Justice Breyer reasoned that Souter’s test was too broad.

“The speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates.”

Nevertheless, he found that First Amendment could apply to public employee’s job speech provided it

“involves a matter of public concern and also takes place in the course of ordinary job-related duties. But it does so only in the presence of augmented need for constitutional protection and diminished risk of undue judicial interference with governmental management of the public’s affairs.”

The dissents also argued that the majority decision creates an anomalous incentive for employees to air their complaints to the press. But this objection, Justice Kennedy wrote, is unfounded as a practical matter since statements of complaint, he suggested, would generally fall outside the scope of employment.

The dissents also argued that the majority decision creates an incentive for employees to bypass internal procedures and go straight to the press with their complaints. But this objection, Justice Kennedy wrote, is unfounded as a practical matter since statements of complaint would generally fall outside the scope employment.

Cindy S. Lee, Glendale, California, argued the case for the Petitioners. Edwin S. Kneedler, Deputy Solicitor General, argued for the United States, as amicus curiae, supporting the Petitioners. Bonnie Robin-Vergeer, Washington, D.C., argued for the plaintiff.

Hospital's Libel Suit Against Union Preempted by Federal Labor Law

By Steven P. Mandell, Steven L. Baron, and
Elizabeth N. Pendleton

In a libel case involving a union's statements published during a public relations campaign to support a labor organizing effort, an Illinois trial court held that a plaintiff must plead actual malice and special damages in order to avoid preemption of federal labor law. *Advocate Health Care Network v. Service Employees International Union, AFL-CIO*, No. 2005-L-02437 (Ill. Cir. Ct. June 23, 2006).

On June 23, 2006, Judge Ronald F. Bartkowicz granted Service Employees International Union, AFL-CIO's ("SEIU") motion to dismiss a complaint filed by Advocate Health Care Network ("Advocate"). Advocate sought damages and injunctive relief for defamation and related claims arising from statements SEIU published that questioned Advocate's billing and collection practices. In dismissing Advocate's state-law claims, the trial court interpreted federal labor law broadly to preempt claims over statements designed to organize the labor force at Advocate's hospitals.

Background

In 2003, SEIU, the largest union of healthcare workers in the United States, began a campaign to organize 25,000 employees of Advocate Health Care Network. Advocate operates ten hospitals and other health care facilities in the Chicago area and is the city's largest health care provider.

Advocate resisted SEIU's efforts to organize and refused to grant SEIU's request for unimpeded access to its employees. In order to educate the public about Advocate's role in the community and gather public support for its organizational efforts, SEIU launched the Hospital Accountability Project (the "Project"). In the Project, SEIU conducted a study of Chicago area hospitals to bring to light the plight of uninsured and underinsured patients, some of whom are members or potential members of SEIU. Among its findings, SEIU concluded that the amount of Advocate's tax exemption exceeded its charitable care and that Advocate aggressively collected bills from uninsured and Latino patients. SEIU published its findings on a web site, in SEIU's newsletter, and in other publications.

Advocate Files Suit

Following the publication of the Project, Advocate filed a complaint against SEIU and asserted several claims related to the alleged false statements. Significantly, Advocate did not dispute that the Project was a component of SEIU's efforts to organize Advocate's employees. In fact, Advocate alleged SEIU made the statements in an effort to "coerce Advocate to yield to SEIU's demands" for access to its employees for the purpose of organizing employees at Advocate's hospitals in the Chicago area.

SEIU moved to dismiss Advocate's claims on the grounds that: (1) federal labor law preempted the claims; (2) the First Amendment barred the claims; and (3) Advocate failed to state a claim under Illinois law.

Preemption Law

Sidestepping SEIU's first amendment and state law defenses, the trial court focused its analysis on whether the National Labor Relations Act ("NLRA") preempted the state law claims. In *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1965), the Supreme Court recognized that union campaigns are frequently characterized by bitter and extreme charges, unfounded rumors, personal accusations, misrepresentations and distortions. Therefore, libel actions under state law may interfere with national labor policy. To avoid this result, the Supreme Court recognized that the NLRA preempts statements made in the context of a labor dispute. *Linn*, 383 U.S. at 64-65.

Advocate argued that NLRA preemption is limited to statements concerning workers and working conditions. SEIU responded that the preemption for statements relating to a "working condition" or "labor dispute" is broad enough to include the Project, which was intended to sway public opinion in support of the union's efforts to organize Advocate's employees.

Citing *Pease v. International Union of Operating Eng'rs., Local 150*, 208 Ill. App. 3d 863, 871-72 (2nd Dist. 1991), the Trial court found that statements made during labor disputes, regardless of the subject matter, could be preempted under *Linn*. In *Peas*, a union attempting to organize Pease Construction Company made statements that its owner carried a gun, lied a lot and was crazy. The

Hospital's Libel Suit Against Union Preempted by Federal Labor Law

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appellate court found that, since the union was, in fact, attempting to organize the company, the union made the alleged defamatory statements during a labor dispute. Because Advocate and SEIU did not dispute that the statements arose during a labor dispute, the trial court applied the holding in *Pease* and found that the statements, regardless of their personal nature, were within the context of a labor dispute and *Linn* therefore applied.

Even if SEIU published the statements within the context of a labor dispute, the trial court found that Advocate could pursue its claim if it could plead and prove that the statements (1) were made with actual malice and (2) caused specific damages. The Circuit found that Advocate had adequately pleaded actual malice but did not adequately plead specific damages.

Advocate alleged two forms of damage arising from the Project. First, Advocate claimed that patients who are capable of paying for Advocate's services may elect not to use them. Second, Advocate claimed uninsured patients, many of whom may qualify for public aid, may be deterred

from seeking such care, thereby diminishing Advocate's status as a charitable institution.

The trial court found that although Advocate alleged a likelihood of damages, Advocate did not meet its burden of pleading special damages. In applying the more stringent damage pleading requirement, the trial court relied on the public policy supporting federal labor law preemption. As Judge Barkowicz noted "[w]ithout this limit, the threat of state libel suits may dampen the ardor of labor, debate and truncate the free discussion envisioned by the Act." *Linn*, 383 U.S. at 64.

At the time of publication, Advocate had yet to announce if it would appeal the trial court's decision.

Steven P. Mandell, Steven L. Baron, and Elizabeth N. Pendleton of Mandell Menkes LLC in Chicago and Craig Becker of the Service Employees International Union represented defendant. Edward W. Feldman and Thomas M. Staunton of Miller Shakman & Beem LLP in Chicago represented plaintiff.

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Contempt Proceedings Dismissed Against TV Station for Showing Jurors Leaving Court

By Guylyn Cummins

Contempt proceedings begun by a retired Superior Court judge against KCOY, a Santa Maria, California television station, were summarily dismissed on June 6, 2006. The station had aired video footage of jurors leaving the courthouse after reaching a verdict in a high profile criminal case of *People v. Bruce Sons*. The case involved the killing of a police officer in the neighboring community of Bakersfield, California. The trial had been moved to Santa Maria, California, after an initial mistrial.

The May 12, 2006, Judge Zel Canter issued an Order to Show Cause in response to his apparent order that jurors in the case be referred to by number, and not by name, to protect their identity. The trial had been covered by KGET, a sister station in Bakersfield. KCOY covered the verdict and was unaware of Judge Canter's order protecting the identities of the jurors.

Judge Canter's order to show cause said the television station's broadcast of the jurors exiting the courthouse was an "apparent" violation of California Rule of Court 980. That Rule gives judges discretion to allow or deny camera coverage within the courthouse, including in its entrances and exits.

As jurors left the courthouse door, KCOY videotaped them exiting the courthouse from a distance of more than 30 feet away, in a coned-off area on a public courthouse plaza where bailiffs had allowed the journalists to be. Judge Canter also ordered a further restraint on "broadcasts of the image of jurors in the *Sons* case."

KCOY responded to the order to show cause with a request for summary dismissal, asserting lack of jurisdiction because no valid order supported a contempt finding. KCOY also asserted that photographing jurors outside of a courthouse from a public plaza does not violate Rule 980, which controls only the interior of a courthouse and photography in the courthouse doorways. KCOY additionally argued the prior restraint on further dissemination of the video violated the First Amendment and article I, section 2 of California's Constitution, and could not withstand constitutional scrutiny.

Contempt Hearing

After a brief status conference on May 31, 2006, the trial judge hearing the contempt proceeding, Judge Melville (who presided over Michael Jackson's Santa Maria, California trial), told KCOY that he understood that Judge Canter was just trying to protect the jurors in this emotionally charged case from harm.

Judge Melville stated that, upon learning that KCOY was not even aware of Judge Canter's order, he was inclined to dismiss the contempt proceedings but asked if KCOY would apologize to Judge Canter for undermining his efforts to protect the jurors.

KCOY voluntarily issued the following apology and the contempt proceedings were summarily dismissed without further hearing:

To the Honorable Zel Canter:

KCOY only recently become aware that Your Honor was trying to protect the jurors in the *People v. Sons* case by protecting their identities and referring to them only by use of a number during trial. Our sister station, KGET, covered the actual trial itself. We regret that our conduct in photographing the jurors as they left the courthouse on May 9, 2006, was inconsistent with the spirit of Your Honor's orders to protect the jurors' identities. We would not have done so had we been aware of the protections Your Honor had afforded the jurors in this case.

Guylyn Cummins, a partner in the San Diego office of Sheppard Mullin Richter & Hampton LLP, represented KCOY in this matter.

MLRC would like to thank summer interns — Peter Shapiro, Benjamin N. Cardozo School of Law and Benjamin Whisenant, University of Utah, S.J. Quinney College of Law for their contributions to this month's MLRC MediaLawLetter.

South Carolina Supreme Court Reverses Courtroom Closure

By Rivers S. Stilwell

The South Carolina Supreme Court, in an appeal by Hearst-Argyle Television and The Greenville News reversed a trial court's decision to close a pre-trial suppression hearing in a highly publicized capital murder trial. *State v. Williams*, No. 26159, 2006 S.C. LEXIS 185 (S.C. May 3, 2006). The decision continues a trend in South Carolina in favor of courtroom access, absent specific findings on the impact of pretrial publicity.

Background

This case involved a highly publicized murder trial in which the defendant held his former girlfriend hostage for several hours in a Greenville grocery store before the police stormed in and found her dead. The autopsy revealed that she had been shot four times in the head with a shotgun. During the hostage situation and following the defendant's arrest, the case received a great deal of media attention. Specifically, several television stations covered the standoff at the grocery store and the *Greenville News* published thirty-eight news and opinion articles addressing the case prior to the suppression hearing in question.

Immediately following the arrest, the defendant gave police a lengthy confession and he was interviewed by a forensic psychiatrist for several hours. The psychiatrist's interview led police to discover the defendant's journal, which contained more incriminating evidence. One week prior to the trial, the defendant moved to suppress the journal and statements made to the forensic psychiatrist.

The majority of pre-trial hearings were held in Anderson, South Carolina – instead of the much larger and centrally located Greenville – to discourage media attendance. Records obtained after the closure order was handed down revealed that the prosecutor and Court had agreed to set the closure hearing in Anderson “in hopes that the media will not arrive.”

When reporters from the *Greenville News* and the local television station appeared, the trial court asked the defense if they wanted to present a motion to close the courtroom. Otherwise, the trial judge said he would make the motion *sua sponte*. The reporters requested a hearing to allow their attorneys to argue in opposition to closing the courtroom. Upon their request, the trial court gave the media one hour to have their lawyers appear.

Following the arrival of the media's attorneys, the trial court conducted a hearing on closing the courtroom. The court decided to close the courtroom based on the determination that the case involved the “hot button” issue of domestic violence and the sensitive racial issue of black on white murder.

The media raised the following issues for review on appeal: (1) Did the trial court close the courtroom without sufficient justification? (2) Did the trial court violate the media's procedural due process rights in the lack of notice for the closure hearing?

Courtroom Access

The South Carolina Supreme Court first looked to federal law to determine whether the trial court closed the courtroom during the suppression hearing without sufficient justification. Here, the United States Supreme Court specifically held that the First Amendment compels a strong presumption favoring open criminal proceedings and that this presumption will only be overcome by an overriding interest based on specific findings that closure is necessary to preserve “higher values,” and the closure must be narrowly tailored to serve that interest. *In re Charlotte Observer*, 882 F.2d 850, 852-53 (4th Cir. 1989) (citing *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 13-14 (1986)).

Additionally, the court found the open courtroom presumption supported by Article I, Section 9 of the South Carolina Constitution, which states that “[a]ll courts shall be public.” S.C. Const. art. I, § 9. The court held that a judge's decision to close any proceeding to the media and public must be supported by specific findings explaining the balancing of the interests at stake and the need for closure.

Under both the state and federal constitutions, the court found that a courtroom can be closed only upon specific findings that: (1) a substantial probability exists that the defendant's right to a fair trial will be prejudiced by publicity, (2) a substantial probability exists that closure would prevent that prejudice, and (3) reasonable alternatives to closure could not adequately protect the defendant's rights.

Applying the test to the trial court's courtroom closure, the South Carolina Supreme Court held that closing the courtroom had no effect on preventing additional publicity regarding the issue of domestic violence in South Carolina or any racial issues involved in the trial.

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South Carolina Supreme Court Reverses Courtroom Closure

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Although the issues of domestic violence and race were genuine, closing the courtroom could not have possibly alleviated either of them. Further, the court noted that even though the trial court could prevent the press from attending the hearing, they could not prevent the press from later publishing reports and articles on the subject matter. Thus, preventing the media from attending the suppression hearing had no impact on suppressing the press's further ability to publicize the defendant's race, prior criminal history, or any issue related to his case.

Procedural Due Process

In arguing that their procedural due process rights were violated, the media specifically argued that the trial court closed the suppression hearing *sua sponte* without giving them adequate notice and a meaningful opportunity to be heard.

The South Carolina Supreme Court disregarded the media's argument by noting that the trial court did not close the courtroom on its own motion. Specifically, the defendant made the motion to close the courtroom. However, the court explained that even if the trial court made the motion on its own, the distinction would not be significant.

The Chief Justice commented at oral arguments that the trial judge "is not a potted plant." Therefore, if closing the

courtroom is the only available option to prevent the substantial probability that publicity would prejudice the defendant's right to a fair trial, the trial court may raise the issue on its own motion, conduct the hearing, and issue a ruling.

Addressing the media's argument that the trial court did not give them adequate notice and opportunity to be heard, the Supreme Court held that the proper standard for notice is to notify the persons present in the courtroom "reasonably in advance of deciding the issue."

The Court held the trial court appropriately followed this standard by alerting the media of its intention to close the courtroom doors and then allowing them a meaningful opportunity to be heard. Mercifully, the published opinion omitted reference to the meager one hour notice provided to the media lawyers.

Rivers S. Stilwell, a partner at Nelson Mullins Riley & Scarborough, LLP, and Carl F. Muller and Wallace K. Lightsey, partners at Wyche Burgess Freeman & Parham represented The Greenville News and Hearst-Argyle Television. The defendant was represented by Assistant Appellate Defender Robert M. Dudek, Solicitor Robert M. Ariail, Deputy Solicitor Betty C. Strom, and Assistant Solicitor Andrew Burke Moorman.

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Makers of “Grand Theft Auto” Settle FTC Charges

By Jeffrey A. Greenbaum

The makers of the “Grand Theft Auto: San Andreas” video game, Take-Two Interactive Software, Inc. and Rockstar Games, Inc. (together, “Take Two”), recently settled Federal Trade Commission charges that they deceptively marketed the game by failing to disclose to consumers that it contained hidden content. *FTC File No.* 052 3158 (June 8, 2006).

The FTC prosecuted Take Two for labeling the game with the Entertainment Software Rating Board’s “Mature” rating without disclosing that there was hidden sexual content in the game that could have changed the game’s rating – even though this content was only viewable if the game were modified by users.

Background

The Entertainment Software Rating Board (“ESRB”) is the self-regulatory organization that rates most video games sold in the United States. The ESRB has a two-part rating system, the rating symbols and the accompanying content descriptors.

Its enforcement action against Take Two makes clear that “companies owe an obligation to the public, independent of their obligations to the ESRB, not to misrepresent the content that might become accessible on a video game.”

The ESRB ratings consist of: EC (early childhood), E (everyone), E10+ (everyone 10 and older), T (teen), M (mature 17+), and AO (adults only 18+). Most major retailers in the United States will not sell a video game that does not have a rating, and some will not accept a game rated “AO.”

Take-Two is the maker of the popular “Grand Theft Auto” video games. In September 2004, Take-Two applied to the ESRB for a rating for “Grand Theft Auto: San Andreas.” Take-Two did not inform the ESRB that there was an unfinished sex mini-game that had been edited out of the game, but was embedded in the game’s computer code.

The ESRB’s published requirements did not state that this type of material was required to be disclosed to the ESRB, however. The ESRB rated the game “M,” with the following content descriptors:

“Blood and Gore, Intense Violence, Strong Language, Strong Sexual Content, and Use of Drugs.”

Take-Two marketed the game with the “M” rating and did not disclose that the game contained unused, but potentially viewable, content.

Soon after the release of the game, however, players were able to access the unfinished sex mini-game, referred to as “Hot Coffee,” through the use of software available on the Internet and other methods. As a result of this, the ESRB changed the game’s rating to “AO,” with the additional content description, “Nudity.”

(These background facts were taken from the allegations in the FTC’s complaint in this matter.)

FTC Action

The FTC alleged that Take Two’s advertising of the “Grand Theft Auto: San Andreas” video game with an “M” rating, without disclosing that there was potentially viewable unrated content on the game that could change the rating to “AO,” was a deceptive practice in violation of Section 5(a) of the FTC Act. Section 5(a) prohibits:



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Makers of “Grand Theft Auto” Settle FTC Charges

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“unfair or deceptive acts or practices in or affecting commerce.” See 15 U.S.C. § 45(a)(1).

Take Two entered in a consent order with the FTC, without admitting wrongdoing, that settled the charges. The FTC announced the settlement on June 8, 2006. The settlement agreement will be subject to public comment through July 10, 2006, after which the Commission will determine whether to make the settlement final. See 71 Fed. Reg. 34620 (June 15, 2006).

As part of the settlement, Take-Two agreed, in connection with video games, to: (a) disclose, clearly and prominently, on product packaging and in any promotion or advertisement for an electronic game, content that is relevant to the rating, unless that content has been disclosed sufficiently in prior submissions to the rating authority; (b) not misrepresent, expressly or by implication, the rating or content descriptors for an electronic game; and (c) establish and implement, and thereafter maintain, a comprehensive system reasonably designed to ensure that all content in an electronic game is considered and reviewed by Take-Two in preparing submissions to the rating authority. Once the order becomes final, Take-Two will be subject to civil penalties of up to \$11,000 per violation if it violates the order.

In a statement, Lydia Parnes, Director of the FTC’s Bureau of Consumer Protection, said “parents have the right to rely on the accuracy of the entertainment rating system. We allege that Take-Two and Rockstar’s actions undermined the industry’s own rating system and deceived consumers. This is a matter of serious concern to the Commission, and if they violate this order, they can be heavily fined.”

FTC Testimony

On June 14, 2006, the FTC presented written testimony to the House Committee on Energy and Commerce Subcommittee on Commerce, Trade, and Consumer Protection on “Marketing Violent Entertainment to Children: Self-Regulation and Industry Practices in the Video Game Industry.”

The FTC testified that, “undisclosed explicit content in video games is obviously a matter of serious concern. Parents must be able to rely on the accuracy of the industry

rating system. Practices, whether by game manufacturers or a third party, that undermine the integrity of this system need to be addressed.”

The FTC acknowledged that, “because the expressive content in video games has been considered protected speech under the First Amendment, there is a very narrow range of permissible government involvement with their advertising and marketing” (footnote omitted).

The FTC asserted in its testimony, however, that its enforcement action against Take Two makes clear that “companies owe an obligation to the public, independent of their obligations to the ESRB, not to misrepresent the content that might become accessible on a video game.”

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LEGISLATIVE UPDATE

FOIA Executive Order, Open Government Act

By Kevin M. Goldberg

One of the biggest actions of the past few months was the release of Executive Order 13392 on December 14, 2005. The White House trumpeted this as a major step forward toward effective and efficient Freedom of Information Act processing; many in the requestor community were skeptical. Now the time has come to see whether this Executive Order will promote real change or simply delay much-needed Congressional oversight and, possibly, reform of FOIA. Both the Executive Order and Open Government Act are reviewed below.

Executive Order 13392

- Entitled “Improving Agency Disclosure of FOIA, it:
 - Requires each agency of the federal government to designate a senior official as the “Chief FOIA Officer” of the agency
 - Each agency was required to do this by January 14, 2006
 - The Chief FOIA Officer must be someone at the Assistant Secretary level or its equivalent
 - He or she will be responsible for the agency’s “efficient and appropriate compliance” with FOIA.
 - Creates “FOIA Requester Service Centers” within each agency.
 - These are the gateways to the agency where requestors can obtain information about the status of requests and any information about an agency’s response.
 - Each FOIA Requester Service Center shall have one or more “FOIA Liaisons” who are to “ensure a service-oriented response to FOIA requests and FOIA-related inquiries”, though no specific methods for accomplishing this are required no new staff or resources are allocated for this purpose.
 - Mandates review of agency administration of FOIA by the Chief FOIA Officer.

- This is to result in the development of an agency-specific plan to improve FOIA implementation over the next two years.
- This plan, due to the Attorney General and Office of Management and Budget by June 14, 2006 will contain concrete milestones to be achieved. Similar plans are to be contained in the agency’s annual FOIA reports for Fiscal Years 2006 and 2007.
- These agency-specific plans continue to be filed with the Department of Justice; they are available for review on the DOJ website at: http://www.usdoj.gov/04foia/agency_performance.html

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 bill’s proposed changes are:
 - A broader definition of the “news media” which applies to any requestor who demonstrates an intent to distribute information to a wider audience, regardless of affiliation.
 - A change to the rule regarding recovery of attorneys fees, allowing litigants to obtain attorneys fees if a substantial part of the records were obtained through court order or settlement.
 - 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.
 - Providing a real enforcement mechanism to ensure that agencies do not ignore the statutorily-required 20 day deadline for responding to a FOIA request.
 - Clarification that records which been given to private contractors for storage and maintenance are still subject to FOIA.

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Legislative Update

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- Creation of a “FOIA Ombudsman” to oversee FOIA and ensure it is administered fairly.
- Establishment of a tracking system to allow requestors to know the status of a request.
- Explicitly requiring Congress to cite to FOIA when creating any new exemption to FOIA in order to prevent new “(b)(3)” exemptions from being passed in secret.
- Two hearings have been held in Congress on this bill
 - The subcommittee on Terrorism, Technology and Homeland Security of the Senate Judiciary Committee held a hearing on March 15, 2005.
 - This was followed by a May 11, 2005 hearing in the subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee. After these hearings, the bill’s

progress slowed as the Senate Judiciary Committee began work on other issues and the House considered other possible language for the provisions relating to the ombudsman and enforcement penalties for undue delay.

- The same House subcommittee is expected to hold an oversight hearing on FOIA again in mid-July. It is expected that this hearing will review whether the Executive Order has ameliorated the problems plaguing FOIA or whether it is nothing more than a smokescreen thrown up by an Administration that is clearly hostile to open government.

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

Broadcast Indecency Enforcement Act Signed into Law

On June 15, President Bush signed legislation authorizing the Federal Communications Commission to increase maximum broadcast indecency fines from \$32,500 to \$325,000. Dubbed the Broadcast Decency Enforcement Act of 2005, it also sets a maximum penalty for any single, continuing violation at \$3 million.

The law was sponsored in the Senate by Kansas Republican Senator Sam Brownback and in the House by Missouri Republican Representative Fred Upton. Following several highly publicized episodes on broadcast television – beginning with Janet Jackson’s 2004 Super Bowl “wardrobe malfunction,” and ending most recently with a simulated orgy scene on the CBS series “Without a Trace” earlier this year – there was strong Congressional support to increase indecency fines. An increase in indecency complaints to the FCC has resulted in fines jumping from \$440,000 in 2003 to nearly \$8 million in 2004.

The impact of the law is already being felt. PBS has sent a new set of guidelines to its documentary producers. In shows airing before 10 p.m., compound words containing indecent words, which used to be only partially bleeped, must now be entirely bleeped. Also, if it is possible to discern the word by reading a person's lips, his mouth must be digitally blurred.