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MEDIA LAW LETTER

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Fifth Circuit Affirms Dismissal of MySpace “Sexual Predator” Suit

Website Not Liable For Third Party Content

By Christopher Popov

Appellate Court Decision

On May 16, 2008, the United States Court of Appeals for the Fifth Circuit affirmed the dismissal of a highly publicized case arising from the statutory rape of a 14 year-old girl by a man she allegedly met on MySpace.com. *Doe v. MySpace, Inc.*, No. 07-50345, 2008 WL 2068064 (5th Cir. May 16, 2008) (Garwood, Clement, Elrod, JJ.). The court held that the plaintiff’s negligence and gross negligence claims against MySpace, Inc. and its parent company, News Corporation, were barred by the Communications Decency Act (“CDA”), 47 U.S.C. § 230, which immunizes interactive computer services from claims that treat them as publishers of user-generated content.

The court began by noting that, in enacting the CDA, Congress recognized the cultural benefits of a robust Internet and sought to ensure its continued growth, free from government intervention. *Id.* at *4. The court also observed that several of its sister circuits have “construed § 230 broadly in all cases arising from the publication of third party content.” *Id.* (citing *Green v. Am. Online* (AOL), 318 F.3d 465, 471 (3d Cir. 2003); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123–24 (9th Cir. 2003); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 984–86 (10th Cir. 2000); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330–31 (4th Cir. 1997)).

Issues on Appeal

The plaintiff raised three main arguments on appeal. First, she argued that the district court erred in applying CDA immunity, as she was not suing because MySpace published any particular content, but rather because it failed to implement reasonable safety measures to prevent minors from communicating with sexual predators. Second, she argued in the alternative that, to the extent her claims were based on MySpace’s publication of any particular content, MySpace was partially responsible for the creation of that content because its search and formatting features make it possible to browse for a user’s profile using standard search criteria, including age, body type, and geographic location. Third, the plaintiff argued that the district court erred in holding that MySpace had no common law duty to protect her daughter by arguing that MySpace, like a “brick and mortar” business, has an affirmative duty to protect its users or invitees from foreseeable injuries.

Doe is significant, because it is the first case to hold that the CDA bars claims based on offline conduct that resulted from seemingly innocuous online communications

argument—that the CDA did not apply in this case because she was suing over MySpace’s failure to implement reasonable safety measures, and not because it published any particular content. Like the district court, the Fifth Circuit found this argument to be disingenuous. To demonstrate the point, the court relied upon *Green v. America Online* (AOL), 318 F.3d 465 (3d Cir. 2003), a case in which the plaintiff sued AOL after he received derogatory comments and a computer virus in an AOL “chat room.”

After acknowledging these precedents, the court considered Doe’s first



In attempting to plead around the CDA’s immunity provisions, Green argued that he was suing not because AOL published the virus or the derogatory comments, but because it failed to honor its “community guidelines,” which pledged to protect AOL users from harassment. Despite the plaintiff’s characterizations of his claims, the Third Circuit recognized that there was “no real dispute that Green’s fun-

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Fifth Circuit Affirms Dismissal of MySpace “Sexual Predator” Suit

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damental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network.” *Id.* at 471. The court further held that “decisions relating to the monitoring, screening, and deletion of content” are “actions quintessentially related to a publisher’s role” and were therefore protected under § 230 of the CDA. *Id.*

Drawing upon the analysis in *Green*, the Fifth Circuit similarly concluded that Doe’s allegations were “merely another way of claiming that MySpace was liable for publishing the communications and they speak to MySpace’s role as a publisher of third party content.” *Doe*, 2008 WL 2068064, at *6. Accordingly, the court held that Doe’s claims were barred under the CDA.

The court did not, however, address the merits of Doe’s argument that CDA immunity ought not to apply because MySpace was an alleged co-creator of the content at issue—an argument that sought to exploit the Ninth Circuit’s *en banc* decision in *Fair Housing Council v. Roommates.com*, No. 04-56916, 521 F.3d 1157 (9th Cir. 2008) (*en banc*). After reviewing the record and quoting extensively from the hearing on MySpace’s Motion to Dismiss, the court held that *Doe* waived this argument by failing to raise it in the district court. *Doe*, 2008 WL 2068064, at *8. The court also declined to consider Doe’s argument that MySpace had a duty under Texas common law to protect its users from foreseeable injuries, similar to the duty that “brick and mortar” businesses owe to their customers. Having determined that MySpace was immune from Doe’s

claims, the court saw “no need ... to assess the viability of Doe’s claims under Texas common law in the absence of the CDA.” *Id.*

Conclusion

With the *Doe* opinion, the Fifth Circuit joins several other circuits in broadly interpreting CDA immunity to bar all “claims against Web-based interactive computer services based on their publication of third-party content” *Doe*, 2008 WL 2068064, at *8. *Doe* is significant, because it is the first case to hold that the CDA bars claims based on offline conduct that resulted from seemingly innocuous online communications; in prior cases, the plaintiffs’ injuries were based at least in part on the published content. It is also the first case to extend CDA immunity to claims that were purportedly based on a website’s failure to protect minors, as opposed to its publication of any particular content. These holdings provide some assurance that courts will not tolerate artful pleadings designed to avoid CDA immunity, especially where the interactive computer service’s only role was to publish content that ultimately lead to the plaintiff’s injuries.

MySpace was represented by Harry M. Reasoner, Thomas S. Leatherbury, Cliff Thau, Michael D. Marin, Christopher V. Popov, and Matthew B. Ploeger of Vinson & Elkins L.L.P., and by Ellen S. Agress and Eugenie C. Gavenchak of News Corporation, Michael J. Angus of Fox Interactive Media, Inc., and Jill H. Ratner of Fox Group.

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“Parody News” Libel Suit Against Fox News Thrown Out

No Evidence of Constitutional Malice

By Theresa M. House

Constitutional malice depends on a defendant’s actual, subjective state of mind – even if a journalist is “negligent” or “gullible” in failing to question the accuracy of an Internet source, this does not mean that he entertained serious doubts about its truth. Last month, Judge D. Brock Hornby of the United States District Court for the District of Maine held that the republication of fictionalized facts and false quotations obtained from a “parody news” article did not constitute reckless disregard of the truth, sufficient to prove constitutional malice, where the defendants subjectively believed that what they reported was true – even where portions of the parody article were “so absurd” that “they should have raised the defendants’ truth-seeking antennae and caused them to question the accuracy of the article as a whole.”

In *Levesque v. Doocy*, 2008 WL 2267186 (D. Me. June 3, 2008), the court granted defendants’ motion for summary judgment in an action brought by Leon Levesque, the Superintendent of the Lewiston School Department, against Fox News Network and two of the co-hosts of the *Fox & Friends* morning television program.

The court dismissed some of Levesque’s claims, holding that the words complained-of were either substantially true or protected expressions of opinion or hyperbole. As to the cablecast as a whole, while agreeing with Levesque that it defamed him by subjecting him to ridicule, the court found that the public-official plaintiff had not shown a triable issue of fact on constitutional malice.

In so doing, the Court rejected plaintiff’s arguments that: (1) the newsgathering was so inadequate that reckless disregard could be inferred; and (2) the defendants’ on-air statements, such as “I almost thought this was from *The Onion*”; “I didn’t think this was actually true”; “I am not making this up”; and “I hope we’re not being duped,” signaled that they doubted the truth of their report.

The Ham Incident

At the Lewiston Middle School cafeteria on April 11, 2007, a white student, egged on by some of his peers,

placed a bag containing ham on a table where Somali-Muslim students were eating lunch. One of the students became very offended and complained to school officials and to the police officer on duty at the school that the act was a “hate crime.”

The incident reminded both students and school officials of an event the year before when a white man in Lewiston rolled a pig’s head into a mosque and was later charged with a bias-related crime. Viewing the incident as an attack on the Somali-Muslim students’ religious and ethnic backgrounds, school officials suspended the boy who placed the ham on the table for ten days, classifying his behavior as a “Hate Crime/Bias” incident. The police department filed a report about the incident, labeling it as a “Crime: Harassment/Hate bias,” and referred it to the Maine Attorney General for possible prosecution under Maine’s civil rights laws.

On April 19, 2007, the Lewiston *Sun-Journal* published a report of the incident, featuring quotations from Levesque and others. Within days, the report was republished on various Internet news sites and blogs, many of which were of the view that the school had gone overboard in its discipline of the student.

One of these reports was written by aspiring medical student and freelance writer Nicholas Plagman, who discovered the *Sun-Journal* report online and was inspired to write his own take on the ham incident – but with a twist. Plagman wrote and published a report of the ham incident that was based on the true story, but which embellished it with additional quotations and facts.

For example, the “ham” became a “ham sandwich.” And where Levesque had been quoted in the *Sun-Journal* article as saying, “We’ve got some work to do to turn this thing around and bring the school community back together again,” Plagman added (falsely) that Levesque also said, “These children have got to learn that ham is not a toy, and that there are consequences for being nonchalant about where you put your sandwich.” On April 23, Plagman uploaded his work to the “news” section of associatedcontent.com, a web site for citizen journalists. But Plagman’s “news” apparently did not stay at associatedcontent.com

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very long.

Instead, the article – which falsely identified itself as sourced to the *Associated Press* – was quickly republished on various internet blogs and news sites – including the popular information resource Google News.

The Fox & Friends Cablecast

In the early morning hours of April 24, 2007, producers for the morning cable program *Fox & Friends* discovered Plagman’s article, the *Sun-Journal* article, and some other similar reports about the ham incident. After confirming the basic facts of Plagman’s article, finding that it had been published on Google News and sourced to the *Associated Press*, and securing other corroborating sources, the ham incident was selected to be featured on that morning’s cablecast. An assistant producer also started trying to reach Levesque by telephone to obtain a comment.

During the three-hour cablecast, *Fox & Friends* anchors reported on the ham incident, and in so doing, repeated some of the false facts/quotations that Plagman had included in his report: (1) that the ham at issue was a “ham sandwich”; (2) that Levesque had said, “These children have got to learn that ham is not a toy”; and (3) that Levesque had stated that the ham incident was “akin to making these kids feel like they’re being shot at back in Mogadishu and being starved to death.”

Later, Levesque’s counsel contacted the Fox defendants to complain that some parts of the April 24th cablecast were inaccurate. On May 16, 2007, one of the *Fox & Friends* anchors delivered an apology on the show.

District Court’s Decision

On June 22, 2007, Levesque filed suit for libel, libel per se, false light invasion of privacy, and punitive damages. After discovery, the defendants moved for summary judgment, arguing that the report was (a) not defamatory; (b) constitutionally protected as substantially true and opinion/rhetorical hyperbole; and (c) published without constitutional malice. Levesque argued that the errors in the report were materially false statements of fact that were reported with reckless disregard for the truth.

On June 3, 2008, the District Court issued an order granting the motion for summary judgment in full. The court agreed that some of the statements – that the school was considering other charges against the suspended student, that calling the incident a hate crime was “crazy,” and that the school was now working to develop an “anti-ham” response plan – were constitutionally protected as substan-



tially true or statements of rhetorical hyperbole or opinion. For the remaining statements, the false quotations and the notion that the ham was a “ham sandwich,” the court found that they were materially false and were reasonably susceptible of a defamatory meaning because the cablecast inspired viewers to ridicule the plaintiff.

Nevertheless, the Court granted the motion for summary judgment as to all statements after finding that there was no clear and convincing evidence of constitutional malice. Emphasizing that constitutional malice is a subjective inquiry depending on the defendants’ actual state of mind, the court found no evidence to contradict the defendants’ decla-

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rations that they had believed the report to be true. In particular, the Court noted that one anchor’s stated belief that Google News is a reliable source that “searches only bona fide news outlets” supported his declaration that he subjectively believed the Plagman article was truthful – *even if that belief was inaccurate*.

The court rejected Levesque’s argument that on-air statements from the Fox defendants such as, “I hope we’re not being duped,” “I thought this was almost from *The Onion*,” and “I’m not making this up,” were sufficient to show evidence of constitutional malice because they implicitly evinced the anchors’ doubts as to the accuracy of the story. The court found that these statements, particularly in light of the defendants’ declarations and evidence of their efforts to research the story before publication, did not in any way contradict the evidence showing they believed what they reported was true.

At most, the court found, the statements revealed a “fleeting concern” that, “in light of the outrageousness of the story,” “the defendants might later learn that what they believed to be true” would prove to be not entirely accurate. But such a fleeting concern was insufficient to show the defendants had “serious doubts” as to the truth.

The court expressed its hopes that the defendants’ actions and omissions – in publishing the report after only a short period of time, in relying on an Internet source without greater efforts to corroborate its report, in failing to confirm the accuracy of the quotations in the Plagman article, and in generally not conducting sufficient further research on the most dubious claims in the Plagman article –

would qualify as “an extreme departure from professional standards,” and would “provide grist for journalism classes teaching research and professionalism standards in the Internet age.”

Nevertheless, the court concluded that “First Amendment principles developed long before the Internet” provide that, under the subjective test for constitutional malice, a “failure to investigate,” without more, is insufficient to prove the defendants acted with reckless disregard for the truth. The court also noted, expressly, that proposed expert testimony regarding common practice and industry standards in journalism is “not relevant” to a finding of constitutional malice.

In so holding, the Court focused its inquiry for constitutional malice precisely where it belonged: on the subjective beliefs of the libel defendants. The Court also re-affirmed the long-standing rule that departures from accepted journalistic standards and practices are insufficient to show constitutional malice.

Defendants Fox News Network, LLC, Steve Doocy, and Brian Kilmeade were represented by Dori Ann Hanswirth, Carlotta Cassidy, and Theresa M. House of Hogan & Hartson LLP, New York City, Jason P. Conti, formerly of Hogan & Hartson LLP, New York City, and currently Vice President, Assistant General Counsel at Dow Jones & Company, Inc., New York City, and John M.R. Paterson and David Soley of Bernstein, Shur, Portland, Maine. Mr. Levesque was represented by Bernard J. Kubetz of Eaton Peabody, Bangor, Maine.

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California Appellate Court Vacates Discovery Order In SLAPP Suit

Newspaper Suing Freelance Journalist Faces Dismissal, Fee Award

By Judith F. Bonilla and Charles D. Tobin

A California Court of Appeal has granted a rare interlocutory writ, for the first time vacating a discovery order in a defamation action on grounds that the underlying reporting was not actionable pursuant to the state's anti-SLAPP (Strategic Lawsuit Against Public Participation) statute.

Paterno v. Superior Court of Orange County, No. G038555, 2008 WL 2390430 (Cal. App. 4th Dist. June 13, 2008) (Aronson, Rylaarsdam, Ikola, J.J.). What makes the case even more unusual is the identity of the defamation plaintiff – a newspaper company.

On June 13 the Court of Appeals in Orange County held that freelance journalist Susan Paterno's reporting in a 2006 *American Journalism Review* (AJR) article could not support a cause of action by Ampersand Publishing Company. Ampersand, owned by billionaire Wendy McCaw, publishes the *Santa Barbara News-Press*. Because the statements at issue in the appeal were not actionable, the appeals court held that Ampersand had failed to demonstrate "good cause" to conduct discovery under Cal. Civ. Code § 425.16 (g).

The ruling clears the way for dismissal of the underlying lawsuit and the recovery of defense expenses. The decision reinforces the strong protection that the anti-SLAPP statute provides against harassing litigation.

Background

The litigation arose out of Paterno's behind-the-scenes look at the turmoil at the *Santa Barbara News-Press*. Paterno, a freelance reporter and chair of the journalism department at Chapman University in Santa Ana, California, published her profile of the newsroom in the December 2006 issue of *AJR*.

Since Ampersand's 2000 purchase of the paper from the New York Times Co., dozens of journalists have quit or been fired in disputes with McCaw and others in upper management of the newspaper. The Society of Professional Journalists bestowed an ethics award on the journalists who

left the newspaper.

McCaw, Ampersand, and an army of their lawyers and publicists have aggressively sought to quash widespread criticism of the newspaper in the wake of the departures. They have sued a rival weekly newspaper for copyright infringement, fired employees who engaged in protests that urged people to cancel subscriptions, contested employees'

The decision reinforces the strong protection that the anti-SLAPP statute provides against harassing litigation.

efforts to unionize, and threatened suit against local businesses that placed "McCaw Obey the Law" signs in their windows. Paterno in researching her *AJR* article spoke with dozens of former and current journalists, but she was threatened with litigation when she attempted to contact newspaper management.

Ampersand, in December 2006, following publication of the *AJR* article, sued Paterno for defamation and trade libel, alleging her account was biased, false and hurt the newspaper's circulation. The complaint alleged that 33 separate statements in the 8-page article were libelous. Among the more absurd portions of Ampersand's lawsuit were challenges to Paterno's reports that McCaw had "flattened" the "wall" of separation between the newsroom and upper management, that the firing of an editor had resembled "a scene out of 'The Battle of Algiers,'" and that McCaw's "largely unexplained directives led to confusion" among the staff. Essentially, the lawsuit accused Paterno of calling the newspaper biased, which, according to the plaintiff's theory of the case, insinuated the newspaper was a defective product and managed unethically.

After publication, *AJR* was also threatened with litigation, but Ampersand never sued the magazine. *AJR* retained counsel to defend Paterno.

Anti-SLAPP Special Motion to Strike

Paterno filed a special motion to strike the complaint under the anti-SLAPP statute, Cal. Civ. Code § 425.16. The

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California Appellate Court Vacates Discovery Order In SLAPP Suit

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statute permits a defendant who engages in lawful expression to avoid the chill of invasive discovery and protracted litigation. The defendant files a special motion to strike that establishes her expression was protected, and the burden then shifts to the plaintiff to demonstrate a probability of prevailing on its claims. While affidavits are typical in a SLAPP action, all discovery is automatically stayed unless a party demonstrates "good cause."

In her anti-SLAPP motion to strike, Paterno made the threshold showing, as the statute requires, that her conduct occurred in furtherance of the constitutional right of free speech in connection with a public issue or an issue of public interest. Paterno further asserted that all 33 of the statements listed in the complaint were not actionable as matters of law. The burden then shifted to Ampersand to demonstrate a probability of prevailing on its claims.

Ampersand filed a responsive motion asserting that it needed expedited discovery – specifically, the depositions of Paterno, her editorial assistant, and paper discovery from *AJR* – to oppose the motion to strike. Ampersand conceded for purposes of the motion that Ampersand was a public figure, arguing that it therefore needed discovery on the issue of actual malice. The discovery motion required the trial court to review the statements at issue and determine whether based on their actionability, Ampersand had demonstrated sufficient "good cause" for discovery.

At an April 2007 hearing, California Superior Court Judge H. Warren Siegel found that Ampersand failed to

meet its burden of showing a probability of prevailing on 29 of the 33 statements, as "most appear as a matter of law to be opinion, or [Ampersand] fails to establish prima facie falsity." However, the trial court found that Ampersand established sufficient showing as to four of the statements, and that Ampersand therefore had shown "good cause" for the discovery in order to establish actual malice. The trial court continued the anti-SLAPP hearing and issued an order permitting Ampersand to pursue the requested discovery. Paterno promptly filed a petition for writ of mandate with the Court of Appeal.

Court of Appeal's Writ Decision

In its decision this month, the Court of Appeal wholeheartedly agreed with Paterno that the trial court abused its discretion, and the appellate panel raised a judicial eyebrow at the notion of a newspaper defamation plaintiff. In an 18-page published opinion written by Justice Richard M. Aronson, the panel held that the trial judge had abused his discretion by permitting discovery, and found that the four statements were not actionable.

In addressing the "good cause" standard, the court rejected Ampersand's argument that discovery should be liberally granted in SLAPP proceedings whenever a plaintiff can show relevancy. On the contrary, the appeals court held that "trial judges should refrain from ordering 'unnecessary, expensive and burdensome' discovery proceedings 'if it appears from the SLAPP motion there are significant issues

as to falsity or publication – issues which the plaintiff should be able to establish without discovery.'"

Reviewing the statements before it, the appeals court held that Ampersand did not introduce sufficient evidence to establish a prima facie case of false or unprivileged statements of facts. Two of Pa-

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AJR Features

From AJR, **December 2006/January 2007**

Santa Barbara Smackdown

A behind-the-scenes look at the turmoil that engulfed the Santa Barbara News-Press after owner Wendy McCaw and her top lieutenants flattened the wall separating the executive suite from the newsroom.

By *Susan Paterno*
Susan Paterno (paterno@chapman.edu) is an AJR senior contributing writer.



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California Appellate Court Vacates Discovery Order In SLAPP Suit

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terno's statements concerned the *News-Press's* handling of a story about the drunk-driving arrest of the editorial page editor, who had remained loyal to Ampersand during its battle with unionizing journalists. Paterno reported that *News-Press* management had issued an order to "kill" the sentencing story. Ampersand argued that reporting was false because Paterno omitted facts that, according to Ampersand, would have presented its side of the story.

The appeals court slammed Ampersand's "novel theory of liability," holding that "there is no constitutional mandate requiring the press to adopt a 'he said, she said' style of reporting." Moreover, the court shared the disbelief the defense encouraged in its briefs about a newspaper's decision to challenge a critique in court:

It is ironic that Ampersand, itself a newspaper publisher, seeks to weaken legal protections that are intended to secure the role of the press in a free society. Newspapers and publishers, who regularly face libel litigation, were intended to be one of the "prime beneficiaries" of the anti-SLAPP legislation.

The court further held that Paterno's report about Ampersand's pursuit of a restraining order, on behalf of one employee against another, was privileged under Cal.Civ.Code 47(d) as a fair report of an official judicial proceeding. The *AJR* article reported that "the *News-Press* pursued a restraining order against Todd in connection with the Fuentes episode in July, costing him close to \$7,000 in attorney's fees, he says, before dropping the case in late October."

Ampersand alleged the statement was defamatory because it failed to report that Ampersand ceased pursuit of the restraining order when the complaining employee left the newspaper. The court, however, noted that Ampersand did not dispute the truth of the statement itself. The court held, "Ampersand's demand for 'context' therefore fails as a basis for alleging the falsity necessary for defamation, and, consequently, also fails to establish good cause for discovery."

Finally, the appeals court rejected Ampersand's defamation claim against the article's characterization of em-

ployees' complaints that *News-Press* management had "slashed" employee benefits and overtime pay. Ampersand had conceded that it no longer matches employees' 401(k) contributions. But the company asserted that it had offset this change in benefits with other incentives, and because Paterno had not included this information, the article falsely portrayed Ampersand as an "arbitrary and abusive employer." The court rebuked the argument, squarely holding that the description "slashed" was a constitutionally protected expression of the employees' opinions, was incapable of being proven false, and that Ampersand's concession had supplied a sufficient basis in fact for the statement.

In another passage sharply critical of Ampersand's decision to litigate, the appeals court noted that rather than trying to make its point in the courts, "if Paterno's statements require further explanation, Ampersand, McCaw, its lawyers, public relations experts, and crisis managers, are free to provide them. Ampersand, as the publisher of Santa Barbara's largest circulation daily newspaper, has ample 'access to channels of effective communication.'"

The court concluded that to "allow the anti-SLAPP statute to serve its intended purpose" and to avoid "irreparable harm" to Paterno, it would issue a writ of mandate directing the superior court to vacate its discovery order and to issue a new order denying the motion for discovery. In signaling to the trial court what the appeals panel believes should happen next, the opinion noted that successful anti-SLAPP defendants are entitled to attorney's fees as a matter of right. The appeals court said that the superior court on remand therefore also should consider whether to grant Paterno's request for her fees in both the appellate and trial levels.

As of press time, the case was pending remittitur to the superior court, and Ampersand had not pursued further appellate review of this decision.

Charles D. Tobin, Judith F. Bonilla, and Shelley G. Hurwitz of Holland & Knight LLP's Washington, D.C., and Los Angeles, CA, offices represent journalist Susan Paterno. Plaintiff Ampersand Publishing Company is represented by Stanton L. Stein, Samuel R. Pryor, and Lauren Sudar of Dreier Stein & Kahan, Santa Monica, CA.

Kentucky Court Adopts Narrow View of Public Concern

“Troubleshooter” Broadcasts Not of Public Concern

A federal district court in Kentucky took a narrow approach to determining what constitutes a matter of public concern in a defamation case, holding that a television news report on a possible real estate scam involving a blind woman did not fit within the definition. *Mackin v. Cosmos Broadcasting, Inc.*, 3:05-CV-331-H, 2008 WL 2152188 (W.D.Ky. 2008) (Heyburn, J.) (adopting a magistrate judge’s opinion).

The court declined to accept the more encompassing public concern doctrine followed in New York, which, it held, “evinces a greater solicitude for the scope of the First Amendment” than the U.S. Supreme Court requires or Kentucky case law supports. Refusing to consider the editorial choices of journalists on the issue, the court emphasized that “newsworthiness” alone does not suffice to make something a public concern and found that the defendants’ report focused on an essentially private transaction that did not affect the public.

Background

The defendant television station, WAVE-3 Louisville, aired a series of “Troubleshooter” consumer reports in May 2004 about the real estate troubles of Lois June Jackson. Jackson, a blind woman, purchased a home from the plaintiffs which turned out to be in a state of disrepair. Her co-worker, a lieutenant with the local police department, contacted the defendants who then interviewed Jackson for an investigative report. The defendants’ report suggested that the plaintiffs had taken advantage of Jackson and included several factual details, such as an allegation that Jackson’s loan was handled by a friend of the plaintiffs.

The plaintiffs sued for defamation and false light invasion of privacy. Defendants motioned for summary judgment, arguing that the defendants’ transaction with Jackson was a matter of public concern and therefore plaintiffs could not presume, but were required to plead and prove, damages.

What is a matter of public concern?

The court’s decision turned on whether the subject of the defendants’ broadcast could be characterized as a matter of

public concern. While the Supreme Court has made it clear that where the allegedly defamatory statements are a matter of public concern, the plaintiff must prove the defendants acted with actual malice, *New York Times v. Sullivan*, 376 U.S. 254 (1964), and must also prove the statements complained of are false and that damages were incurred, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), it is less clear what is required for statements to be considered a matter of public concern in the first place.

The court acknowledged that “the boundaries of the public concern test are vague.” *Mackin*, at 6, quoting from *City of San Diego v. Roe*, 503 U.S. 77, 83-84 (2004) (a public employee speech case).

To determine whether the statements in the WAVE-3 broadcast would fit within the public concern doctrine, the court relied primarily on *Connick v. Myers*, 461 U.S. 138 (1983), another public employee speech case, and its interpretation by the Sixth Circuit, which had previously characterized the case as the “most instructive” Supreme Court precedent on the issue. The court found that the Sixth Circuit typically found matters to be of public concern when the information was needed for the public to make decisions about the operation of their government and when that information was the focus of the speech overall.

The court also examined the public controversy doctrine, particularly as articulated by the Supreme Court in *Time, Inc. v. Firestone*, 424 U.S. 488 (1976), and the D.C. Circuit in *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980). Those cases characterize matters as public controversies when they affect the general public in a significant way; they also emphasize that it is not enough that something is of interest to the public. “Newsworthiness alone will not suffice.” *Mackin*, at 8, quoting from *Waldbaum*, 627 F.2d 1287. Although public controversy doctrine is intended to be applied only in the context of determining who is a “public figure” in a defamation case, the court justified its consideration of the doctrine as “undoubtedly relevant” and found the discussions of the issue “informative.”

The court then applied its discussion of public concern doctrine to the case at hand, finding that the broadcast seg-

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Kentucky Court Adopts Narrow View of Public Concern

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ments at issue did not fit within the doctrine. The decision characterized the subject of the report as an essentially private transaction between two people. The court noted that there was no evidence that the plaintiffs' action was part of a serial pattern of sales of substandard homes to handicapped consumers. The court also refused to consider the response of the community and local government, including the involvement of a city councilwoman who sought help for Jackson, emphasizing that this activity occurred after the broadcast and was therefore irrelevant.

Finally, the court rejected defendant's argument that the broadcasts were directed toward educating viewers about the dangers of sale-by-owner transactions, with the individual transaction here illustrating those dangers.

The court declined to adopt the New York approach to the public concern doctrine, finding that state's deference to the professional judgments of journalists as to what constitutes a matter of public concern to be unsupported by Sixth Circuit and Kentucky jurisprudence. The defendants had urged the court to follow *Cottom v. Meredith Corp.*, 411 N.Y.S.2d. 53 (N.Y. App. Div. 1978), which states:

If we were to test the publication by its newsworthiness, application of the constitutional privilege would rest solely in the editor's hands. Nevertheless, a commercial enterprise's allocation of its resources to specific matters and its editorial de-

termination of what is "newsworthy", may be powerful evidence of the hold those subjects have on the public's attention. *Cottom* at 57.

The court distinguished the case from the WAVE-3 broadcast, noting that the subject of the report in *Cottom* was symptomatic of a larger problem: substandard housing for the elderly.

Because the court here found the subject matter to be private, it ruled that the plaintiffs need only show negligence, and that there is a presumption that the defendants' statements are false and defamatory. The court also rejected the defendant's argument that the statements were protected as opinion. The court noted that opinions can convey underlying defamatory facts and suggested that even the defendants' claim that the plaintiffs had engaged in a "scam" could be viewed as a statement of fact and not merely opinion.

The court also denied summary judgment on the plaintiff's false light invasion of privacy claim because it "cannot find that no material issue of fact exists as to whether there were 'obvious reasons to doubt the veracity' of allegations made..." *Mackin* at 16.

Despite these rulings, the court categorized its decision as "not final," and ordered the plaintiffs to compile a list of the specific allegedly defamatory statements. The defense will then be able to file a subsequent motion for summary judgment on other grounds.



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Libel and Privacy Suit Over Online Newspaper Archive Dismissed

Report About Plaintiff's Arrest Was True

By Clifford S. Davidson

The Southern District of California has granted an anti-SLAPP motion against a plaintiff suing his alma mater, Cornell University, for libel and disclosure of private facts based on a 24-year-old newspaper report that was digitized and placed online as part of Cornell's library. *Vanginderen v. Cornell University*, No. 07-cv-2045 BTM(JMA) (S.D. Cal. June 3, 2008) (Moskowitz, J.).

The case raises a crucial question: whether digitization and online dissemination of a stale publication restarts the statute of limitations for disclosure torts, notwithstanding the single publication rule.

Background

On March 8, 1983, plaintiff Kevin Vanginderen was arrested and charged in Ithaca City Court with a number of counts of burglary and larceny. Shortly thereafter, the *Cornell Chronicle*, Cornell's weekly newspaper, ran a one-paragraph description of the incident in its police blotter column:

Department of Safety Officials have charged Kevin G. Vanginderen of 603 Winston Court Apartments with third degree burglaries [sic] in connection with 10 incidents of petit larceny and five burglaries on campus over a period of a year. Safety reported recovering some \$474 worth of stolen goods from him.

Later that year, Vanginderen was arraigned in county court. He pled guilty to petit larceny and paid a fine, though the court dismissed one indictment due to technical defects and sealed the record related to that indictment, but not the other.

In his complaint, Vanginderen alleged that in September 2007, he performed a Google search of his name and read the 1983 *Cornell Chronicle* article for the first time. He contacted the Cornell library and demanded that the article be redacted or removed from the library's online collection. When Cornell refused his demands, he filed suit in San Diego Superior Court.

Anti-SLAPP Motion

Cornell removed the case to the Southern District of Cali-

fornia and filed an anti-SLAPP motion. In its motion, Cornell argued that the one-year statute of limitations had expired and that digitizing the library's collection, which included the *Chronicle* issue, did not constitute publication that would restart the statute of limitations.

Cornell analogized digitization of the article to simply opening a more convenient branch of the library; if making the *Chronicle* available in the physical library would not constitute publication, simply making available to more people a scanned version of that same issue would not constitute publication either.

In response, Vanginderen argued that placing the article online constituted republication because the article was disseminated to a larger audience. He also argued that the single publication rule does not apply to placing content on the Internet, and that the statute of limitations was tolled because he could not reasonably have been expected to have discovered the *Chronicle* issue during the limitations period.

Alternatively, Cornell argued that, in any event, the *Chronicle* article captured the gist or sting of Vanginderen's crimes and therefore was a fair and true publication, providing a complete defense to Vanginderen's libel claim. Cornell filed Vanginderen's unsealed criminal records in support of its defense.

Vanginderen, on the other hand, alleged that the publication was not fair and true as it noted he had been arrested "in connection with" 10 incidents of petit larceny and five burglaries. Vanginderen argued that this suggested he had committed 15 separate crimes, which he asserted he had not. Vanginderen further argued that Cornell had improperly electronically filed his criminal records.

The Court granted Cornell's motion without reaching the publication issue. The Court discussed Vanginderen's criminal record in detail and concluded: "Although the article may have been poorly written, the 'gist' or sting' [sic] of the article was true."

Pursuant to California's anti-SLAPP law, the Court awarded Cornell its reasonable attorneys' fees and costs. Vanginderen is appealing the decision.

Clifford S. Davidson, an associate, and Bert H. Deixler, a partner at Proskauer Rose in Los Angeles, CA, represented Cornell in this case.

Virginia Court Dismisses Libel and Trademark Claims Against Website

Complaint Over Third Party Content Fails Under Both Theories

By Cameron Stracher

As courts continue to dismiss claims arising from third-party postings on Internet websites under section 230 of the Communications Decency Act, plaintiffs have gotten more creative in their efforts to plead around the statute. Recently, the Eastern District of Virginia was faced with the issue of the applicability of the Lanham Act to claims that essentially arose from allegedly defamatory postings by consumers on a complaint website.

In *Nemet Chevrolet v. ConsumerAffairs.com*, No. 1:08cv254 (E.D. Va.) plaintiffs, a group of franchised automotive dealers who sell cars in the New York area, brought a lawsuit against ConsumerAffairs.com, the operator of a website that allows consumers to post complaints about their experiences with various retail merchants.

Plaintiffs alleged that they were defamed by complaints posted on the website, that defendant tortiously interfered with their business, and that defendant violated the Lanham Act by “unlawfully diverting ... and deriving a profit from misdirecting” consumers through the use of the name “Consumer Affairs,” which allegedly misrepresents defendant’s services and incorrectly leads consumers to believe that defendant is affiliated with a government organization when, in fact, it is a for profit enterprise.

On June 18, 2008, the Eastern District of Virginia (Judge Gerald Lee) dismissed all of plaintiffs’ claims.

Although plaintiff had alleged, “upon information and belief,” that “defendant participated in the preparation and publication” of the defamatory articles that appeared on its website, the court wasted no time dismissing plaintiffs’ claims for defamation and tortious interference.

The court held that plaintiffs had failed to “sufficiently or substantively allege that defendant participate in the creation or the development of the website content at issue,” particularly where plaintiffs were able to identify all but one of the authors of the postings. The court also rejected plaintiffs’ arguments, made for the first time in their opposition to defendant’s motion to dismiss, that defendant’s creation of titles, headings, and categories on the website for the complaints stripped it of immunity under the CDA.

Distinguishing *MCW Inc. v. Badbusinessbureau*, 2004 WL 833595 (N.D. Tex., Apr. 19, 2004), the court held that plaintiffs had failed to make any such allegations in their complaint and that, in any event, the active solicitation by defendants of complaints and photographs alleged in *MCW* -was “far more severe” than the conduct alleged by plaintiffs here.

Lanham Act Claims

As for plaintiffs’ unfair competition and false advertising claims under the Lanham Act, the court essentially found that plaintiffs lacked standing to bring such claims because they were not competitors of ConsumerAffairs and their claims did not allege the type of injury the Lanham Act seeks to protect.

First, the court addressed the various tests for “prudential” standing set forth by several Circuits (as opposed to “Article III” standing, which was not challenged by defendant). Although the district court noted that the Fourth Circuit had yet to rule on the proper test for prudential standing, the court held that under any test plaintiffs lacked standing. Relying on *MCW* and on the test set forth by the Third, Fifth, and Eleventh Circuit, the court held that injury to goodwill was not the type of injury redressed by the Lanham Act and, as to plaintiffs’ false advertising claim, false advertising was only actionable where a plaintiff had been harmed by advertising “touting a the virtues of a competing product or service.”

Quoting *MCW*, the court wrote that “standing only exists, where ‘a competitor is directly injuring another by making false statements about his own goods and thus *inducing customers to switch from a competitor.*’” (emphasis added by court). Thus, under this test, plaintiffs’ lacked standing.

Looking at the test for prudential standing set forth by the Seventh, Ninth, and Tenth Circuits, the court held that plaintiffs could not show that they suffered a commercial injury based upon a misrepresentation and that the injury harmed the plaintiffs’ ability to compete with Consumer Affairs. Thus, under this test, plaintiffs’ also lacked standing.

Under the approach adopted by the First and Second Circuits, the district court held that plaintiff did not have a reasonable inter-

the representations at issue did not constitute commercial advertising

est in being protected “against the type of harm that the Lanham Act is intended to prevent.” In *Park ‘N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 198 (1985), the district court noted, the Supreme Court held that the Lanham Act was designed to “secure the owner of [a trademark] the goodwill of his business and [] protect the ability of consumers to distinguish among competing producers.” Thus, the district court held, because plaintiffs failed to allege any threat to their own trademark, and the case had nothing

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Virginia Court Dismisses Libel and Trademark Claims Against Website

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to do with competing trademarks, plaintiffs failed this standing test as well.

Finally, the court held that even if plaintiffs had standing, the court would dismiss plaintiffs' false advertising claims because the representations at issue did not constitute commercial advertising as is required to state a claim for false advertising under the Lanham Act. The court also noted that under Fourth Circuit jurisprudence, plaintiffs' unfair competition claim would fail because not only had there been no allegation of trademark infringement, but there were no similar trademarks at issue, the parties do not provide similar products or services, and there was no evidence of

actual confusion.

The court noted that the "likelihood of confusion" could be resolved on a 12(b)(6) motion where the goods at issue are unrelated as a matter of law and where the parties are not direct competitors, as is true in the case at bar.

Plaintiffs have indicated they intend to amend and re-file their complaint.

Cameron Stracher, New York Law School, and Jonathan Frieden of Odin Feldman Pittleman PC represented ConsumerAffairs.

Plaintiffs were represented by Ben Chew of Patton Boggs.

Vermont Court Applies Section 230 to Dismiss Libel Claim Against Website

Provider of Interactive Computer Services Immune from Publisher Liability

In what appears to be the first case in Vermont to interpret Section 230 of the Communications Decency Act, a Superior Court dismissed libel claims against the operators of a community website iBrattleboro.com. *Mayhew v. Dunn, et al.* (Vt. Super. Ct. Mar. 18, 2008). Judge David Howard dismissed the case against the website, endorsing and relying on the reasoning of *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) and its progeny.

Background

The plaintiff, Effie Mayhew, a volunteer at Rescue Inc., an emergency medical service in Southern Vermont, sued David Dunn, the former executive director of Rescue Inc., and the operators of iBrattleboro.com, for statements Dunn posted accusing Mayhew of having an adulterous, on-the-job affair. Dunn posted the remark in response to comments critical of his leadership that had appeared in a previous, anonymous posting on iBrattleboro.com and in a column written by Mayhew published in the *Brattleboro Reformer*.

Although the website operators did not author the alleged defamatory statement, plaintiff argued they should be held liable because they did not edit or remove the posting.

Judgment

The Vermont court began by discussing *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the first case that analyzed Section 230. The Vermont court noted that "*Zeran's* holding is widely adopted" and concluded that the case offers "a reasoned and justified" interpretation of Section 230.

The court took judicial notice that iBrattleboro.com was an interactive computer service within the meaning of Section 230. Because the plaintiff was seeking to hold iBrattleboro.com responsible for content admittedly provided by another party, her claims were barred by Section 230.

Plaintiff was represented by Margot L. Stone. iBrattleboro.com was represented by Jim Maxwell.

Court Refuses to Protect Identity of Anonymous Poster in Law Student Libel Case

Plaintiff Made “Concrete” Showing of Claim

In a highly publicized online libel suit brought by two Yale Law School students over a series of lewd and offensive Internet postings, a Connecticut federal district court this month rejected a defendant’s motion to quash a subpoena seeking his identity. *Doe I and Doe II v. Individuals*, 2008 WL 2428206 (D. Conn. June 13, 2008) (Droney, J.).

Background

AutoAdmit.com (“AutoAdmit”) is a web-based message board containing discussion about colleges and graduate schools. The most popular part of the message board is the section devoted to law schools. Users can post, and respond to other posts, anonymously.

AutoAdmit has come under fire for its largely unregulated messages. Some critics view the message board as little more than a venue for racist, sexist and other offensive speech. In this case, two female students from Yale Law School sued 39 pseudonymous screen names. Their claims included libel, invasion of privacy, copyright violation and emotional distress.

Doe II found herself on the receiving end of some particularly nasty messages. These posts included statements that she wanted to be raped and that she abuses heroin, lewd comments on her body, and one post even included a picture of Doe II. Despite the filing of the lawsuit, the negative postings continued.

In January, the district court allowed the plaintiffs to conduct discovery to obtain the identities of the posters. Soon after, a subpoena was issued to AT&T for the identity of the user “AK47” (referred to as Doe 21) based on the IP address assigned to him. Doe 21 filed a motion to quash. The day after Doe 21’s motion, AT&T revealed his identity to plaintiffs. Doe II argued that this made the motion to quash moot, but the court disagreed, pointing out that the court could bar plaintiffs from using the information in the litigation. The district court went on to consider the merits of the motion.

Motion to Quash

The defendant, Doe 21, first argued that the court lacked jurisdiction as the only federal claim was the copyright violation, which Doe 21 argued was “manufactured” for the lawsuit. The court found the copyright claim, based on the photograph, enough to satisfy subject matter jurisdiction.

Turning to the merits of the motion, the court began by noting that traditionally the First Amendment protects anonymous speech. However, this protection is not absolute and must be considered in light of Doe II’s need to pursue her claim. To perform this balancing, the court looked to factors employed by courts balancing these interests in similar cases.

Looking to *Krinsky v. Doe 6*, 72 Cal. Rep. 3d 231 (Cal. App. 2008) and *Dendrite Int’l Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. Super. 2001), the court found that the first factor to be considered is whether the plaintiff has given notification to the anonymous individual and provided them with a “reasonable opportunity” to respond. This was satisfied in the present case because the plaintiffs had posted notice of the subpoenas on AutoAdmit in January, giving Doe 21 had the opportunity to respond in court.

The court then looked to the next factor from *Dendrite*, asking whether the plaintiff clearly identified the actionable statements associated with the poster it seeks to identify. Here the plaintiff had produced statements made by the user AK47/Doe 21.

Finding the second factor met, the court next looked to the “specificity of the discovery request” and the availability of an alternative means to the information. *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004); *Columbia Inc. v. SeesCandy.com*, 185 F.R.D. 573, 578, 580 (N.D. Cal. 1999). Since the plaintiff was specifically seeking identifying information, and since only AT&T could provide that information, the court found that this factor, too, was satisfied.

A similar consideration identified by the court was that

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Court Refuses to Protect Identity of Anonymous Poster in Law Student Libel Case

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the information must be central to plaintiff's claims. *In re Subpoena Duces Tecum to America Online, Inc.*, 2000 WL 1210372, *7 (Va. Cir. 2000); *Dendrite*, 775 A.2d at 760-61. The court found it obvious that the identity of Doe 21 was central to plaintiff's claims.

The court next considered the defendant's expectation of privacy when he posted the comments on AutoAdmit. *Sony Music*, 326 F. Supp. 2d at 566-67; *In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244, 267-68 (D.D.C. 2003), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003). Although Doe 21 was posting on a message board that allowed anonymity, AT&T's privacy policy clearly stated that the company may provide identity information where "permitted or required by law." Thus Doe 21 did not have an expectation of privacy in his identity information.

The last factor to consider, and the one most important to the court, was whether the plaintiff had made "an adequate showing" of her claim. Courts have chosen different ways of evaluating the adequacy of the showing. Some are more deferential to the plaintiff, requiring only a "good faith basis," *America Online*, 2000 WL 1210372, at *8, or a probable cause for the claim. *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, *7 (Conn. Super. 2003). The court here found these standards failed to protect an anonymous defendant's First Amendment rights.

Another standard rejected by the court was requiring the plaintiff to prove that the claims could withstand a motion to dismiss. *SeesCandy.com*, 185 F.R.D. at 579; *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006). The court agreed with the court in *Krinsky*, 72 Cal. Rep. 3d at 244, that this standard is too confusing as jurisdictions employ various standards for motions to dismiss. Similarly, the court rejected a summary judgment standard (*see Best Western Int'l v. Doe*, 2006 WL 2091695, *4 (D. Ariz.

2006); *Doe v. Cahill*, 884 A.2d 451, 461 (Del. Super. 2005)) finding this overly burdensome on the plaintiff, especially when the plaintiff has been unable to conduct discovery.

The standard that the court finally settled upon is to re-

quire the plaintiff "make a concrete showing as to each element of a prima facie case against the defendant."

This court con-

cluded that this standard, which has been adopted by several courts, *see Highfields Capital Management L.P. v. Doe*, 385 F. Supp. 2d 969, 976 (N.D. Cal. 2005); *Sony Music*, 326 F. Supp. 2d at 565; *Krinsky*, 72 Cal. Rep. 3d at 245; *Dendrite*, 775 A.2d at 760-61, was the best balance of both parties' interests.

Turning to the case at hand, the court found that the plaintiff could demonstrate that defamatory statements were published about her and harmed her reputation.

Having met all the factors of the court's test, the court held that plaintiff's subpoena could proceed, and denied Doe 21's motion to quash.

Although the court allowed plaintiffs to proceed anonymously, it rejected Doe 21's motion to proceed anonymously, finding that he had not met the high threshold for anonymity. While Doe 21 had argued that other named defendants in the case have been ridiculed and have lost employment, the court concluded that "these harms are not the special harms required in order to proceed anonymously, but rather social stigma, embarrassment, and economic harm, none of which are grounds for proceeding anonymously."

Plaintiffs are represented by Ashok Ramani, Benjamin W. Berkowitz, Dorothy McLaughlin, Mark A. Lemley, Rose Darling, Steven Mitra, Kecker & Van Nest, LLP, of San Francisco, Cal.; and David N. Rosen of New Haven, Conn.. Doe 21 was represented by John R. Williams of New Haven, Conn.


 The logo for AutoAdmit features the word "AutoAdmit" in a large, bold, black, sans-serif font. A blue brushstroke underline is positioned above the text. To the right of the word "Admit" is a small trademark symbol (TM).

California Anti-SLAPP Statute Cannot Be Used to Challenge Subpoena

Anonymous Bloggers Can't Recover Attorney's Fees

Anonymous Internet posters may be able to quash subpoenas seeking their identities but they may have to pay out of their own pockets to do so, according to a California appellate court. *Tendler v. Jewishsurvivors.blogspot.com*, No. H031130, 2008 WL 2352497 (Cal. Ct. App. June 10, 2008) (Mihara, Duffy, McAdams, JJ.). The court reversed a trial court's decision to grant the respondents' motion to strike and for attorney's fees under the California anti-SLAPP statute. Looking at the statute's plain language, the court found that the special motion to strike was not available to challenge a subpoena.

Background

Rabbi Mordecai Tendler has been the subject of discussion on various blogs for alleged sexual misconduct. Tendler obtained a pre-filing discovery order in Ohio to learn the identities of anonymous posters. He then sent the subpoena to Google because it hosted some of the blogs at issue. Google did not comply with the Ohio subpoena and Tendler filed a motion in California state court to enforce it.

The bloggers, referred to as the "Does," filed a motion to quash and a motion to strike under § 425.16. The Does also sought an award of their attorney's fees and costs under § 425.16. Tendler withdrew his subpoena and the motion to quash was not heard. However, the trial court went on to grant the motion to strike and awarded the Does \$20,330 in attorney's fees and costs.

Subpoena Not a Cause of Action

Section 425.16 of California's Code of Civil Procedure provides a special motion to strike a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." § 425.16 subd. (b)(1). Because a subpoena does not contain any cause of action or serve to initiate a judicial proceeding, the court found that § 425.16 does not apply.

The court explained that its recent decision in *Krinsky v.*

Doe 6, 159 Cal. App. 4th 1154 (Cal. App. 2008), which held that libel plaintiffs must make a prima facie showing to obtain the identity of anonymous posters, does not make the subpoena a cause of action. "The fact that Tendler would have been required to make a prima facie showing to prevail on the motion to quash does not mean that his request for subpoenas was a complaint-like pleading stating causes of action." *Tendler*, 2008 WL 2352497, at *4.

Because the subpoena here did not fit within the language of the anti-SLAPP statute, the court reversed the grant of the motion to strike and the award of attorney's fees and costs. The court acknowledged that there may be First Amendment concerns about denying anonymous Internet posters the availability of the motion to strike, but added that such concerns were properly the consideration of the legislature. Moreover, the court suggested that such concerns "may also be overstated" because the motion to quash was still available.

In his concurring opinion, Judge McAdams agreed that the anti-SLAPP statute did not apply, but added, "I do not reach this conclusion quite so easily and comfortably." *Id.* at *6. The legislature's concern that free speech on the Internet may be deterred by abuses of the judicial process was still implicated by the subpoena request. Judge McAdams saw in *Krinsky* a recognition of the constitutional rights implicated in anonymous Internet posting and the importance of protecting such anonymity: "The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal." *Id.*

Despite his reluctance, Judge McAdams nonetheless agreed that the anti-SLAPP statute could not be construed to cover a subpoena request. He urged the legislature to consider expanding the statute, adding that subpoenas on ISPs and web hosts to learn the identities of anonymous posters will likely increase in the future.

The respondents were represented by Cindy A. Cohn, Electronic Frontier Foundation, San Francisco, CA; and Paul Alan Levy, Public Citizen Litigation Group, Washington, DC.

Pennsylvania Court Dismisses Defamation Suit Over Online Postings

“Imprudent Tirades” Not Defamatory

According to a Pennsylvania federal district court, “unsubstantiated opinions” and “imprudent tirades” posted on a website do not constitute defamation as a matter of law. *Purcell v. Ewing*, 2008 WL 2168903 (M.D. Pa. May 22, 2008) (Conner, J.).

In granting the defendant’s motion to dismiss, the district court recognized that although the posted comments were highly offensive to the plaintiff and violated ordinary standards of decency, the comments were still not actionable due to their subjective nature and lack of defamatory meaning.

Background

Milton Purcell – an alumnus of the Milton Hershey School (“MHS”) in Pennsylvania – filed a defamation complaint based on several comments posted on a publicly accessible internet forum containing news and information about the central Pennsylvania region, where Purcell lives.

The first posting, appearing in September 2006, referenced a photo of Purcell in a homecoming brochure distributed by the MHS Alumni Association, an organization in which Purcell is actively involved. Allegedly posted by defendant Oliver Ewing under the alias “prosecute,” the comments noted: “...two of the candidates look to me like photos that you would see for someone accused of child molestation. Look at...Milt Purcell, those are the type of perverts to look out for...Enough said.”

A second posting under the same screen name appeared ten months later, on July 17, 2007. The poster’s comments included: “What does Purcell do? He is on no committees, he does nothing. How can someone like him has [sic] a full time criminal defense attorney on his payroll?” Ewing allegedly posted the third comment approximately two weeks later, on July 30, 2007. In this posting, “prosecute” commented: “...And tell me what the hell does Purcell do? He is on no committees and has a barn named after his family. Maybe that is where he belongs, in the barn. Perverts and bullies is [sic] all they are. Oh and my, did I say pervert (:<).”

Purcell commenced his defamation action on September 4, 2007, in the Dauphin County Court of Common Pleas.

Ewing then removed the action to federal court and filed a motion to dismiss on the grounds that the postings expressed opinions and lacked any defamatory meaning.

Postings Not Defamatory

Ewing sought dismissal of the complaint on the sole ground that his online postings were not defamatory. In analyzing whether a specific communication is defamatory, the court cited several cases which emphasized the “way in which the communication would have been interpreted by the reasonable, average person in its intended audience” as the determinative factor. *Karl v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 78 F. Supp. 2d 393, 397 (E.D. Pa. 1999). In addition, the court noted the importance of Pennsylvania courts’ established position that statements of opinion, “without more, are not actionable.” *Levenson v. Oxford Global Res., Inc.*, 2007 WL 4370911 (W.D. Pa. Dec. 11, 2007).

Although an expression of opinion may be actionable if it could reasonably be interpreted to imply undisclosed facts of a defamatory nature, without evidence of such implied facts, expressed opinions are entitled to absolute protection against defamation claims. *Cornerstone Sys. v. Knichel Logistics*, 255 F. Appx. 660, 665 (3d Cir. Nov. 30, 2007); *Ober v. Miller*, 2007 WL 4443256 (M.D. Pa. Dec. 18, 2007).

In considering whether defendant’s first posting was defamatory in nature, the court noted that his remarks – which included phrases such as “looks to me” – were couched purely in the language of opinion and void of any factual assertions. In addition, the court highlighted the title of Ewing’s posting: “Look at the pictures,” which “invited readers to evaluate the pictures and form their own conclusions,” as well as the closing line: “Enough said.”

The court also noted that no reader could reasonably interpret defendant’s comments as deriving from any defamatory facts; accordingly, the first online posting was merely “a non-actionable statement of opinion about Purcell’s appearance in a photograph.” Importantly, however, the court stressed the serious social implications of child

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Pennsylvania Court Dismisses Defamation Suit Over Online Postings

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molestation and castigated defendant for his “highly inappropriate” and “dreadfully immature” comments.

Alternatively, defendant’s comments were not defamatory in nature. On the contrary; reasonable readers of the posting would “likely empathize with Purcell as a victim of an uncouth and offensive personal attack,” rather than conclude he had committed a crime.

The court then moved on to defendant’s second posting, which suggested that Purcell has a “full time criminal defense attorney on his payroll” and referred to Purcell as a “bully” and a “moron.” Likening the content of this second posting to remarks made in a similar case, *Beverly Enterprises v. Trump*, the court held that Ewing’s second posting contained “merely caustic insults to which reasonable people would pay little heed.” *Beverly Enters. v. Trump*, 182 F.3d 183 (3d Cir. 1999).

In *Beverly*, the Third Circuit upheld dismissal of a defamation claim against a defendant who had allegedly accused the plaintiff of being a “criminal,” while making other offensive statements against the plaintiff in public. Similarly, the comments made by defendant did not accuse plaintiff of specific criminal actions and failed to identify any victims or motives. When considered in the context of the sarcastic overtone of the posting, the court concluded that the second posting was incapable of defamatory meaning.

The third posting asked “What the hell does Purcell do?,” suggested he belonged in a barn and referred to Purcell as a “bully” and “pervert.” Again noting the bitter and sarcastic tone of these comments, the court concluded defendant was “using the internet forum as an outlet to express personal hostility against Purcell.”

Conclusion

The court emphasized that reasonable readers of defendant’s comments would understand them as “unsubstantiated opinions” and “imprudent tirades” of a person who “harbored an intense personal dislike for Purcell.” Since no reasonable person would alter their perception of Purcell based on these comments, none of defendant’s online postings supported a defamation action.

Plaintiff was represented by Spero T. Lappas, Serratelli, Schiffman, Brown & Calhoun, P.C., Harrisburg, PA. Defendant was represented by Peter J. Speaker, Thomas, Thomas & Hafer, Harrisburg, PA.

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No Jurisdiction or Defamation Claim Against Ohio Newspaper for D.C. Ex-Con

The federal district court in Washington, D.C., threw out a defamation claim by a man an Ohio newspaper labeled a “pedophile.” *Copeland-Jackson v. Oslin*, No. 08-00558, 2008 WL 2211938 (D.D.C. May 29, 2008) (Huvelle, J.).

The court found that it had no personal jurisdiction and that even if it did, the plaintiff could not prove the newspaper had made a false statement, since he had been convicted on two counts of “gross sexual imposition” involving minors.

Background

In 2001, the plaintiff, David Copeland-Jackson, was convicted in an Ohio court for gross sexual imposition involving two boys, aged 14 and 13 years old. In 2008, an Ohio newspaper, *The Ashland Times-Gazette*, published three articles in which Jackson was referred to as a pedophile. Jackson, who now lives in D.C., accessed the articles online and sued the newspaper for defamation, negligence, false light, invasion of privacy, and intentional infliction of emotional distress.

No Personal Jurisdiction

The court first held that the claim must be dismissed for lack of personal jurisdiction, noting that the newspaper is read almost exclusively by Ohio residents. The paper is intended for an Ashland audience and most of the content on its website is available only to paid subscribers. The only D.C. website subscriber appeared to be the plaintiff himself. The only contact the newspa-

per has with D.C. is the limited web content available to anyone with Internet access.

The court found that the D.C. long arm statute did not cover the defendants, who had not purposefully availed themselves of the privilege of conducting business in the District. The court emphasized that web access cannot be the sole basis for personal jurisdiction. See *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1300 (D.C. Cir. 1996); *GTE New Media Services, Inc. v. Bellsouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000).

No False Statement

Even if personal jurisdiction did exist, the court found that Jackson could not make out a defamation claim because he could not demonstrate by a preponderance of the evidence that the defendants had made a false statement. Although Jackson may not actually suffer from pedophilia, a psychiatric disease, the court noted that the dictionary definition of “pedophile” encompasses any adult who is sexually attracted to children, making the defendants’ statements “substantially true,” a complete defense to libel.

The court rejected the argument that the newspaper should have considered whether Jackson had been falsely accused of the offense for which he had been charged. The court noted that Jackson could not use the civil action to “relitigate his case” and the criminal conviction functioned as conclusive proof that he committed “gross sexual imposition” involving children.

MLRC Calendar

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Fair Report Privilege Protects Report of Candidate's Arrest

News reports about a candidate's arrest three days before an election for domestic violence provided a clear case for the application of the fair report privilege in South Carolina. *Cobin v. Hearst-Argyle Television, Inc.*, 2008 WL 2271124 (D.S.C. June 2, 2008) (Floyd, J.). Media reports based on the arrest report were well within the privilege.

Background

Plaintiff John M. Cobin was running for Congress in South Carolina on the Libertarian Party ticket. Three days before the election, Cobin was arrested for criminal domestic violence. The arrest was reported by several local media outlets. Cobin sued WYFF 4, WORD/WYRD FM, WHNS-Channel 21 Fox Carolina, *The Greenville News*, and WSPA News 7, claiming that the reports were defamatory because they exaggerated the facts surrounding the arrest and therefore did not accurately summarize the police report. Some of the complained-of statements included that he "grabbed his wife's neck" and left "bruises" and "visible injuries."

Motion to Dismiss

Cobin filed his lawsuit pro se. Defendants moved to dismiss on the basis of the fair report privilege. The court began its analysis of the motion by acknowledging that the fair report privilege is recognized in South Carolina, citing *Jones v. Garner*, 158 S.E.2d 909, 913 (S.C. 1968) and *White v. Wilkerson*, 493 S.E.2d 345, 348 (S.C. 1997). The privilege extends to reports that are based on government reports and actions. Thus, even if the government report or action was defamatory, the news organization reporting on it will be shielded from liability.

Defendant media outlets argued that they had relied on a police report of plaintiff's arrest and thus were protected by the fair report privilege. The court noted at the outset that although usually the consideration of materials beyond the complaint is not allowed on a motion to dismiss. However, after reviewing the case law in other circuits, and acknowledging that no disagreement existed among the parties as to the news reports' authenticity, the court concluded that they could be reviewed at the motion to dismiss stage.

Generally, the reports all identified the plaintiff, his candidacy and the broadcasts included a photograph or video footage. They also largely restated the contents of the police report in a factual manner and all the news reports were made within a few

days following the arrest. For example, the reports stated that Cobin had "left bruises" and "visible [or physical] injuries" on his wife. Cobin alleged these were defamatory because the bruises he left were "unremarkable" and "everyday." Yet the police report included a box checked "yes" next to "visible injuries Vict." and described in detail multiple injuries. In fact, the court concluded that the news reports were even less inflammatory than the actual police report.

Likewise, the court ruled that WSPA 7's inclusion of the words "beat up his wife" was a fair summary of the arrest report. Although the court considered these words to be the closest of all the statements to editorializing, it was still an accurate description of the incident. The police report had stated that there was a "domestic disturbance" involving Cobin as the aggressor in "domestic abuse." Also, that the words were followed in the broadcast by a story on domestic violence generally in South Carolina was also not defamatory. Here, the court could find no "legally actionable defamatory nexus" to fault WSPA for the order in which they aired the stories.

Similarly, the court dismissed other pugnacious news report descriptions, including that Cobin had "assaulted" and "fought with" his wife, as accurate descriptions of the police report. As for statements that he "push[ed] and shov[ed] her" and "pushed her down twice" these too had foundation in the police report. For example, the police report had described Cobin as having "overpowered [his wife] and pushed her down."

As for whether the pushing happened twice during the incident, the court agreed with Cobin that the police report suggested a single incident of pushing had occurred on two different occasions. Yet the court also agreed with defendants that it could be read as having been twice in one incident. According to the court, the news reports only need to "greatly approximate" the police report.

To the court, these news reports represented the very essence of what the fair report privilege is to protect: a timely and substantially accurate report of government activity. In order to allow the media to report on such matters in a timely fashion, they cannot be held to a standard that requires "extensive investigatory requirements." *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 712 (4th Cir. 1991).

The court granted the motion to dismiss as to all defendants except for one, WORD. WORD had failed to provide its news report, and thus the court could not rule on it at this time. However, the court did note that if WORD's report is similar to the other defendants, then the plaintiff is unlikely to succeed.

Washington Court of Appeals Strikes Down State's Criminal Libel Statute

State Law Failed to Require Actual Malice; Was Vague and Overbroad

By Eric M. Stahl and Kristina Silja Bennard

The Washington Court of Appeals has struck down the state's criminal libel law in its entirety, holding that the statute violates the First Amendment and is facially unconstitutional. The 3-0 decision, *Parmelee v. O'Neel*, No. 35652-0-II (Wash. Ct. App. June 19, 2008), is the state's first published opinion to address the constitutionality of the criminal libel law.

Washington's criminal libel statute pre-dates statehood, but has rarely been invoked. The most recent reported prosecution was in 1925, in a case in which the state Supreme Court reversed dismissal of libel charges against an individual for signing a recall petition for a public official that allegedly contained untrue and malicious accusations. *State v. Wilson*, 241 P. 970 (1925).

Prosecutors have let the statute fall into virtual disuse, and for good reason. The Washington statute is similar to the Louisiana criminal libel law that the U.S. Supreme Court held, over 40 years ago, violated the First Amendment because it permitted liability for speech that was true, and for false statements made without actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 74, 78, (1964). In fact, *Garrison* cites Washington's criminal libel law as an example of the type of statute that failed constitutional scrutiny. *Id.* at 70 n.7

The libel statute has remained on the books, however, and officials at the Washington State Department of Corrections invoked it in 2005, when they were looking for a way to punish inmate Allan Parmelee for a scathing letter

violation of the state criminal libel law, RCW 9.58.010.

The statute makes it a crime – punishable by up to one year in jail and a \$5,000 fine – to utter words that tend (1) “[t]o expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse”; (2) “[t]o expose the memory of one deceased to hatred, contempt, ridicule or obloquy”; or (3) “[t]o injure any person, corporation or association of persons in his or their business or occupation.” RCW 9.58.010.

Speech falling within these three categories is prima facie “malicious,” and thus subject to prosecution, “unless justified or excused.” RCW 9.58.020. To be “justified,” a statement must not only be true, but also “fair” and “published with good motives and for justifiable ends.” *Id.* To be “excused,” the speaker must have had reasonable grounds to believe the statement’s “truth” and “fairness” “after a fair and impartial investigation.” *Id.*

In his lawsuit, inmate Parmelee claimed that the disciplinary action against him violated his First Amendment rights and was based on an unconstitutional statute. The Court of Appeals agreed. Interestingly, the Court addressed the constitutional issues even though it questioned whether Parmelee raised the issue before the trial court. The Court held that it could do so under its authority to consider “manifest constitutional errors for the first time on appeal.” Perhaps underscoring the extent of the state’s constitutional error in relying on the statute, the Court also noted that the state’s attorneys “refus[ed] to address the constitutionality of the statute in either their briefing or at oral argument.”

The Court found, first, that “Washington’s criminal libel statutory scheme does not meet minimum constitu-

tional standards under *Garrison*.” The statute failed because it contains precisely the features that *Garrison* held to be unconstitutional: it allows prosecution for “(1) false statements made without actual malice or (2) true statements made without good motive or intent.” The Court concluded that these features made the statute facially un-

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The statute failed because it contains precisely the features that *Garrison* held to be unconstitutional

he wrote complaining about prison conditions. In addition to substantive criticisms, the letter labeled the prison superintendent a “man-hater lesbian.” Parmelee was cited under a catch-all prison regulation that permitted discipline for “[c]ommitting any act that is a misdemeanor under local, state, or federal law that is not otherwise included in these rules.” The “misdemeanor” alleged was

Washington Court of Appeals Strikes Down State's Criminal Libel Statute

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constitutional such that it could not be applied in any circumstances.

Parmelee also found the statute unconstitutional for two additional, alternative reasons. The Court found the statute overbroad for essentially the same reasons that it was facially unconstitutional – namely, that it “prohibits true speech and false speech made without actual malice.” And the Court held that the statute was void for vagueness “because it includes the term ‘malicious’ without reference to ‘actual malice’ as required under *New York Times* [v. *Sullivan*]. A person of common intelligence may guess that ‘malicious’ in RCW 9.58.020 refers to the common law meaning of malice as opposed to the *New York*

Times ‘actual malice’ standard.”

The Court declined to determine whether the statute was unconstitutional as applied to *Parmelee* because the record was inconclusive and because the statute’s facial invalidity made such a determination unnecessary.

Eric Stahl is a partner and Kristina Silja Bennard is an associate with Davis Wright Tremaine LLP in Seattle, Wash. They appeared in the Parmelee case on behalf of amicus curiae ACLU of Washington, which urged the Court of Appeals to find the Washington criminal libel statute unconstitutional.

Sixth Circuit Affirms Defense Verdict in Unusual Strict Liability Case

Defendant Proved Truth and Opinion

The Sixth Circuit affirmed a defense verdict in a libel case brought by a university professor against his ex-wife over an autobiographical book she published discussing their marriage. *Lassiter v. Lassiter*, No. 06-6358, 2008 WL 2312308 (6th Cir. June 3, 2008) (unpublished) (Norris, Gibbons, Griffin, JJ.). In a brief decision, the court held that defendant had proved at trial that the statements at issue were true or opinion.

At issue was a book written by Sharlene Graham Lassiter entitled *I Have a Testimony*. The book was first published in 2003 by Winepress Publishing, a small religious publisher. Sharlene Lassiter later self-published the book. The book discussed how faith and prayer guided her through her rocky marriage and divorce. Her ex-husband sued over passages stating that he had been violent during the marriage and had affairs with students.

In a cautionary ruling for self-publishers and bloggers, the Kentucky federal district court applied a strict liability standard to the case. See *Lassiter v. Lassiter*, No. 04-106, 2006 WL 2792221 (E.D. Ky. Sept. 26, 2006) (bench verdict decision). Without discussion, the trial court concluded that plaintiff was a private figure, that defendant was non-media, and that her book was of purely private interest – and therefore subject to a strict liability standard under Kentucky law. However, on the merits the trial court found that her fact specific testimony proved that her allegations of violence were true. She was not able to prove her allegations of adultery true, but the court accepted this was an opinion based on disclosed facts.

The Sixth Circuit affirmed after having “carefully reviewed the book” and record, adopting the reasoning of the trial court.

Plaintiff was represented by Marc D. Mezibov, Mezibov & Jenkins, Cincinnati, OH. Defendant acted pro se.

Second Circuit Affirms Dismissal of Lawsuit Over Diet Book

Diet Advice and Ideas Fully Protected by First Amendment

The Second Circuit affirmed dismissal of a lawsuit over the popular diet book *Dr. Atkins' New Diet Revolution*, holding that the book's "advice and ideas are non-commercial speech, fully protected by the First Amendment." *Gorran v. Atkins Nutritionals, Inc.*, No. 07-0120, 2008 WL 2164656 (May 22, 2008) (Sotomayor, Wesley, Wallace, JJ.).

Background

The plaintiff, a 54-year old Florida businessman, sued Atkins Nutritionals, Inc., and the estate of its founder Dr. Atkins, for products liability, negligent misrepresentation and deceptive trade practices under Florida law. Plaintiff claimed that he followed the Atkins Diet's high-fat, high-protein, low-carbohydrate regimen for two years until he had to have an angioplasty to unclog one of his coronary arteries. The gist of plaintiff's claim was that the diet book, a related website and the company's food products were "defective and unreasonably dangerous."

In December 2006, U.S. District Court Judge Denny Chin granted the defendants' motion to dismiss for failure to state a claim. *See* 464 F. Supp. 2d 315 (S.D.N.Y. 2006). The claims failed, the court explained, because the diet book is noncommercial speech entitled to full First Amendment protection even though it recommends the company's own food products. The book discusses, among other things, how the diet works, why weight loss occurs, general nutritional guidelines, and disease prevention. The court stated:

Defendants' books and food products are not defective or dangerous products within the meaning of products liability law. Pastrami and cheesecake – large amounts of which Gorran admittedly consumed – may present risks, but these are risks of which consumers are aware. The average consumer surely anticipates that these and other high-fat or high-protein foods may increase cholesterol levels and the risk of heart disease. Moreover, the Diet consists of

advice and ideas. The concepts may be controversial and the subject of criticism, but they are protected by the First Amendment.

Id. at 326-29. In a footnote, Judge Chin shared his own simple diet advice: "Run more, eat less."

The plaintiff solely appealed the dismissal of his claim under the Florida Deceptive and Unfair Trade Practices Act. *See* Fla. Stat. § 501.204(1) ("FDUTPA"). Plaintiff contended that the defendants violated FDUTPA by (1) promoting the low-carbohydrate Atkins diet and related products as "safe for all customers"; (2) "failing to give adequate warnings about the adverse health consequences of a high-fat diet"; and (3) "claiming that the diet was 'fool-proof' and a guaranteed success when they well knew that there would be people for whom the diet would not be safe." Plaintiff sought minimal money damages (\$40 for the cost of two editions of the book and \$25 for food products), but sought an injunction requiring health warnings on all Atkins-related books, websites and products.

Second Circuit Decision

In a summary order, the Second Circuit affirmed dismissal, holding that the defendants' advice and ideas were noncommercial speech, fully protected by the First Amendment. The book and website are not "expressions related solely to the economic interests of the speaker and its audience, but instead seek to communicate a particular view on health, diet, and nutrition, with an offer to purchase the message."

Plaintiff was represented by Daniel Kinburn, Physicians Committee for Responsible Medicine.

Defendants were represented by Thomas Leghorn, Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York; and Alan Mansfield, Greenberg Traurig, LLP NY.

Maryland Court Dismisses Defamation Suit Against Fox

Rejects Plaintiffs' "Discovery Rule" Argument

By Laura Handman and Rory Eastburg

In *Interphase Garment Solutions, LLC, et al. v. Fox Television Stations, Inc.*, No. 8:07-cv-02940-DKC (D. Md. June 6, 2008) (Chasanow, J.), a Maryland district court recently dismissed a complaint against a Fox affiliate based on its coverage of a local school uniform controversy. In the process, the court clarified issues related to the discovery rule in mass media libel actions – issues that were murky due to the underdeveloped state of Maryland media law.

Background

In September 2007, plaintiffs Interphase Garment Solutions, LLC (“IGS”) and Mark Coleman filed a \$5 million lawsuit in state court. The complaint cited three reports that ran just over a year earlier on WTTG, the local Fox affiliate in Washington, D.C. Plaintiffs did not dispute that the broadcasts provided a substantially true account of a public controversy – IGS had failed to deliver school uniforms in time for the beginning of the school year. Plaintiffs also admitted that, as reported, plaintiff Mark Coleman had been sued by a local hospital for breach of contract. But plaintiffs claimed the broadcasts falsely implied that IGS had breached its uniform contract with the parents when, plaintiffs said, IGS was still *attempting* to conform to the contract. Plaintiffs also claimed that the hospital lawsuit against Mr. Coleman was based on his unpaid hospital bills, not a dispute over uniforms.

District Court Decision

Fox removed the case to the federal court and moved to dismiss all counts. In June, the court dismissed the complaint in its entirety. The court found that plaintiffs’ claim for defamation was barred by Maryland’s one-year statute of limitations for defamation claims. *See* Md. Code Ann. Cts. & Jud. Proc. § 5-105.

Plaintiffs admitted that more than a year had passed between the broadcasts and the suit. Instead, they sought to rely on the discovery rule, which provides that a cause of action accrues when a plaintiff in fact knows or reasonably should know of the wrong. *Interphase*, 8:07-cv-02940-DKC at *5. The court hesitated to apply the rule, noting that “although Maryland has not squarely held so, other courts ‘uniformly have rejected the application of the discovery rule to libels published by the mass media.’” *Id.* (quoting *Shively v. Bozanich*, 31 Cal. 4th 1230, 1250 (2003)). It added that even if the discovery rule applied, “[p]laintiffs concede[d] that they knew of the broadcasts at the time they were aired.” *Id.* at *6.

However, plaintiffs argued that the statute of limitations did not begin to run until they knew *both* that the tortious act has been committed, *and* that concrete harm resulted. *Id.* This position arguably is supported by one reading of *Sears, Roebuck and Co. v. Ulman*, 287 Md. 397, 401 (1980), which notes that a cause of action accrues when the plaintiff “knew or reasonably should have known that the defendant committed a wrongful act *which injured or damaged the plaintiff*” (emphasis added). But the court looked to other jurisdictions and rejected this interpretation, concluding that “[a] defamation claim is complete when the allegedly defamatory statement is broadcast because the injury to reputation is immediate.” *Interphase*, 8:07-cv-02940-DKC, at *6-7 (citing, *inter alia*, *Brown v. American Broadcasting Co., Inc.*, 704 F.2d 1296, 1300 (4th Cir. 1983) (applying Virginia law)). Thus, it dismissed the defamation claim as time barred.

The court also dismissed plaintiffs’ remaining claims, for intentional interference with contractual relations, intentional infliction of emotional distress (IIED), and invasion of privacy (intrusion). *First*, plaintiffs claimed that, by reporting on the controversy, WTTG “intentionally interfered with a contract between IGS and the parents of a number of students at Prince George’s County schools.” The court disagreed, dismissing the claim because “[t]o demonstrate that a defendant’s actions were intentional and improper, a

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Maryland Court Dismisses Defamation Suit Against Fox

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plaintiff must show that the defendant's conduct was directed at an existing or prospective economic relationship [and not] a mere incidental effect of the allegedly wrongful conduct." *Id.* at *9 (internal quotations omitted).

Second, plaintiffs claimed that the broadcasts constituted intentional infliction of emotional distress. Again, the court disagreed, dismissing the count because plaintiffs "merely allege[d] that the broadcasts inaccurately asserted that Mr. Coleman has similarly failed to deliver on a contract to provide uniforms to a hospital," conduct which is not "utterly intolerable in a civilized society," as required to prove IIED in Maryland. *Id.* at *11 (citation omitted). *Finally*, plaintiffs claimed that WTTG invaded Mr. Coleman's privacy by displaying a court document showing that Mr. Coleman had been sued by the hospital. *Id.* The court rejected this argument as well, noting simply that "public

court documents are not private facts." *Id.* at *13 (citing *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 719 (4th Cir. 1991) (*en banc*)).

In sum, the *Interphase* ruling provides support for two propositions that were not entirely clear in Maryland – that courts "uniformly have rejected the application of the discovery rule to libels published" by the mass media, and that "a defamation claim is complete when the allegedly defamatory statement is broadcast."

Laura Handman and Rory Eastburg of Davis Wright Tremaine LLP in Washington, D.C. represented Fox Television Stations, Inc. in this case, with Susan Seager, Senior Counsel at Fox Group Legal. Plaintiff was represented by Roland N. Patterson, Jr. of the Law Office of Patterson and Associates, LLC.



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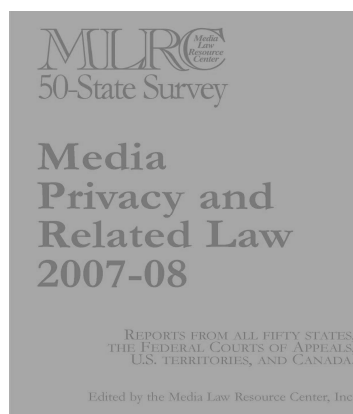
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“Naked Cowboy” Has No New York Privacy Claim for M&M Ad Can Proceed with Federal False Endorsement Claim

A New York federal district court ruled that the state’s misappropriation statute does not extend to a fictional persona. *Burck v. Mars, Inc.*, 2008 WL 2485524 (S.D.N.Y. June 23, 2008) (Chin, J.). The court dismissed a statutory privacy claim over advertisements featuring an M&M with plaintiff’s likeness. Plaintiff, however, had stated a claim for trademark infringement under the Lanham Act’s provision protecting against false endorsement.

Background

Beginning his opinion for the court, Judge Chin declared, “This is the case of The Naked Cowboy versus The Blue M&M.” While the two characters are at the heart of the litigation, the details of the case are a bit more nuanced, as the judge went on to discuss.

Street Performer Robert Burck has become a staple in New York City’s Times Square, where he performs as “The Naked Cowboy.” While in character, Burck wears a white cowboy hat, white cowboy boots, white underwear, and carries a guitar. The Naked Cowboy is now a popular tourist attraction and nationally recognizable figure. Burck has registered trademarks to the name and likeness.

Mars, Inc., the makers of M&Ms candy, ran an advertisement in Times Square featuring a Blue M&M dressed in a white cowboy hat, white cowboy boots, white underwear, and carrying a guitar. The advertisement was a video loop featuring M&Ms dressed as various famous New York figures. An animated mural in the M&M World store also displayed the M&M cowboy character.

Burck sued for violation of New York Civil Rights Law 50-51 and trademark infringement under the Lanham Act. The defendants argued, as an affirmative defense, that the advertisements were parodies. Burck moved to strike the parody defense. The defendants motioned to dismiss and for judgment on the pleadings.

No State Claim for Fictional Persona

The court first considered Burck’s state law privacy claim. Sections 50-51 of the New York’s Civil Rights Law create a cause of action for the use without consent of “the name, portrait or picture of any living person” for advertising or trade. There is no common law right to publicity in New York.

As to whether the blue M&M cowboy violates the statute, the court found litigation generated by the use of “look-alikes” in adver-

tisements to be instructive. In *Onassis v. Christian Dior-New York, Inc.*, 122 Misc.2d 603 (N.Y. Sup. Ct. 1984), a New York court found that Jacqueline Kennedy Onassis’s right under the Civil Rights Law had been violated when a model meant to be mistaken for Onassis was used in an advertisement. However, in *Allen v. Nat’l Video, Inc.*, 610 F.Supp. 612 (S.D.N.Y. 1985), an advertisement using a Woody Allen look-alike was found not to be a violation of sections 50 and 51 because the impersonator did not look enough like Allen to give the illusion that the actor was actually present in the advertisement. The *Allen* court held that “[m]erely suggesting certain characteristics of the plaintiff, without literally using his or her name, portrait, or picture, is not actionable under the statute.” 610 F.Supp. at 621.



Here the court held, “[t]he plain language of the Civil Rights Law makes it clear that the statutory right to privacy does not extend to fictitious characters adopted or created by celebrities.” The court compared the blue M&M to the robot in *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992). There, an advertisement depicting a mechanical robot dressed like Vanna White, of the television show “Wheel of Fortune,” was held to not be a violation of the

California privacy statute. Although White was able to proceed with her claim under California common law, the court found that the state statute, which is similar to the New York statute, did not cover such a caricature of a person.

After analyzing these cases, the court held that a “persona” is not a “portrait” or “picture” within the meaning of the statute. Burck’s right of privacy claim was thus dismissed.

False Endorsement

Section 43(a) of the Lanham Act provides a cause of action for falsely implying that a person endorses a product or service. To

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“Naked Cowboy” Has No New York Privacy Claim for M&M Ad*(Continued from page 28)*

make out a false endorsement claim, there must be a likelihood of consumer confusion as to whether the trademark owner endorsed the product.

The defendants argued that the advertisements were parodies which no one would confuse for an endorsement. They further argued that even if confusion were likely, the parodies are protected fair use under the First Amendment.

The court declined to consider at this stage of the case whether the M&M cowboy was a parody. For purposes of considering the defendants’ motion to dismiss, the court accepted Burck’s argument that consumers would view the M&M cowboy as promoting a product rather than parodying



The Naked Cowboy and, therefore, the court declined to dismiss Burck’s Lanham Act claim.

Burck’s motion to strike the defendant’s parody defense was also denied. The court again noted that the question was a factual issue that couldn’t be decided at the current stage of the litigation. The court rejected Burck’s contention that an advertisement cannot be a protected parody, noting that parodies can have “hybrid” uses and finding that the video and mural in question served both commercial and artistic purposes.

Plaintiff is represented by Scott M. Rothman of Halberstadt Curley LLC, Conshohocken, PA; and Kevin T. Mulhearn, Orangeburg, NY. Defendant is represented by Joseph Price, Arent Fox LLP, NY.

New York Trial Court Quashes Subpoena to Reporter Testimony Was Sought In Medical Malpractice Case

By George Freeman

New York State Supreme Court Judge Kibbie Payne quashed a subpoena to *New York Times* reporter John Schwartz in a Florida medical malpractice case. *In the matter of Michael Sheehan*, No. 103654/08 (May 9, 2008).

Plaintiff claimed that he suffered a brain injury interfering with his ability to speak clearly as a result of the defendant doctor’s negligence. The reporter interviewed the plaintiff on a business story subsequent to the injury, and, when called by the defendant’s lawyer, apparently suggested that plaintiff was able to speak without any speech impediment during the interview. Defendant therefore petitioned a New York court to subpoena Schwartz.

The *New York Times* moved to quash under New York’s Shield Law which gives a journalist a qualified privilege with respect to such non-confidential information: the privilege can only be overcome if the subpoenaing party shows that the information sought goes to the heart of the matter and cannot be obtained from alternative sources.

Citing almost exclusively the cases referred to in *The Times*’ brief, the court quite easily concluded that defendant had not met that test. The court determined that the defendant doctor had not shown that the information was not obtainable from alternative sources and noted that “friends, neighbors, other business associates and/or family members [could] testify as to Sweet’s speech patterns before and after the alleged injury.” The court also found that in light of the potential for expert medical witnesses, reporter Schwartz’s testimony hardly was critical or necessary to the case.

For all those reasons, the court quashed the subpoena. Trial in the case is scheduled pretty imminently; therefore, it seems extremely unlikely that the defendant will attempt an appeal.

George Freeman, in-house counsel at The New York Times, represented the paper in this matter.

New York Times and International Herald Tribune Win Dismissal of Libel Suits in England

“Abuse of Process” for Libel Suits to Go Forward in England

By David McCraw

A trial court master in England has dismissed defamation suits brought against *The New York Times* and *The International Herald Tribune* (IHT) by a former associate of the Beatles who complained about the way he was portrayed in a commentary about the death of the Beatles' one-time guru, Maharishi Mahesh Yogi. *Mardas v. New York Times Company*, No. HQ08X00875 (Q.B. 2008).

Special Master Leslie of the High Court of Justice, Queen's Bench Division, concluded that it would be an “abuse of process” to permit the two lawsuits, based on the same article, to go forward because the plaintiff's alleged reputational harm was limited and the costs of preparing and trying the case would be “monumental.” The court took special note of the limited circulation of the articles in England and the difficulties the court and the parties would face in presenting evidence about events that were more than 40 years old.

The claimant, Alex Mardas, was known as “Magic Alex” in the 1960s when he struck up a friendship with John Lennon. Mardas became a Beatles insider known for his extravagant claims about the magical inventions he was working on and was later hired to create a recording studio for Apple Records. Mardas was mentioned in passing in the opinion piece that *The Times* and the IHT published in February 2008 exploring the Maharishi's influence on the Beatles. The article referred to Mardas as a “supposed inventor and charlatan.” It then recounted how he had spread rumors that the Maharishi had made improper sexual advances toward a female follower during the Beatles' visit to the Maharishi's ashram in India in 1968. According to several published histories of the Beatles, those rumors played a role in the Beatles' disillusionment with the Maharishi and in the decision by George Harrison and John Lennon to leave the ashram.

The information about Mardas contained in the piece repeated widely known bits of Beatles lore. Several memoirs have explored Mardas's role in the Beatles' falling out with the Maharishi, and articles and books about the Beatles regularly discuss Mardas's failed attempt to create the Apple studio and his pronouncements that he could create such amazing things as electric paint and force fields that would make buildings invisible.

Mardas now lives in Greece. He commenced the two lawsuits in London in March. Justice Leslie dismissed the cases in a written judgment on June 10, 2008.

While there was clearly publication in England sufficient to establish jurisdiction under U.K. law, Master Leslie noted that the article had limited readership in England. It did not appear in the print edition of the IHT, and only 177 copies of *The Times* circulated in England. The court found that there were four hits on the on-line version of *The Times* story and 27 hits on the IHT's on-line version, although on both websites the article remained available to readers after the initial publication. Master Leslie then addressed the exorbitant costs of trial, which he predicted would last four weeks, involve testimony from the surviving Beatles and many others, and engender argument over the admissibility of prior publications about the events. He envisioned that, under the circumstances, the “primary motivation of both parties would become the recovery of their costs” under English law, which requires the loser to pay.

In finding that the cost and effort far outstripped any recovery that Mardas might win, Master Leslie quoted Justice Eady: “The game is not worth the candle.” Then, after citing a Court of Appeal decision from a Dow Jones case on the same theme (“[these cases] are not even worth the wick”), he took the analogy one step further, saying that in the action against *The Times*, the phrase “not even worth the match” was deserved.

Master Leslie based his decision in part on the court's traditional duty of “dealing with a case proportionately, and allotting to it an appropriate share of the court's resources.” He noted that Mardas was not without a remedy: he was free to bring suit against *The Times* in the United States and against the IHT in Paris, where it is published – jurisdictions where the papers had substantially larger circulations.

Mardas has initiated an appeal to a judge of the High Court.

Both *The Times* and the IHT are owned by The New York Times Company.

The newspapers were represented by Mark Stephens and Pia Sarma of Finers Stephens Innocent, Geoffrey Robertson of Doughty Street Chambers, and David Sherborne of 5 Raymond Buildings. Mardas was represented by the law firm of Stockler Brunton.

Across the Pond: English Court of Appeal Upholds JK Rowling's Son's Breach of Privacy Claim

By David Hooper

Last year I described how Mr Justice Patten had struck out the claim brought on behalf of JK Rowling's son David for breach of privacy in respect of unauthorised press agency photos published in the press. See "*The Other Side of the Pond*" *MediaLawLetter* Oct. 2007 at 40.

The salient facts were that a press agency took long lens photos surreptitiously of J K Rowling's then 19-month-old son David. The agency's role in life is revealed by its boast to be "The World's Biggest and Best Celebrity Picture Agency" with a revelatory website www.mrpaparazzi.com. The photos were fairly mundane pictures of the Murray (Rowling) family going from their apartment to a local café.

They knew J K would not have consented to the photos. They showed David's face and there was no attempt to pixelate the photos. There was no evidence of any distress being caused by the photos being taken nor of harassment there was no reason to suppose that David was aware of the fact that the pictures had been taken.

Court of Appeals Decision

The case was heard before a strong Court of Appeal presided over by its senior judge Sir Anthony Clarke, Master of the Rolls, and the decision was handed down on 7 May 2008. *Murray v Big Pictures (UK) Ltd* (2008) EWCA 446

The case had to navigate between the *Campbell*

v MGN (2004) 2 AC 457 where Baroness Hale had indicated that the law of privacy was not likely to be engaged by taking a picture of someone popping out for a pint of milk and the *Hannover v. Germany* case (2005) 40 EHRR 1, where pictures of Princess Caroline in and around a restaurant were held by the European Court of Human Rights to engage the law of privacy.

The underlying principles for resolving such apparent conflicts if there is a dispute between a House of Lords decision and an ECHR ruling is that the Court of Appeal should follow the House of Lords decision. This was not the trial of David's claim, although it is likely that the case

will be settled beforehand on the basis of the Court of Appeal's ruling. The issue was simply whether, on the assumed facts, there was a triable case to be heard.

David was entitled to have his case heard unless on the assumed facts, the defendant was bound to succeed. In a nutshell, the Court of Appeal's ruling was that the law of privacy should protect a child from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photos in a public place for publication which the person who took the photo knew would not be consented to on behalf of the child.

There was also a claim under the Data Protection Act 1998 on the basis that David's personal data as revealed by the photos had been processed unlawfully and unfairly. On the basis of the Court of Appeal's ruling that claim is also likely to be successful. It is a statutory variant on the law of privacy.

The test for privacy is that the essential touchstone of private life is whether or not in respect of the disclosed facts the person in question had a reasonable expectation of privacy. Lord Nicholls in the *Campbell* case had indicated that the publication of the material must be highly offensive to be actionable. That, the Court of Appeal felt, related to the balancing exercise between the Article 8 right of privacy and the Article 10 right of freedom of speech rather than to whether the law of privacy was engaged.

the Court of Appeal's ruling was that the law of privacy should protect a child from intrusive media attention

The fence for the engagement of the law of privacy itself is set rather lower. Lord Hoffmann produced a helpful definition of privacy in that the law focuses on the protection of human autonomy and dignity and the right to control the dissemination of information about a person's private life and the right to the esteem and respect of other people. With this right of privacy goes a reasonable expectation of privacy, the test for which is objective. What would a person of ordinary sensibility feel if placed in the same position as the claimant and faced with the same publicity?

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Across the Pond: English Court of Appeal Upholds JK Rowling’s Son’s Breach of Privacy Claim

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The test of reasonable expectation of privacy is a broad one. One looks at all the circumstances of the case, the attributes of the claimant, the nature of the activity in which the claimant is engaged, the place at which the event happened, the nature and purpose of the intrusion, the absence of any consent (whether known or inferred), the effect on the claimant and the purposes for which the information came into the hands of the publishers.

The Court of Appeal felt that Mr Justice Patten had paid insufficient attention in this case to the fact that the claimant was a child. The test he should have applied was did the child have a reasonable expectation of privacy in the sense that a reasonable person in his position would feel that the photograph should not be published. It was, the Court of Appeal felt, at least arguable that David had a reasonable expectation of privacy and the case should go for trial.

In reaching this conclusion, the Court of Appeal borrowed from Clause 6 of the Press Complaints Commission Editorial Code of Practice:

“Editors must not use the fame, notoriety or position of a parent or guardian as the sole justification for publishing details of a child’s life. The acid test in writing about the child of a public figure who is not famous in his own right is whether the newspaper would write such a story if it were about an ordinary person.”

The *Murray* decision is another significant expansion of the English law of privacy and one that is important for publishers and their advisers to study. The likelihood is that the case will not go to the House of Lords. Accordingly there will be greater protection for the children of celebrities and probably greater protection for celebrities themselves in respect of unauthorised photographs, which are not obviously intrusive.

David Hooper is a partner with Reynolds Porter Chamberlain in London.

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Keyword Advertising in France: Supreme Court Refers Issue to the Court of Justice of the European Communities

By Jean-Frédéric Gaultier and Marie Jourdain

Since 2003, French courts have been witnessing ever-increasing litigation surrounding keyword advertising, pitting trademark owners against advertising-link providers and/or advertisers.

The scenario at issue is the following: an advertising-link provider (e.g. Google AdWords, Overture Services) offers to sell to an advertiser a link to the latter's website, which is displayed as soon as a keyword, previously chosen by the advertiser, is entered by an internet user in the course of a internet search. The advertising link is usually displayed next to the natural search results under the heading "commercial links" or "sponsored links". In addition to being paid, the advertising-link provider plays a role through (i) providing a key-word suggestion tool, (ii) which suggests a list of the most frequently entered search-related key words, and (iii) activating the advertising-link.

The keyword constitutes the cornerstone of the success of the advertising link in that it triggers the advertisers' website display. When said key word is identical or similar to the trademark of a third party, which has not authorised such use, the resulting referencing is called "*position squatting*" in France.

Considering the numerous decisions issued by French courts in respect of position squatting (more than 30 decisions over the last five years), a general trend in favour of trademark owners, whose actions have been successful in almost all cases, appears to be emerging. Nevertheless, French case law is still muddled as regards the legal grounds on which position squatting is sanctionable and, in particular, as to whether (i) advertising-link providers and advertisers may be held liable for trademark infringement and, (ii) the legal status of advertising-link provider, i.e. advertising agency or internet service provider. This uncertain situation also extends to the rest of the European Union, many contradictory decisions having been rendered by other national courts.

This issue might be settled in the coming years since the French Supreme Court has issued on May 20, 2008 three decisions in which it has posed interlocutory questions to the Court of Justice of the European Communities (ECJ).

See French Supreme Court, commercial division, 20 May 2008: decision n°06-20.230, *Google France, Google Inc vs. Louis Vuitton Malletier*; decision n°06-15.136 CNRRH, *Mr. Thonet, Mr Raboin and Tiger vs. Google France* and decision n°05-14.331 *Viaticum and Luteciel vs. Google France*.

The ECJ is asked to construe the Directive of 21 December 1988 relating to trademarks (Directive n° 89/104/EEC of the Council, of 21 December 1988, to reconcile the Laws of the Member States relating to trademarks) and the Council Regulation of 20 December 1993 on the Community trademark (Council Regulation n°40/941 of 20 December 1993 on the Community trademark) by answering the following questions:

As regards advertising-link providers' liability:

- when making available to advertisers key words reproducing or imitating third parties' trademarks and organising, through a positioning agreement, the creation and the preferred display of advertising links that redirect internet users to advertisers' websites promoting and offering for sale either (i) identical and/or similar goods to those designated by the trademarks or, (ii) goods infringing the trademarks, does the advertising-link provider make use of a trademark in a manner susceptible to justify prohibition by the owner of such trademarks?
- Assuming that the above-mentioned use does not constitute a trademark use that may be prohibited by its owner, may the advertising-link provider be considered as providing a data company service consisting in the storage of information provided by a recipient of the service within the meaning of the Directive 8 June 2000 on Electronic Commerce such that the liability of the advertising-link's provider may only be incurred if previously notified by the trademark's owner of the fact that the adver-

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**Keyword Advertising in France:
Supreme Court Refers Issue to the Court of Justice of the European Communities**

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tiser is making a non-authorized use of the trademark?

As regards advertisers' liability:

- When reserving key words, reproducing or imitating third parties' trademarks, that redirect internet users to its internet website in order to promote and offer for sale identical and/or similar goods to those designated by the trademarks, does the advertiser make use of a trademark in such a manner as to justify prohibition by the owner of such trademark?

No doubt all entities involved in position-squatting matters will be eagerly awaiting the decision of the ECJ and, when it is known, to subject it to thorough analysis:

- advertising-link providers since, whatever the decision issued by the Court, it will probably have significant consequences, as this advertising system is a critical component of the business models of internet search engines as well as of shopping sites;
- advertisers, who are the first to derive benefit from position squatting; and
- trademark owners, who may suffer damageable consequences in the event of position squatting, including goodwill diversion, trademark devaluation and/or erosion, loss of profits, etc.

Jean-Frédéric Gaultier and Marie Jourdain are Avocats à la Cour at Clifford Chance Europe LLP.

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Fifteen Seconds of “Imagine” in Movie Permitted as Fair Use

Use of Song Clip in Movie Was Transformative

A New York federal district court denied a request for a preliminary injunction prohibiting further distribution and requiring a recall of existing copies of the feature-length film, “EXPELLED: No Intelligence Allowed.” *Lennon v. Premise Media Corp.*, 2008 WL 2262631 (S.D.N.Y. June 2, 2008) (Stein, J.). The request was made by the widow and children of John Lennon in response to the film’s unlicensed use of 15 seconds from the song “Imagine,” to which the Lennons own the copyright.

The decision turned on the court’s analysis of the fair use doctrine. The court emphasized the transformative purpose and character of the use, noting that the inclusion of the excerpt serves “to criticize what the filmmakers see as the naïveté of John Lennon’s views.” The brevity of the excerpt in relation to the rest of the song and the rest of the movie also weighed in favor of finding fair use.

Background

Yoko Ono Lennon, Sean Lennon, and Julian Lennon, the widow and sons of John Lennon, who composed the song “Imagine,” filed a complaint alleging copyright and trademark infringement. At issue was the unauthorized use of a 15-second portion of the song accompanied by a display of the lyrics during the film, “EXPELLED: No Intelligence Allowed.”

The movie, narrated by actor and writer Ben Stein, is intended as a critique of the teaching of Darwinian evolution over the theory of “intelligent design.” The film features interviews with proponents of secularism; following one such interview, Stein suggests that the song “Imagine” advocates the same idea. The movie then plays a 15-second

excerpt of the song with the corresponding lyrics displayed on the screen: “Nothing to kill or die for/ And no religion too.”

Although the defendants had obtained permission to use every other well-known song included in the movie, they had not done so for “Imagine.” The film was released in theaters on April 18, 2008 and the Lennons, along with the song’s publishing administrator, EMI Blackwood Music, filed their complaint soon after. They subsequently brought the motion for a preliminary injunction on April 30, 2008.

The court entered a temporary restraining order preventing further distribution of the film.

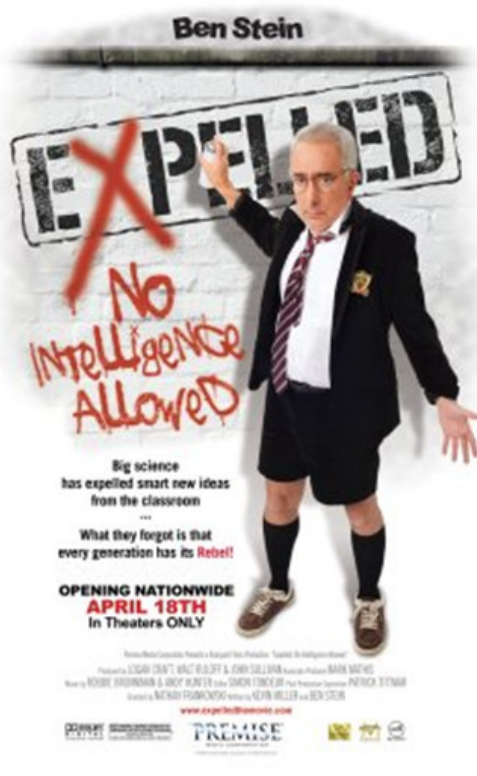
Irreparable Harm Can be Presumed

In considering whether a preliminary injunction would be appropriate, the court first looked to whether the plaintiff had demonstrated there would be irreparable harm in the absence of an injunction. The court found that the plaintiff had met this requirement due to the presumption of irreparable harm where the plaintiff makes out a prima facie showing of infringement. In a footnote, the court rejected defendants’ claim that this presumption was abrogated in the recent Supreme Court decision, *eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388 (2007). In *eBay*, the Court declined to apply a general rule of issuing permanent injunctions in patent infringement cases absent exceptional circumstances, finding the rule to violate the Patent Act. The *Lennon* court distinguished the presumption applied in this case because it did not require an imposition of an injunction upon finding of infringement. The court also noted the injunction in *eBay* was permanent whereas the one sought by the Lennons was preliminary.

Likelihood of Success on the Merits

The court then looked to the plaintiff’s likelihood of succeeding on the merits, noting that the motion was subject

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Fifteen Seconds of “Imagine” in Movie Permitted as Fair Use

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to the more stringent standard of “clear” or “substantial” likelihood of success because the recall requested would qualify as a “mandatory injunction” that would alter the status quo. Although the court found that plaintiffs were likely to succeed in establishing a prima facie case of copyright infringement, the court also found that the defendants were likely to successfully make out an affirmative defense of fair use.

Defendants Fair Use Defense

The court next considered whether the defendants’ use of the song was protected by the fair use doctrine and concluded that the defense was available. Key to the court’s determination was finding that the purpose and character of the use was transformative rather than simply commercial. Although the movie itself is commercial in that it seeks to profit overall, the use of “Imagine” served as social commentary, leading the court to place less weight on the commercial nature of the film in its fair use analysis.

Defendants’ use is nonetheless transformative because they put the song to a different purpose, selected an excerpt containing the ideas they wished to critique, paired the music and lyrics with images that contrast with the song’s utopian expression, and placed the excerpt in the context of a debate regarding the role of religion in public life. *Lennon* at 15.

The use of the song clip in the movie was compared to the use of a copyrighted photograph in an art work in *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006). In *Blanch*,

the Second Circuit found the artist’s inclusion of a portion of the plaintiff’s photograph for purposes of social commentary in his work to be protected fair use under the Copyright Act. The trial court found the song excerpt in “EXPELLED” to be similarly protected. The court also emphasized that a finding of transformative use does not require that the original material be altered or that the use of the material be strictly necessary to the larger project.

A finding of fair use was also favored because the excerpt constituted only a very minor portion of the movie’s total running time. Citing *Blanch*, the court declined to view the defendants’ failure to seek permission for use of the clip as evidence of bad faith.

With respect to the amount and sustainability of the excerpt used as compared to the copyrighted work as a whole, both quantitatively and qualitatively, the court found the 15-

transformative use does not require that the original material be altered or that the use of the material be strictly necessary to the larger project.

second song clip to be a reasonable amount in light of the purposes for defendants’ use. The portion excerpted represents

only a small percentage of the three-minute song. The specific portion may be a highly recognizable section of the song, but the court emphasized that the song was so repetitive that virtually any fifteen-second excerpt would be recognizable.

The balance of factors led the court to confidently expect that the defendants would prevail on their fair use defense. Because the plaintiffs were not likely to succeed on the merits and the balance of hardships did not tip decidedly in their favor, the preliminary injunction was denied.

Plaintiffs were represented by Peter S. Shukat and Dorothy M Weber, Shukat Arrow Hafer & Weber, LLP in New York. Defendants were represented by Anthony T. Falzone of the Stanford Law School Center for Internet & Society and Lord, Bissell & Brook, LLP in New York.

Court Orders Disclosure of New Jersey Governor's Emails to Ex-Girlfriend / Union Chief

Emails Are Public Records

By Matthew Lane and Kathleen A. Hirce

In a widely-publicized opinion handed down last month by the Superior Court of New Jersey, Law Division, Judge Paul Innes ordered the public disclosure of a large portion of the email correspondence between New Jersey Governor Jon Corzine and Carla Katz, the President of Communications Workers of America, Local 1034, a New Jersey union representing approximately 10,000 state employees.

Katz and Corzine had been involved in a close personal relationship for years, drawing wide-spread suspicions of impropriety. The court found that with the exception of a series of emails subject to the executive privilege, the communications should be disclosed pursuant to New Jersey's Open Public Records Act and the state's common law right to know. *Wilson v Brown*, No. Mer-L-1297-07 (N.J. Law Div. May 29, 2008).

Background

In arriving at its holding, the court noted that it was focused in part upon the "quite unique" circumstances of the case. The relationship between Governor Corzine and Carla Katz began before the Governor's inauguration, during which time Corzine made "significant financial payments" to Katz. Following Corzine's inauguration, the two entered a different phase of their relationship, though they appear to have remained in close contact. This contact continued through the state's collective negotiations with Katz's union, regarding state employees.

Public controversy surrounded the relationship between Corzine and Katz, and consequently the Governor asked that his dealings with Katz and the Communication Workers of America, Local 1034 be reviewed by the Ethics Advisory Panel. This panel had been established by executive order.

Meanwhile, Thomas Wilson, the plaintiff in the case at issue here, filed a records request pursuant to New Jersey's Open Public Records Act (OPRA), N.J.S.A. 47:1A-1, et seq., and the common law. Wilson, the Chairman of the New Jersey Republican State Committee, requested copies of "any and all documents, correspondence and/or e-mail communications between the Governor and/or any member of the Governor's staff and Ms. Carla Katz[.]" As the Law Division noted, this request was specifically limited, and sought only communications that re-

lated to "official state business."

Procedural History

Plaintiff's request was reviewed by Custodian of Records William C. Brown, who is the defendant in this case as well as Senior Associate Governor's Counsel. Brown informed Plaintiff that, surprisingly, no responsive documents or correspondence existed at all. He added that even if any responsive emails had been found, they could not be disclosed as they were protected by a long recognized "judicial protection afforded non-public communications between senior public officials and those with whom they communicate" and a privacy exemption in the form of section 2(c) of Executive Order No. 26, passed by former New Jersey governor James McGreevey in August 2002.

That section states, in pertinent part, that "[a]ll portions of records containing information provided by an identifiable natural person outside the Office of the Governor which contains information that the sender is not required by law to transmit and which would constitute a clearly unwarranted invasion of personal privacy if disclosed" are to be exempt from disclosure.

Plaintiff's petition to Wilson for reconsideration was similarly rebuffed. Consequently, he filed a verified complaint and order to show cause. Carla Katz, Communications Workers of America, Local 1034, and Communications Workers of America intervened in the action.

Open Public Records Act

Following a lengthy explanation of the background of this action and the review by the Ethics Advisory Panel, the court sided with plaintiff, holding that pursuant to OPRA, the requested documents should be "readily accessible" to the citizens of New Jersey. Indeed, the court emphasized the legislative public policy rationale inherent in the OPRA statute, which was meant to foster accessibility to government records among the citizenry. The burden of proving that documents are exempt from disclosure is upon the custodian of the government record.

Specifically, the court held that the documents requested by the plaintiff were "government records" within the meaning of OPRA as they were "made, maintained, or kept on file in the

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Court Orders Disclosure of New Jersey Governor's Emails to Ex-Girlfriend / Union Chief

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course of . . . official business . . . by [an] officer . . . of the State . . . or ha[d] been received in the course of . . . official business by any such officer[.]”

The defendant, in an effort to bar the request for disclosure, proffered several possible exemptions from the OPRA disclosure requirement. In ultimately rejecting an exemption based on the above-mentioned section 2(c), the court found that Katz's position at the helm of a powerful union in the state of New Jersey presented a very real possibility of a conflict of interest or improper influence on the Governor's chief obligation to properly serve the interests of the people of New Jersey.

In fact, the court emphasized that the information request at issue did not present an “unwarranted invasion of personal privacy” but was instead a situation where “the public interest is in access to sufficient information to enable the public to understand and evaluate the reasonableness of the public body's action.” (quoting *S. Jersey Publ'g Co. v. N.J. Expressway Auth.*, 124 N.J. 478, 494-95 (1991)).

As the court noted, “[t]he public has a right to know whether the relationship between the Governor and Ms. Katz had any improper influence or effect on the Governor's paramount obligation to serve the interest of the citizens of New Jersey first.” That the Governor himself had requested an inquiry for these purposes from the Ethics Advisory Panel only bolstered the Plaintiff's argument.

The court likewise rejected the defendant's argument for the imposition of executive privilege to bar disclosure of the communications in their entirety, noting the limited nature of New Jersey's executive privilege. Generally, the court opined, communications between the Governor and staff-members will be covered while communications between the Governor and a “high level official in a public employee union” fall outside the scope of the privilege. Here, too, the court expressed concern regarding the possibility of a potential conflict created by the communications.

The court did find, however, that a select few documents would, in fact, be subject to the executive privilege and therefore barred from disclosure. Having determined that Katz could indeed have been an “advisor” to Corzine on matters unrelated to her union duties and issues of public employment, the court held that the documents relating to topics “which do not directly touch upon Ms. Katz's position as president of the union or state employees, but upon issues of general statewide policy” were protected under the executive privilege and were not to be dis-

closed. Significantly, these documents merely represent a very small portion of the correspondence between Corzine and Katz.

Finally, the court rejected Katz's attempt to exempt the disclosure based upon OPRA's “collective negotiations.” Katz's role in any negotiation would have been peripheral at best, and thus not covered under the exception.

Common Law Right to Know

The court additionally analyzed the plaintiff's argument for disclosure under the common law right to know. The common law right, pursuant to *Higg-A-Rella, Inc. v. City of Essex*, 141 N.J. 35 (1995), is not limited by OPRA and actually allows for broader disclosure than that prescribed by the statute.

It is well-established in New Jersey that in order to sustain a claim based on the common law right to know, the plaintiff must (1) establish an interest in the subject matter of the document and (2) demonstrate that, based on several public policy factors, disclosure would benefit both the general interests of the citizens and government of New Jersey. The court found that none of the factors counseled against disclosure, again siding with the plaintiff.

The circumstances of this case are unique, as the court acknowledged. However, the plaintiff's stated purpose of seeking information “in order to protect the integrity of collective negotiations between the Governor and a state employee labor union” aligned with both the legislative policy behind OPRA and the state's strong common law background favoring access. In fact, as the court noted, the “relationship [between Corzine and Katz] created a clear potential for conflict.” The Corzine camp has publicly renounced this decision and plans to seek reconsideration through the appeals process.

Matthew Lane is a Summer Associate and Kathleen Hirce an Associate at McCusker, Anselmi, Rosen & Carvelli, P.C. in Florham Park, N.J.. Plaintiff Thomas Wilson was represented by Mark D. Sheridan, Drinker, Biddle & Reath in Florham Park, N.J. Defendant William C. Brown was represented by Deputy Attorney General Joseph C. Fanaroff. Intervenors Carla Katz and CWA, Local 1034 were represented by Sidney Lehmann of Szaferman, Lakind, Blumstein, Blader & Lehmann in Lawrenceville, N.J. and the Communications Workers of America were represented by Steven P. Weissman of Weissman & Mintz in Somerset, N.J.

ETHICS CORNER

Close Corporation Conflicts

No Easy Answers

By Ronald C. Minkoff

It's a scenario that professional responsibility lawyers are frequently asked about. For many years a lawyer (L) has represented a close corporation (XYZ Corp.) with two 50% owners, A and B. L has handled a number of matters for XYZ, including a transaction with a third party vendor and a lawsuit against another former owner in which A and B were named as counterclaim defendants.

Throughout, L had numerous attorney-client communications with A and B, acting in their capacities as corporate officers and, in connection with the lawsuit, their personal capacities. One day, A informs L that B just left the company after A learned that B had been stealing from the company for years, assisted by the very same vendor L had litigated against. A asks L to represent XYZ - and possibly A as well - against B. L wants to know: can she take on this representation?

The knee-jerk reaction from most professional responsibility lawyers is that L has to step out of the situation entirely, that she cannot represent A or B either because they were both her clients or because they were co-owners of her client XYZ.

The answer, however, is not that simple. Indeed, unraveling this problem raises a host of sub-issues: What kind of conflict of interest is this? Is L's duty of loyalty implicated, her duty of confidentiality, or both?

The Allegaert Decision

The analytical complexity here stems from the Second Circuit's decision 30 years ago in *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977), a case whose conflict of interest analysis is now outmoded but still retains considerable influence on federal and state courts throughout the U.S.

The *Allegaert* case involved a merger that financier H. Ross Perot orchestrated of two troubled Wall Street brokerage firms, duPont Walston Inc. ("Walston") and duPont Glore Forgan ("DGF"), both which were customers of Perot's main business, Electronic Data Services ("EDS"). Each of these entities had its own principal outside law firm: Wal-

ston was represented by Shearman & Sterling ("Shearman"), DGF by Weil Gotshal & Manges ("Weil") and EDS by Leva, Hawes ("Leva").

Although Walston maintained its separate identity after the merger, and Shearman continued as Walston's principal outside counsel, Weil and Leva also represented Walston on a variety of matters, including in a class action lawsuit that involved similar allegations to those in the Trustee's lawsuit.

When Walston filed for bankruptcy protection, Weil and Leva sought to represent DGF and EDS against their former client, Walston, in the bankruptcy court proceedings. Walston moved to disqualify. The district court denied the motion, and the Second Circuit affirmed. Recognizing that Walston was now a former client of Weil and Leva, the Second Circuit based its conflicts analysis on Canon 4 of the New York Code, which addressed *confidentiality*, because the New York Code at the time did not yet include a provision like Model Rule 1.9 that governed former client conflicts.

Under its Canon 4 analysis, the *Allegaert* court ruled that the law firms could be disqualified only if they had obtained confidential information from Walston, something which would normally be presumed if there was a "substantial relationship" between the current and former representations, which there undoubtedly was. *Allegaert*, 565 F.2d at 250. But the court made clear that the "substantial relationship" test would not even apply unless Walston could show "that [Weil and Leva were] in a position where [they] could have received information which [their] former client [Walston] might reasonably have assumed [they] would withhold from [their] present client[s]." *Id.*

The court concluded that Walston had failed to make this showing "[b]ecause Walston necessarily knew that information given to [Weil and Leva] would certainly be conveyed to their primary clients in view of the [joint venture] agreement." *Id.* In other words, because Walston never expected that Weil and Leva would keep its information confidential from DGF and EDS, it could not claim a disqualifying conflict when Weil and Leva chose to represent DGF and EDS against it in a later litigation. *Id.* at 250-51.

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Applying *Allegaert* To Our Facts

When the *Allegaert* holding is applied to our hypothetical, a strong argument can be made that L can represent XYZ, and even A, against B. B has left the company and, if he was ever L's client at all (more on that below), he is now a former client. Under Model Rule 1.9 and (in New York) DR 5-108, which govern "former client" conflicts, L would be prohibited from taking on a lawsuit against B if that lawsuit involved the "same or a substantially similar matter" to the one in which L had represented B previously. B could certainly argue that the current case against him, involving the very same vendor L had sued previously, satisfies this test.

But as already noted, *Allegaert* holds that the "substantial relationship" test does not apply here. That test is "implicated" only if L was in a position to receive "information which his former client might reasonably have assumed the attorney would withhold from his present client." *Allegaert*, 565 F.2d at 250.

But when he handled the earlier matters, L was engaged in a joint representation: even assuming that he represented B, he also represented XYZ. It is well-established that "[w] here an attorney represents two or more clients who are similarly situated with regard to a lawsuit, each client must reasonably expect that facts learned from one will be available in defense of the other. That is the essential condition of a common representation." *Felix v. Balkin*, 49 F. Supp. 2d 260, 270 (S.D.N.Y. 1999); see also *Kempner v. Oppenheimer*, 662 F. Supp. 1271, 1277-78 (S.D.N.Y. 1987).

Under this basic rule, B understood that any communications L had with him about the case (and the vendor) would be shared with XYZ – and with A. He thus had no expectation that whatever he said to L would remain confidential. This means, under *Allegaert*, that L may take on the lawsuit against B.

Courts Adhering to *Allegaert*

Time and again, courts in the Second Circuit and elsewhere have used this analysis – an analysis based solely on the *duty of confidentiality* – to support a lawyer taking on a lawsuit against a corporate officer whom the lawyer had previously represented jointly with other officers or with the corporation.

On occasion courts have pointed to special circumstances in order to justify this. See, e.g., *Rite Aid Corp. Secs. Litig.*, 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001) (corporate officer

Mostly, however, the courts rely solely on the limited duty of confidentiality, and the principle that the jointly represented client could not expect his or her confidences to be kept from his or her co-clients.

who lied to corporation's counsel during joint representation may not have corporation's lawyer disqualified from representing corporation in later lawsuit against him); *Rochhigiani v. World Boxing Counsel*, 82 F.Supp.2d 182, 188 (S.D.N.Y. 2000) (though U.S. attorney previously represented boxer and U.S. promoter jointly, U.S. attorney permitted to represent promoter against the boxer when later dispute arose because boxer had consulted own attorney throughout).

Mostly, however, the courts rely solely on the limited duty of confidentiality, and the principle that the jointly represented client could not expect his or her confidences to be kept from his or her co-clients. E.g., *Christiansen v. U.S. Dist. Ct.*, 844 F.2d 694, 698 (9th Cir. 1988) (law firm who represented corporation and director could continue to represent director in lawsuit against corporation's successor-in-interest, because "corporation necessarily knew that any information it gave to [the lawyer] would be conveyed to [the director]"); *Occidental Hotels Mgmt. LLC v. Westbrook Allegro LLC*, 440 F. Supp. 2d 303 (S.D.N.Y. 2006) (lawyer who had represented subsidiary in merger transaction, working in tandem with corporate parent, not disqualified from representing parent in indemnification dispute with post-merger entity; "it is difficult to see how Plaintiffs reasonably could have expected [the lawyer] to have kept any information related to the merger . . . confidential from [the parent]"); *Gen-Cor LLC v. Buckeye Corrugated, Inc.*, 111 F.

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Supp. 2d 1049, 1056-57 (S.D. Ind. 2000) (lawyer who had represented companies and 100% owner may represent owner in subsequent suit against successor entity to companies, since law firm “could not have learned anything through its representation of [the predecessor entity] not already known to [the owner]”); *Cohen v. Acorn Int’l*, 921 F. Supp. 1062, 1064 (S.D.N.Y. 1995) (although law firm may have represented company and all three of its shareholders in suit with third party, it may represent company and majority shareholder in later dispute with minority shareholders; minority shareholders could not expect information they gave to firm to be withheld from company’s lawyer); *Kinlay v. Wilmott*, Index No. 602886/04, 801 N.Y.S.2d 235, 2005 WL 1021570 (Sup. Ct. N.Y. Co. March 21, 2005) (shareholder had no expectation that law firm representing company and all shareholders would keep information he gave lawyer confidential from the corporation, and thus may not have lawyer disqualified).

Is the Former Officer a Former Client?

All of this, of course, jumps over an important question: did L ever represent A or B, or did he just represent XYZ? “As a general rule . . . a law firm does not represent the shareholder of a corporation, even a close corporation, simply by virtue of its representation of the corporation itself.” *April Broad., Inc. v. Smith*, No. 95 Civ. 7664, 1996 WL 137487 at *4 (S.D.N.Y. March 27, 1996); accord, *Cohen*, 921 F. Supp. at 1064; *Wayland v. Shore Lobster & Shrimp Corp.*, 537 F. Supp. 1220, 1223 (S.D.N.Y. 1982); see also MR 1.13 (a) (“A lawyer employed by or retained by an organization represents the organization acting through its duly authorized constituents.”); *Bobbitt v. Victorian House, Inc.*, 545 F. Supp. 1124, 1126 (N.D. Ill. 1982) (corporate director has no expectation that lawyer for corporation represents him personally).

Under this “general rule,” assuming one could find no personal representation of A or B in any of the earlier matters, L’s representation of XYZ against B would be perfectly proper. Of course, there was personal representation here, on the counterclaims in the lawsuit, but that representation might not be “substantially related” to the current lawsuit. In any event, there are several cases which suggest that representing a close corporation does mean representing the corporate shareholders who own and control the corporation, and

whose money is bound up with the corporation’s fate. See, e.g., *Rosman v. Shapiro*, 653 F. Supp. 1441, 1445 (S.D.N.Y. 1988) (disqualifying lawyer for close corporation in lawsuit against former 50% shareholder; “where, as here, the corporation is a close corporation consisting of only two shareholders with equal interests in the corporation, it is indeed reasonable for each shareholder to believe that the corporate counsel is in effect his own attorney”); *In re Brownstein*, 288 Or. 83, 87 (1979) (same); *Flores v. Willard J. Price Assocs., LLC*, 20 A.D.3d 343, 344, 799 N.Y.S.2d 43 (1st Dep’t 2005) (defining “party” for conflicts purposes to include those corporate officials who control corporation, implement corporate legal advice or face personal liability); R. Simon, *Simon’s New York Code of Professional Responsibility Annotated* 801 (Thomson West 2005 ed.) (hereafter, “Simon”) (“A lawyer who formerly represented an entity may be held to have represented some of the officers, . . . directors and employees or other major actors in the entity. This is especially a risk when the entity was small and the lawyer had regular contact with the people who ran the organization. . . .”).

The “Duty of Loyalty” Analysis

Most of the cases on both sides of that issue arose in the *Allegaert* context, which meant they focused on the corporate official’s *expectation* of confidentiality based on whether he understood the lawyer to be representing him. But although *Allegaert* retains vitality today, one must keep in mind that it was decided before a “former client” conflict rule existed, either in the Model Code or the Model Rules. The advent of MR 1.9, closely followed in New York by the virtually identical DR 5-108, has caused many courts to re-consider the use of the *Allegaert* analysis in the “former joint client” context.

An analysis based on MR 1.9 recognizes that MR 1.9 is designed to further the duty of loyalty as well as confidentiality. See MR 1.9, Comment 1 (“After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality *and conflicts of interest* and thus may not represent another client except in conformity with this rule”) (emphasis added). This adds a dimension to the analysis that *Allegaert* leaves out. E.g., *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449, 454-55 (S.D.N.Y. 2000) (“The [Second] Circuit [in *Allegaert*] held only that Canon 4 is not implicated where there could have

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been no confidences to begin with,” and did not address Canon 5 loyalty issues); *In re I Successor Corp.*, 321 B.R. 640, 656 (Bankr. S.D.N.Y. 2005) (“the substantial relationship test is meant to protect not only confidences, but also the expectation of loyalty by a prior client”) (citing cases).

One District Court refused to apply *Allegaert* to a conflict of interest claim involving a lawyer for a limited partnership where the claim arose in a state that had adopted MR 1.9, noting:

[Unlike under *Allegaert*], Model Rule 1.9 is designed to address not only the narrow need to protect a client’s confidences, but also to establish broader standards of attorney loyalty and to maintain public

confidence in the legal system . . . [T]he application of Rule 1.9 does not turn on the divulgence of confidences: “Information so acquired is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard whether someone else may be privy to it.”

Prisco v. Westgate Entm’t, Inc., 799 F. Supp. 266, 271 (D. Conn. 1992) (attorney for general partnership may not represent limited partners in suit against general partner) (quoting *Brennan’s, Inc. v. Brennan’s Restaurants, Inc.*, 590 F.2d 168, 172 (5th Cir. 1979)). Put succinctly, Rule 1.9 “imposes an ethical obligation irrespective of [whether] harm” may or does result from divulging confidential information. *Prisco*, 799 F. Supp. at 272 (quoting *Koch v. Koch Indus.*, 798 F. Supp. 1525, 1535 (D. Kan. 1992)).

Assuming that B can be deemed L’s former client along with XYZ, this line of cases changes the outcome of our hypothetical. Under these decisions, what matters is that L has turned against a former client on the “same or a substantially similar” matter, MR 1.9, not whether XYZ or A might have been privy to information B divulged to L during the prior representation. See, e.g., *I Successor Corp.*, 321 B.R. at 658 (law firm which represented corporation previously is disqualified from representing directors and officers adverse to corporation’s successors, although all had been privy to same

attorney-client communications); *Sec. Inv. Pro. Corp. v. R.D. Kushnir & Co.*, 246 B.R. 582, 589 (Bankr. N.D. Ill. 2000) (“disqualification of counsel for the former principal of a corporate debtor is not prevented by the attorney’s [former] joint representation of the debtor and that principal . . .”); *Prisco*, 779 F. Supp. at 272 (law firm which represented general partnership is disqualified from suing general partner, which is deemed to have been a co-client); *Casco No. Bank v. JBI Assocs., Ltd.*, 667 A.2d 856, 860 (Me. 1995) (lawyer disqualified from representing one corporate affiliate against other affiliates that he previously represented, even though confidences were shared among all entities during prior rep-

resentation).

A review of cases shows that courts around the U.S. are split, with some continuing to adhere to *Allegaert* and others following the broader “duty of loyalty” analysis. As a result, the answer to this common problem remains elusive, especially since the problem may be compounded by other issues as well, such as whether L ought to be called as a witness about events she witnessed during her work for A and B. Whether L can represent XYZ against B will depend on the jurisdiction in which the problem arises, what the particular facts are and, perhaps, on which judge makes the decision. It also depends on the risk tolerance of L’s law firm, and whether taking on the new representation is sufficiently lucrative to justify the possible reputational and financial risk that collateral litigation over the purported conflict might pose.

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